

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 15th September, 2011

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W.P.(C) 18393/2005

**REHABILITATION MINISTRY EMPLOYEES
CO-OPERATIVE HOUSE BUILDING
SOCIETY LTD**

..... Petitioner

Through: Ms. Monika Arora, Adv.

Versus

**ARCHAEOLOGICAL SURVEY OF
INDIA & ANR**

..... Respondents

**Through: Mr. Jayant Tripathi & Mr. Sunil
Rajput, Adv. for ASI.
Mr. Ajay Verma, Adv. for DDA.**

AND

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W.P.(C) 1735/2011

SUBHASH CHANDER KUMAR

..... Petitioner

Through: Ms. Monika Arora, Adv.

Versus

**ARCHAEOLOGICAL SURVEY
OF INDIA & ANR**

.... Respondents

**Through: Mr. Ajay Verma & Mr. Manu
Parashar, Advocates for DDA.**

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? Not necessary
2. To be referred to the reporter or not? Not necessary
3. Whether the judgment should be reported in the Digest? Not necessary

RAJIV SAHAI ENDLAW, J.

1. The petitioner in W.P.(C) 18393/2005, a Co-operative House Building Society was in the year 1982 allotted and granted perpetual lease of a plot of land for development of a Residential Colony since known as Shivalik, New Delhi. It appears, that in or about the year 1985-89 when the petitioner was seeking sanction of the layout plan for the said colony, a monument known as 'Sarai Shahaji' situated adjacent to the land so allotted to the petitioner Society was also under consideration for being declared as a protected monument under The Ancient Monuments and Archaeological Sites and Remains Act, 1958. As such, the petitioner was asked to also involve the respondent no.1 Archaeological Survey of India (ASI) in the process of sanction of layout plan.

2. It is the case of the petitioner that a Tripartite Agreement was reached amongst respondent no.1 ASI, respondent no.2 DDA and the petitioner, as contained in the letter dated 10th December, 1985 of the respondent no.1 ASI to the petitioner and which is as under:-

“GOVERNMENT OF INDIA

*SUPERINTENDING ARCHAEOLOGIST
ARCHAEOLOGICAL SURVEY OF INDIA
DELHI CIRCLE, SAFDARJUNG TOMB,
NEW DELHI – 110 003*

D.O.NO. 5/112/85-M-15561

Dated : 10.12.85

To,

*The President,
Ministry of Rehabilitation,
Employees Group Housing Society Ltd.,
Jaislmer House,
Man Singh Road,
New Delhi – 110 001.*

Sub: Protection of monument in Sarai Shahji.

Dear Sir,

Kindly refer to the discussion held with the representative of your Society in connection with the protection of the monument noted above and the land to be left for the maintenance of the monument. In this connection it may be pointed out that the proposal of leaving a strip of land along the proposed protection line of the monument was agreed during the joint inspection of the site on 18.07.1984. The proposal has been

embodied in the blue print (Copies enclosed herewith). The Director General has also approved the proposal and we are proceeding further to declare the monument as protected in pursuance of the agreement reached at site on 18.07.84. It is requested that you may start your work keeping in view of the proposal.

*Yours faithfully,
SUPERINTENDING ARCHAEOLOGIST."*

3. The petitioner further relies upon the letter dated 22nd March, 1991 of the respondent no.2 DDA to the petitioner releasing the building activity in the colony *inter alia* on the following terms:

*"DELHI DEVELOPMENT AUTHORITY
VIKAS SADAN
I.N.A.
NEW DELHI*

F.23(17)74/Bldg.

Dated: 22.03.1991

*A.K. GUPTA
Jt. Director (Bldg.)*

*The President
Ministry of Rehabilitation Employees
Co-Op. House Building Society Ltd.
Pocket-A, Shivalik (Nr. Water Tank)
New Delhi – 110 012.*

Sub: Release of building activity in the colony belonging to Ministry of Rehabilitation Co-op. House Building Society Ltd. at Malviya Nagar.

Sir,

I am directed to inform you that the building to for 624 plots only of the above mentioned society at Malviya Nagar is hereby released. This is in response to your letter dated 19.03.91 whereby you have submitted an undertaking to comply with the conditions enumerated in this office letter of even number dated 19.03.91. Further, the release of the building activity is subject to this following:-

- 1. That the individual plot owners can now submit their own building plans to DDA for sanction.*
- 2. That each plot is permitted to have 2-storeyed construction for 2 dwelling units only.”*

4. It is also the contention of the petitioner that the petitioner in compliance of the conditions aforesaid laid down by the respondent no.1 ASI sacrificed a large chunk of valuable land allotted to it.

5. The Notification declaring the monument aforesaid as a protected monument was published on 21st May, 1988.

6. The present petition was filed when certain members of the petitioner Society, in or about the year 2004 approached the respondent

no.2 DDA for obtaining the sanction of the plans for raising construction on their plots; the respondent no.2 DDA upon being so approached asked the said members of the petitioner to obtain a No Objection Certificate (NOC) from the respondent no.1 ASI; the said NOC was refused by the respondent no.1 ASI.

7. This petition has been filed impugning the Notification dated 21st May, 1988 of declaration of the monument as a protected monument and Notification dated 16th June, 1992 regulating/prohibiting construction within certain periphery of protected monuments. It is the contention of the petitioner that the said Notifications are prospective and do not apply to the construction activity on the plots in the colony developed by the petitioner since the petitioner had as far back as in 1985 obtained permission from the respondent no.1 ASI and the approval by the respondent no.2 DDA of the layout plan was in consultation with the respondent no.1 ASI. It is contended that permission having already been granted by the respondent no.1 ASI then, the prohibition subsequently imposed is not applicable to the petitioner. The petitioner also impugns the action of the respondent no.2 DDA of asking the members of the petitioner to obtain NOC from the

respondent no.1 ASI and the refusal of the said NOC by the respondent no.1 ASI. Mandamus is sought to the respondent no.2 DDA to grant permission for construction on plots no.1, 21, 24, 46, 54, 75, 83, 84, 85, 90, 91, 107, 116 & 121 and permission for raising second floor on the already built up plots of Block-C, Shivalik as per the approved site plan.

8. The counsel for the petitioner has invited attention to Section 20A of the Act owing where to the NOC has been denied by the respondent no.1 ASI and NOC has been insisted upon by the respondent no.2 DDA. Section 20A(1) defines an area of 100 meters, in all directions, from a protected monument as a prohibited area. Section 20A(2) prohibits construction in prohibited area. It is not in dispute that the plots in the colony of Shivalik with respect where to the reliefs are sought, are situated within the prohibited area. The counsel for the petitioner however contends that the case of the petitioner is covered under the first proviso to Section 20A(3) of the Act which is as under:-

“Provided that any area near any protected monument or its adjoining area declared, during the period beginning on or after the 16th day of June, 1992 but ending before the date on which the Ancient Monuments and Archaeological Sites and Remains (Amendment and

Validation) Bill, 2010, receives the assent of the President, as a prohibited area in respect of such protected monument, shall be deemed to be the prohibited area declared in respect of that protected monument in accordance with the provisions of this Act and any permission or licence granted by the Central Government or the Director-General, as the case may be, for the construction within the prohibited area on the basis of the recommendation of the Expert Advisory Committee, shall be deemed to have been validly granted in accordance with the provisions of this Act, as if this section had been in force at all material times:

Provided further that nothing contained in the first proviso shall apply to any permission granted, subsequent to the completion of construction or re-construction of any building or structure in any prohibited area in pursuance of the notification of the Government of India in the Department of Culture (Archaeological Survey of India) number S.O. 1764, dated the 16th June, 1992 issued under rule 34 of the Ancient Monuments and Archaeological Sites and Remains Rules, 1959, or, without having obtained the recommendations of the Committee constituted in pursuance of the order of the Government of India number 24/22/2006-M, dated the 20th July, 2006 (subsequently referred to as the Expert Advisory Committee in orders dated the 27th August, 2008 and the 5th May, 2009).".

It is argued that the prohibition does not apply under the proviso aforesaid to cases where ASI had earlier granted permission for

construction. It is urged that ASI having at the time of sanction of layout plan of the colony, permitted construction on plots sanctioned in the layout plan, construction, as permitted in accordance with law, on the said plots cannot be said to be prohibited under Section 20A (2) of the Act.

9. The counsel for the respondent no.2 DDA has contended that the layout plan which was sanctioned by the respondent no.2 DDA does not permit the owners of individual residential plots sanctioned in the said layout plan to raise construction thereon and such owners are still required to obtain the sanction for construction/building on their respective plots. It is contended that the owners of the plots within the prohibited/regulated area having not raised the construction thereon prior to 16th June, 1992 (when prohibition came into force) cannot claim to be exempted from the said prohibition on the basis of the layout plan having been sanctioned. The argument is that the permission/sanction of layout is no sanction for construction.

10. The counsel for the respondent no.1 ASI has contended that even the permissions which are mentioned in the proviso aforesaid to Section 20A(3) were challenged and have been struck down by the Division Bench

of this Court in LPA No.417/2009 titled *Emca Construction Co. v. ASI* decided on 30th October, 2009. He has further invited attention to Section 38(2)(a) to show the rule making power of the respondent no.1 ASI and to Rule 2 (f) of the Ancient Monuments and Archaeological Sites and Remains Rules, 1959 defining prohibited and regulated areas and to Rule 33 prohibiting any construction in a prohibited and regulated area.

11. The permission envisaged in the proviso aforesaid to Section 20A(3) (supra) is the permission of the respondent no.1 ASI and not by the respondent no.2 DDA. The counsel for the petitioner has however contended that the respondent no.1 ASI also had in 1985 granted permission for sanction of the layout plan.

12. Even if the letter dated 10th December, 1985 (supra) is deemed to be the permission of the respondent no.1 ASI to the sanction of the layout plan, the said sanction was only to the residential plots being carved out within the prohibited area (as subsequently came into force), subject to leaving a strip of land along the monument. It is not very clear whether in the issuance of the subsequent letter dated 22nd March, 1991 (supra) by the respondent no.2 DDA mentioning that each plot was permitted to have a

two storeyed construction, the respondent no.1 ASI was involved or not. The counsel for the petitioner however contends that since as per the then municipal laws, two storey construction was permitted on residential plots, the consent by the respondent no.1 ASI to the layout plan ought to be construed as a consent/permission to construction of two floors/storeyes on the residential plots so sanctioned. The counsel for the petitioner further states that the respondent no.1 ASI was then permitting construction up to 15 mtrs. in height.

13. I am unable to agree. The documents show consent of ASI only to the layout plan. The layout plan though sanctioned residential plots within prohibited distance, did not grant permission for construction thereon and for which separate permission was necessary. I am therefore unable to accept that any permission for construction, as now sought, was granted by sanction of the layout plan. Further, the prohibition of construction within 100 mtrs came into force only on 16th June, 1992. It cannot be said that there was any application of mind on 10th December, 1985 when ASI consented to sanction of layout plan of the colony, to grant exemption from the prohibition which came into force subsequently.

14. Moreover the proviso aforesaid validates only those permissions granted between 16th June, 1992 and 29th March, 2010 (being the date on which the Ancient Monuments & Archaeological Sites & Remains (Amendment & Validation) Bill, 2010 received the assent of the President) and granted by the ASI on the basis of the recommendation of the Expert Advisory Committee. The permission relied upon by the petitioner is not between the said dates but is of prior thereto and is not on the basis of recommendation of the Expert Advisory Committee . In fact the Expert Advisory Committee itself came to be formed in or about 2006 and the proviso aforesaid was inserted only to validate the permissions granted and which had been struck down by this Court in *Emca Construction Co.* (supra). The question which arises is whether the permission even if any granted prior to 16th June, 1992 can also be said to be exempt from the prohibition otherwise imposed in Section 20A of the Act.

15. Though the counsel for the petitioner has contended that the proviso to Section 20A should be interpreted to be validating permissions granted prior to 1992 also but the settled principle of interpretation of statutes is that a proviso to a prohibitory Section has to be strictly construed so as not

to dilute the effect of the prohibition contained in the main provision. (See *Satnam Singh v. Punjab & Haryana High Court* (1997) 3 SCC 353 and *Institute of Chartered Financial Analysts of India v. Council of the Institute of Chartered Accountants of India* AIR 2007 SC 2091). The counsel for the respondent no.1 ASI has also contended that unless the petitioner challenges the *vires* of the said proviso for the reason of the same validating permissions granted between 16th June, 1992 and 29th March, 2010 only and not permissions prior thereto, the same cannot be interpreted to include permissions of prior thereto. The only reason for inserting the proviso aforesaid was to validate the permissions, granted on recommendation of Expert Advisory Committee and which had been struck down by this Court. That being the reason for the enactment of the proviso, the scope thereof cannot be expanded as sought.

16. The counsel for the petitioner at this stage invites attention to the rejoinder filed in this petition in para 6 whereof it is *inter alia* stated that the prohibition treating all protected monuments alike is irrational inasmuch the protection ought to be linked to the various parameters concerning the monuments. However the same again constitutes a ground

for challenging the *vires* of the proviso aforesaid to Section 20A(3) of the Act and which aforesaid has not been done in the present case.

17. W.P.(C) 18393/2005 therefore fails and is dismissed with liberty however to the petitioner as sought to file another petition impugning the vires of the Act.

18. W.P.(C) No.1735/2011 has been filed by the owner of Plot No.C-82 in the colony. It is stated that besides the arguments already dealt above, it is *inter alia* his contention that the appeal preferred by him on 9th July, 2008 against the order of ASI refusing NOC has not been adjudicated. However in view of the factual and legal scenario being the same as discussed above no purpose would be served in directing the disposal of the said appeal also.

W.P.(C) No.1735/2011 is also accordingly dismissed.

No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

SEPTEMBER 15 , 2011
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