

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

Date of decision: 10th October, 2011

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W.P.(C) 4357/2011

VIJAYA LAXMI

..... Petitioner

Through: Mr. Anil Sapra, Sr. Adv. with Ms.
Shama Sharma, Adv.

Versus

**ARCHAEOLOGICAL SURVEY OF INDIA
& ORS**

.... Respondents

Through: Mr. J. Tripathi, Adv. for R-1 ASI.
Mr. Shivram, Mr. Nikilesh & Mr.
Shantanu Singh, Advocates for R-2.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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

RAJIV SAHAI ENDLAW, J.

1. The petition impugns the letter dated 8th June, 2011 of the respondent no.1 Archaeological Survey of India (ASI) extending the time for construction activity on property No. A-10, Nizamuddin (East), New Delhi and further seeks to prohibit any further construction activity on the

said property for the reason of the same being situated within the 100 mtrs. “prohibited area” from the ancient monument of Humayun Tomb.

2. Notice of the petition was issued and vide *ex parte* order dated 17th June, 2011 the respondent no.2 M/s Emca Construction Company (ECC) raising construction on the said property was restrained from carrying out any further construction; the respondent no.4 MCD was also directed to ensure compliance of the order. The respondent no.2 ECC has applied for vacation of the said interim order. Pleadings have been completed and counsels have been heard.

3. The petitioner claims to be a practicing Advocate having her office at A-14, Nizamuddin (East), New Delhi and thus affected by the construction on property No.A-10 in her neighbourhood.

4. The construction on property No.A-10 has a chequered history. Earlier W.P.(C) 7889/2009 titled ***Gaurang Kanth v. Archaeological Survey of India & Ors.*** was filed for restraining the said construction permission wherefor had then been granted by respondent no.1 ASI vide

letter dated 1st August, 2008. Interim orders dated 31st March, 2009 and 4th August, 2009 directing *status quo* to be maintained qua the construction were issued. Aggrieved therefrom the respondent no.2 ECC preferred LPA No.417/2009 which was decided on 30th October, 2009. The Division Bench of this Court held:-

- a. that the challenge to the construction was for the reason of the Central Government having vide Notification dated 16th June, 1992 prohibited any construction within 100 mtrs. of a “protected monument”. The said Notification was subject matter *inter alia* of order dated 23rd July, 2004 of the Division Bench of this Court in FAO (OS) No.414/2002 titled ***Archaeological Survey of India v. Narendra Anand***. The Division Bench directed the Central Government to review the Notification in the light of the discussion in the judgment;

- b. in compliance with the said directions of the Division Bench the Director General of the respondent no.1 ASI vide note dated 8th June, 2006 constituted a Committee to recommend grant of permissions for construction within the prohibited / restricted areas of the protected monuments. The said Committee started making recommendations for allowing construction within the prohibited area on case to case basis and on the basis of which recommendations the respondent no.1 ASI started giving no objections for constructions within the said area. One such permission was granted to the respondent no.2 ECC also for raising construction on property No.A-10;
- c. the Division Bench however found the constitution of the Committee to be *ultra vires* the Ancient Monuments Archaeological Sites and Remains Act, 1958. The Division Bench however noted that the Committee had

processed over 400 applications from all over the country and of which 150 were from Delhi itself. The Division Bench accordingly while prohibiting the Committee from processing any further application(s), also directed the respondent no.1 ASI to take steps to re-consider all permissions granted in pursuance to the recommendations of the Committee and take consequential steps after giving the affected parties an opportunity of being heard;

The Division Bench accordingly directed *status quo* to be maintained with respect to property No.A-10 till re-consideration by the respondent no.1 ASI.

5. To resolve the situation which had arisen owing to the judgment aforesaid of the Division Bench, first an Ordinance dated 23rd January, 2010 to amend the provisions of the Act was promulgated and thereafter on 30th March, 2010 an amending Act enacted. When W.P.(C) No. 7889/2009 aforesaid preferred by Mr. Gaurang Kanth came up before this Bench on

23rd September, 2010, all counsels agreed that in view of the said Ordinance and amendment to the Act, the said writ petition did not survive; the same was accordingly disposed of. However while doing so this Court also observed that merely because the interim order in force till then would stand vacated on the disposal of the writ petition, would not entitle the respondent no.2 ECC to continue with the construction if required to obtain any fresh permission therefor.

6. Since the property No.A-10 is situated within the prohibited area of 100 mtrs. from the ancient protected monument of Humayun Tomb, the respondent no.2 ECC for raising construction thereon, besides requiring the permission from the respondent no.4 MCD also required the permission from the respondent no.1 ASI. The Committee constituted by the respondent no.1 ASI pursuant to judgment supra in *Narendra Anand* for considering the applications for such permission, considered the case of the respondent no.2 ECC for construction on the said property and the Superintending Archaeologist of the respondent no.1 ASI vide letter dated 1st August, 2008 (supra) intimated to the respondent no.2 ECC the accord

of permission on 26th June, 2008 to raise construction of a building comprising ground, first and second floors at property No.A-10, Nizamuddin (East), New Delhi subject to the compliance by the respondent no.2 ECC of the conditions mentioned therein. It was further stated in the said letter that the said permission/licence was valid for a period of one year only from the date of issuance thereof.

7. It has emerged that the respondent no.2 ECC being not satisfied with the aforesaid permission/licence, represented and which representation resulted in the letter dated 6th March, 2009 of the Director General of the respondent no.1 ASI to the Superintending Archaeologist, Delhi Circle. The said letter records that the case was examined by the members of the Expert Advisory Committee (EAC) in the meeting held on 22nd January, 2009 and the said Committee had recommended that respondent no.1 ASI may accord permission for re-construction up to the maximum height at par with the height of the neighbouring authorized buildings which exist as on date and may consider allowing the construction of basement provided the neighbouring buildings have a similar feature. Finding the residential

buildings adjoining property no.A-10 on the North & South sides to be having a height of 12.5 mtrs. and 9.5 mtrs. respectively, the Director General of the respondent no.1 ASI permitted re-construction on property No.A-10 up to a maximum height of 12.5 mtrs. only besides mumty over the terrace. The counsel for the respondent no.1 ASI has during the hearing handed over a copy of letter dated 6th March, 2009 addressed by the respondent no.1 ASI to the respondent no.2 ECC on the same lines.

8. On the basis of the said NOC of the respondent no.1 ASI, the respondent no.4 MCD also on 20th March, 2009 passed the plans valid up to the year 2014 for construction on the said property up to the height of 12.5 mtrs. with 2.5 mtrs. mumty.

9. However, notwithstanding the aforesaid permissions, the construction could not be completed owing to the stay orders in the earlier writ petition aforesaid. However in the interregnum when the stay was not in force, it is informed that construction up to a height of 9 mtrs. has already been raised on the property which is lying half built.

10. Though the Division Bench of this Court in judgment dated 30th October, 2009 (supra) held the constitution of EAC to be *ultra vires* the Act and directed ASI to re-consider the cases but as aforesaid, to get over the said situation, the Act itself was amended. The first proviso to Section 20A(3) of the amended Act provides 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).".

11. The only ground on which the senior counsel for the petitioner now impugns the construction is that the proviso aforesaid validates only those permissions which were in force as on 30th March, 2010 being the date of coming into force of the amending Act. It is contended that the permission granted on 1st August, 2008 for a period of one year only which expired on 31st July, 2009 would not stand re-validated notwithstanding the amendment to the Act. It is further contended that when the letter dated 1st August, 2008 specified the period of one year only for completing the construction, the letter dated 6th March, 2009 without any such limitation is bad in law.

12. I have at the outset enquired from the counsel for the respondent no.1 ASI whether the proviso aforesaid is intended to validate only the

constructions already completed in pursuance to the recommendation of the EAC or can be made applicable also to the permissions though granted on the recommendation of the EAC but in pursuance where to no construction had been carried out.

13. The counsel for the respondent no.1 ASI states that what has been validated is the permission which had become null and void in view of the judgment dated 30th October, 2009 supra of the Division Bench and not the construction. It is contended that it would thus be irrelevant whether in pursuance to the permission the construction had been carried out or was yet to be carried out. He contends that if the intent of the legislature had been to save only the construction already carried out, the legislature would have validated the constructions already carried out in pursuance to the recommendations of the EAC and not the permission itself. He has also invited attention to the opinion obtained by the respondent no.1 ASI from the Solicitor General in this regard. It is contended that owing to the judgment of the Division Bench, a large number of ongoing constructions including of several public projects had come to a standstill and it was for

this reason only that the Ordinance and the amendment to the Act was brought about. It is contended that in pursuance to the Ordinance and the amendment the construction activity in pursuance to the permissions granted at the instance of the EAC has continued.

14. The counsel for the respondent no.1 ASI with reference to clause in the letter dated 1st August, 2008 of the permission contained therein being valid for one year only has also contended that though there was no such time frame provided in the recommendations of the EAC or the permission issued by the Director General of the respondent no.1 ASI but such time frame was stipulated in the letters issued by the Superintending Archaeologist for the reason of the said Superintending Archaeologist being required to supervise the said construction to ensure that the same was carried out in compliance of the conditions. It is contended that the same clause is to be found in the letter dated 6th March, 2009 issued by the Superintending Archaeologist to the respondent no.2 ECC even though not in existence in the internal letter dated 6th March, 2009 under challenge in these proceedings.

15. The senior counsel for the petitioner has contended that what has been validated by the proviso aforesaid is only what had already been done and no power has been granted to do anything further; that the permission already granted was valid for one year only and the said one year having expired, the respondent ASI in the garb of the said proviso cannot extend the time for which permission for construction was granted. Reliance in this regard is placed on *State Inspector of Police v. Surya Sankaram Karri* (2006) 7 SCC 172 and on *Sethi Auto Service Station v. Delhi Development Authority* (2009) 1 SCC 180.

16. The counsel for the respondent no.2 ECC has also contended that the respondent no.2 ECC owing to the stay orders in the earlier writ petition has never had the time of full one year for raising the construction. It is contended that the respondent no.2 ECC had only 88 days without stay and in which time the construction as now existing up to 9 mtrs. was constructed. It is contended that the respondent no.2 ECC ought not to be made to suffer for the reason of the orders of stay which have now become infructuous/redundant owing to amendment aforesaid of the Act.

17. The counsel for the respondent no.2 ECC has also contended that the petitioner is but a mere proxy for Mr. Gaurang Kanth who was earlier targeting the respondent no.2 ECC and qua whom the Division Bench returned adverse findings. It is contended that he has put up the petitioner to continue targeting the respondent no.2 ECC. It is argued that when all other similarly situated persons, in pursuance to the amendment of the Act, have been allowed to complete their construction, it is unfair to deprive the same benefit to the respondent no.2 ECC.

18. I am satisfied with the argument of the counsel for the respondent no.1 ASI that the proviso aforesaid validates the permissions and not the constructions already carried out. The question which thus arises is, whether the said permission was time bound and if so, whether the validation by amendment aforesaid of the Act, of the said permission permits the extension of time for raising construction.

19. The permissions for raising construction notwithstanding the prohibition came to be granted on case to case basis, as aforesaid, pursuant to the direction of the Division Bench of this Court in *Narendra Anand*.

Neither the judgment in *Narendra Anand* nor the note dated 8th June, 2006 (supra) constituting EAC for recommending grant of such permissions is shown to be containing any such condition requiring the permissions to be time bound. It is the case as aforesaid of ASI and which I have no reason to disbelieve that the permission as recommended by the EAC and as granted by the Director General ASI were not time bound and such condition of time was added by the Superintending Archaeologist while communicating the permission to the applicant, to ensure compliance. What is to be gauged in the said scenario is the weightage to be given to such condition. I am of the view that the condition of time incorporated in such backdrop cannot be said to be going to the root of the permission, when neither the EAC nor the sanctioning authority had deemed it appropriate to make the permission time bound and when condition of time was introduced only by the authority which was to oversee compliance. The Apex Court in *V.P. State Road Transport Corpn. V. Assistant Commissioner of Police (Traffic) Delhi* 2009 (3) SCC 634 noticed the difference between conditions imposed by the primary authority and conditions imposed by the “countersigning authority” in that case. It was

held that the jurisdiction to cancel the permit for breach of conditions imposed by the primary authority, is of the primary authority only and not of the counter signing authority. Similarly the proviso to Section 20(A) 3 with which we are concerned in the present case also talks of permission by the Director General, ASI on the recommendation of the EAC and which permission is not found to be time bound. Thus the said permission cannot be said to have ceased to be in existence for the reason of lapse of time imposed by the Superintending Archaeologist.

20. Time in such circumstances cannot also be said to be of essence. When time is not of essence, it is extendable. In the facts of the present case there are more than sufficient reasons for the respondent no.2 ECC having not been able to avail the permission within the time granted. Time is even otherwise not shown to have any relevance to the permission granted. During the course of hearing, the Minutes of the 15th and 19th Meetings of EAC held on 7th May, 2008 and 22nd January, 2009 were handed over. A perusal thereof shows that the conditions which weighed with the EAC for recommending permission for construction on subject

property, were existence of several buildings between the protected monument and subject property and allowing construction on subject property of same height as other existing buildings not affecting the skyline any further. The said factors which resulted in grant of permission are not found to have any relevance to time. It is not the case of the petitioner that the buildings earlier existing and owing where to it was earlier felt that construction on subject property will not affect the skyline, have now ceased to exist.

21. Even otherwise, ASI save for within the prohibited/restricted area is not concerned with construction which is otherwise regulated generally by the municipal body. The Municipal body generally while granting sanction for construction limits the time therefor but which time is extendable. Imposition of such time is also to ensure compliances of the conditions subject to which such sanction is granted.

22. There is nothing in the Act also to show time to be of any relevance. Once the EAC and the Director General, ASI had in accordance with the state of affairs then prevailing permitted construction and which

permission has now been validated by amending the Act, there is nothing to show in the amending Act that only those permissions time whereof had not expired were intended to be validated and not others. The Act was amended on 30th March, 2010 to allow/validate something which had been invalidated vide judgment dated 30th October, 2009 of the Division Bench of this Court. The Legislature cannot be held to be oblivious of the permissions so granted being time bound. The Legislature however chose to validate the permissions and which include permissions validity whereof, as fixed by the overseeing authority, had expired. The Legislature did not make any distinction between the permissions time whereof had expired and permissions time whereof had not expired. The only conclusion is that the benefit of the amendment is intended for all permissions. There is even otherwise no reason for discriminating between the two types of permissions.

23. I am therefore of the opinion that the permission was not time bound and the time fixed by the Superintending Archaeologist was neither part of the recommendation of the EAC nor the permission of the Director

General, ASI.

24. Though the aforesaid is enough to dismiss the Writ Petition but I may add that there is nothing in the Act as amended, prohibiting extension of time. The counsel for ASI has stated and again I have no reason to disbelieve that in other such permissions also made time bound by the overseeing authority, extensions have been granted and construction carried out. There is no reason for discriminating against the petitioner. Once the Legislature has required certain state of affairs to be deemed/imagined, what was observed by Lord Asquith in *East End Dwellings Co. Ltd v. Finsbury Borough Council* (1951) 2 All ER 587 that unless prohibited from doing so, one should also imagine as real, consequences and incidents and one should not permit one's imagination to boggle when it comes to inevitable corollaries of that state of affairs is squarely applicable. The proviso to Section 20A(3) requires the permission to be deemed to have been validly granted. If it had been validly granted, ASI then would have also had the power to extend the time fixed by its Superintending Archaeologist for raising the construction

and there is nothing in the Act prohibiting us from assuming so also. There is nothing in the Act to prohibit extensions of time by which the permission was limited.

25. There is another aspect of the matter. The respondent no. 2 ECC as aforesaid has had only 88 days out of the one year's time granted; during rest of the time there was a stay against construction, granted earlier at the instance of the petitioner in W.P.(C) No. 7889/2009 and now in this petition. The Division Bench of this Court in order dated 30th October, 2009 held the petitioner in W.P.(C) No. 7889/2009 to be not entitled to stay. Similarly the petitioner herein is also found to have failed in the case brought before this Court. The settled principle of law is that none should suffer owing to the act of the Court. The respondent no.2 ECC in the present case could not avail of the permission owing to the said interim orders which were /are found to have been wrongfully obtained and have ultimately not been sustained. The respondent no.2 ECC cannot be allowed to suffer on account thereof.

25. The petition therefore fails and is dismissed. The petitioner being an Advocate, I refrain from imposing any costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

OCTOBER 10 , 2011

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(corrected and released on 14th November, 2011)