

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

DECIDED ON: 24.02.2012

+ **L.P.A. 982/2011, C.M. APPL. 21273/2011 (for stay)**

MRS. VIJAYA LAXMI

Through: Dr. Saif Mahmood, Advocate.

versus

ARCHAEOLOGICAL SURVEY OF INDIA & OTHERS

Through: Sh. Jayant Tripathi, Advocate, for ASI.

Sh. Shivram, Advocate, for Resp. No.2.

Ms. Perna Verma, Advocate, for Ms. Mini Pushkarna,
Advocate, for MCD.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. The present appeal impugns a judgment of the learned Single Judge dated 10.10.2011 in W.P. (C) 4357/2011 by which the writ petitioner (who is the appellant here), had questioned the permission granted by the respondent – Archaeological Survey of India (ASI) to the second respondent to construct within 100 metres of the Humayun Tomb – a protected monument under the Ancient Monuments Act, 1958.

2. The facts necessary for the purpose of this judgment are that the second respondent apparently purchased the property – A-10, Nizamuddin East, New Delhi-16 and sought for permission to construct upon it. The local authorities, such as the Municipal Corporation of Delhi (MCD) etc. were to

proceed with the application for sanction of the plans, after the ASI accorded its approval. By virtue of a Notification dated 16.06.1992 of the ASI, all constructions within 100 metres of protected monuments were prohibited. Apparently, over a period of time, the ASI used to consider applications for permissions within this area on case-to-case basis and had constituted an Expert Committee for this purpose. This Court, in a Division Bench judgment had occasion to deal with that practice. In L.P.A. No. 417/2009, by its judgment dated 30.10.2009, the Court held that the Notification constituting the Expert Committee and the consequent permissions accorded by it were beyond the authority conferred upon the ASI by the Act. This had a snow-balling effect since ongoing constructions at various stages throughout the country were jeopardized. In order to obviate situation, the executive stepped in and issued an Ordinance, setting-up an authority to oversee implementation of the enactment and at the same time, validating, subject to certain conditions, the permissions granted by the Expert Committees from time to time. Later, the Ordinance was replaced by an Act, which amended the Ancient Monuments Act, 1958.

3. The appellant had complained that the permission granted to the second respondent by the ASI's Expert Committee dated 26.06.2008 was illegal and could not be implemented. Several contentions were made in the course of the writ proceeding; the ASI had, during the submissions before the learned Single Judge urged that in view of the amended provisions of the Act, the petition had been rendered meritless. The learned Single Judge, by the impugned judgment noticed the concerned law - the two provisos to Section 20(A)(3) of the amended Act. The relevant discussion, rejecting the appellant's contention is found in the following extract:

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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 whereto 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.

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4. It is urged by the appellant’s counsel that the impugned judgment overlooked a very material aspect, i.e. openness of the time limit and also the extension of the time limits by the ASI from time to time, which defeats the purpose of the enactment as it permits construction on the basis of a limited one-time extension in perpetuity. It is submitted that if the reasoning of the learned Single Judge were to be sustained, permissions conditioned upon time would be routinely extended and this defeats the very concept of a prohibited area which received statutory recommendation through controlling provisions of Section 20(A) itself.

5. As may be seen from the extract of the impugned judgment, learned

Single Judge was of the opinion that the condition of time imposed was by the Superintending Archaeologist in this case even though the Director General, ASI as well as the Expert Advisory Committee had not communicated any such time limit. We are of the opinion that the contentions made are without merit. The findings in paras 18 and 19 are that the Superintending Archaeologist was merely concerned with compliance with the permission given and could not, of his own, impose further conditions since he was not the primary authority for the decision. It is argued that the actual permission granted by the DG ASI was not on the record.

6. The impugned judgment had relied upon the decision – *V.P. State Road Transport Corporation v. ACP (Traffic) Delhi* 2009 (3) SCC 634 where the authority empowered to administer the orders of the competent authority, was held not to possess the powers of the primary authority and impose further conditions. In our opinion, the view taken by the learned Single Judge was correct. Besides, we notice that if the one year time limit had to be adhered to, the whole purpose of the proviso which the parties were concerned with in this case would have been defeated. This is for the simple reason that the validation sought to achieve a basic objective, i.e. to ensure that the Expert Committee's recommendations, giving clearance to specific construction activities, were protected from the deleterious effects of the Division Bench ruling on 30.10.2009. If the time limits in such cases are to be read as an integral part of the permission, the entire object of enacting the proviso itself, in our opinion, would be defeated. Further, building activity planning is complex in metropolitan areas like Delhi where a potential user would have to seek permissions and approvals from

multifarious bodies or authorities. In Delhi, for instance, such sanctions or permissions would have to be obtained from the MCD, in many cases, from the Delhi Urban Arts Commission, and in some instances, from the AAI and the NDMC and so on. If each body are to insist on time limit and themselves are unable to process the applications within the time, the concerned applicant would be deprived of the benefit of his property. Our attention was also drawn to the recent judgment of the Supreme Court in *ASI v. Narendra Anand*, Civil Appeal No. 2430/2006 dated 16.01.2012. We have been taken through the said judgment. Apart from quoting the relevant provisions of law, there is no direct interpretation of the two provisos with which the present case is concerned. That judgment set-aside the ruling of the Division Bench of this Court, which had in fact directed the ASI to confirm its position *vis-à-vis* the prohibited area. The Court noticed that with the coming into force of the amended Act, the Division Bench ruling could not be sustained.

7. In view of the above discussion, we find no merit in the appeal, which has to fail; the appeal and all pending applications are accordingly dismissed.

S. RAVINDRA BHAT, J

S.P.GARG, J

FEBRUARY 24, 2012

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