

\$~57

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

Date of Decision : 11.12.2019

+ W.P.(C) 6447/2019 & CM Nos.27370/2019, 46683/2019
BIJI RAJESH

..... Petitioner

Through: Ms.Biji Rajesh, petitioner in person.

versus

SOUTH DELHI MUNICIPAL CORPORATION & ORS

..... Respondents

Through: Ms.Garima Prashad, SC/SDMC with Mr.Shadab Khan, Adv. for R-1.

Mr.Jayant Tirpathi & Mr.Dinesh Dahiya, Advs. for R-2 & R-6.

Mr.Sachin Nahar & Mr.V.P. Nahar, Advs. for R-3 with ASI Arvind Kumar & SI Arun Kumar, PS-Nizammuddin.

Mr.Rahul Malhotra, Mr.Varun Garg & Ms.Himanshi Madan, Advs. for R-4 & R-5.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed *inter alia* challenging the permission dated 13.03.2018, granted by the Competent Authority under the provisions of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (hereinafter referred to as the 'Act') in favour of the respondent nos. 4 and 5 to carry out repair/renovation of

ground, first and second floor at property no. A-11, Nizamuddin East, New Delhi.

2. It is not disputed that the said property falls within the “prohibited area” as prescribed under Section 20A of the Act being within 100 meters of the Humayun Tomb, which is a protected monument.

3. By the Impugned Letter dated 13.03.2018, the Competent Authority has granted permission to the respondent nos. 4 and 5 to carry out the following work:

“....repair/renovation (flooring, plastering, tiling work, filling of cracks, repair/replacement of doors and windows, modification of internal wall and staircase, plumbing work, electric work & painting/whitewashing work to be done) of existing building of Bank of Baroda at Property No. A-11, Nizamuddin (East), New Delhi which fall in the Prohibited of Humayun's Tomb, a centrally protected monument. The repair/renovation shall be undertaken strictly in accordance with the plan, section and elevation submitted by you without changing its exterior limits of the existing structure, both vertically and horizontally, subject to the previous sanctioned plan MCD as per provisions of Delhi Building Bye-Laws 1983 and Master Plan for Delhi, 2021. Kindly note that no new construction is allowed.....”

4. The limited grievance of the petitioner in the present petition is that in the garb of the Impugned Permission, the respondent nos. 4 and 5 are removing the internal walls of their building by merging more than one room into one. It is submitted by the petitioner that the same amounts to “re-construction” and therefore, cannot be allowed being prohibited under Section 20 A of the Act.

5. On the other hand, the learned counsels for the respondents have taken me through the Act as also the provisions of the Ancient Monuments and Archaeological Sites and Remains (Framing of Heritage Bye-Laws and Other Functions of the Competent Authority) Rules, 2011 (hereinafter referred to as the 'Rules') to contend that mere removal of the internal walls would neither amount to "construction" and/or "re-construction" but amounts only to "repair and renovation" which is a permitted activity in terms of Section 20C of the Act.

6. I have considered the submissions made by the petitioner in person and the learned counsels for the respondents.

7. Section 20A of the Act prescribes that an area extending to a distance of 100 meters in all directions of a protected area or a protected monument shall be the "prohibited area", wherein as otherwise provided under Section 20 C of the Act, no person other than the Archaeological Officer shall carry out any construction.

8. Section 20 C of the Act prescribes as under:-

"20C. Application for repair or renovation in prohibited area, or construction or re-construction or repair or renovation in regulated area.—(1) Any person, who owns any building or structure, which existed in a prohibited area before the 16th day of June, 1992, or, which had been subsequently constructed with the approval of the Director-General and desires to carry out any repair or renovation of such building or structure, may make an application to the competent authority for carrying out such repair or renovation, as the case may be.

(2) Any person, who owns or possesses any building or structure or land in any regulated area, and desires to carry out any construction or re-construction or repair or renovation of such building or structure on such land, as the case may be, may make an application to the competent authority for carrying out construction or re-construction or repair or renovation, as the case may be.”

9. A reading of the above two provisions would clearly show that what is prohibited is the carrying out of any construction in the ‘prohibited area’, while any ‘repair or renovation’ of any building or structure which existed prior to 16.06.1992 or which has been subsequently constructed with the approval of the Directorate General of the Archaeological Survey of India, can be permitted even in the prohibited area by the Competent Authority.

10. The term “construction” is defined in Section 2 (dc) of the Act and is reproduced as under:-

“(dc) “construction” means any erection of a structure or a building, including any addition or extension thereto either vertically or horizontally, but does not include any re-construction, repair and renovation of an existing structure or building, or, construction, maintenance and cleansing of drains and drainage works and of public latrines, urinals and similar conveniences, or, the construction and maintenance of works meant for providing supply of water for public, or, the construction or maintenance, extension, management for supply and distribution of electricity to the public or provision for similar facilities for public;”

11. A reading of the above provision would clearly show that “construction” does not include any “re-construction, repair and renovation of an existing structure or building”.

12. “Re-construction” is defined under Section 2(k) of the Act as under:-

“(k) “re-construction” means any erection of a structure or building to its pre-existing structure, having the same horizontal and vertical limits;”

13. A reading of the above would clearly show that re-construction under the Act means any erection of any structure or building to its pre-existing structure, having the same horizontal and vertical limit, that is, if the structure is re-constructed with same height and facade, it would not amount to “construction” within the meaning of the Act.

14. Section 2 (m) defines “repair and renovation” as under:-

“(m) “repair and renovation” means alterations to a pre-existing structure or building, but shall not include construction or re-construction.”

15. A reading of the above provision would clearly show that “repair and renovation” would include “alterations” to pre existing structure and building.

16. As long as there is no erection of a fresh structure or building or increase in the covered area, mere removal of internal walls would not amount to “construction” within the meaning of the Act.

17. The petitioner, however, placing reliance on the Rule 6 and Rule 8 of the said Rules submits that “repair and renovation” would include only minor repairs such as filling up of or grouting cracks, re-plastering of certain portion of the buildings etc., and not removal of the internal walls.

18. Rules 6, 7 and 8 of the Rules are reproduced hereinunder:-

“6. Processing of applications under various categories :-
The competent authority shall consider processing of the applications so received under the following categories, namely:-

I. Large scale development projects involving construction proposed by the State Government or the Central Government, public sector, private bodies or any person, such as multi-purpose dams, hydro-electric projects, townships, industrial plants, airports or such other projects.

II. Public utility projects involving construction by the State Government or the Central Government, private-public sector, such as roads, highways, pathways, drains, sewage lines, water tank/lines (both above the ground and under ground), transportation, metro railways (above and underground), bus station, etc., or such other projects.

Provided that the public works shall not include maintenance and cleansing of drains and drainage works and of public latrines, urinals and similar conveniences, or, the construction and maintenance of works meant for providing supply of water for public, or construction or maintenance, extension, management for supply and distribution of electricity to the public or provision for similar facilities to the public.

III. Construction of public amenities to be provided by State Government, the Central Government, non-Governmental organizations, public sector undertakings, local bodies or private bodies or any person, such as, drinking water facility, toilets, kiosks, facilities for physically challenged, publication counter, souvenir shops, ticket booths, information counters, visitor facilitation centres, parking facilities for various types of vehicles or generator rooms.

IV. Re-construction of residential buildings or structures in the land owned by any person, office building or structure

owned by private, public sectors, the State Government or the Central Government or any other agency located in the regulated area.

V. Construction of residential buildings or structures in the land owned by any person, the State Government or the Central Government or any other agency located in the regulated area.

VI. Repair or renovation of residential building or structure located in the prohibited area owned by any person, private sector, public sector, the State Government or the Central Government built prior to 16th June, 1992 or subsequently constructed with the approval of Director General, Archaeological Survey of India on the basis of the recommendation of the expert advisory committee; or

VII. Repair or renovation of any building or structure located in the land owned by the applicant in the regulated area.

7. Category of application to be forwarded to Authority :-
The competent authority shall forward the applications received under category I, II, III, IV and V specified in rule 6, to the Authority after processing them with its recommendation.

8. Category of applications to be processed and cleared by the competent authority under intimation to Authority.- (1)
The applications received under category VI of rule 6 in the prohibited area, involving minor repairs, such as filling up of or grouting cracks, re-plastering of certain portions of the building or structure, repairs to water tanks or drainage, sewerage lines, underpinning to strengthen the foundation, replacement of windows, doors, relaying of flooring, water-tightening the roof, providing weather proof course to stop leakage, replacement of electrical poles, laying or alter water pipe lines, preventing breach of water tanks, replacement of or strengthening of staircase, provide coat of whitewash or colour wash or painting of walls of the building or structure or similar such works may be examined and

grant permission at his end under intimation to the Authority.”

19. Rule 6 provides for making of an application before the Competent Authority for carrying out of various works. Rule 7 provides that the application received under category I, II, III, IV and V specified under Rule 6, after processing the same, shall be forwarded by the Competent Authority to the “Authority”, which is the National Monuments Authority, alongwith its recommendations. As far as repairs are concerned, as provided in category VI of Rule 6, the Competent Authority may itself take a decision on the same and grant permission at its end with intimation to the Authority.

20. Rule 8 is not exhaustive in nature of the repairs and renovations. It uses the words “such as” in the opening and “or similar such works” in the end. For determining the extent of such repairs and renovation, therefore, one would have to keep in view the legislative intent that follows from the definition of ‘construction’, ‘re-construction’ and ‘repair and renovation’ in the Act. Read together, it would clearly show that mere removal of the internal walls of a building without, in any manner, affecting the facade of the same or making any additional construction therein, would amount only to ‘repair and renovation’ and not construction of the building or structure.

21. The petitioner has further placed reliance on the judgment of the Supreme Court in *Archaeological Survey of India and Ors. vs. Narender Anand and Ors*, MANU/SC/0086/2012 to contend that repair does not include within itself demolition of a structure. To

appreciate the above argument, paragraph 29 of the said judgment is reproduced hereinbelow:-

“29. What has been done by enacting Sections 20A and 20B is to give legislative mandate to the concept of prohibited and regulated areas respectively for the purposes of mining operation and construction. Before the 2010 amendment, the Central Government could issue notification under Rule 31 read with Rule 32 and declare an area near or adjoining a protected monument to be a prohibited area or a regulated area for the purposes of mining operation or construction or both. With the insertion of Section 20A it has been made clear that every area, beginning at the limit of the protected area or the protected monument, as the case may be, and extending to a distance of one hundred meters in all directions shall be the prohibited area in respect of such protected area or protected monument. Not only this, by virtue of proviso to Section 20A(1) the Central Government has been clothed with the power to extend the prohibition beyond 100 meters by issuing a notification in the Official Gazette keeping in view the classification of any protected monument or protected area, as the case may be, under Section 4A. Of course, this power can be exercised only on the recommendations of the Authority as defined in Section 2(da) and constituted under Section 20F. Somewhat similar provision has been made in Section 20B for the regulated area in respect of every ancient monument and archaeological site and remains.

Proviso to that section empowers the Central Government to issue notification in the Official Gazette and specify an area more than two hundred meters to be the regulated area having regard to the classification of any protected monument or protected area, as the case may be, under Section 4A. In terms of Section 20A(2), it has been made clear that no person other than an Archaeological Officer shall carry out any construction in any prohibited area. This is subject to Section 20C, which can be treated as an exception to Section 20A(2). That section lays down that any person who owns any building or structure,

which existed in a prohibited area before 16.6.1992 or had been subsequently constructed with the approval of the Director General may carry out any repair or renovation of such building or structure by making an application to the competent authority. The term "renovation" appearing in Section 20C will take its colour from the word "repair" appearing in that section. This would mean that in the garb of renovation, the owner of a building cannot demolish the existing structure and raise a new one and the competent authority cannot grant permission for such reconstruction. Section 20A(3) lays down that the Central Government or the Director General can, in exceptional cases and having regard to the public interest, pass a reasoned order and permit a public work or any project essential to the public or other construction in a prohibited area provided that such construction does not have substantial adverse impact on the preservation, safety, security of, or access to the protected monuments or its immediate surrounding. The use of the expression "such other work or project" in clause (b) of Section 20A(3), if interpreted in isolation, may give an impression that the Central Government or the Director General is empowered to allow any other work or project by any person in the prohibited area but, in our view, the said expression has to be interpreted keeping in view the mandate of Article 49 of the Constitution and the objects sought to be achieved by enacting 1958 Act, i.e. preservation of ancient and historical monuments, archaeological sites and remains of national importance. This would necessarily imply that 'such other work or project' must be in larger public interest in contrast to private interest. In other words, in exercise of power under Section 20A(3), the Central Government or the Director General cannot pass an order by employing the stock of words and phrases used in that section and permit any construction by a private person de hors public interest. Any other interpretation of this provision would destroy the very object of the 1958 Act and the prohibition contained in notification dated 16.6.1992 and sub-section (1) of Section 20A would become redundant and we do not think that this would be the correct interpretation of the amended provision. It also needs to be

emphasized that public interest must be the core factor to be considered by the Central Government or the Director General before allowing any construction and in no case the construction should be allowed if the same adversely affects the ancient and historical monuments or archaeological sites.”

22. A reading of the above would clearly show that the Court has warned that in the garb of renovation, the owner of the building cannot demolish the existing structure and raise a new one.

23. In the present case, mere removal of internal walls would not fall within the prohibited activity as explained by the Supreme Court.

24. In this regard a reference can also be made to Clause 6.4.1(j) of the Building Bye-Laws for Union Territory of Delhi, 1983, which provides that no notice and building permit is necessary for erection or re-erection of internal partitions provided the same are within the purview of the Bye-Laws and do not otherwise violate any provisions regarding general building requirements, structure stability and fire safety requirements of the Bye-Laws. This clearly shows that erection or re-erection of internal partition walls is not treated as “construction” in general. Similarly, reliance of the petitioner on the Lok Sabha debate on Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Bill, 2010 in Lok Sabha can also be of no assistance to the petitioner. The Act has to be read on its own terms. [refer:- *CIT vs. Meghalaya Steel Limited*, (2016) 6 SCC 747]

25. In view of the above, I do not find any substance in the challenge to the permission dated 13.03.2018 granted by the Competent Authority in favour of the respondent nos. 4 and 5.

26. However, having said the above, the petitioner, placing reliance on the counter affidavit filed by the South Delhi Municipal Corporation (SDMC)/respondent no. 1 has submitted that the SDMC has sanctioned the building plan taking 41.45 sq meters as covered area on the second floor. She submits that in the Impugned Permission granted by the Competent Authority the covered area on the second floor was prescribed as 34.660 sq meters.

27. Though the learned counsel for the respondent no. 1 submits that the original sanctioned building plan of the respondent nos. 4 and 5 was for 41.45 sq meters, the petitioner draws reference to the online sanction granted by the respondent no. 1 on 05.04.2019 by file no. 10061182 in favour of respondent nos. 4 and 5 to submit that the same clearly shows that the sanctioned area was 34.660 sq meters while existing area was 53.160 sq meters and sanction allows further additional construction of 1.080 sq meters.

28. As the sanction given by the Competent Authority is clear in its terms that no additional construction will be allowed and is based on the second floor construction being 34.660 sq meters, the respondent nos. 4 and 5 are restrained from carrying out any construction activity over and above this limit.

29. This, however, does not preclude the respondent nos. 4 and 5 to approach the Competent Authority for further sanction of the construction on the second floor of the said building. Such application, if made by the petitioner shall be considered by the Competent Authority strictly in accordance with law.

30. The respondent no. 6 has in its counter affidavit stated that it would like to have a joint inspection conducted by respondent nos. 1 and 2 of the construction activity being carried out by respondent nos. 4 and 5.

31. Keeping in view that the alleged repair and renovation is being carried out by the respondent nos. 4 and 5 within the 'prohibited area', it is directed that such joint inspection, alongwith officers of the respondent no. 1, must be carried out within one week from today to ensure that the respondent nos. 4 and 5 are working strictly in accordance with the sanction given by the Competent Authority. Action shall be taken by the Competent Authority and the SDMC Officers against any unauthorized activity being carried out in the said building. Such inspection be carried out within a period of one week from today.

32. The petition is disposed of in the above terms.

NAVIN CHAWLA, J

DECEMBER 11, 2019/rv