

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.5466/2013

PETITIONER : Anant s/o Vinayak Thatte
Age : 72 years, Occu. Retd.,
R/o. Begumpura, Aurangabad.

...VERSUS...

RESPONDENTS:

1. The Union of India,
Through its' Secretary,
Ministry of Culture, Room No.502,
'C' Wing, Shastri Bhavan,
New Delhi 110 115.
2. The Director General,
Archeological Survey of India,
Janpath, New Delhi, 11.
3. The Superintending Archeologist,
Archeological Survey of India,
Aurangabad Circle, Aurangabad.
4. The State of Maharashtra,
Through its' Secretary,
Ministry of Culture,
Mantralaya, Mumbai.
5. The Divisional Commissioner,
Aurangabad.
6. The Municipal Corporation,
Through its Commissioner, Aurangabad.
7. The Town Planning Officer,
Municipal Corporation, Aurangabad.

(Added R-8 as per Hon'ble Court order
dated 29/3/16 in C.A. - 4922/14)

(Amendment made as per Hon'ble Court's
order dated 29/3/16 in CA No:-4922/14)

8. Maharashtra Tourism Development Corporation Limited,
(A Company incorporated under The Companies Act, 1956) having
its Corporate Office at Express Towers,
9th Floor, Nariman Point,
Mumbai – 400 021
through its Incharge Regional Manager-
Sushma w/o Ravindra Joshi,
Age : 57 years, Occu. : Service as above,
R/o : Darga Road, Aurangabad.
9. The State of Maharashtra, through its
Secretary, Water Resources Department,
Mantralaya, Mumbai – 32.

(Added Resp-9 as per Hon'ble Court's
order dated 07/02/19)

Ms P.S. Talekar, Advocate h/f Mr. S.B. Talekar & Mr. U.R. Awate,
Advocate for petitioner
Mr. S.B. Deshpande, A.S.G. for respondent nos.1 to 3
Mrs. A.V. Gondhalekar, Addl. G.P for respondent nos.4 and 5
Mrs. M.A. Deshpande, Advocate for respondent no.6

**CORAM : S.V. GANGAPURWALA AND
AVINASH G. GHAROTE, JJ.**

Judgment reserved on : 05/12/2019
Judgment pronounced on : 06/11/2020

J U D G M E N T (PER : AVINASH G. GHAROTE , J.)

1. Heard. Rule. Rule made returnable forthwith. Heard finally with the consent of the learned Counsel for the parties.

2. The petition raises a question of grant of protection to the underground aqueduct system known as “Thatte Nahar” situated in the city of Aurangabad, Maharashtra, which originates from a well, constructed in dry stone masonry on a farm land in Islampurwadi, upstream of Harsool water tank and culminates in Thatte Houz situated in Begumpura locality of Aurangabad. The construction of the aqueduct is in underground arched tunnels built in brick-lime masonry 2 to 2.5 km. in length which is situated in Harsool water tank from which water is channelized by a 10 inch diameter terracotta pipeline, which opens out in a large cistern admeasuring 40 ft. x 40 ft. having depth of 10 ft., situated in front of the residence of Shri Bhagwantrao Thatte-Naik, in Begumpura, Aurangabad. In the tunnels at Harsool tank end, an arrangement has been provided to avoid choking by construction of a small wall in the channel in which 2 to 3 pipes of big size have been fitted, one

above the other, so that if the lowest pipe is choked, water flow from the upper pipe (second) and likewise the third pipe is assured. The detailed description of this aqueduct system as found annexed to the communication by the Thatte family dated 18/10/1972, addressed to the respondent No.3, Superintending Archaeologist, S.W. Circle, Aurangabad, is as under :

“(A) The Thatte Nahar is a water course running through a channel starting from well in the bed of the tributary to the Harsul river. The channel is built in excellent lime cement and covered with pucea ‘ladaw’ with openings at intervals called ‘roshandans’ to allow entrance in the channel for repairs and removal of silt occasionally.

(B) This nahar is situated in Islampurwadi to the north of Aurangabad and is at a distance of some six miles from this town. What is most striking is the commanding position of the site at a height which allows this free flow of water to the Bengampura tank (Hauz).

(C) The source of water consists of springs of water percolating from the sands of river bed. It is collected in the reservoir like well and is surrounded with strong masonry construction work. The water thus collected is made to pass through underground channel of appreciable depth by construction of walls in brick and lime. This channel extends to a length of 2 to 3 miles. Roshandans (openings) have been provided at intervals

throughout the channel. An interesting arrangement has been provided in this channel to avoid choking of the Nahar. A small wall has been constructed in the channel in which two to three pipes of big sized have been fitted one above the other. If the lowest pipe is choked water flow from the upper pipe and likewise the third.

(D) This channel is then led into a pipeline made of clay pieces filled together and imbedded in masoning work all along. The pipeline winds its way on the rough surface of this ground covered with nullahs and mounds here and there. At such places the pipeline has been protected by providing sockets made of heavy stone.

(E) The pipeline reaches the first exhaust known as 'Chauras Bamba- a pillar wherein the water reaches the maximum height and allows diversions of water course. At the bottom of the pillar a small receptacle is constructed to collect silt and other impurities which can be removed from time to time. The pipeline then continues upto another exhaust called 'Hathni' which is a Bamba without a pillar.

(F) From 'Hathni' the pipeline comes to another pillar known as 'Gaol Bamba'. From Gaol Bamba the pipeline enters a channel dug and carved out in a hill. This channel is known as Khandi and measures 160 ft. The hill has not been blasted to allow the passage of the water but has been carried out. Thanks to the patience of the skilful artisans engaged in laying the pipeline.

(G) This channel terminates at the other end of the hill where a roshandan has been kept and enters the

Parsi Tower of silence when again the water course continues its onward flow through pipeline of clay immersed in pucca masonry, just near the surface of the ground. This pipeline reaches the shoobhakaran Bamba pillar just behind the Mukbara.

(H) The pipeline continues its course and then reaches the Kumbhar Bamba - pillar in Begampura. This pillar has diversions for Mukbara and two other cisterns. The pipeline passes now through the Kumbhar galli of Begampura and is received in the Patil Bamba pillar from where diversions to six places has been provided. The pipeline continues its flow and terminates at the Bada Hauz Bamba-pillar, from where pours down in the big cistern through rectangular pillar constructed exactly at the centre.

(I) This Bada Hauz tank is a perfect square with a side of 42 ft. and a depth of 10 ft. It is constructed in lime cement. At the sides of the tank a step of uniform width 2 ½ ft. is constructed all along the sides just at the middle of the side of the tank. There is an outlet in the corner at the bottom to allow the water to pass out of the tank for emptying and clearing it. A gallery 4ft. Wide has been provided on all sides of the tank to allow people the use of its water.

(J) Adjacent to the tank two ditches of the length of the tank have been built on the roadside to allow animals to drink the water.

(K) Since the supply of water was in abundance a net-work of pipeline was laid out throughout the locality

to places far and near and cisterns were constructed to store the water and the use of the people of course without expecting any return from them.

(L) Summing up, we beg to state that the Thatte Nahar passes through the following villages:

- 1) Islampurwadi – survey Nos. 11/1 , 11/2*
- 2) Harsul – survey Nos. 233, 234, 237, 243, 245, 271/1, 254/1*
- 3) Pahadsingpura- Survey No 47/1, 47/2*
- 4) Aurangabad- Survey Nos. 97, 106, 108*

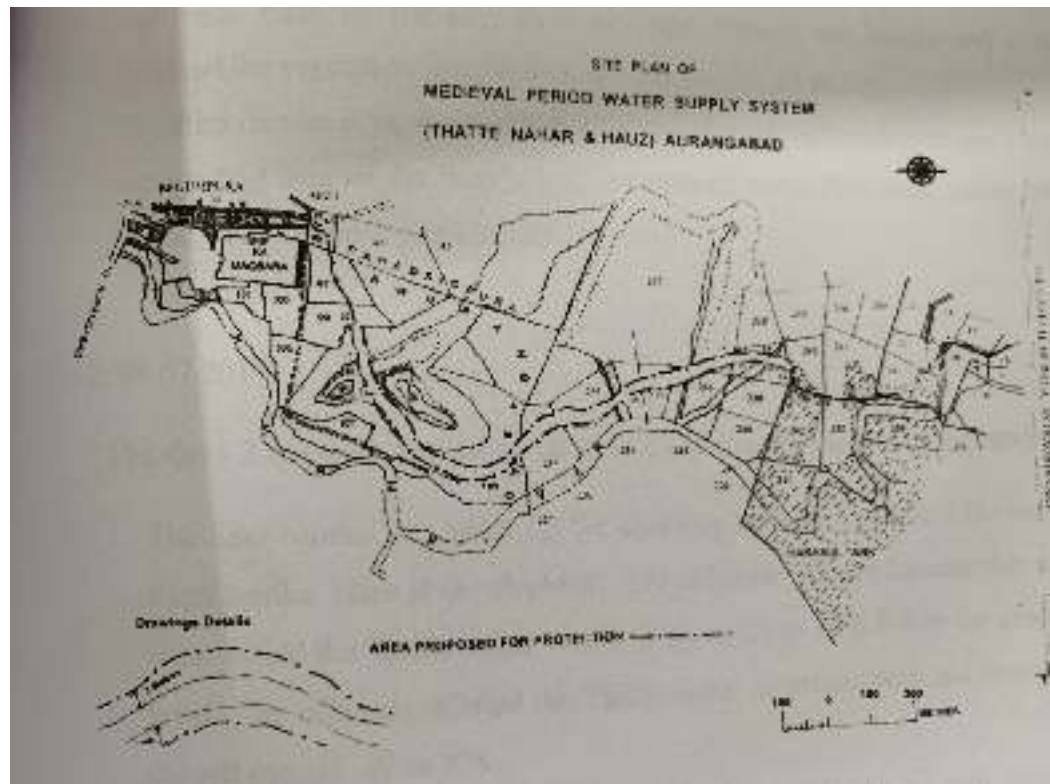
(M) The Nahar has the following Bambas- pillars- for the receipt and exit of water

- 1) Chauras Bamba(Pillar)- rectangular*
- 2) Hathani- ground level receptacle without pillar*
- 3) Gaol Bamba (Pillar)- cylindrical*
- 4) Shoobhakaran Bamba (Pillar) -cylindrical*
- 5) Kumbhar Bambi(Pillar)- -- do--*
- 6) Patil Bamba (Pillar) - -- do --*
- 7) Thatte Bamba (Pillar)- -- do --*
- 8) Bada Hauz Bamba in the wall*

(N) The original sanad of the Nizam granting us the ownership has been submitted to your office earlier.

(O) The Thatte Nahar is a self contained system and has been serving the people for the last two centuries continuously requiring practically no maintenance. The water is of the best quality, tasteful and improves digestion. It is pure and healthful.”

A descriptive note prepared by the Deputy Superintending Archaeologist, Aurangabad, dated 15/3/1973, supporting the above position also finds place on record at page 96. A figurative plan of Thatte Nahar is as under :



3. This underground water system has been constructed in the year 1762 AD and has a running length of around 7.5 kms. This aqueduct was supplying water not only to the family members of Bhatwantrao Thatte-Naik, but was also catering to the needs of the residents of Begumpura, where it opened out. The entire

construction of the aqueduct is of such a nature, that use of the height differences in the ground level is made of, so that water travels not by any external force but by gravity alone. The channels have openings at intervals called “Roshandans (Bambas)” to allow entrance to channels for repairs and removal of silt occasionally.

4. This aqueduct system was constructed by Shri Bhagwantrao Thatte-Naik in the 1762 AD out of his own funds and has been since maintained by his successors, till it was taken over by the respondent no.3. This aqueduct system, has since 1762 continuously been in operation satisfying the water requirements of the locality of Begumpura.

5. Similar aqueduct systems, reported to be 12 in numbers, have also been constructed in Aurangabad by Malik Ambar, the then Prime Minister of Nizamshah, the then ruler of Ahmednagar and founder of Aurangabad city in 1617 AD, for catering to the needs of the newly founded city of Aurangabad.

6. It is material to state that the Aurangabad District Gazetteer makes a mention of 12 water systems constructed for supplying water to Aurangabad city, out of which, the water supply system to Begumpura (Thatte Nahar) is one of them.

7. On 16/1/1971 the members of the Thatte family, wrote a letter to the Superintending Archaeologist, South-West circle, Aurangabad, stating that they were of the opinion that the maintenance and upkeep of Thatte Nahar and Houz, should be done by some resourceful authority and therefore, the entire aqueduct system should be taken over by the Archaeological Survey of India (A.S.I.) with the condition that name of the aqueduct system should be continued as Thatte Nahar and the family continues to receive water free of cost from the system and no connections be given to private parties from the system.

8. The offer of the landowners to handover the entire system to the A.S.I., was recommended by the Respondent No.3, Superintending Archeologist, S.W. Circle, Aurangabad to the Director General of A.S.I., New Delhi by his letter dated 19/5/1971,

in which it was stated that the Superintending Archaeologist, had himself inspected the ancient water supply system, which was 200 years old, conveying water from a distance of about 5 miles from Harsool by channeling through rocks and earthen water pipes of 6 inches diameter throughout the year to residents of Begumpura as well as Bibi-Ka-Maqbara and with minor repairs, a supply of one lac gallon of water per day would be ensured.

9. It is contended by the petitioner that an agreement came to be executed between the Thatte family and the A.S.I., on 10/1/1972 in terms of which, the Thatte Nahar and Houz were handed over to the A.S.I., on terms and conditions as contained therein in the year 1972. A specimen form of agreement is placed on record at page 104 along with Form-B, as was required. It is, however, material to note that a signed copy of the said agreement, is neither available with the owners nor with the A.S.I., as claimed by it. The communication dated 5/2/2013 addressed to the petitioner, by the Archaeological Department, clearly states that the signed copy of the agreement is not traceable, however, an unsigned

draft copy which was available with the A.S.I. has been placed on record at page 104 as stated above.

10. On 4/10/1972 the then Divisional Commissioner, Aurangabad, wrote a letter to the Superintendent A.S.I., S-W Circle, Aurangabad, complaining that in view of the contract between Shri Thatte and the A.S.I., all the water from Thatte Nahar was being diverted for use of the A.S.I., due to which residents of Begumpura locality, who were earlier receiving water from Thatte Nahar, were facing great difficulties due to shortage of water supply, and it was therefore requested that the water supply be restored to the residents of Begumpura locality.

11. The then Superintendent A.S.I., S-W Circle, Aurangabad, on 9/10/1972 replied to the above letter, stating that the Government of India, had decided to protect the ancient water system known as Thatte Nahar and Houz, as a monument of national importance under the Ancient Monuments And Archaeological Sites And Remains Act, 1958 (for short, hereinafter referred to as "AMASR Act, 1958), since the system was unique. It

was also stated that similar ancient water supply systems at Bijapur and other places were also protected under the Rules framed under the AMASR Act, 1958. It was also stated that the owners were expected to enter into an agreement or make a gift of the system to the A.S.I. and the necessary documents had already been sent to the Director General of Archaeology, New Delhi for getting them vetted by the Ministry of Law. It was also stated that since long the system was not working properly due to chocking up of canals which had resulted in drying up of the Houz situated in Begumpura, however, consequent to the A.S.I. agreeing to protect the water system and Houz, as a monument, steps had been taken to repair the damaged portions, removal of silt, boulders, etc from the underground pipes and channels etc. resulting in improvement of the water supply. It was also stated that Thatte Nahar used to supply water to the Bibi-Ka-Maqbara since long as could be made out from the alignment of the pipes and connections made about 18 years ago. It was also stated that the usual supply of water to the Houz from which public of Begumpura used water has been assured.

12. Several letters of recommendations have been placed on record for declaring the Thatte Nahar and Houz as monument of national importance on account of its unique system which revealed the ingenuity of its engineers in laying pipes cutting through a massive hill and lifting water by siphon system and so also there are several communications placed on record to and fro between the Superintendent Archaeologist, S-W Circle, Aurangabad, and the A.S.I., New Delhi as well as the Thatte family, in this regard.

13. The Minutes of the 23rd Meeting of the Expert Advisory Committee to review the cases for construction/ reconstruction/ addition/ alteration /renovation of buildings in the prohibited/regulated areas of centrally prohibited monuments, held on 18th and 19th August, 2009 have been placed on record at Exhibit-L, page 148. In this meeting, while considering an application from Inspira Leisure and Hospitality Limited, which was constructing a Golf Club at Jarwada-Harsoola road in Gat/Survey Nos.235, 236 and 237, underneath which the Thatte Nahar passes, while rejecting the application, it was stated, that the proposal for protection of the monument was already approved by the then Ministry of Culture

and the preliminary notification for protection had been referred to the Ministry of Law for vetting.

14. On 18/9/2009, a notification under Sub Section 1 of Section 4 of the AMASR Act, 1958 was published in the official gazette of the Government of India, expressing the intention of the Government to declare Thatte Nahar as a monument of national importance and calling upon any person interested to lodge any objection within two months from the issue of the notification.

15. On 9/11/2009, several persons, lodged their objections to the proposed declaration in respect of a segment of the Nahar, passing through the city on the ground that in the area of 3 meters to 10 meters on either side of the aqueduct system, which was demarcated for protection, several houses/constructions had come up over a period of time, as a result of which any declaration under the AMASR Act, 1958 and the consequent protection as contemplated by the notification under Section 4 (1) of the AMASR Act, 1958 would adversely affect them. Other objections in this regard, are dated 9/11/2009, 10/11/2009, 11/11/2009 and

16/11/2009. The other objections dated 23/11/2009 by M.T.D.C. Limited and Inspira Leisure and Hospitality Limited, the objection by Mahesh and Umesh Gundellu, dated 15/12/2009, Khushalchand Dongre, dated 30/11/2009, Chandrakant Khaire (M.P) dated 16/12/2009 are all beyond the period of two months, as provided for in the notification under Section 4 (1) of the AMASR Act, 1958.

16. There appeared to be lot of apprehension in the residents of the localities under which a portion of the Thatte Nahar passes, in respect of the nature and extent of protection proposed to be granted as is reflected from the letter of the then Member of Parliament, dated 27/11/2012, for though the Section 4 (1) notification indicated a restriction within an area of 3 to 10 meters on either side of the Nahar, however, representations were made by the Regional Officers of A.S.I., that the protection would be to the extent of 100 meters on either side of the Nahar.

17. The Director (Monuments), A.S.I. vide letter dated 28/12/2012 addressed to the Superintending Archaeologist, S-W Circle, Aurangabad, in light of the intention to issue final

notification under the AMASR Act, 1958, called for certain information as indicated therein, relating to the actual Survey numbers to be protected and their ownership details, the expenditure incurred by the A.S.I. and the effect of the amendment of 2010 to the AMASR Act, 1958 on nearby prohibited and regulated area on declaring the monument protected.

18. Though the response by the Superintending Archaeologist, S-W Circle, Aurangabad to the above letter dated 28/12/2012 is not on record, however, by a communication dated 6/8/2013 issued by the Director General, A.S.I., the printout of which e-mail has been placed on record at Exh.S (page 159-A) it has been stated that the matter was reviewed and it has been decided not to proceed with further action for declaration of the monument/site (Thatte Nahar) as a protected monument under the AMASR Act, 1958. It is aggrieved by this action and communication that the present petition has been filed.

19. The respondent nos.1 to 3 on 20/3/2014 filed affidavit-in-reply, wherein they admitted that the water supply system

“Thatte Nahar” was still in use. It was further admitted that this water supply system was unique and most intact example of the engineering skill of the late medieval period and was easily accessible for inspection and repairs along its course. It was further admitted that pursuant to the site inspection by the Director General of A.S.I., vide communication dated 10/1/1972, it was principally agreed to protect the ancient water supply system. It is, however, submitted that consequent to the issuance of the preliminary notification under Section 4 (1) of the AMASR Act, 1958 on 18/5/2009, after due deliberation the Director General, A.S.I. had taken a decision on 6/8/2013, holding that the issue of declaring “Thatte Nahar” as protected monument had been reviewed and it was decided not to proceed for declaring the same as a protected monument under the AMASR Act, 1958. The reason as appearing from the affidavit-in-reply, of the respondent nos.1 to 3, appears to be that consequent to the preliminary notification dated 18/9/2009, objections were received from the residents of the localities from which Thatte Nahar passes which were taken into consideration and the decision was arrived at not to declare it as a protected monument. Though it is admitted that “Thatte Nahar” is an

important monument as it is one of the surviving medieval water pipeline system of Aurangabad and is an excellent example of living hydraulic engineering, however, on the ground that it was situated in densely populated area and the public would be affected by the prohibition/regulation once it is declared as a protected monument, the Director General, A.S.I. is claimed to have taken a decision not to declare it as a protected monument. It is, however, specifically stated that as on date (of the filing of the reply on March, 2014) the A.S.I. is incurring expenditure for maintaining the said Thatte Nahar.

20. The petitioner filed rejoinder on 21/6/2016, wherein it was stated, that the A.S.I. has been indulging into procrastination on all counts inasmuch as under an R.T.I. query it was found that though preliminary notification under Section 4 (1) of the AMASR Act, 1958 were issued, in respect of several monuments, the final notification, under Section 4 (3) of the AMASR Act, 1958, was not issued in respect of any of them except one for the Archaeological site comprised in Survey plot No.185, Bhokardan. It was submitted that even in respect of monuments such as Bibi-Ka-Maqbara,

Ghrushneshwar temple (one of the 12 Jyotirlings of India) though there was a preliminary notification under Section 4 (1) of the AMASR Act, 1958, the final notification under Section 4 (3) of the AMASR Act, 1958 had not been issued, though these monuments continued to be protected and taken care of by the A.S.I. It was submitted, that though the site was handed over by the Thatte family in the year 1971 itself to A.S.I., it took more than 37 years, to issue the preliminary notification under Section 4 (1) of the AMASR Act, 1958. It was further contended that the decision to review the intention to declare Thatte Nahar as a protected monument, in the face of consistent recommendation in its favour, was clearly due to political pressure. Insofar as the claims in respect of the objections received it was stated that so far as the Golf course proposed to be constructed by the M.T.D.C., the contractor had already been withdrawn from the project. The entire lands of Survey Nos.235, 236 and 237, which were slated for the Golf course, were within the control of the M.T.D.C. and the revenue department and appropriate modifications to its development could always be made. Insofar as other lands and so also any encroachments made therein it could also be removed under the Government Resolution dated

12/7/2011. It was further submitted that 80 % of the Thatte Nahar was constructed underneath Government land and open spaces without any habitation and it was only 20% part of the Nahar that was constructed in the area of Begumpura, which was populated which could be taken care of by grant of adequate compensation or by directing the occupants not to undertake any construction activity.

21. The petition came to be amended in pursuance to the order dated 29/3/2016, whereby additional grounds were raised in light of the amendment to the AMASR Act, 1958, as effected by the Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Act, 2010. The additional grounds raised included the absence of power of review in the authority, the cryptic nature of the communication containing review, non-supply of the copy of the order of review etc.

22. The respondent nos.1 to 3 consequent to the amendment, filed an additional affidavit-in-reply on 7/10/2016 and reiterated its stand that the decision of not declaring Thatte Nahar

as protected monument was taken after considering the objections received consequent to the preliminary notification and the authority was well within its rights to do so.

23. We have extensively heard Ms Talekar, the learned Counsel for the petitioner, Shri S.P. Deshpande, A.S.G. for the respondent nos.1 to 3, Shri A.V. Gondhalekar, Additional Government Pleader for respondent nos.4 and 5 and Mrs. M.A. Deshpande, learned Counsel for the respondent no.6.

24. At the outset, it would be material to note that since 1971, the respondent no.3, has been regularly maintaining the site in question, by incurring expenditure thereupon, as is stated in paragraph 19 of its affidavit dated 20/3/2014. At intervals when the respondent no.3 neglected the upkeep and maintenance of Thatte Nahar, this Court upon a grievance by the petitioner in this regard, had called upon the respondent nos.1 to 3 to explain their action of neglect as the same was contrary to the positive statement on oath made in the affidavit dated 20/3/2014, consequent to which, an affidavit dated 14/3/2017 by the respondent nos.1 to 3 contains the

statement that the respondent nos.1 to 3 shall take proper measures for conservation and maintenance of Thatte Nahar/Haud as and when the situation warrants and whenever there is a leakage in the pipeline or blockage in the Nahar pipeline, they would take appropriate measures to remove it, which statement was accepted and recorded by the Court in its order dated 22/10/2018. By an order dated 27/11/2018, a survey was directed to be conducted to ascertain the status of blockage or leakage with a direction to the respondents to take remedial measures. In pursuance to the above direction inspection, cleaning and minor repair work was carried out, the report in respect of which dated 12/7/2019, is placed on record.

25. It is further material to note that considering the antiquity of the underground water systems in Aurangabad and need for their protection and the water scarcity in the city of Aurangabad, *suo moto* cognizance, was taken by this Court and Writ Petition No.766/2003, (Additional Registrar ...Vs...State of Maharashtra) was registered. In the said writ petition, a Committee

was appointed for conducting a detailed survey, which had submitted its report on the Nahar-a- Panchakki.

26. Certain provisions of the AMASR Act, 1958 being material are quoted as under :-

“Section 2 (a) “ancient monument” means any structure, erection or monument or any tumulus or place of internment or any cave, rock sculpture, inscription or monolith, which is of historical, archaeological or artistic interest and which has been in existence for not less than one hundred years and includes -

(i) the remains of an ancient monument.
(ii) the site of an ancient monument.
(iii) such portion of land adjoining the site of an ancient monument as may be required for fencing or covering in or otherwise preserving such monument, and
(iv) the means of access to, and convenient inspection of an ancient monument.

(b) “antiquity” includes -
(i) any coin, sculpture, manuscript, epigraph or other work of art or craftsmanship,
(ii) any article, object or thing detached from a building or cave,

(iii) *any article, object or thing illustrative of science, art, crafts, literature, religion, customs, morals or politics in bygone ages,*

(iv) *any article, object or thing of historical interest, and*

(v) *any article, object or thing declared by the Central Government by notification in the Official Gazette to be an antiquity for the purpose of this Act.*

which has been in existence for not less than one hundred years.

(c) *“archaeological officer” means an officer of the Department of Archaeology of the Government of India not lower in rank than Assistant Superintendent of Archaeology.*

(e) *“Director-General” means the Director-General of Archaeology, and includes any officer authorised by the Central Government to perform the duties of the Director-General.*

(f) *“maintain”, with its grammatical variations and cognate expressions, includes the fencing, covering in, repairing, restoring and cleansing of a protected monument, and the doing of any act which may be necessary for the purpose of preserving a protected monument or of securing convenient access thereto.*

(i) *“protected area” means any archaeological site and remains which is declared to be of national importance by or under this Act.*

5. Acquisition of rights in a protected monument.-(1) *The Director-General may, with the*

sanction of the Central Government, purchase, or take a lease of or accept a gift or bequest of any protected monument.

(2) Where a protected monument is without an owner, the Director-General may, by notification in the Official Gazette, assume the guardianship of the monument.

(3) The owner of any protected monument may, by written instrument, constitute the Director- General the guardian of the monument, and the Director- General may, with the sanction of the Central Government, accept such guardianship.

(4) When the Director- General has accepted the guardianship of a monument under sub-section (3), the owner shall, except as expressly provided in this Act, have the same estate, right, title and interest in and to the monument as if the Director-General has not been constituted a guardian thereof.

(5) When the Director-General has accepted the guardianship of a monument under sub-section (3), the provisions of this Act relating to agreements executed under section 6 shall apply to the written agreements executed under the said sub-section.

(6) Nothing in this section shall affect the use of any protected monument for customary religious observances.

6. Preservation of protected monument by agreement.- *(1) The Collector, when so directed by the Central Government, shall propose to the owner of a*

protected monument to enter into an agreement with the Central Government within a specified period for the maintenance of the monument.

(2) An agreement under this section may provide for all or any of the following matters. Namely:-

- (a) the maintenance of the monument,*
- (b) the custody of the monument and the duties of any person who may be employed to watch it,*
- (c) the restriction of the owner's right-*
 - (i) to use the monument for any purpose,*
 - (ii) to charge any fee for entry into or inspection of, the monument,*
 - (iii) to destroy, remove, alter or deface the monument, or (iv) to build on or near the site of the monument.*
- (d) the facilities of access to be permitted to the public or any section thereof or to archaeological officers or to persons deputed by the owner or any archaeological officer or the Collector to inspect or maintain the monument ;*
- (e) the notice to be given to the Central Government in case the land on which the monument is situated or any adjoining land is offered for sale by the owner, and the right to be reserved to the Central Government to purchase such land or any specified portion of such land, at its market value;*
- (f) the payment of any expenses incurred by the owner or by the Central Government in connection with the maintenance of the monument;*

(g) the proprietary or other rights which are to vest in the Central Government in respect of the monument when any expenses are incurred by the Central Government in connection with the maintenance of the monument;

(h) the appointment of an authority to decide any dispute arising out of the agreement; and

(i) any matter connected with the maintenance of the monument which is a proper subject of agreement between the owner and the Central Government.

9. Failure or refusal to enter into an agreement.- *(1) If any owner or other person competent to enter into an agreement under section 6 for the maintenance of a protected monument refuses or fails to enter into such an agreement, the Central Government may make an order providing for all or any of the matters specified in sub-section (2) of section 6 and such order shall be binding on the owner or such other person and on every person claiming title to the monument from, through or under, the owner or such other person.*

(2) Where an order made under sub-section (1) provides that the monument shall be maintained by the owner or other person competent to enter into an agreement, all reasonable expenses for the maintenance of the monument shall be payable to the Central Government.

(3) No order under sub-section (1) shall be made unless the owner or other person has been given an

opportunity of making a representation in writing against the proposed order.”

27. The basic crux of the argument revolves around the contention that (a) there was an agreement between the owners of the Thatte Nahar and Houz (monument hereinafter) and the A.S.I. for its maintenance, preservation and protection in the year 1972 (the date for which as claimed by the petitioner is 10/1/1972) executed between the members of the Thatte family and the Superintending Archaeologist, A.S.I. and/or (b) the absence of authority in the taking of decision of not to proceed ahead in declaring it as a National Monument under Section 4 (3) of the AMASR Act, 1958.

28. Insofar as the plea that there was an agreement between the owners and the A.S.I. is concerned, the reply dated 5/2/2013 (Annexure-G, page 104) by the respondent no.3, to the R.T.I. query seeking copies of the agreement, states that the signed copy was not traceable, however, an unsigned draft agreement copy is available, which is attached.

29. A perusal of this document/agreement at page 104, indicates that it is a specimen for agreement under Section 6 of the AMASR Act, 1958. The schedule appended to the agreement, describes the name of the monument as “ancient water supply system known as Thatte Nahar and Hauz”. In Form – B annexed to this document the comments at serial nos.20 to 23 being material are reproduced as under :-

20	<i>Any agreement between the owner and present caretaker</i>	<u>Enclosed</u>
21	<i>Recommendation</i>	<i>Recommended for protection.</i>
22	<i>Date of Inspection</i>	
23	<i>Office file and upto date position regarding protection</i>	<u>No.2/1/MH/1/71/M dated 10/1/1972 from the Director General, A.S.I., New Delhi.</u>

(emphasis supplied)

The entry in the office file bearing No.2/1/MH/1/71/M dated 10/1/1972, clearly was material, which would have shed light upon the issue of the agreement, however, the same has not been produced by the respondent nos.1 to 3 on record. On 27/1/2017, the copies of the office notes of the respondent no.2, have been placed on record. It is however material to note that these office

notes are from 15/11/1984 onwards. Though the above reply dated 5/2/2013 to the R.T.I. query clearly mentions regarding the office note dated 10/1/1972, copies of the office notes, prior to 15/11/1984 have not been placed on record. The office notes post 15/11/1984 consistently speak about not only the antiquity of the monument and the need for protection but also of the fact that the monument had been handed over to the A.S.I., which was maintaining the same. Certain portions of the office notes being material are reproduced hereunder :-

Office-note dated	Text	Page no.
30/03/1993	<i>Some time back it was decided to protect the ancient water supply system known as Thatte Nahar and Thatte Houz at Aurangabad. It is one of the earliest water supply system in Aurangabad still operational. It is privately owned <u>and the owner (s) handed it over to A.S.I.</u> but it has not been notified as a protected monument.</i>	8
29/07/2000	<i>This proposal to protect 'Thatte Nahar and Houz' was mooted as early as 1972 when the Thatte family of Aurangabad who claimed ownership <u>handed over the property to the then South-Western Circle of the Archaeological Survey of India.</u></i>	58

25/3/2009	<i>The matter relates to declaration of Thatte Nahar and Houz as a protected monument of Aurangabad. It is one of the earliest water supply in Aurangabad still operational. It is privately owned <u>and the owners handed it over to A.S.I., but it has not been notified as a protected monument.</u></i>	54
21/4/2009	<i>It is privately owned. <u>But the owners have handed it over to A.S.I. for maintenance as a protected monument.</u></i>	55
15/6/2009	<i>It is privately owned. <u>But the owners have handed it over to A.S.I. for maintenance as a protected monument.</u></i>	58
17/6/2009	<i>It is privately owned, <u>but the owners have handed it over to ASI for maintenance as a protected monument.</u></i>	

27/12/2012	5. <u>That it was in the year 1971 the ASI had made an agreement with the family members (decedents) of Shri Bhagwat Bhairav Thatte and accordingly took over the maintenance and administration of the Thatte Nahar.</u> 6. That since then ASI through office of the Superintending Archaeologist, Aurangabad Circle has provided all safety and protection of this engineering marvel in all seasons and all days and nights. 7. <u>That since the taking over of the Thatte Nahar by ASI huge amount of expenditure has been incurred by the ASI towards the protection and maintenance of Thatte Nahar besides the equal or more amount of salary that was paid over the years to the staff and labour engaged for the purposes.</u> 11. <u>It is important to note that ASI in the office of SA, ASI, Aurangabad Circle gets free of charge water from Thatte Nahar round the year for the requirement of office, departmental residential quarters, the entire horticulture operation of Bibi ka Maqbara is carried out through this water, tourist who visit to the monument and sizable number of local citizens (the local stake holders) get fresh water from Thatte Nahar.</u> 12. To know the actual details of all the survey numbers for their ownership records we may ask Aurangabad Circle to get the information from the State Authorities and the <u>details of expenditure that have been spent by the ASI since 1971 when it has been taken over by the ASI for the management and also the expenditure incurred if any earlier to that.</u>
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(emphasis supplied)

It is thus apparent that there is a series of notings as demonstrated above in the official record of the respondent no.2, which indicates two things (a) that an agreement has been entered into between the owners of the monument and the A.S.I. in the year 1971 and (b) consequent to the agreement of the year 1971 the monument was handed over to the A.S.I., which is managing and maintaining it and has been incurring expenditure for the same till date. It is thus apparent, that this agreement, clearly relates to the provisions of Section 6 of the AMASR Act, 1958 which mandates preservation of protected monument by agreement.

30. The question which arises is whether the monument in question, can be considered to be a protected monument, as envisaged by Section 2 (j) read with Section 4 (1) and (3) of the AMASR Act, 1958, these provisions read as under :-

“2(j) “protected monument” means any ancient monument which is declared to be of national importance by or under this Act.

4. Power of Central Government to declare ancient monument, etc., to be of national importance. -

(1) Where the Central Government is of opinion that any ancient monument or archaeological site and remains not included in section 3 is of national importance, it may, by notification in the Official Gazette, give two months' notice of its intention to declare such ancient monument or archaeological site and remains to be of national importance; and a copy of every such notification shall be affixed in a conspicuous place near the monument or site and remains, as the case may be.

(2) Any person interested in any such ancient monument or archaeological site and remains may, within two months after the issue of the notification, objects to the declaration of the monument, or the archaeological site and remains, to be of national importance.

(3) On the expiry of the said period of two months, the Central Government may, after considering the objections, if any, received by it, declare by notification in the Official Gazette, the ancient monument or the archaeological site and remains, as the case may be, to be of national importance.

(4) A notification published under sub-section (3) shall, unless and until it is withdrawn, be conclusive evidence of the fact that the ancient monument or archaeological site and remains to which it relates is of national importance for the purposes of this Act.”

(emphasis supplied)

31. The communications placed on record at Exhibits-C to G, clearly demonstrate that the monument in question, was considered by the respondent nos.2 and 3 to be unique from an archaeological point of view being a medieval period water supply system, which was still extant and did not use any mechanical device or power, to ensure the flow of water through the system. The office notes of the respondent no.2 on record from 15/11/1984 to 22/6/2013, time and again reiterate the antiquity of the monument, its uniqueness, ingenuity of its creator and the need to protect and preserve the same. In fact, accepting this need, the then Minister for Culture had approved the issuance of the preliminary notification under Section 4 (1) of the AMASR Act, 1958 which was so issued on 18/9/2009, which declared the intention of the Central Government to declare the said ancient monument to be of national importance. It is quite another thing that it took the respondent nos.2 and 3 more than 37 years, after as per the office notes, it was handed over in the year 1971, to come to a stage of issuing the declaration under Section 4 (1) of the AMASR Act, 1958. It is, however, an admitted position on record, that the final notification under Section 4 Sub Section 3 of the AMASR Act, 1958 was not

issued, in view of the impugned communication dated 6/8/2013. In that light of the matter, it cannot be said, that the monument in question, satisfies the requirement, in law, as of date of being a protected monument, as defined in Section 2 (j) of the AMASR Act, 1958, as the same envisages a prior declaration of the same being of national importance which could only be done by a final notification under Section 4 (3) of the AMASR Act, 1958. So also for this reason, the provisions of Sections 5 and 6 of the AMASR Act, 1958 are not applicable as they specifically require a prior declaration of a monument, to be a protected monument, for being attracted.

32. However, the action of not so declaring it which is reflected from the communication dated 6/8/2013 is also in challenge in the present matter.

33. In this regard a bare perusal of the communication 6/8/2013 (Exhibit-S/page 159-A), which is an e-mail issued by the Director General of the respondent no.2 merely speaks that the matter had been reviewed and it had been decided not to proceed with further action for declaration of the monument/site as

protected monument under the AMASR Act, 1958. It does not spell out any reason whatsoever for such an action. However, the affidavit-in-reply filed by the respondent nos.1 to 3 speaks about objections by the residents of the locality through which the Thatte Nahar passed as being the reason for not proceeding ahead with the notification under Section 4 (3) of the AMASR Act, 1958.

34. In this regard the compilation of the documents regarding proceedings pertaining to the protection/de-protection of Thatte Nahar as placed on record by the respondent nos.1 to 3 can be of some assistance. The preliminary notification under Section 4 (1) of the AMASR Act, 1958 was issued on 18/9/2009, by which objections were to be lodged within two months of the date of its publication as required by Sub Section 2 of Section 4 of the AMASR Act, 1958, by any person interested. As the notification under Section 4 (1) of the AMASR Act, 1958 was published on 18/9/2009, the period of two months would be over on 17/11/2009. The reply of the respondent nos.1 to 3 dated 20/3/2014, lists out five representations/objections received under Section 4 (2) of the

AMASR Act, 1958, within the time period stipulated under Section 4 (3) of the AMASR Act, 1958 as under :-

<i>Sr. No.</i>	<i>Name</i>	<i>Date</i>
1	<i>Shri Vinayak Prabhakar Pande, local Corporator, Begumpura, Aurangabad.</i>	<i>09/11/2009</i>
2	<i>Begumpura Sangharsh Samiti.</i>	<i>09/11/2009</i>
3	<i>Maharashtra Navnirman Sena, Aurangabad City.</i>	<i>10/11/2009</i>
4	<i>Secretary, Shri Giri Darshan Cooperative Housing Society.</i>	<i>16/11/2009</i>
5	<i>Shri Rustam Narayan Hasane and Hiralal Sakharam Hasane.</i>	<i>11/11/2009</i>

The affidavit-in-reply further states that after the expiry of the period as contemplated in Section 4 (3) of the AMASR Act, 1958, four more representations had been received from (1) Deputy General Manager, M.T.D.C. (2) Inspira Leisure and Hospitality Limited, Mumbai (3) Khushalchand Khemchand Dongre (Pahadia) and (4) Shri Chandrakant Khaire, Member of Parliament. These representations though received after the stipulated period as provided in Section 4 (3) of the AMASR Act, 1958 were also forwarded to the respondent no.2 by the respondent no.3.

Insofar as the representations/objections received after the expiry of the period, as contemplated by Section 4 Sub Section 3 of the AMASR Act, 1958, the same in light of the language used in Section 4 (3) of the AMASR Act, 1958, ought not to have been considered by the respondent no.2. The notings, however, demonstrate that the respondent no.2 got swayed by the objections as lodged by the M.T.D.C. in spite of the fact that similar objections raised earlier of Inspira Leisure and Hospitality Limited, in 2009 were rejected in the meeting held on 18-19/8/2009 and the objections of the then local Member of Parliament, in spite of the fact that neither of these objections were within time as stipulated by Section 4 (2) of the AMASR Act, 1958 nor did they completely object to the proposed intention to declare the monument as a protected monument under Section 4 (3) of the AMASR Act, 1958. The office notings dated 7/1/2010 (page 64) and 8/2/2010 (page 65/66) make a mention of the objections received. The comments of the respondent no.3 were called for and received by the respondent no.2 in respect of the above objections, which is dated 22/10/2010 at record page 206, which considering the objections suggested a via-media of imposing restrictions in relation to further

construction/excavation within a distance of 3 to 10 meters of the pipeline, to the extent it passes from the populated area. Insofar as the areas which are not populated the restriction as per the Act could be imposed. The position that it was an ancient system in need of preservation and protection was reiterated. The office notes dated 6/6/2012, 27/12/2012, which are post-objections also strongly reiterate the need for grant of protection and declaration of the monument as a protected monument.

In this regard perusal of the individual objections as received within stipulated time would reveal that the objection by Vinayak Prabhakar Pande, Corporator, was basically to the restriction to be imposed to the extent of 100 meters on each side of the pipeline, in respect of the populated areas, as they contain constructions. The objection by Begumpura Sangharsh Samiti also related to the portion of the Nahar which fell in the populated area. The objection of the Maharashtra Navnirman Sena also related to the portion of the Nahar which passed in the populated area. The objection by Rustam Hasane, who claimed to be the owner of Gat No.238/1 and 242, which was being used for agriculture sought compensation at market rate in case of its acquisition. Giri Darshan

Cooperative Housing Society claimed ownership in respect of 2 acres and 4 gunthas in Survey No.96, Begumpura, upon which 17 plots were laid which were allotted to its members and therefore, the notification was opposed. The other objections beyond stipulated time were by the M.T.D.C. which claimed the land of Survey Nos.235, 236 and 237, of Harsool admeasuring about 180 acres assured to take steps to protect the monument and made development in such a manner that the monument would not be disturbed, while construction a Golf course around it. Inspira Leisure and Hospitality was the contractor to which M.T.D.C had allotted the work of constructing Golf course on land of Survey Nos.235, 236 and 237 of Harsool allotted to the M.T.D.C. Mahesh Gundellu was the owner of plot Nos.108 and 109 in Gat No.191 of Aurangabad village and claimed that the area did not fall within the 10 meters distance from the Nahar and in case the land was acquired, compensation be granted. The objection by Khushalchand Dongre (Pahadia) who claimed to be cultivating the land of Survey Nos.109, 233 and 234 assured to take all positive steps for preserving the Nahar and requested to only acquire the portion of the Nahar. The objection by Shri Chandrakant Khaire, the then

Member of Parliament was also in respect of the populated areas from which the pipeline passed.

35. As stated above, the above objections were duly considered by the respondent no.3 in its reply dated 22/10/2010, who while still asserting the need for grant of protection to Thatte Nahar, had proposed a via-media as indicated therein. The need to declare the monument as a protected monument of national importance, in spite of the objections, was reiterated as is reflected from the office notes dated 4/11/2010, 6/6/2012, 27/12/2012 and 22/6/2013.

36. The office note dated 7/8/2013 at page 85 of the compilation submitted by the respondent nos.1 to 3, which records the decision not to proceed ahead in the matter, thus assumes significance and is reproduced as under : -

“This pertains to protection of Thatte Nahar and Hauz in Sambhaji Nagar (Aurangabad). Preliminary notifications indicating intention to declare the said monument as centrally protected was issued on

22.09.2009. Several representations from local residents, political parties and Hon'ble MP (Lok Sabha) Shri Chandrakant Khaire were received against the protection of Thatte Nahar as centrally protected monument. The main contention of most of the representation are that thickly populated area located directly above the pipeline would seriously affect the implementation of the 1992 notification on prohibited and regulated area once Thatte Nahar is declared as centrally protected monument. Some residents have asked for the proper compensation if the land is acquired in sequel if protected while other strongly objected for acquiring the area.

The matter had been reviewed and in view of serious objections raised by local residents, political parties and Hon'ble Member of Lok Sabha Shri Chandrakant Khaire, it has been decided by competent authority not to proceed for further action for declaration of the monument/site as protected monument under the AMASR Act, 1958.

Necessary directions have already been issued to SA, Aurangabad Circle and competent authority that there is no need for person to seek NOC either from SA, Auranbagad Circle of the competent authority for undertaking any construction activities.

In view of the above, preliminary notification issued on 22.9.2009 indicating its intention to declare the Thatte Naher as centrally protected monument is to be withdrawn.

Submitted for necessary approval.

(D.N. Dimri)

SA (M)”

37. A perusal of the above note dated 7/8/2013, would demonstrate, that the same is prepared by Shri D.N. Dimri, whose designation is SA (M), which is Superintending Archaeologist (Monuments). The note has been submitted to the Joint Director General, who has stated that he would like to consider the same, however, there existed a reference from P.M.O., which may also be considered before taking any action in the matter. He, in turn, submits the same to the Director General for consideration. There is no other noting on record later than 8/8/2013.

38. As against that the email by the Director General A.S.I. Shri Pravin Shrivastava, (Exh.S/Pg.159-A), addressed to Aurangabad Circle of A.S.I. is dated 6/8/2013, i.e. a day earlier , which also states that 'the matter had been reviewed and it had been decided not to proceed with further action for declaration of the monument/ site as protected monument. This indicates that

something has happened between 22/6/2013 and 7/8/2013, however, what has happened, is inexplicable as there is nothing on record to indicate the same. There are no note sheets after 22/6/2013 and till 6/8/2016, in the compilation of the note sheets placed on record by the respondents 1 to 3. Thus who was the Competent Authority, who took the decision to review and not to proceed ahead in the matter, what was his authority, what was considered, deliberated upon, what were the reasons, all this is totally absent in the matter. Even the reply affidavits filed by the respondents placed on record do not shed any light in this regard. Surely the Director General, A.S.I. cannot be equated with the Central Government, which is the Authority under Section 4(3) of the AMASR Act, 1958 to consider and decide the objections and direct or refuse to direct, issuance of the declaration of the monument being of National Importance. Though Section 29 of the AMASR Act, 1958, provides for delegation of powers, by the Central Government, the same has to be by way of notification in the Official Gazette. No such notification indicating delegation of powers of the Central Government to any officer/authority has been placed on record to indicate that any officer/authority of the A.S.I. was

delegated the powers under Section 4 (3) of the AMASR Act, 1958. The question is whether the “Central Government” as mentioned in Sub Section 3 of Section 4 of the AMASR Act, 1958 would mean the Director General of A.S.I. or the concerned Ministry/Minister. In this regard, it would be necessary to consider the note by which the preliminary notification under Section 4 (1) of the AMASR Act, 1958 came to be issued. The said note, which starts from page 57 dated 16/6/2009 wherein the noting on page 58 dated 2/7/2009, clearly indicates, that the proposal either under Section 4 (1) or 4 (3) of the AMASR Act, 1958 has to be put up to the concerned Ministry, in this case the Ministry of Culture, who would be the authority to consider and approve or disapprove of the proposal. Thus, any objection, received under Section 4 (2) of the AMASR Act, 1958 has to be considered by the Central Government and not by the Director General, unless he is shown to be so authorized by the Central Government in this regard. The respondent nos.1 to 3 have not placed on record any such authority delegated to the respondent no.2 under the provisions of Section 4 (3) of the AMASR Act, 1958 to consider and decide such objections, or for that matter authority to recall a notification issued under Section 4 (1) of the AMASR Act,

1958 by the Central Government. Thus, the action of considering and deciding the objections as reflected from the noting at page 85 under the signature of Shri D.N. Dimri, SA (M) dated 7/8/2013 and the subsequent notings thereunder, as well as the e-mail dated 6/8/2013 (Exh.5/Page 159-A) is clearly without any authority of law, as neither the SA (M) nor the Joint Director or the Director of the Archaeological Survey of India can be considered to be the “Central Government” as contemplated by Section 4 (1) and 4 (3) of the AMASR Act, 1958, specifically so, in absence of any delegation of such power of consideration and decision in that regard as is mandatorily required under Section 29 of the AMASR Act, 1958.

39. The noting dated 7/8/2013 under the signature of D.M. Dimri, SA (M) also does not depict that either the SA (M) had the power to review or for that matter who had reviewed the matter or had considered the objections and taken a decision. It also does not spell out as to who was the competent authority as mentioned in the note dated 7/8/2013, who is claimed to have taken a decision not to proceed further in the matter. Neither is there any noting on record to indicate as to how the objections, received within the stipulated

time, were dealt with, by whom, what factors were considered; what weighed, in taking the decision not to proceed ahead, in view of the contrary overwhelming material/opinion on record, handing over to A.S.I., as per their own office notes; expenses incurred; what were the reasons; why were the objections beyond the time stipulated under Section 4 (2) of the AMASR Act, 1958 were considered. One of the objections within time related to agricultural activity on the land to which the proviso to Section 19 (1) of the AMASR Act, 1958 was attracted. Thus, there is an absolute deafening silence in this regard both in the notings and the reply/submissions of the respondents on record due to which the impugned action as reflected from the noting dated 7/8/2013 of S.A.(M) and the e-mail dated 6/8/2013 (Exh.5/Page 159-A) clearly cannot be sustained in law and the same is therefore quashed and set aside. It is needless to say that for a review, there has to be decision capable of being reviewed. Here, in fact, there is no decision absolutely at all, by the authority, which in law is empowered to take the same, which also affects the legality of the aforesaid communication, for which reason also it cannot be sustained in law.

40. That leads us to the next contention by the learned A.S.G., Mr. Sanjeev Deshpande, who by inviting our attention to his written submissions dated 5/12/2019, and a comparative table of the provisions of the AMASR Act, 1958, and the Maharashtra Ancient Monuments and Archaeological Sites and Remains Act, 1960 (State Act of 1960) given therein, has urged that the petitioner, would be well advised to take up the matter under the State Act of 1960, as was the opinion of the Central Authority as submitted by him. It was further submitted by him that, by a notification dated 16/6/1992, the Department of Culture (A.S.I.) had issued a notification to declare area up to 100 meters from the protected limits and further beyond up to 200 meters to be prohibited and regulated area, which was under the AMASR Act, 1958. The State Act of 1960, however, did not contain any such prohibition and this was an additional reason according to him, for the petitioner to take recourse to the State Act of 1960. He further placed reliance upon (a) *Amit Vishnupant Khot and others ..Vs.. Union of India and others, 2008 (3) Mh.L.J. 257 [2007 (6) Bom. C.R. 530]*, (b) *Archaeological Survey of India ..Vs.. Narender Anand*

and others, (2012) 2 SCC 562, (c) Advocates' Forum for Social Justice and others ..Vs.. The State of Tamil Nadu and Ors. (2017) 1 M.L.J. 81 (Manu/TN/2684/2016) and (d) Asha Ranjan ..Vs.. State of Bihar and Others, (2017) 4 SCC 397 in support of his submissions.

41. Insofar as the contention that it was advisable for the the petitioner to take recourse to the State Act of 1960, is concerned, we are unable to countenance this argument as this merely results in passing the buck and nothing else. On the one hand the respondent nos.1 to 3 still maintain their stand that 'Thatte Nahar and Houd', is an medieval piece of engineering required to be protected. On the other hand they say that the respondent nos.1 to 3 shall not do so, but the State of Maharashtra should be approached for this purpose. The very idea defeats the purpose altogether, as the respondent nos.1 to 3 after handing over of the monument in 1971, as per their own records and maintaining it, for last 49 years, now have the gumption to say that the petitioner should now approach the State Authorities. This is not only dereliction of the duties and responsibilities under the AMASR Act, 1958, but apathy of the

grossest nature, which in fact results in destroying the very purpose for which the A.S.I. has been created.

42. It is moot to note that the situation on the ground level in the year 1971 as to constructions, when the monument was taken over by the respondent nos.1 to 3 was quite different, than what is prevailing today, all of which is clearly due to the apathy of the respondent nos.1 to 3 to issue the preliminary notification under Section 4 (1) on 18/9/2009, i.e., after more than a period of 37 years. Thus, the situation is of the own making of the respondent nos.1 to 3, and no one else can be blamed for it.

43. A rather disturbing position has been pointed out by the petitioner in his rejoinder in which he alleges that though notifications under Section 4 (1) of the AMASR Act, 1958, has been issued in respect of several monuments, the final notifications under Section 4 (3) have not been issued at all, even though these monuments have been taken over by the respondent nos.1 to 3, as being ancient monuments requiring protection, which in case it is true would add to the woes of the monuments, its creators and those striving for its preservation, as one does not know how it will

affect the respondent nos.1 to 3, considering the snails pace at which they have been traversing in the instant matter.

44. In the case of *Amit Khot* (supra) the Court was considering the provisions of the Maharashtra Regional Town Planning Act, 1966 and specifically those which related to heritage buildings/precincts/structures and Regulation 67 along with appendix VII-A of the Development Control Regulations for the City of Aurangabad as sanctioned by the State Government under Section 31 (1) of the M.R.T.P Act, 1966 on 21/4/1995, vis-a-vis, the old District Court Building which was included in the list of 156 monuments in Aurangabad city for the purpose of applicability of the Heritage Regulations. After considering that the old District Court Building was in an extremely dilapidated condition beyond repairs, and the negative recommendation of the Heritage Committee as endorsed by the General Body of the Aurangabad Municipal Corporation, sent to the State Government, and the reply of the A.S.I. that it was not a Historical Monument, its demolition was permitted. The case in hand is totally different, inasmuch as we are not called upon to consider the Heritage Regulations and it has been the consistent stand of the respondent nos.1 to 3 that the

‘Thatte Nahar and Houd’ is an ancient medieval system requiring protection, which has been handed over to the A.S.I. over since 1971, as per their records.

45. In *Archaeological Survey of India ..Vs.. Narender Anand and others* (supra), the Hon’ble Apex Court was considering the scope and ambit of Section 20A of the AMASR Act, 1958, in respect of a monument (Jantar Manter Delhi), which was already declared as of National Importance by a notification dated 13/9/1956 under Section 53 (1) of the Ancient Monuments Preservation Act, 1904 and the permission granted to the owner of a building within the ‘protected area’ to demolish existing structure and raise a new one under the garb of renovation, and it was held that the direction as given by the High Court to review or reconsider the notification dated 16/6/1992, could not be sustained. The term ‘renovation’ appearing in Section 20C was held to take its color from the word ‘repair’ appearing in this section and the expression “such other work or project” in clause (b) of Section 20A (3), was to be interpreted keeping in view the mandate of Article 49 of the Constitution and objects sought to be achieved by enacting the

AMASR Act, 1958, and must be in larger public interest in contrast to private interest and while allowing the appeal in favour of the A.S.I. it was made clear that in future the Central Government or the Director General shall not take any action or pass any order under Section 20A (3) and 20C except in accordance with the observations made in the judgment. The basic question as is extant in the present petition, did not fall for consideration in ***Narender Anand*** and thus this judgment is of no assistance to arguments put forward by the learned Assistant Solicitor General.

46. In ***Advocates Forum for Social Justice*** (supra) the Hon'ble Apex Court was considering the doctrine of proportionality in light of the rights enshrined in Article 19 (1) (a) of the Constitution and the Constitutional validity of the Tamil Nadu Establishment of Private Law Colleges (Prohibition) Act 2014, which was struck down as *ultra vires* the Constitution of India. ***Asha Ranjan*** (Supra) is also on balancing to fundamental rights or inter fundamental rights. Insofar as the doctrines of proportionality and balancing of fundamental rights are concerned, their applicability the authorities, implementing the provisions of the AMASR Act,

1958, in the matter of construction made, in a segment of the Thatte Nahar, will have to consider by applying their mind and recording reasons for whatever decision is taken, which as already observed is totally absent in the present case, that too, when considering the present state of affairs existing on the ground, the system of transportation of water, is still working, even after more than a couple of centuries.

47. We, therefore, reiterate that the action on part of the respondent nos.1 to 3, as reflected from the noting dated 7/8/2013 and the e-mail dated 6/8/2013, as indicated in para 39 above, cannot be sustained and is therefore quashed and set aside. The respondents are directed to consider the matter, in light of the recommendations dated 22/10/2010 and the subsequent office notes, as indicated in para 35 of this judgment and all other attending circumstances and take appropriate decision in the matter. The writ petition is partly allowed to the above extent.

In view of what we have said above, Civil Application No.4282/2019 for addition of party stands rejected.

By Civil Application No.8127/2019, the order as passed by this Court on 10/4/2019 to the extent of para 10 and 11 is sought to be recalled at the behest of the respondent nos.1 to 3. In view of the fact that the applicants nos.1 to 3 in the application/respondent nos.1 to 3 in the petition, have taken over the monument since 1972 and have been maintaining the same and incurring expenses therefor, the question of recalling the order, dated 10/4/2019, does not arise at all. The civil application is also dismissed.

Rule is made absolute in the aforesaid terms. No order as to costs.

(AVINASH G. GHAROTE, J.)

(S.V. GANGAPURWALA, J.)