

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision : 30th October 2009

LPA 417/2009

EMCA CONSTRUCTION CO. THR. M.P.GUPTA Appellant
Through: Mr. Rakesh Tiku, Adv.

versus

ARCHEOLOGICAL SURVEY OF INDIA & ORS. Respondents
Through: Mr. Jayant Tripathi, Adv. for R-1/ASI
Mr. Aman Lekhi, Mr. Ashok Bhasin, Sr. Advs.
with Mr. Rahul Kumar, Adv. for R-4
Mr. Ajay Arora, Mr. Kapil Dutta, Adv. for MCD
Ms. Jyoti Singh, Adv. for GNCTD

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether reporters of the local papers be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

S. MURALIDHAR, J:

1. Not very far from this Court is located the Humayun's Tomb. It is a historical monument. It is a mausoleum built for the Mughal emperor Humayun who ruled between 1530 and 1540 and again from 1555 till 1556 when his son Akbar took over the reins. The construction of the mausoleum was commenced by Humayun's senior widow Hamida Banu Begum also known as Haji Begum in 1565, nine years after his death. A Persian architect Mirak Mirza Ghiyath was commissioned to design and build it. It is stated to exemplify a synthesis of Persian and Indian traditions of architecture. The arched alcoves, corridors and the high double dome signify the Persian influence and the kiosks which give it a pyramidal outline from a distance are attributed to the Indian influence. It is believed to have inspired the design of

the Taj Mahal, a monument built many years later in Agra by Humayun's great grandson Shahjahan.

2. Humayun's tomb is square red sandstone double-storeyed structure that rises from a 7 m. high square terrace, raised over a series of cells accessible through arches on each side. Externally on each side of the tomb are elevations decorated by marble borders and panels. Around the high marble double dome in the centre are pillared kiosks. The tomb is a beautiful sight to behold, even when viewed from a distance. The nearly 450 year old Humayun's tomb is a major tourist attraction in Delhi. It has been declared as a world heritage monument. It is a protected monument within the meaning of the Ancient Monuments Archaeological Sites and Remains Act, 1958 ('the 1958 Act') and the Ancient Monuments Archaeological Sites and Remains Rules, 1959 ('the 1959 Rules'). Consequent to a notification issued on 16th June 1992 by the central government, an area of 100m surrounding the Humayun's tomb has been declared a "prohibited area" within which no construction activity is permitted.

3. The tomb is now located in an area of New Delhi known as Nizamuddin East. It is surrounded by a residential colony. The continuing construction activity in the said residential colony is a cause for concern. It has given rise to the present proceedings.

4. This appeal by EMCA Construction Co. is directed against the interim orders dated 31.3.2009 and 4.8.2009 passed by the learned Single Judge in

CM No. 4260/2009 in WP(C) No. 7889/2009. By the interim order dated 31.3.2009 the parties were directed to maintain status quo with regard to the construction in respect of the property at A-10, Nizamuddin East, New Delhi (hereafter 'the said property') and by the subsequent order dated 4.8.2009, the earlier interim order was made absolute.

5. The aforementioned writ petition was filed by Mr. Gaurang Kanth, an Advocate having his office at A-9 (Basement), Nizamuddin East, New Delhi. The grievance in the writ petition was that the Archaeological Survey of India (ASI), respondent No.1 herein, had by a communication dated 1.8.2008 granted permission to the appellant EMCA Construction Company for reconstruction of the ground, first and second floor at the said property (at A-10, Nizamuddin East) despite the fact that the said property was located within 100 m. of Humayun's Tomb,

6. The appellant, EMCA Construction Company, filed a reply to the writ petition along with an application CM No. 5221/2009 seeking vacation of the interim stay granted on 31.3.2009. The ASI had also filed its reply to the writ petition on 27.5.2009. The case of the appellant in its reply to the writ petition was that it had purchased the said property in 2005. The building was an old one and so the appellant decided to reconstruct it. Since in certain other cases ASI had granted permission for reconstruction, the appellant applied to the ASI for permission for the reconstruction. This was, however, rejected by the Superintending Engineer, ASI, Delhi Circle by an order dated 28.2.2008. Aggrieved by the said order, the appellant filed an 'appeal' before the Director

General, ASI on 5.3.2008. The appellant, in the meanwhile, also sought permission from the Municipal Corporation of Delhi (MCD) for carrying out construction on the said property. The case of the appellant was placed before an Expert Advisory Committee ('Committee') of the ASI on 7.5.2008. The Committee recommended that permission could be granted. Accordingly the Director General, ASI by the communication dated 1.8.2008 accorded the appellant permission for reconstruction of the building comprising ground, first and second floor at the said property. This was challenged in the above writ petition by Gaurang Kanth. The appellant again applied to the ASI on 19.8.2008 for constructing ground plus three floors along with the basement on the said property. In response thereto, the ASI by its letter dated 6.3.2009, granted the appellant permission to reconstruct up to a maximum height of 12.5 m. besides mumty over the terrace up to maximum height of 2.5 m. Thereafter, the appellant applied for and was granted building sanction by the MCD on 20.3.2009. It is contended that since there was no violation of any statutory provision of law, no interference was called for with the proposed construction by the appellant on the said property.

7. In its affidavit dated 27.5.2009 before the learned single Judge, the ASI pointed out that the writ petitioner Mr. Gaurang Kanth had not come to the Court with clean hands. According to the ASI, the entire building at A-9, Nizamuddin East had been constructed illegally without taking any permission from the ASI as required by law and as such, the entire building was liable to be demolished. Since this fact had not been disclosed in the petition, it deserved to be dismissed. It was submitted that the petition was motivated and was "essential to stop construction in the building adjacent to

that of the neighbour” and was therefore an abuse of the process of Court. It was further submitted that the writ petitioner’s building was “closer to the Humayun’s Tomb” and therefore there was no question of any view of the Tomb being blocked if the proposed construction was allowed.

8. In the said affidavit of the ASI, a reference was made to an order dated 23.7.2004 passed by a Division Bench of this Court in *Archaeological Survey of India v. Narendra Anand* [FAO(OS) 414/2002] and *Heritage & Cultural Forum v. Union of India* [WP(C) No. 2635/2002]. According to the ASI, in view of the directions of the Division Bench and in view of the fact that there were a number of cases where persons desired to construct/reconstruct upon their property falling within the 100 m. Zone of a protected monument, an Expert Advisory Committee (Committee) comprising eminent experts was constituted to aid and advise the Director General, ASI for dealing with such cases. The Committee was headed by the Director General, ASI and a renowned historian and archaeologist, an expert in urban planning, and a leading expert on the history of Delhi. ASI explained that the Committee “examines all proposals where a relaxation of the rule prohibiting construction within the 100 mts. area is asked for, and decides on a case to case basis such applications.” It was pointed out that the case relating to the construction at the said property was decided by the Committee at its meeting held on 22.1.2009. The ASI defended the permission granted to the appellant herein for carrying on construction in the said property. It was submitted that Rule 37 of the Rules provided for an appellate mechanism and since the Committee had examined the proposal and opined that the proposed construction did not threaten the integrity of the monument, did not affect the access of the public

to the monument or otherwise impair the skyline in relation to the monument, permission was granted “as per the norms.” It was further stated that “there is no threat or danger of any kind to the monument of Humayun’s Tomb on account of the construction at A-10, Nizamuddin East which is at a distance of 88 metres from the said monument.” According to the ASI, the writ petitioner had not produced any material, scientific or expert evidence to substantiate his allegation of danger to the monument.

9. It may be mentioned that initially by an order dated 28.8.2009 in the present appeal, while granting a stay of the orders dated 31.3.2009 and 4.8.2009, it was prima facie observed by this Court that the writ petitioner Mr. Gaurang Kanth had no locus standi to maintain a writ petition as “he himself is occupying the adjoining building which has been constructed admittedly without any permission from the ASI.” This Court also expressed a prima facie opinion that “appellant company who had obtained mandatory prior approval of the ASI could not have been restrained from carrying out construction without either disposing of appellant-Company’s application for vacation of ex-parte ad-interim stay or without giving reasons.”

10. This court has perused the record of the case as available with the ASI and with the consent of the parties has heard the appeal finally. The submissions of Mr.Rakesh Tiku, learned counsel for the Appellant, Mr.Aman Lekhi and Mr.Ashok Bhasin learned Senior Counsel for Mr.Gaurang Kanth, Mr.Jayant Tripathi, learned counsel for the ASI, Mr.Ajay Arora, learned counsel for the MCD and Ms.Jyoti Singh learned counsel for the GNCTD have been heard.

11. The genesis of the present case is the Notification dated 16.9.1992 issued by the central government Union of India prohibiting any construction within 100 mts. of a protected monument. The said notification reads as under:

**“THE GAZETTE OF INDIA
DEPARTMENT OF CULTURE
(ARCHAEOLOGICAL SURVEY OF INDIA)
NEW DELHI, THE 16TH JUNE 1992
(ARCHAEOLOGY)**

S.O. 1764. – Whereas by the notification of the Government of India in the Department of Culture, Archeological Survey of India no. S.O. 1447 dated the 15th May 1991, published in the Gazette of India, part II, Section 3, sub-section (ii) dated the 25th May 1991, the Central Government gave one month’s notice of its intention to declare areas up to 100 meters from the protected limits and further beyond it up to 200 meters near or adjoining protected monuments to be prohibited and regulated areas respectively for purposes of both mining operation and construction;

And whereas the said Gazette was made available to the public on the 5th June 1991;

And whereas objections to the making of such declaration received from the person interested in the said areas have been considered by the Central Government.

Now, therefore, in exercise of the powers conferred by rule 32 of the Ancient Monuments and Archaeological Sites and Remains Rules, 1959, the Central Government hereby declares the said areas to be prohibited and regulated areas. This shall be in addition to and not in any way prejudice to similar declarations already made in respect of monuments at Fatehpur Sikri; Mamallapuram; Golconda Fort, Hyderabad, Andhra Pradesh; Thousand Pillared Temple, Hanamkonda, district Warangal, Andhra Pradesh; Sher Shah’s Tomb, Sasaram, Bihar; Rock Edict of Ashoka, Kopbal, district Raichur, Karnataka; Fort Wall, Bijapur, Karnataka; Gomateswara Statute at Sravanabelagola, district Hassan, Karnataka; Elephanta Caves, Gharapuri, district Kolaba, Maharashtra.

[No. F.8/2/90-M]
M.C. JOSHI,
Director General.”

12. It is disputed by the ASI that vis-à-vis the Humayun’s Tomb an area “up

to 100 metres” from its limits is a “prohibited area” and beyond it up to 200 meters is a “regulated area” respectively for purposes of construction. The recognition of Humayun’s tomb as a protected monument has itself a long history. The first step towards legislative protection of monuments in India was contemplated under the Ancient Monuments Act, 1904. Under Section 3 of that Act, the Central Government was given the power to declare any ancient monument as a “protected monument”. This was followed by the Act of 1951. Under Section 126 of the States Reorganization Act, 1956, monuments protected under the 1904 Act situated in Part C States (including Delhi) were declared monuments of national importance. In 1958, The Ancient Monuments and Archaeological Sites and Remains Act was enacted. Under Section 2(j) of the 1958 Act, “protected monument” means any ancient monument which is declared to be of national importance by or under the 1958 Act. Under Section 3 of the 1958 Act, all ancient and historical monuments which have been declared as such under the 1951 Act or by Section 126 of the States Reorganization Act, 1956 “shall be deemed to be ancient and historical monuments or archaeological sites and remains declared to be of national importance for the purpose of this Act.” Rule 2(f) of the 1959 Rules defines a ‘prohibited area’ or ‘regulated area’ to mean “an area near or adjoining a protected monument which the Central Government has, by notification in the Official Gazette, declared to be a prohibited area, from as the case may be, a regulated area, for purposes of mining operation or construction or both.”

13. We may at this stage notice the provisions under Articles 49 and 51A (f)

of the Constitution of India which reads as under:-

“49. Protection of monuments and places and objects of national importance.___It shall be the obligation of the State to protect every monument or place or object of artistic or historic interests, declared by or under law made by Parliament to be of national importance, from spoilation, disfigurement, destruction, removal, disposal or export, as the case may be.”

“51A. Fundamental duties.___It shall be the duty of every citizen of India_____

xxx

xxx

(f) to value and preserve the rich heritage of our composite culture.”

14. We note that the Supreme Court has in *Rajeev Mankotia v Secretary to President of India AIR 1997 SC 2766* while discussing the provision of the Constitution and the Act observed as under (AIR SC @ 2767-6 & 2774):

“6. It would, therefore, be manifest that all ancient and historical monuments and all archaeological sites and remains or any structure, erection or monument or any tumulus or place of interment shall be deemed to be ancient and historical monument or archaeological sites and remains of national importance and shall be so declared for the purpose of Ancient Monuments Act if they have existed for a century; and in the case of a State monument, of State importance covered by the appropriate State Act. The point of reference to these provisions is that an ancient monument is of historical, cultural or archaeological or sculptural or monolithic or artistic interest existing for a century is of national importance or of State importance. In other words, either of them are required and shall be protected, reserved and maintained as national

monuments or State monuments for the basis which not only gives pride to the people but also gives us insight into past glory of our structure, culture, sculptural, artistic or archaeological significance, artistic skills and the vision and wisdom of our ancestors, which should be preserved and perpetuated so that our succeeding generations learn the skills of our ancestors and traditions, cultural and civilisation. They would have the advantage to learn our art, architecture, ascetic tastes imbibed by the authors of the past and to continue the same tradition for the posterity. Preservation and protection of ancient monuments, is thus the duty of the Union of India and the State Government concerned in respect of ancient monuments of national importance or those of State importance respectively to protect, preserve and maintain them by preserving or restoring their original conditions.

21..... We avail this opportunity to direct the Government of India to maintain all national monuments under the respective Acts referred to above and to ensure that all of them are properly maintained so that the cultural and historical heritage of India and the beauty and grandeur of the monuments, sculptures secured through breathless and passionate labour workmanship, craftsmanship and the skills of the Indian architects, artists and masons is continued to be preserved. They are pride of Indians and places of public visit.”

15. In *Wasim Ahmed Saeed v. Union of India 2004 (8) SCALE 159*, the Supreme Court was dealing with the issue concerning 86 shops (of which 19 were shops-cum-residence) found within a 100 m radius of the Fatehpur Sikri, a protected monument near Agra. The Court ordered:

“As per the report filed in the undated affidavit, which is tendered in Court today, by Archaeological Survey of India (ASI) within first 100 metres of monument, there are 86 shops

of which 19 are shops-cum-residence. The ASI is directed to remove and/or close down within a fortnight from today all shops within 100 metres. The State of U.P. and the Police are directed to give all assistance required for such removal. It is clarified that, for the present, residents must not be disturbed. The State to consider acquiring some land for the purpose of rehabilitating the residents.

The ASI and the local police to thereafter ensure that no shop either in a temporary structure or otherwise comes up within 100 metres. For that purpose both the ASI and the Police to nominate an officer each, whose names will be given to this Court. It will be the duty of these officers to supervise the area every day and ensure that no shop comes up within 100 metres. If any shop is found within 100 metres these officers will be held personally responsible and will become liable in contempt. The named officers not to be transferred without permission of this Court.

Before demolition/closure takes place, the ASI to note down the names of the shopkeepers whose shops are being demolished/closed down. These shopkeepers to be given shops in Ghata No.244/2.”

Similar orders have been passed in *M.C. Mehta v. ASI 2005 (4) SCALE 73* in relation to constructions in the vicinity of the tombs of Zauq and Ghalib in Delhi.

16. The above provisions and the Notification dated 16.6.1992 were discussed *in extenso* by the Division Bench of this Court in *Narendra Anand* (supra). The issue there concerned illegal constructions within 100 m of Jantar Mantar, another protected monument. A plea was made in that case that the Court

should take a “practical and pragmatic approach” to the problem. In response to that submission, this Court in para 7.6 of the judgment observed as under:

“7.6 We find ourselves to be in agreement with the submissions made by Mr Lekhi in this regard that a pragmatic and practical approach must be adopted and we must not become slaves to a rule of thumb. At the same time, prima facie, we feel that as long as the Notification dated 16.6.1992 holds the field, no construction activity can be permitted within 100 meters of Jantar Mantar. However, **this does not dissuade us from directing the Central Government to review the operation of its Notification dated 16.6.1992 and to consider the provision of a mechanism where the prohibition is imposed or relaxed on a case to case basis.** It is true that the 100 meter stipulation brings in a certain degree of objectivity and cuts out subjectivity. But, it also introduces an element of arbitrariness inasmuch as it treats all protected monuments alike, which in fact are quite dissimilar. The degree and type of protection depends upon various variables such as the nature of the protected monument, its locale, the weather conditions, the topography, the soil etc.,. There has to be an application of mind on these and other issues linked with preservation and the ASI ought not to hide behind the said notification and abdicate this vital function of theirs. Public interest lies in protection and preservation. It also lies in development and progress. The two opposing forces have to be harmonised and balanced in the context of time and space. We feel that prohibition of construction must not be left to an inflexible rule of thumb but must be arrived at after a conscious and objective application of mind. There may be instances where larger prohibited and regulated areas are necessary, while in others smaller areas of prohibition and regulation would suffice. **Therefore, we direct the**

Central Government to review its Notification dated 16.6.1992 in the light of the discussion above within a period of six months from the date of this judgment.”

(emphasis supplied)

17. The highlighted portions of the above order are crucial as far as the present case is concerned since they are being interpreted to mean that the Central Government was constrained to set up a mechanism for granting permission for construction within the 100m area of a protected monument. Purportedly aggrieved by the above directions, the ASI filed SLP(C) No. (CC 1603 and 1604) of 2005, in the Supreme Court. We have been shown a copy of the said SLP paper book. The main grievance of the ASI, as set out in the grounds of the SLP are as under:

“A. It is submitted that the portion of the impugned Judgment directing review of the statutory notification dated 16.6.92 is liable to be set aside in as much as Hon’ble Delhi High Court ought to have appreciated the expert role of the Archaeological Survey of India in the preservation conservation and protection of ancient monuments, which has set the limit of 100 metres as the minimum limit after due deliberation and consideration of all factors.

B. That the Hon’ble Delhi High Court ought to have appreciated that the limit of 100 metres, being set by an expert body which is entrusted with the task of preservation of the national heritage of India, ought not to be interfered with, specially in the absence of specific prayers to that effect.

C. That the Hon’ble Delhi High Court ought to have realized that a review of the limits set under the notification dated 16.06.1992 would lead to situation where the statutory role of the Petitioner in the protection of monuments would be diluted;

D. That the Hon’ble Delhi High Court’s order directing review of the Notification dated 16.06.1992 ought to be set aside in view of the observation made by the Hon’ble Supreme Court in W.P. (C) 653 of 1994 dated 02.09.2004 to the effect that there should be no such reconsideration of the 100 metre limit in respect of ancient monuments.

E. That the Hon'ble Delhi High Court ought to have realized that the direction to carry out the review within 6 months is not feasible in as much as the exercise would entail a review of 4000 monuments, bringing out separate preliminary and confirmatory notifications in respect of each of them, with a mandatory gap of 2 months between the preliminary notification and the confirmatory notification.

F. That the Hon'ble Delhi High Court ought to have appreciated that the in as much as there is constitutional mandate contained in Article 49 of the Constitution of India, directing the preservation of monuments, and in as much as there is a statutory enactment to protect monuments of national importance, there cannot be any "trade-off between preservation on the one hand and development on the other", and the order directing the review, being based on such reasoning, ought to be set aside.

18. Along with the above SLP, a prayer for interim relief was also made as follows:

“(a) Pass an ex-parte ad-interim order, staying the operation of that part of the impugned combined Judgment and Final Order dated 23.07.2004 passed by the Hon'ble High Court of Delhi in F.A.O. (OS) 414 of 2002 and W.P. (C) 2635 of 2002, whereby the Hon'ble High Court has directed a review of the Notification dated 16.6.1992 within a period of 6 months.”

19. On 8.5.2005, the Supreme Court passed the following order in the aforementioned SLP:

“Delay condoned.

Issue notice. In the meantime, portion of the High Court order directing the Government to re-consider limits around ancient monuments is stayed.”

20. It appears that nearly one year thereafter on 8.6.2006, the Director General of ASI prepared a note for approval of the Secretary (Culture) concerning

constructions in prohibited/restricted areas. The said note which is instructive reads as under:

“Sub.: Construction in prohibited/restricted areas

Secretary (Culture) may kindly recall that a presentation was made before the Minister (T&C) regarding permission for construction in prohibited/ restricted areas of the protected monuments. A set of guidelines which was prepared by the ASI in consultation with the Legal Advisor was put up to the Minister (T&C) for consideration and approval.

During the discussions on the subject, the Minister (T&C) desired that:

- (i) ASI should make a complete photo-documentation of the surroundings of all protected monuments to keep a record of the present level of construction around the monuments.
- (ii) Lay down the condition / circumstances under which reconstruction / renovation of buildings in the prohibited area may be allowed.
- (iii) Constitute a committee to advise the DG, ASI in giving permission for renovation / reconstruction in the prohibited areas.

As a meeting of the Superintending Archaeologists is convened in the 3rd week of June 2006, the matter of photo-documentation would be discussed and appropriate instructions will be issued to all the SA's. The Legal Advisor (Shri Sanjay Jain) has already been requested to discuss the matter at point No.2 above.

Regarding the matter of constitution of an Advisory Committee, it is submitted that this Committee should consist of well known experts / professionalists as permitting construction in the prohibited / regulated area is a function exercised under the statutory powers. It is for consideration that the Committee may consist of

- (i) Prof. K.T. Ravindran (Expert in Urban Planning, School of Planning and Architecture)
- (ii) Shri Jagat Pati Joshi, former DG, ASI (who formulated the Ahmedabad guidelines) and
- (iii) Smt. Narayani Gupta, Historian and former Prof. of Jamia Milia Islamia University, Member of the Expert Group constituted by the Supreme Court for Red Fort.

This may kindly be placed before the Minister (T&C) for favour of kind information and approval.

Sd/-
(C. Babu Rajeev)
DG, ASI,
8.6.2006”

21. This was approved by the Union Minister for Tourism and Culture. Later, on 7.7.2006, two other members, one a landscape Architect and another an Architect were added to the Committee.

22. In response to a pointed query by the Court, it was candidly stated by learned counsel appearing for the ASI that although some draft guidelines had been prepared for functioning of this Committee, those guidelines were never formally adopted. The said draft guidelines are not to be found even on the file of the ASI. The fact is that the Committee of the ASI, which has no legal basis for its functioning, has been examining applications and granting permissions for constructions within 100m of the protected monuments contrary to the notification dated 16.6.1992, without any guidelines whatsoever. This is indeed a matter for grave concern. What is even more astonishing is that in the notes on the file proposing the setting up of the Committee, no reference is made either to the order of the Division Bench of this Court or to the order of the Supreme Court.

23. Learned counsel appearing for the ASI, when asked to explain the basis for setting up and for the functioning of the above Committee, referred to the order of the Division Bench. According to him, since only one portion of the direction issued by the Division Bench requiring the Central Government to

review the Notification dated 16.6.1992 was stayed, the other portion of the direction requiring it to consider setting up a mechanism for granting permissions for construction/renovation in relaxation of the Notification on a case to case basis was operative and that this Committee was accordingly constituted.

24. We do not find this explanation to be acceptable in law. Clearly, the ASI is contradicting the very stand taken by it before the Supreme Court in the SLP referred to hereinbefore. There the ASI has taken the stand the Notification dated 16.6.1992 prohibiting any construction within a range of 100 m. from a protected monument is sacrosanct and ought not to be diluted at all. Therefore, for the ASI now to set up a Committee to consider relaxation of that very norm on a case to case basis is not only unacceptable as being contradictory to its own stand, but is also clearly impermissible in law. As of today, the Notification dated 16.6.1992 prohibiting construction within a range of 100 m. from a protected monument is in force. That Notification has not been diluted one bit. To us it seems plain that the ASI is misreading the directions contained in the judgment of the Division Bench of this Court in *Narendra Anand*. If the sentence in question is read as a whole, it is apparent that what the Division Bench meant was that as and when the Central Government reviews the position and considers relaxing the norm stipulated in the Notification dated 16.6.1992, it should also consider setting up of a mechanism whereby prohibition is imposed or relaxed on a case to case basis. It is indeed strange that while on the one hand, the ASI has urged before the Supreme Court that there should be no dilution of the aforementioned Notification and the Supreme Court has on its urging stayed the direction of

this Court asking the Central Government to review the said Notification, the ASI has itself set up a Committee to grant permissions in dilution of the said Notification. The stay granted by the Supreme Court requires the notification dated 16.6.1992 to be given full effect to without any relaxation of the norm stipulated therein. The ASI is charged with the statutory duty to ensure this. Its actions since 8.6.2006 have unfortunately been to the contrary.

25. A desperate attempt was made by learned counsel appearing for the ASI to justify the setting up and working of the Committee with reference to Rules 33, 35, 36 and 37 of the 1959 Rules. Rule 33 states that no person other than an archaeological officer shall undertake any mining operation or any construction in the prohibited area or in a regulated area except under and in accordance with the terms and conditions of a licence granted by the Director-General. Rule 33, therefore, does not permit undertaking of any construction by a person other than an Archeological Officer. It can hardly be invoked for justifying the setting up of a Committee to grant permissions to private parties for construction in a prohibited area. There is no doubt that as far as the Humayun's Tomb is concerned, the area covering a radius of 100m surrounding it is a prohibited area. The construction envisaged to be permitted in terms of Rule 34 is only for a "regulated area" and not a prohibited area. The provision under Rules 35, 36 and 37 relate to the grant or refusal of licence to undertake construction in a "regulated area". These do not apply to a prohibited area. Consequently, these rules are hardly of any assistance to the ASI to justify its setting up of a Committee to grant permission for construction in a prohibited area.

26. There is yet another problem for the ASI. The communication dated 28.2.2008 by the Superintending Archaeologist (SA) addressed to the appellant reads as under:

“Sir,

With reference to your application dated 23.11.07 on the subject cited above, I inform you that the site under reference falls in the prohibited area of South Wall of Humayun’s Tomb, a centrally protected monument at a distance of 82m. As per the Ancient Monuments and Archaeological Sites and Remains Act, 1958, Rules, 1959 and subsequent notification issued under the rules in 1992, the permission for construction / reconstruction / addition / alteration cannot be granted. You are, therefore, requested not to undertake any construction / reconstruction / addition / alteration at the site under reference which may amount to violation of law in force.”

In law the SA was right. There was no question of any permission being granted to the appellant. Further, there was no question of the appellant filing an appeal against such refusal. Neither the Act nor the Rules contemplates any such appeal. We are really at a loss to know how the appellant herein could have possibly preferred an appeal against the order dated 28.2.2008 passed by the Superintendent of the ASI and the said appeal having been entertained by the Director General, ASI. No power has been vested under the 1958 Act in the Director General, ASI to entertain such an appeal much less to grant any permission for construction or renovation of any building in the prohibited area.

27. We now take up for consideration the points urged by Mr.Tiku, learned counsel for the Appellant. He submitted that there was no formal declaration under the 1958 Act declaring Humayun’s tomb to be a protected monument; that only a monument declared to be of national importance can be declared to

be a protected monument in terms of Section 2(j) of the 1958 Act; in the absence of such declaration it is the Delhi Ancient and Historical Monuments and Archaeological Sites and Remains Act 2004 ('The Delhi Act') which would apply; in terms of Section 17 of the Delhi Act an area up to 50 m from the protected limits of a monuments shall be declared as a prohibited area and further beyond it up to 100m a regulated area and therefore the central government's Notification dated 16.6.1992 will also not apply.

28. We do not find merit in the above submissions. The counter affidavit filed by the ASI to the writ petition, which has been adverted to earlier, states that all ancient monuments in terms of the 1904 Act situated in Part C States (including Delhi) were declared to be of national importance under Section 126 of the States Reorganisation Act 1956. Under Section 2(j) of the 1958 Act, "protected monument" means any ancient monument which is declared to be of national importance by or under the 1958 Act. Under Section 3 of the 1958 Act, all ancient and historical monuments which have been declared as such under the 1951 Act or by Section 126 of the States Reorganization Act, 1956 "shall be deemed to be ancient and historical monuments or archaeological sites and remains declared to be of national importance for the purpose of this Act." Consequently the 450 year old Humayun's tomb which obviously was an ancient monument under the 1904 Act is a protected monuments of national importance under Section 2 (j) of the 1958 Act. Therefore there is no question of the Delhi Act applying as it pertains to monuments other than those of national importance. The limits specified in the Notification dated 16.6.1992 of the central government would apply to the Humayun's tomb and not Section 17 of the Delhi Act. Also, throughout the

Appellant has itself been contending that the Humayun's tomb is a protected monument. This is to be found in its appeal both before the DG, ASI as well as in the present memorandum of appeal. Consequently, the appellant cannot be now heard to say that Humayun's tomb is not a protected monument

29. It was then submitted by Mr.Tiku that under Rule 10 of the 1959 Rules, permission could be sought from the central government for construction in a "protected area" and that is how the application to the ASI and the further appeal to the DG, ASI was made. In the first place it requires to be noticed that under Section 2 (i) of the 1958 Act a "protected area" is defined to mean "any archaeological site and remains which is declared to be of national importance. This refers to the area of the monument itself. Rule 10 of the 1959 Rules talks of construction in the "protected area" and not a "prohibited area" as defined under Rule 2 (f) of the 1959 Rules. The Notification dated 16.6.1992 has been issued by the central government in terms of Rule 32 of the 1959 Rules and it specifies the "prohibited area" and "regulated area." In terms of Rule 35 permission can be granted for construction, if at all, in a regulated area. There is no provision in the 1959 Rules that permits the central government to give permission for construction in a prohibited area.

30. Mr.Tiku relied upon the notification dated 20.7.2006 to submit that a Committee was validly constituted and was therefore had the power to grant building construction permission. As already noticed the said Committee has functioned thus far without any authority of the law. Moreover, the said notification was in fact never published.

31. The inescapable conclusion is that the order dated 1.8.2008 of the DG, ASI granting permission to the appellant for reconstruction in the said property was wholly ultra vires the 1958 Act and the 1959 Rules and in the teeth of the Notification dated 16.6.1992 issued by the Central Government. Consequently, the further permission granted on 6.3.2009 to the appellant to construct up to a maximum height of 12.5 m. besides mummy up to 2.5 m. was also wholly without the authority of law.

32. We also have no doubt whatsoever that the setting up of the Committee by the ASI, with the approval of the Union Minister for Culture and Tourism, Government of India for advising the DG, ASI on the grant of permission for construction/renovation in a prohibited area was wholly without any legal basis. The appellant has, along with the memorandum of appeal, enclosed a Notification dated 20.7.2006 purportedly issued by the ASI constituting the Committee with the DG, ASI as its Chairman. We were, however, informed by Mr. Tripathi, learned counsel appearing for the ASI that the said Notification was never in fact issued. He submitted that the reference in the said Notification to Rule 33 of the 1959 Rules was a mistake since that Rule had no application. He submitted that the said Notification should in fact be considered to be a circular. However, as already noted above, there is absolutely no provision in the 1958 Act permitting the Government to set up such a Committee much less for the said Committee to take decisions on granting permission for construction/ renovation in a prohibited area.

33. We are informed that the Committee has processed over 400 applications

from all over the country and over 150 such applications from Delhi itself. We are constrained to note that this entire exercise is without the authority of law. We are, however, unable to pass consequential orders as all the affected parties would have to be given a hearing which is neither practicable nor feasible. We are also not a little concerned that the ASI, which is entrusted with the constitutional and statutory responsibility of ensuring preservation of our ancient and protected monument, is facilitating the violation of the notification dated 16th June 1992 by granting permissions for construction in prohibited areas all over the country. The least the ASI should have done is to await the outcome of the SLP filed in the Supreme Court. The stay granted by the Supreme Court meant that the hands of the ASI, as far as the said notification was concerned, were tied. It had to be strictly enforced. Instead the ASI acted to the contrary. As far as the present case goes, the ASI hardly needs to be reminded that every 'reconstruction' of a building afresh, after pulling down an existing one, would involve activity that might endanger a 450 year old protected monument. That concern should be uppermost in the priorities of the ASI.

34. We direct the ASI through its DG to forthwith stop accepting and processing any application for grant of permission for construction/renovation of any structures or buildings in a prohibited area and to also stop accepting appeals against any orders that may have been issued refusing such permissions. The ASI will also take steps within a period of four weeks, to reconsider all permissions granted pursuant to the setting up of the Committee and take consequential steps, after giving the affected parties an opportunity of being heard.

35. As far as the case of the appellant is concerned the order dated 1.8.2008 and the subsequent order dated 6.3.2009 of the ASI granting it permission to raise construction are clearly illegal and in contravention of the Notification dated 16.6.1992.

36. Mr. Lekhi, learned Senior counsel appearing for Mr. Gaurang Kanth very fairly stated that if the building occupied by Mr. Kanth which is A-9, Nizamuddin East was also constructed in contravention of the Notification dated 16.6.1992, then it should also face the same fate.

37. We accordingly order that the status quo shall be maintained in respect of the properties both at A-9 and A-10, Nizamuddin East since both are stated to be in contravention of the Notification dated 16.6.1992 declaring the area within 100 m. of the Humayun's Tomb to be a prohibited area. The Central Government is empowered under Rule 38 of the 1959 Rules to direct the owner or occupier of an authorized building in a prohibited area to remove such building or a part thereof within a period specified in that order. We direct the Central Government to exercise its powers under Rule 38 vis-à-vis both the appellant EMCA Construction Co., as well as Mr. Gaurang Kanth and/or any other occupier by issuing them each a show cause notice within a period of two weeks from today. After considering their respective replies thereto, which shall be filed within a further period of two weeks, a hearing shall be given to them and a reasoned order passed in accordance with law. Till such time the central government passes such orders, status quo in relation to the two properties in question will be maintained. It would be open

to the appellant and Mr. Kanth and/or other occupier of the properties in question to seek appropriate remedies as may be available to them in law if they are aggrieved by those orders.

38. We accordingly vacate the interim order dated 28.8.2009 passed by this Court in the present appeal. The impugned interim orders dated 31.3.2009 and 4.8.2009 passed by the learned Single Judge will stand substituted by the present judgment. The appeal and application are accordingly disposed of.

39. This order be given dasti to the learned counsel for the parties.

S. MURALIDHAR, J.

CHIEF JUSTICE

OCTOBER 30, 2009