

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 25.01.2011

CORAM THE HONOURABLE MR. JUSTICE M.M.SUNDRESH

**W.P. NO.11796 OF 2008
AND M.P.NOS.1 & 2 OF 2008**

S.Gnanasekaran .. Petitioner

Versus

1. Archeological Survey of India
Chennai Circle
Rep. by the Superintending Archaeologist
Fort St.George, Chennai 600 009.

2. Inspector of Police
Meensurity Police Station
Udayarpalayam Taluk
Ariyalur District. .. Respondents

PRAAYER: Petition filed Under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records relating to the order made in F.No.4/3/TJ/04-1243 dated 11.04.2008 passed by the 1st respondent and quash the same and consequently forbear the respondents from interfering with the petitioner's right to sell cool drinks or demolishing the structure put up in S.F.No.75/1, situated at Gangaikonda Cholapuram Village, Udayarpalayam Taluk, Ariyalur District.

For Petitioner : Shri.Pitty Parthasarathy

For Respondent-1 : Shri.S.M.Deenadayalan
Standing Counsel for A.S.I.

For Respondent-2 : Mrs.D.Geetha
Additional Government Pleader

* * * * *

O R D E R

Lord Curzon, architect of the pathbreaking Ancient Monuments Preservation Act, 1904, which is the forerunner to the Ancient Monuments and Archeological Sites and Remains Act, 1958 (24 of 1958), while speaking at the annual meeting of the Asiatic Society of Bengal in the year 1900, has observed as follows:

"The historic buildings, the magnificent temples, the inestimable works of art, are invested with a publicity that to some extent saves them from the risk of desecration or the

encroachments of decay. Here all is different. India is covered with the visible records of vanished dynasties, of forgotten monarchs, of persecuted and sometimes dishonoured creeds. These monuments are, for the most part, though there are notable exceptions in British territory, and on soil belonging to Government. Many of them are in out-of-the-way places, and are liable to the combined ravages of a tropical climate, an exuberant flora, and very often a local and ignorant population, who see only in an ancient building the means of inexpensively raising a modern one for their own convenience. All these circumstances explain the peculiar responsibility that rests upon Government in India. If there be anyone who says to me that there is no duty devolving upon a Christian Government to preserve the monuments of a pagan art, or the sanctuaries of an alien faith, I cannot pause to argue with such a man. Art and beauty, and the reverence that is owing to all that has evoked human genius or has inspired human faith, are independent of creeds, and, in so far as they touch the sphere of religion, are embraced by the common religion of all mankind. Viewed from this standpoint, the rock temple of the Brahmans stands on precisely the same footing as the Buddhist Vihara, and the Mohammedan Musjid as the Christian Cathedral. There is no principle of artistic discrimination between the mausoleum of the despot and the sepulchre of the saint. What is beautiful, what is historic, what tears the mask off the face of the past, and helps us to read its riddles, and to look it in the eyes — these, and not the dogmas of a combative theology, are the principal criteria to which we must look."

2. The father of this nation in his famous address at Benaras Hindu University made in the month of February, 1916 after visiting the Vishwanath Temple has said in the following words:

"I visited the Vishwanath temple last evening, and as I was walking through those lanes, these were the thoughts that touched me. If a stranger dropped from above on to this great temple, and he had to consider what we as Hindus were, would he not be justified in condemning us? Is not this great temple a reflection of our own character? I speak feelingly, as a Hindu. Is it right that the lanes of our sacred temple should be as dirty as they are? The houses round about are built anyhow. The lanes are tortuous and narrow. If even our temples are not models of roominess and cleanliness, what can our self-government be? Shall our temples be abodes of holiness, cleanliness and peace."

3. Relevance of History and Archeology:

3.1. History is connected to every other subject and activity in the universe. Science, Maths, Development of mankind, evolution of nature, art, belief, custom, economy, politics, military, language and religion all have their own history. What is today is the continuation of the past and what is today will be the history for the future. In the words of Cicero:-

"History is the witness that testifies to the passing of time; it illuminates reality, vitalizes memory, provides guidance in daily life and brings us tidings of antiquity.

3.2. Archeology, a part of History plays an important role in the development of mankind and in different spheres of activities including the political, economical, social, religious and cultural advancement.

4. Importance of Ancient Temples as a tool of Archeology:

4.1. Ancient Temples of India play a pivotal role as a tool to understand Ancient India. The Temples illustrate and speak about the political system that prevailed at the relevant point of time along with its history. They are the standing examples of the military prowess of the rulers who built them as a symbol of their authority and also to mark the occasion which is inclusive of commemoration of the victory over their enemies.

4.2. The Ancient Temples also throw light on the social structure of Ancient India. They bring out the different strata of the society. The caste system and the position of women could be understood on a study of the temples. The functioning of the temple itself would amply illustrate the living together of different strata of the then society consisting of priests, artists, musicians, dancers and support staff, etc. Apart from that, temples also make us understand the then Ancient Village life. All the functions in a Village have been conducted in the temples. Justice delivery system was taken to the roots by dispensation in the temples.

5. Temple and rural economy:

5.1. Important and annual festivals have been conducted in the temples. They have been also used as granary to store foodgrains. Tax collection used to be done at the temples.

6. Importance of Monuments:-

6.1. The Honourable Apex Court in RAJEEV MANKOTIA v. SECRETARY TO THE PRESIDENT OF INDIA AND OTHERS [AIR 1997 SC 2766] was pleased to observe that the monuments are the pride of India and places of public visit. It was further held that the efforts should be made by the Government of India to protect the monuments. The observations made by the Honourable Apex Court is extracted hereunder:

"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. The tourist visitors should be properly regulated. Collections of funds by way of admission/entrance fee should be conscientiously accounted for and utilised for their upkeep and maintenance under respect regulations/rules. Adequate annual budgetary provisions should be provided. In this behalf, it may not be out of place to mention that if one goes to Williamsburg in United States of America, the first settlement of the Britishers therein is preserved as a tourist resort and though it is one in the row, its originality is maintained and busy business activity goes on in and around the area attracting daily hundreds of tourists from all over the world. Similar places of interest, though of recent origin, need to be preserved and maintained as manifestation of our cultural heritage or historical evidence. Similar efforts should also be made by the Government of India, in particular the Tourism Department, to attract foreign tourist and to give them good account of our past and glory of the people of India as message to other countries and territories. Equally, all the State Governments would do well vis-a-vis monuments of State importance, though given power under Entry 12, List II of the Seventh Schedule to the Constitution. From this perspective, the petitioner has served a great cause of national importance and we place on record his effort to have the Viceregal Lodge preserved

and maintained; but for his painstaking efforts, it would have been desecrated into a Five Star Hotel and in no time "We, the people of India" would have lost our ancient historical heritage."

7. Temples, Culture and Art:

7.1. The Ancient Temples of India are repositories of Indian culture. Dances in various forms were conducted in the temples. Music concerts both vocal and instrumental were also conducted in the temples. They would depict the paintings of mythological and historical events. Paintings pertaining to different styles and periods are found in the temples. They also speak about knowledge of ancient India in the field of dyeing. The sculptures depicted in the temples speak volumes about the artistic talent of sculptors. Different languages were developed and patronized in the temples and it was common that the publications would be made within the precincts of the temples. The temples played their role as places of high learning. They also speak about mathematical skill of ancient India through their layout, enacting the development made in the use of geometry. The narration of historical events in writing made on the walls of the temples throw substantial light on the social fabric prevalent at the relevant point of time.

7.2. Thus, the temples are the most important instruments in the field of archeology to unearth ancient India.

8. Duty to protect monuments:

8.1. The Constitution of India imposes a duty on every citizen to protect and preserve the rich heritage of our country. Article 51(A)(f) which deals with Fundamental Duties specifically imposes such a duty. Article 51(A)(f) is extracted herein:

"It shall be the duty of every citizens of India:

(f) To value and preserve the rich heritage of our composite culture;"

8.2. It is Lord Curzon who was the first one to realise the importance of preservation of ancient monuments. With that objective, he was instrumental in the enactment of Ancient Monuments Preservation Act, 1904. After independence, the Government of India realising the utmost necessity to protect the ancient monuments has introduced the Ancient Monuments and Archeological Sites and Remains Act, 1958 (24 of 1958).

9. Brihadeeswarar Temple:-

9.1. The Brihadeeswarar Temple originally called as 'Peruvudaiyar Temple' and also known as 'Big Temple', is the creation of the great Chola King Rajaraja Cholan, built more than about 1000 years ago in the 25th year of his coronation. It is one of the Cultural and Natural Properties inscribed on the World Heritage List by UNESCO. It is the first Granite Temple and one of the most prized architectural possession of this great country. The temple is known for its huge monolithic 'Vimana' made of a single stone, whose shadow is said to have been not seen on the ground. Apart from this grandeur, it is also known for its axial, symmetrical and geometrical rules. The temple played its role as a platform for 'Bharatha Natyam' dancers' which constitutes one of the ancient dances of this country. It played a multiple role in the life of general public at that point of time. The impressive

paintings on the walls of the temple as well as the intrinsic artistic depiction of statues speak volumes about the development in the field of art and architecture. It is no wonder that the temple withstood the test of time and stands as a living monument of the past rulers of this country giving pride and inspiration to the generations to come.

10. The Ancient Monuments and Archeological Sites and Remains Act, 1958 (24 of 1958):

10.1. The Act was enacted by the Parliament in the year 1958. Section 2 of the said Act defines, ancient monuments which is very exhaustive in nature. The said section also defines "prohibited area" and "protected monument" giving the meaning to a place as the one which is declared to be of national importance by or under the Act. Section 4 deals with the power of the Central Government to declare ancient monuments to be of national importance. The Central Government has been given the power under Section 13 to acquire protected monuments apart from maintenance under section 14.

10.2. Section 16 of the Act deals with the protection of the place of worship from misuse, pollution and desecration. Similarly, section 19 deals with restrictions on enjoyment of property rights in protected areas. The proviso to section 19 speaks about the power of the Central Government to remove any building constructed within the protected area in contravention of the Act. Rules have been made by the introduction of the Ancient Monuments and Archeological Sites and Remains Act, 1958 (24 of 1958) and thereafter. The Parliament has recently introduced a bill in the Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Bill, 2010 proposing to insert Sections 30-A to 30-C providing for punishment for any construction in the protected and regulated area. It also provides for punishment for the offences committed by the Government officials in contravention of the Act. The action taken under notification No.S.O.1764 dated 16.06.1992 was also sought to be validated in the proposed bill introduced in Bill No.26-C of 2010.

10.3. The Act thus provides for an exhaustive procedure for the protection of ancient monuments which is inclusive of the power to prohibit the construction in the protected area.

11. Facts of the case:

11.1. The petitioner herein is owning an immovable property within the protected zone of the monument namely, 'The Brihadeeswarar Temple' within 11 metres to 61 metres. The petitioner was earlier given the right to run a soft drink shop in the auction conducted for the year 2007-08. Thereafter, he lost in the auction conducted for the year 2008-09.

11.2. An application was made by the petitioner to the respondent No.1 seeking permission for putting up a temporary shed by way of a letter dated 04.04.2008 stating that he would dismantle the temporary construction as and when he was asked to remove. However, the respondent No.1 in and by their reply dated 11.04.2008 rejected the said request stating that the temporary construction proposed, falls within 100 metres of the protected area of the monument and hence, cannot be considered as being violative of the provisions contained in the Ancient Monuments and Archeological Sites and Remains Act, 1958 (24 of 1958), the Rules made under, read with the amending notification dated 16.06.1992 issued by the Government of India. Challenging the said order passed by the

respondent No.1 made in F.No.4/3/TJ/04-1243 dated 11.04.2008 with a consequential prayer forbearing the respondents from interfering with the petitioner's right to sell cool drinks or to take action towards the demolition of the structure, the present Writ Petition has been filed.

12. Shri.Pitty Parthasarathy, learned counsel appearing for the petitioner submitted that the petitioner has got every right to do the business in his own place. The petitioner has specifically stated that he would remove the temporary structure. It is his further submission that, the respondents have allowed other persons to do the business in the protected area of the monument. The learned counsel also submitted that the order impugned will have to be set aside, since the same has been passed without affording an adequate opportunity to the petitioner. Therefore, it is prayed that the Writ Petition will have to be allowed.

13. Per contra, Shri.S.M.Deenadayalan, learned Standing Counsel for A.S.I. appearing for the first respondent submitted that as per the relevant rules read with the notification dated 16.06.1992, no construction is permissible within 100 metres of a protected monument. Admittedly, the petitioner's property comes within the prohibited distance of the protected monument. The other vendors have been given the permission outside the protected monument and not within the protected area as alleged by the petitioner. The petitioner cannot violate the provisions of the Act, Rules and notifications, by constructing the building and thereafter seek a ratification. The Honourable Apex Court in the judgment rendered in W.P.No.653 of 1994 has held that there shall not be any shop within 100 metres of any historical monument. Any such permission given by any officer would amount to contempt.

14. The learned Standing Counsel for A.S.I. has also relied upon the judgment of the Honourable Apex Court in RAJEEV MANKOTIA v. SECRETARY TO THE PRESIDENT OF INDIA AND OTHERS [AIR 1997 SC 2766] wherein, directions have been given to protect the monuments within the country. Further reliance was also made in the judgment of the Honourable Apex Court in M.C.MEHTA v. UNION OF INDIA AND OTHERS [2001 (8) SCALE 106]. The learned counsel further made reliance upon the judgment rendered by the Honourable Apex Court in UNION OF INDIA AND ANOTHER v. INTERNATIONAL TRADING CO. AND ANOTHER [(2003) 5 SCC 437], apart from the judgment of this Court rendered in S.A.TEACHER TRAINING COLLEGE v. THIRUVALLUVAR UNIVERSITY [(2006) 3 M.L.J. 65] and submitted that when an activity is prohibited under law, then there cannot be a writ issued by the Honourable High Court contrary to the same. Therefore, the learned Standing Counsel for A.S.I. submitted that the Writ Petition will have to be dismissed.

15. It is not in dispute that the petitioner's property situated in S.F.No.75/1, at Gangaikonda Cholapuram Village, Udayarpalayam Taluk, Ariyalur District, is situated within the prohibited distance of 100 metres from the protected area. It is also not seriously challenged by the petitioner about the power available with the respondents to impose such a prohibition of a construction within 100 metres of the protected area. The petitioner has neither challenged Section 19 nor the rules made thereunder read with the amended notification issued by the Government of India on 16.06.1992. Therefore, inasmuch as the respondents have the power and authority to prohibit any construction within 100 metres, the Writ Petition as filed is devoid of merits. As submitted by the learned counsel for the respondents, a writ cannot be issued by this Court directing the respondents to act contrary to the statute and the provisions of law.

16. In the present case on hand, the petitioner has in fact put up a construction contrary to law. The mere fact that an application was made seeking permission to put up construction cannot be a ground to condone the unauthorised and the illegal action on the part of the petitioner. The petitioner ought to have waited for the reply from the respondents before proceeding to construct the building, either temporary or otherwise. Therefore, the petitioner cannot invoke the extraordinary and discretionary jurisdiction provided under Article 226 of the Constitution of India.

17. The other contention of the learned counsel appearing for the petitioner was that, other vendors have been permitted to conduct business within the protected area also cannot be countenanced. It is trite law that Article 14 is positive in concept. In other words, an illegal order or action which enures to the benefit of one party cannot be a basis for extending the same to another. Therefore, even assuming that some other persons have been given permission contrary to law the same cannot be a ground to extend the said benefit to the petitioner. In this connection, it is useful to refer the judgment of the Honourable Apex Court in STATE OF UTTARANCHAL v. ALOK SHARMA [(2009) 7 SCC 647], wherein it has been held as follows:

"27. Our attention has been drawn to an additional affidavit filed by the respondents wherein inter alia it has been shown that a large number of employees who had been absorbed were initially appointed after 01.10.1986. Article 14 carries with it a positive concept. It would have no application in the matter of enforcement of an order which has its source in illegality. In other words, equality cannot be applied in illegality. [See Post Master General v. Tutu Das (Dutta) [(2007) 5 SCC 317] (SCC p.324, para 18) and Punjab SEB v. Gurmail Singh [(2008) 7 SCC 245] (SCC p.254, para 28.)"

18. Similarly, in a recent judgment the Honouarable Apex Court in JAIPUR DEVELOPMENT AUTHORITY v. MAHESH SHARMA [(2010) 9 SCC 782] has held as follows:

"47. It is amply clear from our decision in Civil Appeal No.8590 of 2003 that the issuance of notifications under Sections 4 and 6 of the Land Acquisition Act as also the award passed for acquisition of the land was a nullity and the subsequent action of the Government derequisitioning land by issuance of notification under Section 48 was just and proper as that was merely by way of rectification of the mistake committed therein. In the light of this decision, we find that the respondents herein have no claim or right to a fresh allotment of land, as directed by the Land Acquisition Officer. That other allottees have been wrongly delivered possession by the appellant does not, in any way, entitle the respondents to claim the same benefit for a wrong action cannot be allowed to be perpetuated on the ground of discrimination, which is not at all applicable. Furthermore, it is important to note that none of the respondents herein has been in possession of the said land allotted do them.

48. Moreover, this Court in Yadu Nandan Garg. v. State of Rajasthan [(1996) 1 SCC 334] on a case dealing with the lapse on the part of the Land Acquisition Officer in wrongly granting a benefit to one party, has held that the benefit thus wrongly granted cannot entitle others to get the same or to press claims of invidious discrimination."

19. It has been specifically stated in the counter affidavit that the averment made to the effect that other persons have been allowed to do the business within the

protected area is totally false. It has been further submitted by the learned counsel for the respondents that permissions have been granted to other parties only outside the prohibited area. There is absolutely no evidence in support of the averments made by the writ petitioner that identically placed persons are permitted to do business in the prohibited area. Therefore, in the absence of any positive evidence, the contention of the learned counsel for the petitioner that other persons have been given permission to do the business within the prohibited area also cannot be countenanced.

20. As observed earlier, the Honourable Apex Court in RAJEEV MANKOTIA v. SECRETARY TO THE PRESIDENT OF INDIA AND OTHERS [AIR 1997 SC 2766] referred supra held in clear terms about the importance of the preservation of ancient historical heritage which are the pride of the nation. The individual right will have to give way to the overwhelming public interest. The monuments not only belong to the entire nation but to humanity in general as they are the living examples of evolution of mankind. Therefore, the petitioner cannot claim as a matter of right that he should be allowed to do the business within the prohibited area.

21. In fine, the Writ Petition is liable to be dismissed and accordingly, the same is dismissed. The respondents are given liberty to take appropriate action in accordance with law against the petitioner, if the temporary structure put up by him is not removed. No costs. Consequently, connected miscellaneous petitions are closed.

25.01.2011

Index : Yes
Internet : Yes

Sri

To

1. The Superintending Archaeologist
Archeological Survey of India
Chennai Circle
Fort St.George
Chennai 600 009
2. The Inspector of Police
Meensurity Police Station
Udayarpalayam Taluk
Ariyalur District

M.M.SUNDRESH, J.

sri

PRE-DELIVERY ORDER IN
W.P. NO.11796 OF 2008

25.01.2011