

MANU/MH/1284/2007

Equivalent Citation: 2007(6)ALLMR86, 2008(1)BomCR670

IN THE HIGH COURT OF BOMBAY

Writ Petition No. 2445 of 2004 and Notice of Motion Nos. 161, 297 and 322 of 2007

Decided On: 03.10.2007

Appellants: **Janhit Manch and Ors.**

Vs.

Respondent: **Union of India (UOI) and Ors.**

Hon'ble Judges/Coram:

J.N. Patel and A.A. Sayed, JJ.

Counsel:

Shiraz Rustomji, Amicus Curiae

For Appellant/Petitioner/Plaintiff: Bhagwanjee Rayani, President, S.C. Naidu, Adv., i/b., C.R. Naidu, Adv. & Co. in Notice of Motion No. 161 of 2007, E.K. Sasidharan, Adv. in Notice of Motion No. 297/2007, Samir A. Vaidya, Adv. in Notice Motion No. 322/2007 and A.R. Pande, Adv. in Notice of Motion No. 595/2006

For Respondents/Defendant: Rajendra Raghuvanshi, A.S.G., Rajiv Chawan and Vinod Joshi, Advs., i/b., T.C. Kaushik, Adv., K.K. Singhavi, Sr. Adv. and P.A. Purandare, Adv. for BMC, and K.R. Belosay, G.P. for State

Case Note:

Property - Removal of encroachments - Prayer made for removal of encroachments and unauthorised constructions in the prohibited area - Held, State Government directed and particularly, Urban Development and Revenue Department of State Government and Home Department to issue instructions to respective authorities i.e. local planning bodies and police to extend all possible cooperation and logistic support to Archaeological Survey of India in removing unauthorised constructions structures and illegal occupants in prohibited area.

JUDGMENT

1. The Additional Solicitor General has filed an affidavit on behalf of respondent Nos. 1 and 3 pursuant to the Court's direction. The subject-matter can be considered in two parts. The first part which requires to be given top priority is in respect of problems of unauthorised constructions and illegal occupants which are within the prohibited area. It is stated in the affidavit in reply that in so far as the removal of encroachments and unauthorised constructions in the prohibited area is concerned, the ASI has already taken steps by informing the local authorities like the Municipal Commissioner MCGM and the Collector of the Region to extend all necessary aid and assistance to the officials of the ASI in the matter.

2. It has been expressed that land around the monument which falls in the prohibited area does not belong to ASI and is owned by private individuals and other agencies and that The Ancient Monuments and Archaeological Sites and Remains Act, 1958 does not enable the ASI to remove illegal constructions in prohibited area and that

such provisions are only available under Sub-section (2) of Section 19 of the said Act which relate to removal of constructions from prohibited area only.

3. This Court has no hesitation to arrive at a conclusion that such misreading of the provisions by the ASI is detrimental to the object and purpose of the act itself i.e. the Ancient Monuments and Archaeological Sites and Remains Act, 1958 and the rules framed therein i.e. the Ancient Monuments and Archaeological Sites and Remains Rules, 1959. If the Act and the Rules are read together, no Ravi Ramkrishnan construction is permitted within the prohibited area and, therefore, any constructions made within the prohibited area or illegal occupants within the prohibited area or occupying protected monument can be removed by the ASI in coordination with the local authorities i.e. local statutory body, be it Municipal Corporation, Municipal Council or Gram Panchayat with the assistance of the revenue and the police authorities.

4. We are informed by the learned Counsel for the parties that insofar as Jogeshwari Caves are concerned, even the MCGM has granted sanction for construction of building after the notification dated 16th June, 1992 came to be issued by the Government of India which has been published in Gazette of India dated 4th July, 1992, Rule 38 of which reads as under:

38. Removal of unauthorised buildings - (1) The Central Government may, by order, direct the owner or occupier of an unauthorised building in a prohibited area or in a regulated area or of a building or part thereof which has been constructed in contravention of any of the conditions in contravention on of any of the conditions or a licence granted under Rule 35 to remove such building or part thereof within a period specified in that order.

(2) If the owner or occupier refuses or fails to comply with an order made under Sub-rule (1), the Central Government may direct the District Magistrate to cause the building or part thereof to be removed, and the owner or occupier shall be liable to pay the cost of such removal.

5. In view of this, even in cases where the local planning authority has granted sanction for constructions in ignorance of provisions of The Ancient Monuments and Archaeological Sites and Remains Act, 1958 and the Ancient Monuments and Archaeological Sites and Remains Rules, 1959 and the notification dated 16.6.92 published by the Department of Culture (Archaeological, Survey of India), New Delhi, the said construction will be an unauthorised construction. In so far as the aforesaid provisions are concerned, the person has undertaken such construction by obtaining sanction from the local planning authority at his own peril. The only right, owner of such unauthorised structures or illegal occupants has, is to be given due notice before action for demolition or removal of unauthorised constructions and illegal occupants is undertaken by ASI.

6. In so far as other construction encroachments and illegal occupants of such structures are concerned, we are of the view that the ASI shall proceed to remove such unauthorised structures/illegal occupants by following due process of law.

7. Though the Public Interest Litigation restricts itself to the Archaeological Monuments particularly various caves namely Jogeshwari, Mandapeshwar, Mahakali or Kondivita and Kanheri, we find that there is no legal impediment in the way of the Archaeological Survey of India to take action in respect of such encroachers not only

in Mumbai and Thane District, but the ASI department can proceed to take action in respect of such monuments all over the State of Maharashtra.

In so far as the constructions which have been undertaken or proposed in the regulated zone is concerned, the learned Additional Solicitor General submitted that they are following the guide-lines which have been adopted throughout the Country by ASI based on the report of the expert group on Ahmedabad monuments and accordingly, they will process the respective cases in accordance with the rules by applying guidelines relating to Ahmedabad Monuments suggested by expert group of the Ahmedabad monument of the ASI.

8 . We therefore, direct the State Government and particularly, the Urban Development and Revenue Department of the State Government and the Home Department to issue instructions to the respective authorities i.e. the local planning bodies and police to extend all possible cooperation and logistic support to the Archaeological Survey of India in removing unauthorised constructions structures and illegal occupants in prohibited area.

9. It was suggested that if the Urban Development of the State Government, Revenue and the Home Department directs the planning authority to incorporate the guide-lines based on recommendation of the expert group of the Ahmedabad Monuments in the Development Control regulations it will facilitate in resolving the issue of regulating unauthorised constructions in the regulated area within their respective jurisdictions.

10. The learned Additional Solicitor General submits that such steps are being taken all over the State but the ASI department faces a peculiar problem in so far as the city of Mumbai and Thane is concerned and that it is their experience that in spite of taking necessary steps for removal of unauthorised structures/constructions and occupants from the prohibited area, encroachers/squatters have resurfaced. We do not think that if the State and its officials extend all possible Cooperation, it is difficult to take preventive steps, and such recurrence can be completely stopped. The ASI as well as the State Government should also inform all the local bodies including the companies which are supplying power/electricity not to provide civic amenities like water drainage roads and electricity to any unauthorised/illegal structures/illegal occupants within the prohibited zone of protected monument.

11. We expect that the Committee constituted by this Court would take necessary steps in the matter and the said local authorities as well as the state authorities and particularly the police would extend all possible co-operation in removal of such illegal structures and illegal occupants from the prohibited zone and submit a preliminary report of action taken to this Court within a period of weeks. We further direct that the State Government and the competent authorities under Maharashtra Slum Area (Improvement, Clearance and Redevelopment) Act, 1971 shall not notify any prohibited zone of ASI as notified slum area eligible for rehabilitation under the Slum Rehabilitation Act/Scheme.

12. The learned Additional Solicitor General after seeking instruction from the officials of the ASI who are present in Court makes a statement that the ASI has sufficient funds to safeguard the monuments by fencing the precincts of the monuments and also carry out necessary repairs so as to preserve the structures. One way of generating funds is to charge a person a nominal fee who are visiting these monuments. Para 5 of our order dt. 10.8.2006 stands modified accordingly. This

order disposes of all notice of motions taken out by the parties who are seeking their applications to be processed by the ASI in the regulated zone.

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