

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2430 OF 2006

Archaeological Survey of India

... Appellant

versus

Narender Anand and others

... Respondents

WITH

CIVIL APPEAL NO. 2431 OF 2006

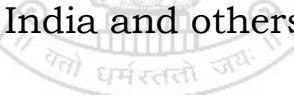
Narender Anand and another

... Appellant

versus

Archaeological Survey of India and others

... Respondents



JUDGMENT

JUDGMENT

G. S. Singhvi, J.

1. These appeals are directed against the judgment of the Division Bench of the Delhi High Court whereby the appeal filed

by Archaeological Survey of India (appellant in C.A. No. 2430 of 2006 and respondent No.1 in C.A. No. 2431 of 2006) was allowed and the order of injunction passed by the learned Single Judge in IA No. 2912 of 2002 in Suit No. 645 of 2002 allowing Shri Narendra Anand and M/s. Raval Apartments Pvt. Ltd. (respondent Nos. 1 and 2 in C.A. No.2430 of 2006 and appellants in C.A. No. 2431 of 2006) to raise construction up to the height of 55 feet on plot No.14, Janpath Lane, New Delhi was set aside and Writ Petition No.2635 of 2002 filed by Heritage and Cultural Forum was disposed of with a direction to the Central Government to review notification dated 16.6.1992 issued under Rule 32 of the Ancient Monuments and Archaeological Sites and Remains Rules, 1959 (for short, 'the Rules').

2. While Archaeological Survey of India has questioned the direction given by the Division Bench of the High Court for review of notification dated 16.6.1992, respondent Nos. 1 and 2 have challenged that portion of the impugned judgment by which the Division Bench vacated the order of injunction passed by the learned Single Judge.

3. Archaeological and historical pursuits in India started with the efforts of Sir William Jones, who put together a group of antiquarians to form the Asiatic Society on 15th January 1784 in Calcutta. He was supported by many persons who carried out survey of monuments in various parts of India. The identification of Chandragupta Maurya with Sandrokottos of Greek historians by Jones helped in fixing a chronological horizon of Indian history. This was followed by the identification of Pataliputra (Palibothra of classical writings) at the confluence of the Ganga and Sone. The decipherment of Gupta and Kutila script by Charles Wilkinson was a landmark in this regard. Thereafter, many individuals made contribution in surveying different monuments in India. In 1861, Alexander Cunningham was appointed as the first Archaeological Surveyor. He surveyed areas stretching from Gaya in the east to the Indus in the northwest, and from Kalsi in the north to the Narmada in the south, between 1861 and 1865. For this, he largely followed the footsteps of the Chinese pilgrim Hieun Tsang. However, with the abolition of the Archaeological Survey in 1866, this work came to

a grinding halt. In the meanwhile, an Act was passed in 1863 empowering the Government to prevent injury to, and preserve the buildings remarkable for their antiquity and historical or architectural value. In 1878, Treasure Trove Act was enacted which enabled the Government to confiscate treasures and antiques found during chance digging. After 26 years, the Ancient Monuments Preservation Act, 1904 (for short, ‘the 1904 Act’) was enacted for the preservation of ancient monuments and objects of archaeological, historical or artistic interest. Section 2(1) of that Act, which contains the definition of “ancient monuments” and Section 3 under which the Central Government was empowered to declare an ancient monument to be a protected monument were as under:

“2. Definitions.—In this Act, unless there is anything repugnant in the subject or context.—

(1) “**ancient monument**” means any structure, erection or monument, or any tumulus or place of interment, or any cave, rock-sculpture, inscription or monolith, which is of historical, archaeological or artistic interest, or any remains thereof, and includes

—
(a) the site of an ancient monument;

(b) 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

(c) the means of access to and convenient inspection of an ancient monument:

3. Protected monuments.—(1) The Central Government may, by notification in the Official Gazette, declare an ancient monument to be a protected monument within the meaning of this Act.

(2) A copy of every notification published under sub-section (1) shall be fixed up in a conspicuous place on or near the monument, together with an intimation that any objections to the issue of the notification received by Central Government within one month from the date when it is so fixed up will be taken into consideration.

(3) On the expiry of the said period of one month, the Central Government, after considering the objections, if any, shall confirm or withdraw the notification.

(4) A notification published under this section shall, unless and until it is withdrawn, be conclusive evidence of the fact that the monument to which it relates is an ancient monument within the meaning of this Act.”

4. The framers of the Constitution were very much conscious of the need of protecting the monuments and places/objects of artistic and historic importance. This is why Article 49 was incorporated in the Directive Principles of State Policy (Part IV of

the Constitution) whereby an obligation has been imposed on the State to protect every monument or place or object of artistic or historic interest declared by or under law made by Parliament. For the sake of reference Article 49 is reproduced below:

“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 interest, 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.”

5. In 1951, Parliament enacted the Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951, whereby certain monuments etc. were declared to be of national importance. After 7 years, Parliament enacted the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (for short, ‘the 1958 Act’) to provide for the preservation of ancient and historical monuments and archaeological sites and remains of national importance, for the regulation of archaeological excavations and for the protection of sculptures, carvings and other like objects. Similar legislations have been enacted by various State legislatures with reference to

entry 12 List II of the Seventh Schedule of the Constitution. The definition of “ancient monument” contained in Section 2(a) and Sections 3, 4, 38(1), (2)(a) and (b) and 39 of the 1958 Act, which are relevant for deciding the issues raised in these appeals are reproduced below:

“2. Definitions. – In this Act, unless the context otherwise requires,—

- (a) “ancient monument” means any structure, erection or monument, or any tumulus or place of interment, 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 100 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;

3. Certain ancient monuments, etc., deemed to be of national importance. – All ancient and historical monuments and all archaeological sites and remains which have been declared by the Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951 (71 of 1951), or by section 126 of the States Reorganisation Act, 1956 (37 of 1956), to be of national importance shall be deemed to be ancient

and historical monuments or archaeological sites and remains declared to be of national importance for the purposes of 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 my 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.

38. Power to make rules.-(1) The Central Government may, by notification in the Official

Gazette and subject to the condition of previous publication, make rule for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

- (a) the prohibition or regulation by licensing or otherwise of mining, quarrying, excavating, blasting or any operation of a like nature near a protected monument or the construction of buildings on land adjoining such monument and the removal of unauthorised buildings;
- (b) the grant of licences and permissions to make excavations for archaeological purposes in protected areas, the authorities by whom, and the restrictions and conditions subject to which, such licences may be granted, the taking of securities from licensees and the fees that may be charged for such licences.

39. Repeals and saving. – (1) The Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951 (71 of 1951), and section 126 of the States Reorganisation Act, 1956 (37 of 1956), are hereby repealed.

(2) The Ancient Monuments Preservation Act, 1904 (7 of 1904), shall cease to have effect in relation to ancient and historical monuments and archaeological sites and remains declared by or under this Act to be of national importance, except as respects things done or omitted to be done before the commencement of this Act.”

6. In exercise of the power vested in it under Section 38 of the 1958 Act, the Central Government enacted the Rules, the relevant provisions whereof are extracted below:

“31. Notice or intention to declare a prohibited or regulated area.- (1) Before declaring an area near or adjoining a protected monument to be a prohibited area or a regulated area for purposes of mining operation or construction or both, the Central Government shall, by notification in the Official Gazette, give one month's notice of its intention to do so, and a copy of such notification shall be affixed in a conspicuous place near the area.

(2) Every such notification shall specify the limits of the area which is to be so declared and shall also call for objection, if any, from interested persons.

32. Declaration of prohibited or regulated area. – After the expiry of one month from the date of the notification under rule 31 and after considering the objections, if any, received within the said period, the Central Government may declare, by notification in the Official Gazette, the area specified in the notification under rule 31, or any part of such area, to be a prohibited area, or, as the case may be, a regulated area for purposes of mining operation or construction or both.

33. Effect of declaration of prohibited or regulated area.- No person other than an archaeological officer shall undertake any mining operation or any construction, -
(a) in a prohibited, area, or
(b) in a regulated area except under and in accordance with the terms and conditions of a licence granted by the Director- General.”

7. Jantar Mantar, New Delhi is one of the five unique observatories built between 1699 and 1743 by Majoraja Jai Singh (II) of Jaipur, who was a great Mathematician and Astronomer. The other observatories are at Jaipur, Ujjain, Varanasi and Mathura. Jantar Mantar, New Delhi, like other observatories has several instruments that can graph the path of the astronomical universe. There is a colossal Samrat Yantra at the periphery of Jantar Mantar. To the South of Samrat Yantra, there is an amazing instrument called Jai Prakash, which has two concave hemispherical structures used for determining the position of the Sun and celestial bodies. The other important yantras are Misra Yantra, Daksinovartti Bhitti Yantra, Karka Rasivalaya, Niyat Cakra, Rama Yantra, Brhat Samrat and Sasthamsa Yantra. Unfortunately, some of these yantras have been rendered unworkable or have become non-functional. One of the main reasons for this is the construction of multistoried structures which have come up in the vicinity of Jantar Mantar in the last 25 to 30 years.

8. In exercise of the powers conferred by Section 3(1) of the 1904 Act, the Central Government issued notification dated 4.10.1956, which was published in the Gazette of India dated 13.10.1956, declaring Jantar Mantar, New Delhi to be a protected monument. That notification reads as under:

**“MINISTRY OF EDUCATION
ARCHAEOLOGY
New Delhi, the 4th October 1956”**

S.R.O. 2306. - In exercise of the powers conferred by sub-section (1) of Section 3 of the Ancient Monuments Preservation Act, 1904 (7 of 1904), the Central Government hereby declares the ancient monument described in the Schedule annexed hereto to be a protected monument within the meaning of the said Act.

SCHEDULE

Sl. No.	Dist- rict	Locality	Name of Monum- ent	Area	Boundary: East, South, North, West	Whether in religious use	Owner- ship	Rem- arks
	Delhi	New Delhi	Jantar Mantar	Protect- ed area 5.39	South: South India Club, 9, Jantar Mantar Road East: Low Land with a modern temple & well West: Jantar Mantar Road	No	Maharaja of Jaipur	

					North-East: Partap Singh Building			
					North-West: Parliament Street			

[No.F-3-76/50-C-1]
D. CHAKRAVARTI
Under Secretary”

9. With a view to correct an obvious mistake committed by showing Maharaja of Jaipur as the owner of Jantar Mantar in the Schedule of the aforesaid notification, the Central Government issued notification dated 3.5.1957 under Section 3(1) of the 1904 Act, which reads as under:

“TO BE PUBLISHED IN THE GAZETTE OF INDIA

PART II SECTION III.

No. F.3-76/50-0.1
Government of India,
Ministry of Education.

New Delhi, dated the 3rd May, 1957.

NOTIFICATION

(ARCHAEOLOGY)

In exercise of powers conferred by sub-section (1) of section 3 of the Ancient Monuments Preservation Act, 1904 (7 of 1904) and in supersession of notification of

the Government of India Ministry of Education No.F.3-76/50/0.1 dated the 4th October, 1956, the Central Government hereby declares the ancient monument described in the Schedule annexed hereto to be a protected monument within the meaning of the said Act.

(Sd/-
(Rameshwar Dass)
Under Secretary

The Publisher,
Gazette of India,
New Delhi.”

The Schedule annexed with that notification is reproduced below:

“Ct.	Local ity	Name of Monume nt	Area	Boundary: East, South, North, West	Ownership
1	2	3	4	5	6
Delh i	New Delhi	Jantar Mantar	Protecte d area 5.39	South: South India Club, 9, Jantar Mantar Road East: Low Land with a modern temple & well West: Jantar Mantar Road North-East: Partap Singh Building North-West: Parliament Street	Government of Rajasthan”

10. Although, notification dated 3.5.1957 was not published in the Official Gazette, as was done in the case of notification dated 4.10.1956, the only difference in the two notifications was that in the Schedule appended to the first notification, the ownership of Jantar Mantar was shown to be that of "Maharaja of Jaipur" and in the second notification, the owner of Jantar Mantar was shown as the Government of Rajasthan. What needs to be emphasized is that after merger of the erstwhile State of Jaipur and formation of the State of Rajasthan, Maharaja of Jaipur did not retain his earlier status and he no longer remained the owner of Jantar Mantar because it was not his private property.

11. In exercise of the power vested in it under Rule 31 of the Rules, the Central Government issued notification dated 15.5.1991, which was published in Gazette of India dated 25.5.1991, and gave notice of its intention to declare an area of 100 meters from the protected limits and further beyond it upto 200 meters near or adjoining protected monuments to be prohibited and regulated areas respectively for the purposes of mining operations and constructions. After considering the

objections/suggestions received from the public, the Central Government issued notification dated 16.6.1992, which was duly published in the Official Gazette. The final notification reads thus:

“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, Archaeological Survey of India No. S.O. 1447 dated the 15th May, 1991 published in Gazette of India, Part-II Section 3 sub-section (ii) dated 25th May, 1991, the Central Government gave one month's notice of its intention to declare area upto 100 metres from the protected limits, and further beyond it upto 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 Monument 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 the similar declarations already made in respect of monuments at Fatehpur Sikri; Mahabalipuram; Golconda Fort, Hyderabad (Andhra Pradesh); Thousands Pillared Temple, Hanamkonda, Distt. Warangal (Andhra Pradesh); Shershah' Tomb, Sasaram (Bihar); Rock Edict of Ashoka, Kopbal, Distt. Raichur (Karnataka); Gomateshwara Statue at Sravanbelgola, District Hassan (Karnataka); Elephanta Caves, Gharapur, District Kolba (Maharashtra).

(No.F.8/2/90-M-M.C.
M.C. Joshi, Director General”

12. Respondent Nos. 1 and 2, who own plot No. 14, Janpath Lane submitted an application to the New Delhi Municipal Corporation (for short, ‘the Corporation’) sometime in August 1986 for sanction of the building plan for the construction of multistoried commercial building. The same was rejected vide letter dated 15.9.1986 on the ground that the area was under comprehensive development and the details of redevelopment controls/drawings, if any, finalized by the Delhi Development Authority (for short, ‘the DDA’) were not available with the Corporation. After about 7 years, respondent Nos.1 and 2 again submitted application dated 24.6.1993 for sanction of the building plan. The DDA vide its letter dated 1.10.1993 suggested

to the Corporation that plot No.14, Janpath Lane form part of redevelopment scheme and the building plan should be approved as per the Development Control Norms. The building plan was finally sanctioned by the Corporation sometime in September 2000 and was released on 5.3.2001. Thereafter, respondent Nos. 1 and 2 demolished the existing structure and started digging foundation for the new building. On 5.5.2001, the Conservation Assistant of Archaeological Survey of India lodged a complaint about the excavation and construction being undertaken by respondent Nos. 1 and 2 in violation of the prohibition contained in notification dated 16.6.1992. The Superintending Archaeologist, Archaeological Survey of India, vide his letter dated 10.5.2001 informed the Corporation that the sanction given by it was contrary to notification dated 16.6.1992. Thereupon, the Corporation issued notice dated 23.5.2001 to respondent Nos. 1 and 2 and directed them to stop the construction and obtain the requisite permission from the Archaeological Survey of India.

13. Respondent Nos. 1 and 2 challenged the letter of the Corporation in Suit No. 645 of 2002 and prayed that the restriction imposed on the construction of building be declared as nullity. They also filed I.A. No. 2912 of 2002 under Order 39 Rules 1 and 2 CPC for temporary injunction. On 22.3.2002, the learned Single Judge directed registration of the suit and passed an ex parte injunction order whereby the Corporation was restrained from giving effect to letter dated 23.5.2001 subject to the condition that respondent Nos. 1 and 2 shall furnish an undertaking that they will raise construction up to the height of 55 feet only. On notice, Archaeological Survey of India filed I.A.No.4479 of 2002 for modification of order dated 22.3.2002. The same was disposed of by the learned Single Judge with a direction to respondent Nos. 1 and 2 not to raise construction beyond the DPC level.

14. The injunction application was finally allowed by the learned Single Judge vide order dated 30.10.2002 and order dated 22.3.2002 was made absolute. The learned Single Judge noted that despite several opportunities, counsel representing

Archaeological Survey of India failed to produce a copy of the Official Gazette in which notification dated 3.5.1957 was published and held that in the absence of such publication, the notification cannot be treated as effective. The learned Single Judge further held that subsequent notification dated 8.1.1958 in which reference was made to earlier notification dated 3.5.1957 was also ineffective and in the absence of a legally binding notification having been issued under Section 3(1) of the 1904 Act, the prohibition contained in notification dated 16.6.1992 cannot be made applicable to the plot of respondent Nos.1 and 2.

15. I.A.No.10985/2002 filed by Archaeological Survey of India for review of the injunction order was disposed of by learned single Judge on 27.11.2002 by taking cognizance of the concession made by the counsel appearing on its behalf that notification dated 3.5.1957 had not been published in the Official Gazette.

16. Archaeological Survey of India challenged the order of injunction in FAO (OS) No.414 of 2002 mainly on the ground that while deciding the application for injunction, the learned Single Judge had misinterpreted the notifications issued under Section 3(1) of the 1904 Act and Section 39 of the 1958 Act.

17. During the pendency of the appeal filed against the order of the learned Single Judge, Heritage and Culture Forum, Delhi filed Writ Petition No.2635 of 2002 by way of public interest litigation and prayed for issue of a mandamus for stopping the construction of multistoried building on the plot owned by respondent Nos. 1 and 2 by asserting that the same was contrary to the provisions of the 1958 Act and the Rules framed thereunder and the prohibition imposed on the construction of buildings within 100 meters of the protected monument.

18. In their counter affidavit, respondent Nos. 1 and 2 not only questioned the *locus standi* of the Heritage and Culture Forum to challenge the permission granted to them for the construction of building, but also pleaded that the prohibition contained in

notification dated 16.6.1992 was not applicable to their plot. On behalf of Archaeological Survey of India, the Superintending Archaeologist filed counter affidavit and pleaded that the building plan sanctioned by the Corporation which enabled respondent Nos. 1 and 2 to construct the building was violative of the prohibition contained in notification dated 16.6.1992.

19. At the hearing of the appeal, learned counsel for respondent Nos. 1 and 2 reiterated the plea taken before the learned Single Judge that Jantar Mantar, New Delhi cannot be treated as a protected monument because notification dated 3.5.1957 had not been published in the Official Gazette and, as such, the prohibition contained in notification dated 16.6.1992 was not applicable to his clients. He then argued that there was no justification to enforce the prohibition qua plot No. 14, Janpath Lane because a number of other buildings including Phase-II of the Corporation's building had already been constructed around Jantar Mantar in violation of the restriction of 100 meters.

20. The Division Bench of the High Court took cognizance of the fact that the Corporation had constructed Phase-II building in violation of the prohibition contained in notification dated 16.6.1992 and directed Archaeological Survey of India to explain why such construction of that building was not stopped. Thereupon, the Superintending Archaeologist filed affidavit dated 26.5.2003. In paragraph III(1) and (2) of his affidavit, the deponent spelt out the details of the objections raised by Archaeological Survey of India against the construction of Phase II building of the Corporation and claimed that the officers of the Corporation continued with the construction despite objections. In paragraph IV of his affidavit, the deponent made the following statement:

“IV) That it is evident from the above-stated chronology of events that in so far as ASI is concerned, it pursued the matter with NDMC and Government of NCT of- Delhi vigorously with the hope that NDMC would stop the construction. However, despite best efforts of ASI, nothing was being done to ensure that the construction activity at the site takes place in accordance with the provisions of Law. It is only on 26th August, 2003 that an application in the prescribed form has been submitted by NDMC, seeking the permission of Archaeological Survey of India to sanction the construction in the regulated area. It is respectfully submitted

that Archaeological Survey of India does not have any machinery, either to demolish the construction or to stop the construction and therefore it could do only as much in the present case, since it involved a local authority, and for the purposes of execution of its orders ASI has to depend upon the assurance of Local Government only. It is significant to note that in the present case the construction was carried out by none other than the municipal authority, and, as such, there was nothing that Archaeological Survey of India could do except to persuade the concerned authority to dissuade from persisting with the same. Towards the said directions, best efforts were made by the ASI, but to no avail.”

21. In compliance of order dated 26.4.2002 passed by the Division Bench of the High Court, the Corporation submitted a status report containing the details of the applications made by respondent Nos. 1 and 2 and sanction of the building plan. The status report also made a mention of letter dated 25.9.2001 written by the DDA to the Corporation that the objections/suggestions made by Archaeological Survey of India regarding setbacks and heights were considered while finalizing the Redevelopment Scheme in 1989, which was approved by the DDA on 24.5.1994 and by the Ministry of Urban Development in October 1994.

22. In compliance of another order passed by the Division Bench on 6.8.2003, the Corporation explained its position regarding Phase II building by stating that approval for NDMC, New Delhi City Centre was granted vide Resolution dated 12.2.1969 and the building was to be constructed in two phases. That plan for Phase II was approved by the Delhi Urban Arts Commission on 13.3.1992 and the building was constructed without violating the 100 meters restriction.

23. Respondent Nos.1 and 2 also filed an affidavit and claimed that the proposed building is 218 feet away from the outer boundary of Jantar Mantar and 101.46 meters from the protected monument. According to respondent Nos.1 and 2, in terms of the sanction plan they are entitled to construct building up to the height of 75 feet but the learned Single Judge has allowed construction only up to 55 feet.

24. The Division Bench of the High Court first considered the implication of the concession made before the learned Single

Judge by the counsel appearing for Archaeological Survey of India that notification dated 3.5.1957 had not been published in the Official Gazette as per the requirement of Section 3(2) of the 1904 Act and observed that the so called concession was inconsequential because copy of the Official Gazette had, in fact, not been produced before the Court. The Division Bench then considered the question whether Jantar Mantar is a protected monument, referred to notifications dated 4.10.1956 and 3.5.1957 and observed that the second notification had been issued only with a view to correct the mistake which had been committed in mentioning the name of Maharaja of Jaipur in the column of 'ownership' of the first notification. The Division Bench opined that Jantar Mantar had already been declared as a protected monument by notification dated 4.10.1956, which was specifically saved by Section 39 (2) of the 1958 Act. The Division Bench then referred to notification dated 16.6.1992 and held that in view of the prohibition contained therein, respondent Nos. 1 and 2 were not entitled to raise construction on plot No.14, Janpath Lane because the same was within 100 meters of the

protected monument. The observations made by the Division Bench in this respect are extracted below:

“The Notification dated 4.10.1956 clearly refers to the protected area as comprising 5.39 acres. It is not in dispute that the entire area within the boundary wall comprises of these from 5.39 acres. Thus, reading the 1956 Notification itself makes it clear that what is protected is not just the buildings/structures comprised within, which collectively go by the name Jantar Mantar, but the entire area of 5.39 acres. Now, reading the Notification dated 16.6.1992, it is apparent that what has been prohibited is mining and construction activity within 100 meters “from the protected limits” of the protected monuments. Therefore, the measurement that has to be obtained is not from the structures but from the boundary wall or in other words from “the limits of the protected area”. If that is so, then there is no dispute that the proposed building at plot No.14, Janpath Lane falls within 100 meters thereof.”

25. The Division Bench rejected the argument of respondent Nos.1 and 2 that in view of the provisions contained in the Delhi Development Authority Act, 1957 (for short, ‘the DDA Act’), which is a special law enacted for planned development of Delhi, the prohibition contained in notification dated 16.6.1992 issued under Rule 32 of the Rules framed under Section 38 of the 1958 Act will not be applicable to their case. In the opinion of the Division Bench, there is no conflict between the provisions of the

DDA Act and the 1958 Act because the two statutes operate in different fields and even if there was some conflict, the 1958 Act being a special law enacted for the preservation and protection of ancient monuments would prevail over the DDA Act.

26. The Division Bench then noted that several buildings including the Phase II building of the Corporation had come up in violation of the prohibition contained in notification dated 16.6.1992 but did not delve deep into the issue because an undertaking was given on behalf of the Corporation that the basement of the building constructed in violation of the prohibition shall not be used. Finally, the Division Bench vacated the order of injunction passed by the learned Single Judge but proceeded to direct the Central Government to review notification dated 16.6.1992 by observing that a provision could be made for relaxation of the prohibition on case to case basis because the degree and type of protection depends upon variables such as the nature of protected monument, its location, the weather conditions, the topography, the soil etc. and there has to be application of mind on these and other issues linked

with preservation of monuments and Archaeological Survey of India cannot take shelter of the notification prohibiting construction within 100 meters from the boundary of the protected monument in each and every case for refusing permission or license for construction.

27. Before proceeding further, we deem it proper to mention that in compliance of the direction given by this Court on 29.9.2010, an additional affidavit was filed on behalf of the Corporation detailing the events leading to the construction of its Phase II building. In the end, it has been stated that Director General, Archaeological Survey of India has accorded ex-post facto approval to the construction of that building. In support of this assertion, copies of letter dated 11.2.2005 issued by the Director General, Archaeological Survey of India to the Chairperson of the Corporation conveying ex-post facto approval and license dated 21.2.2005 issued by the Superintending Archaeologist, Delhi Circle, have been placed on record. Respondent Nos.1 and 2 also filed additional affidavit stating therein that while they are not being allowed to construct

building, the Corporation has constructed multistoried building within 70 meters of the protected monument and this is in clear violation of the prohibition contained in notification dated 16.6.1992.

28. At this stage, it is apposite to mention that during the pendency of these appeals the 1958 Act was amended by the Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Act, 2010 and Sections 20A and 20B were inserted with effect from 16.6.1992 and Sections 20C to 20Q were inserted with effect from 29.3.2010. Since the validity of the Amendment Act has not been questioned before us, we do not propose to examine the same. However, we would like to notice the provisions of Sections 20A, 20B, 20C and 20F(1) and (2), the interpretation of which will have far reaching impact on the future of protected monuments of national and international importance including Jantar Mantar, New Delhi. These sections read as under:

“20A. Declaration of prohibited area and carrying out public work or other works in prohibited area.-
Every area, beginning at the limit of the protected

area or the protected monument, as the case may be, and extending to a distance of one hundred metres in all directions shall be the prohibited area in respect of such protected area or protected monument:

Provided that the Central Government may, on the recommendation of the Authority, by notification in the Official Gazette, specify an area more than one hundred metres to be the prohibited area having regard to the classification of any protected monument or protected area, as the case may be, under section 4A.

(2) Save as otherwise provided in section 20C, no person, other than an archaeological officer, shall carry out any construction in any prohibited area.

(3) In a case where the Central Government or the Director-General, as the case may be, is satisfied that

—

(a) it is necessary or expedient for carrying out such public work or any project essential to the public; or

(b) such other work or project, in its opinion, shall not have any substantial adverse impact on the preservation, safety, security of, or, access to, the monument or its immediate surrounding, it or he may, notwithstanding anything contained in sub-section (2), in exceptional cases and having regard to the public interest, by order and for reasons to be recorded in writing, permit, such public work or project essential to the public or other constructions, to be carried out in a prohibited area:

Provided that any area near any protected monument or its adjoining area declared, during the period beginning on or after the 16th day of June, 1992 but ending before the date on which the Ancient

Monuments and Archaeological Sites and Remains (Amendment and Validation) Bill, 2010, receives the assent of the President, as a prohibited area in respect of such protected monument, shall be deemed to be the prohibited area declared in respect of that protected monument in accordance with the provisions of this Act and any permission or licence granted by the Central Government or the Director-General, as the case may be, for the construction within the prohibited area on the basis of the recommendation of the Expert Advisory Committee, shall be deemed to have been validly granted in accordance with the provisions of this Act, as if this section had been in force at all material times:

Provided further that nothing contained in the first proviso shall apply to any permission granted, subsequent to the completion of construction or reconstruction of any building or structure in any prohibited area in pursuance of the notification of the Government of India in the Department of Culture (Archaeological Survey of India) number S.O. 1764, dated the 16th June, 1992 issued under rule 34 of the Ancient Monuments and Archaeological Sites and Remains Rules, 1959, or, without having obtained the recommendations of the Committee constituted in pursuance of the order of the Government of India number 24/22/2006-M, dated the 20th July, 2006 (subsequently referred to as the Expert Advisory Committee in orders dated the 27th August, 2008 and the 5th May, 2009).

(4) No permission, referred to in sub-section (3), including carrying out any public work or project essential to the public or other constructions, shall be granted in any prohibited area on and after the date on which the Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Bill, 2010 receives the assent of the President.

20B. Declaration of regulated area in respect of every protected monument.-(1) Every area, beginning at the limit of prohibited area in respect of every ancient monument and archaeological sites and remains, declared as of national importance under sections 3 and 4 and extending to a distance of two hundred metres in all directions shall be the regulated area in respect of every ancient monument and archaeological sites and remains:

Provided that the Central Government may, by notification in the Official Gazette, specify an area more than two hundred metres to be the regulated area having regard to the classification of any protected monument or protected area, as the case may be, under section 4A:

Provided further that any area near any protected monument or its adjoining area declared, during the period beginning on or after the 16th day of June, 1992 but ending before the date on which the Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Bill, 2010, receives the assent of the President, as a regulated area in respect of such protected monument, shall be deemed to be the regulated area declared in respect of that protected monument in accordance with the provisions of this Act and any permission or licence granted for construction in such regulated area shall, be deemed to have been validly granted in accordance with the provisions of this Act, as if this section had been in force at all material times.

20C. Application for repair or renovation in prohibited area, or construction or re-construction or repair or renovation in regulated area. - (1) Any person, who owns any building or structure, which existed in a prohibited area before the 16th day of

June, 1992, or, which had been subsequently constructed with the approval of the Director-General and desires to carry out any repair or renovation of such building or structure, may make an application to the competent authority for carrying out such repair or renovation, as the case may be.

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

20F. Constitution of National Monuments

Authority. -(1) The Central Government shall, by notification in the Official Gazette, constitute an Authority to be called as the National Monuments Authority.

(2) The Authority shall consist of,—

(a) a Chairperson, on whole-time basis, to be appointed by the President, having proven experience and expertise in the fields of archaeology, country and town planning, architecture, heritage and conservation-architecture or law;

(b) such number of members not exceeding five whole-time members and five part-time members to be appointed, on the recommendation of the Selection Committee referred to in section 20G, by the Central Government, having proven experience and expertise in the fields of archaeology, country and town planning, architecture, heritage, conservation-architecture or law.

(c) the Director-General as member, ex officio."

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

4A. Of course, this power can be exercised only on the recommendations of the Authority as defined in Section 2(da) and constituted under Section 20F. Somewhat similar provision has been made in Section 20B for the regulated area in respect of every ancient monument and archaeological site and remains. Proviso to that section empowers the Central Government to issue notification in the Official Gazette and specify an area more than two hundred meters to be the regulated area having regard to the classification of any protected monument or protected area, as the case may be, under Section 4A. In terms of Section 20A(2), it has been made clear that no person other than an Archaeological Officer shall carry out any construction in any prohibited area. This is subject to Section 20C, which can be treated as an exception to Section 20A(2). That section lays down that any person who owns any building or structure, which existed in a prohibited area before 16.6.1992 or had been subsequently constructed with the approval of the Director General may carry out any repair or renovation of such building or structure by making an application to the competent authority. The term “renovation” appearing in Section 20C will

take its colour from the word “repair” appearing in that section. This would mean that in the garb of renovation, the owner of a building cannot demolish the existing structure and raise a new one and the competent authority cannot grant permission for such reconstruction. Section 20A(3) lays down that the Central Government or the Director General can, in exceptional cases and having regard to the public interest, pass a reasoned order and permit a public work or any project essential to the public or other construction in a prohibited area provided that such construction does not have substantial adverse impact on the preservation, safety, security of, or access to the protected monuments or its immediate surrounding. The use of the expression “such other work or project” in clause (b) of Section 20A(3), if interpreted in isolation, may give an impression that the Central Government or the Director General is empowered to allow any other work or project by any person in the prohibited area but, in our view, the said expression has to be interpreted keeping in view the mandate of Article 49 of the Constitution and the objects sought to be achieved by enacting 1958 Act, i.e. preservation of ancient and historical monuments, archaeological

sites and remains of national importance. This would necessarily imply that ‘such other work or project’ must be in larger public interest in contrast to private interest. In other words, in exercise of power under Section 20A(3), the Central Government or the Director General cannot pass an order by employing the stock of words and phrases used in that section and permit any construction by a private person de hors public interest. Any other interpretation of this provision would destroy the very object of the 1958 Act and the prohibition contained in notification dated 16.6.1992 and sub-section (1) of Section 20A would become redundant and we do not think that this would be the correct interpretation of the amended provision. It also needs to be emphasized that public interest must be the core factor to be considered by the Central Government or the Director General before allowing any construction and in no case the construction should be allowed if the same adversely affects the ancient and historical monuments or archaeological sites.

30. We may now revert to the impugned judgment in these appeals. In our view, Archaeological Survey of India is fully

justified in making a grievance that the Division Bench of the High Court was not justified in directing the Central Government to review the prohibition contained in notification dated 16.6.1992. The High Court's anxiety to maintain a balance between the dire necessity of protecting historical monuments of national and international importance and development of infrastructures is understandable, but it is not possible to approve the fiat issued to the Central Government to review the prohibition contained in notification dated 16.6.1992. That notification was issued by the Central Government for implementing the policy enshrined in Article 49 of the Constitution and the 1958 Act i.e. to preserve and protect ancient and historical monuments and archaeological sites and remains of national importance. Section 19 of the 1958 Act contains a restriction against construction of any building within the protected area or carrying out of any mining, quarrying, excavating, blasting or any other operation of similar nature in such area. Rules 31 and 32 of the Rules empower the Central Government to declare an area near or adjoining a protected monument to be a prohibited area or a regulated area for the

purposes of mining operation or construction. The Central Government must have issued notification dated 16.6.1992 after consulting experts in the field and keeping in view the object of the 1958 Act. Therefore, in the name of development and accommodating the need for multistoried structures, the High Court could not have issued a mandamus to the Central Government to review/reconsider notification dated 16.6.1992 and that too by ignoring that after independence large number of protected monuments have been facing the threat of extinction and if effective steps are not taken to check the same, these monuments may become part of history. One of such monument is Jantar Mantar, New Delhi. Some of its instruments have become unworkable/non functional. This is largely due to construction of multistoried structures around Jantar Mantar. Therefore, we have no hesitation to hold that the High Court was not justified in directing the Central Government to review or reconsider notification dated 16.6.1992 and, to that extent, the impugned judgment is liable to be set aside. We may add that with the insertion of Sections 20A and 20B, the direction given by the High Court for review of notification dated 16.6.1992 has

become infructuous and the Government is no longer required to act upon the same.

31. The appeal of respondent Nos.1 and 2 is wholly meritless. The High Court, in our view, has rightly held that even though notification dated 3.5.1957 did not become effective because the same was not published in the Official Gazette, the earlier notification issued on 4.10.1956 remained effective and the same was saved by Section 39(2) of the 1958 Act. We may add that even though notification dated 3.5.1957 was issued in supersession of notification dated 4.10.1956, the same remained alive because of non compliance of Section 3(2) of the 1904 Act. The High Court's interpretation of the prohibition contained in notification dated 16.6.1992 is correct and the distance of 100 meters has to be counted from the outer boundary wall of Jantar Mantar which has protected area of 5.39 acres and not the physical structures of the observatory. The High Court has given detailed reasons for rejecting the plea of respondent Nos.1 and 2 that the provisions of the DDA Act would prevail over those contained in the 1958 Act and we entirely agree with it.

32. We may have dealt with the additional affidavits of the parties in greater detail and examined whether Archaeological Survey of India was justified in not taking action against construction of large number of buildings in violation of the prohibition contained in notification dated 16.6.1992, but do not consider it proper to do so because the owners of these buildings are not parties to these appeals.

33. In the result, Civil Appeal No.2430 of 2006 is allowed and the direction given by the Division Bench of the High Court for review of notification dated 16.6.1992 is set aside. However, it is made clear that in future the Central Government or the Director General shall not take action or pass any order under Section 20A(3) and 20C except in accordance with the observations made in this judgment. Civil Appeal No.2431 of 2006 is dismissed. The parties are left to bear their own costs.

.....J.
(G.S. SINGHVI)

.....J.
(ASOK KUMAR GANGULY)

New Delhi;
January 16, 2012.

