

भारत INDIA
गिरा सपा
TWENTY RUPEES

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IN THE HIGH COURT OF JUDICATURE AT JABALPUR
W.P. NO. 1220 12006

PETITIONER:

Archaeological Survey of India,
Bhopal Circle, Bhopal through its
Superintending Archaeologist

Emr
66383

VERSUS

RESPONDENTS:

1. State of Madhya Pradesh,
Through Chief Secretary,
Vallabh Bhawan, Bhopal
2. Secretary, Department of
Revenue, Madhya Pradesh
Bhopal.

EPD

Director General of Police,
Madhya Pradesh, Bhopal

4. Commissioner, Revenue
Division, Sagar, M.P.

EPD

Collector, District Damoh

6. Superintendent of Police,
District Damoh

7. ~~Chief~~ Chief, Forest
Conservator-in-~~charge~~ Department, Madhya Pradesh,
Bhopal

8. Secretary, Department of Mines &
Mineral, Madhya Pradesh,
Vallabh Bhawan, Bhopal

9. Shri Digambar Jain Atishay
Chhetra Kundalpur Public
Trust, Kundalpur through its
Secretary

10. Santosh Kumar Jain, President,
Shri Digambar Jain Atishay
Chhetra Kundalpur Public
Trust, Kundalpur

11. Satya Pal Shravan, Secretary
Shri Digambar Jain Atishay
Chhetra Kundalpur Public
Trust, Kundalpur



Filed on 16/11/06

V Shri *K. N. Nigam*
Advocate

R. to A.R.

WRIT PETITION UNDER ARTICLES 226 AND 227 OF THE
CONSTITUTION OF INDIA FOR ISSUANCE OF AN
APPROPRIATE WRIT, DIRECTION OR ORDER

DETAILS OF PETITION

1. Particulars of the petitioner:
As above in the cause title.
2. Particulars of the respondents:
As above in the cause title.
3. Particulars of the order against which the petition is made:
In the instant petition the petitioner is seeking protection from this Hon'ble Court for preserving the ancient monuments. The petitioner is also seeking the direction to command the respondents-authorities to act as per the statutory provisions and exercise the powers conferred on them being the executives and police authorities of the area and act within the legal frame work to protect the ancient monuments and remove the encroachments, illegal constructions raised within the protected and prohibited area of Kundalpur. The petitioner is also seeking quashment of the order No.F-6-164/7/Nazul/90 dated 5.4.99 issued by the Secretary, Department of Revenue in the name and order of Governor of M.P. whereby a decision has been taken to handover 158.65 acres land, Patwari Halka No.81, village Kundalpur, Settlement No.337, area 34.35 acres of village Fatehpur, Settlement No.346 and 6.54 acres of village Teergarh Settlement No.171, total area being 199.45 acres of land of above villages of the district of Damoh, M.P. to the Shri Digambar Jain Atishay Chhetra Kundalpur Public Trust, Kundalpur (hereinafter referred to as 'the Trust'). It is further mentioned in the said order that the aforesaid Trust will maintain the land in the adjoining area of the monuments with certain conditions. This is nothing but virtually a



A/R
17.9.12

**HIGH COURT OF MADHYA PRADESH PRINCIPAL
SEAT AT JABALPUR**

Writ Petition No.1220/2006

Archaeological Survey of India Petitioner
v.
State of M.P. and others..... Respondents

For the petitioner: Shri Rajendra Tiwari, Senior
Advocate with Shri K.N.Pethia
and Shri Satish Dawra, Advocates

For the respondents : Shri R.D.Jain, Advocate General
with Shri Swapnil Ganguly, Panel
Lawyer

For the respondents : Shri Gopal Subramaniam and
Shri Ravish Agrawal, Senior
Advocates with Shri Hemant
Shrivastava, Shri Anubhav Kumar
and Shri D.K.Mishra, Advocates

For the intervener: Shri P.C.Jain, Advocate

Writ Petition No.4159/2006

Mohd.Ajam Khan..... Petitioner
v.
Archaeological Survey of India..... Respondents
and others

For the petitioner: Shri Rajendra Mishra, Advocate

For the respondents: Shri Rajendra Tiwari, Senior
Advocate with Shri K.N.Pethia
and Shri Satish Dawra, Advocates

For the respondents : Shri R.D.Jain, Advocate General
with Shri Swapnil Ganguly, Panel
Lawyer

For the respondents : Shri Gopal Subramaniam and
Shri Ravish Agrawal, Senior
Advocates with Shri Hemant
Shrivastava, Shri Anubhav Kumar
and Shri D.K.Mishra, Advocates



Present: Hon'ble The Acting Chief Justice Mr.Sushil Harkauli
Hon'ble Mr.Justice Alok Aradhe

ORDER

(17.09.2012)

As per Alok Arade, J :

In both the writ petitions common questions of law and fact arise for consideration, therefore, the same were heard together and are being decided by this common order. For the sake of convenience, we shall refer to the facts from W.P. No.1220/2006 which has been filed by the Archaeological Survey of India.

2. As per the facts set forth in the petition, the Jain temples which were constructed sometime in 6th-7th Century A.D. are scattered over an area of 199.45 acres in villages Kundalpur, Fatepur and Teergarh in Tahsil Hata, District Damoh. Some temples are situate on the hills at village Kundalpur, including the temple of 'Bade Baba'. The Jain temples which are situate at village Kundalpur, on the hills were declared as protected monuments by the Chief Commissioner, Central Provinces under Section 3(1) of the Ancient Monuments Preservation Act, 1904 (hereinafter referred to as 'the 1904 Act') by notification dated 16.7.1913. Thereafter, in exercise of powers under Section 3(3) of the aforesaid Act, the Chief Commissioner by notification dated 30.11.1914 confirmed the notification dated 16.7.1913 in so far as it relates to the protection of Jain temples on the hills at Kundalpur. In this case the dispute is confined only to 'Bade Baba' temple.

3. According to the petitioners, since the temple in question is a protected ancient monument, therefore, no construction or mining activity can be carried out in view of notification dated 16.6.1992 issued under Rule 32 of the Ancient Monuments and

Archaeological Sites and Remains Rules, 1959. But the State Government under political pressure has by an order dated 5.4.1999 handed over the management of protected area of the temple to the Trust called Digambar Jain Atishay Keshtra Kundalpur Public Trust, subject to terms and conditions enumerated therein.

It is further pleaded in the writ petition that Assistant Superintending Archaeologist inspected the temples in question situate at Kundalpur on 25.4.1999 and found that members of the committee of the Trust have destroyed and damaged the monument by altering the same and by making new construction within the prohibited and protected area. It was further found that the temple namely 'Bade Baba Ka Mandir' has suffered tremendous damage and more than 80% of the temple has been destroyed. The inspection report has been placed on record as Annexure P/7. The caretaker of the monument thereafter lodged a first information report under Section 30 of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (hereinafter referred to as 'the 1958 Act'). It is the case of the petitioners that local administration and police authorities have failed to discharge their duties in not preventing the members of the Trust from damaging the temple in question. Thereafter, again on 16.12.2005, the Superintending Archaeologist prepared a detailed inspection report in respect of site in question. On 2.12.2005, the Superintending Archaeologist sent a letter to the Collector and the Superintendent of Police requesting them to protect the ancient monument, but no action was taken by the local authorities and on 15.1.2006 when the Collector, Superintendent of Police and officers of Archaeological Survey of India as well as the petitioner in W.P. No.4159/06 visited the site in question, they faced protest from the members of the Trust as well as the public in general and their vehicles were stoned and the petitioner in W.P. No.4159/06 was manhandled. In



the aforesaid factual background, the petitioners have approached this Court inter-alia seeking a direction to restrain the respondents No.9 to 11 from raising any illegal construction, making any alteration and from damaging the temple in question. The petitioners have also prayed for a direction to remove the construction which has been illegally raised by respondents No.9 to 11. The petitioners have also prayed for quashing of order dated 5.4.1999 passed by the State Government.

5. Learned senior counsel for the petitioners submitted that by notifications dated 16.7.1913 and 20.11.1914, the Jain temples situate on the hills of village Kundalpur were declared protected monuments under the provisions of the 1904 Act. It is further submitted that since the monument in question was without any owner therefore, the Commissioner under Section 3(6) of the 1904 Act was under an obligation to assume the guardianship of the monument and the expression "may" as used in Section 3(6) of the 1904 Act has to be read as "shall" otherwise, the very purpose of the Act would be frustrated. It was further submitted that under the Ancient Monument and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act 1951 (hereinafter referred to as the '1951 Act') as well as the 1958 Act, the temple was declared to be of national importance and therefore, no construction or renovation work in respect of temple in question could have been carried out without the permission of the Archaeological Survey of India, as the same constitutes violation of Section 19 of the 1958 Act.

6. Learned senior counsel for the petitioners while inviting the attention of this Court to letter dated 5.1.2006 (Annexure P/12) sent by the respondent-Trust submitted that the same contains an admission to the effect that the monument in question is under the guardianship of the Archaeological

Survey of India and, therefore, the permission was sought from the Archaeological Survey of India for shifting the idol of 'Bade Baba' by the respondent-Trust. It was further submitted that even if the respondent - Trust submits an application for re-construction of the monument, the same cannot be granted as the respondent-Trust can only be allowed to preserve and conserve the monument in question. Learned senior counsel for the petitioners has also referred to the Conservation Manual by John Marshall.

It is also pointed out while referring to letter dated 7.7.2012 filed along with I.A. No.8808/12 that the construction is being raised on reserved forest, which is legally impermissible. It is further submitted that on one hand the State Government is asserting the ownership of the monument in question and on the other hand, the Trust is claiming the ownership of the monument in question. It is also urged that the expression "Central Government" includes local Government. In support of his submissions, learned senior counsel has placed reliance on the decisions of **Rajeev Mankotia Vs. Secretary to the President of India and others**, A.I.R. 1997 SC 2766 and **Satya Dev Busheri Vs. Padam Dev and others**, AIR 1955 SC 5.

7. On the other hand, learned senior counsel for respondents No. 9 to 11 submitted that after the enactment of the Government of India Act, 1935, there has been no declaration in respect of the monument in question by the Central Government that it is the monument of national importance. In the absence of any declaration under the 1951 as well as the 1958 Acts, the aforesaid Acts do not apply to the temple in question. Thereafter, the State Government in exercise of power under Entry 12 of the List-II, enacted the Madhya Pradesh Ancient Monuments and Archaeological Sites and Remains Act, 1964, (hereinafter referred to as 'the 1964 Act') and the monument in question is governed by the provisions of



the 1964 Act. It is further urged that the attempts are being made by respondents No. 9 to 11 to preserve the deity of 'Bade Baba' and no commercial activity of any sort shall be undertaken, and that respondent-Trust has declined to accept the land, the management of which was offered to the Trust vide order dated 5.4.1999 passed by the State Government. It is argued that the respondent-Trust is the owner of the monument in question and has been maintaining the temple in question for past several years and since the temple was in dilapidated condition, the same was rebuilt in 1940, 1976 as well as in 1992. The factum of reconstruction of the 'Bade Baba' temple in 1940, 1976 and 1992 has not been controverted by the petitioners by filing the rejoinder.

8. Learned Senior counsel for the respondent No. 9 to 11 fairly submitted that monument in question is a protected monument under the 1904 Act and is governed by the provisions of 1964 Act, and if any permission is required under the law for carrying out the construction work for preservation of the deity namely 'Bade Baba', the Trust would submit an application for obtaining the permission to the State Government to raise construction before undertaking any further construction work.

9. Learned Advocate General for the State submitted that the State Government is the owner of the monument in question, however, the same is being looked after by the respondent-Trust. It is further submitted that the petitioner Archaeological Survey of India is not in possession of the monument in question and infact had sought possession of the monument from the State Government. It is also submitted that pursuant to the first information report which was lodged on behalf of Archaeological Survey of India, a criminal case was registered which was filed in the Court namely Criminal Case No.36/2000. However, for

want of evidence, no further action was taken and the final report was submitted on 26.9.2000. In support of his submissions, learned Advocate General has placed reliance on decisions of the Supreme Court in the cases of *Joseph Pothan Vs. The State of Kerala*, A.I.R. 1965 SC 1514 and *Karnataka Board of Wakf Vs. Government of India and others*, (2004) 10 SCC

749.

We have considered the respective

10. submissions made by learned counsel for the parties. Admittedly, under the provisions of the 1904 Act, the notifications dated 16.7.1913 and 20.11.1914 were issued by the Chief Commissioner in respect of temple in question. While issuing these notifications, the Chief Commissioner was acting as the 'Local Government' as the term was then understood. The Government of India Act, 1919 was enacted to make further provisions with respect to Government of India. The Preamble to the Act provides that concurrently with the gradual development of self-governing institutions in the provinces of India it is expedient to give to those Provinces in provincial matters the largest measure of independence of the Government of India which is compatible with the due discharge by the latter of its own responsibilities. Thereafter, the Government of India Act, 1935 brought about the concept of federal government with distribution of powers in the real sense for the first time. In the 1935 Act, the subject "ancient historical monuments and archaeological sites and remains" was put in the Federal List. By the Government of India (Adaption of Indian Laws) Order 1937, the provisions of 1904 Act were adopted and it was provided that the expression "local Government" shall be read as "Central Government".

11. After commencement of the Constitution of India, the Parliament enacted the Ancient and



Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951 to declare certain ancient and historical monuments and remains in part A States and Part B States to be of 'national importance' and to provide for certain matters connected therewith. Section 2 of the 1951 Act inter alia states that all ancient and historical monuments and all archaeological sites and remains declared by this Act to be of 'national importance' shall be deemed to be protected monuments and protected areas respectively within the meaning of the 1904 Act. But a crucial aspect is noteworthy here that **all** protected monuments under the 1904 Act did not automatically become of 'national importance'. Part I of the Schedule of the 1951 Act states that all ancient and historical monuments which before the 1st day of April, 1956 have either been declared by the Central Government to be protected monuments within the meaning of the 1904 Act or possession of which has been taken by the Central Government as protected monuments shall be monuments of national importance. Section 2 (j) of the 1958 Act defines 'protected monument' to mean an ancient monument which is declared to be of national importance by or under the 1958 Act.

12. In order to attract the applicability of 1958 Act, declaration in respect of a monument has to be made by the Central Government under Section 4 of the 1958 Act. Section 4 of the 1958 Act provides that 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 monument to be of national importance. The Central Government neither under the provisions of the 1951 Act nor under the provisions of the 1958 Act has

issued any notification in respect of the temple in question.

13. It is noteworthy to mention here that the 1951 Act as well as the 1958 Act are post-Constitution Acts. In both the Acts, the Parliament has used the expression "Central Government". The Parliament is deemed to be aware about the concept and meaning of the term 'Central Government' under the Constitution. Therefore, the contention made by learned senior counsel for the petitioner that the expression "Central Government" should be read so as to include "local Government" cannot be accepted.

14. It is also pertinent to mention here that after issuance of the notification dated 16.7.1913 and 20.11.1914, there is no evidence to show that the Commissioner/Collector ever assumed the guardianship of the temple in question. On the other hand, from perusal of the entries made in the register of Archaeological Survey of India it is apparent that it contains the remark that the temple in question is very well looked after and is preserved by the Jain community and, therefore, there is no need to enter into any agreement with the owners. The Archaeological Survey of India instead of assuming the guardianship of the monuments in question has acknowledged the fact that the temple in question is being managed by the Trust which has preserved the monument and, therefore, there is no need to enter into an agreement with the Trust. In the absence of any automatic provision of vesting of the monument in question in the Central Government and in the absence of any action taken by the Commissioner for assuming the guardianship of the temple in question, by mere issuance of the notifications under Section 3 of the 1904 Act, it cannot be said that any legal right in respect of the monument in question is created in favour of the Archaeological Survey of India.





15. Section 39(2) of the 1958 Act provides that the 1904 Act 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 in respect of things done or omitted to be done before the commencement of the Act. Similarly, Section 38 of the 1904 Act enacted by the State Legislature provides that The Ancient Monuments Preservation Act, 1904 (VIII of 1904), in its application to the State of Madhya Pradesh shall cease to have effect in relation to ancient and historical monuments, archaeological sites and remains and all other matters pertaining thereto, to which this Act applies, except as respects things done or omitted to be done before the commencement of this Act. Therefore, the notifications issued under the 1904 Act are valid and are in existence. The monument in question has not been declared to be of national importance and since the same is an ancient monument, therefore, it would be governed by the provisions of 1964 Act.

16. The contention made on behalf of the petitioners that since the monument in question was without owner therefore, the same would vest in the Central Government, cannot be accepted as there is no provision which permits automatic vesting of the monument in question in the Central Government. Article 296 of the Constitution of India provides that subject as hereinafter provided any property in the territory of India which, if this Constitution had not come into operation, would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as *bona vacantia* for want of a rightful owner, shall, if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union. Therefore, in view of Article 296 of the Constitution of India, in case of

absence of the owner in respect of the monument in question, the property would vest in the State Government. The State Government as well as the respondent-Trust has asserted its ownership in respect of the temples in question with reference to the documents available on record.

17. However, we refrain ourselves from expressing our opinion with regard to issue of ownership of the temples in question as it is well settled in law that the question of title cannot be adjudicated in a summary proceeding under Article 226 of the Constitution of India. *See: Srinivas Vs. Government of Andhra Pradesh and others*, A.I.R. 2005 SC 4455. In view of submission made by learned senior counsel for respondent-Trust that Trust has declined to accept the management of land offered to it vide order dated 5.4.1999, there is no need to advert to the issue of validity of order dated 5.4.1999.

18. Now we may deal with the contention of the learned senior counsel for the petitioner that the construction of the temple is being raised on the land which has been notified as reserved forest. In this connection, learned senior counsel has invited the attention of this Court to letter dated 30.1.2012 sent by the Additional Chief Conservator of Forest to the Superintendent of the Archaeological Department. From perusal of the aforesaid letter, it is apparent that initially, land admeasuring 221.87 acres was proposed to be notified under Section 4 of the Indian Forest Act, 1927 as reserved forest. Ultimately, by notification dated 4.3.1974 issued under Section 20 of the Indian Forest Act, only 63.25 acres of land was notified as reserved forest. The remaining land i.e. 158.62 acres of land was not declared as reserved forest. Therefore, the contention that the construction is being made on the reserved forest land cannot be accepted.



19. It has also been argued from petitioners' side that the respondent-Trust can only be allowed to undertake the work of preservation and conservation of the monument in question and not of its reconstruction. In para 20.3 of the return, which has been filed on behalf of the respondent-Trust in W.P. No.12220/06, it has been stated that in the year 1940, the dome of 'Bade Baba' temple had collapsed and the predecessor of the Trust built another dome in order to protect the idol of 'Bade Baba' and the pilgrims. It has further been submitted that in the year 1976 again the dome of the 'Bade Baba' had fallen and the Trust built a new dome. It has further been asserted that temple of 'Bade Baba' did not have any foundation and resultantly the walls were likely to fall at any time, therefore, the respondent-Trust carried out the repairs in order to prevent any damage to the idol of 'Bade Baba'. It has also been stated that in the year 1992, substantial repairs in the said dome were carried out. The photographs have also been annexed as Annexure R/15. It is also stated that 'Vadi' of the temple was removed as the same had collapsed and the Trust from time to time installed various supporting pillars, jacks etc. to support the dome and the walls, roof etc. from collapsing. The photographs of the repair work undertaken by the respondent-Trust have been annexed as Annexure R/17. The fact that material alteration was carried out in the temple where the idol of 'Bade Baba' was installed is also substantiated from the report submitted by the Assistant Superintending Archaeologist vide Annexure P/7. It is also pertinent to mention here that the averments made in the return which have been referred to supra, have not been rebutted on behalf of the petitioners by filing the rejoinder. It is well settled in law that if an averment of fact is not denied, the same shall be taken to be admitted. **See: Naseem Bano (Smt.) Vs. State of U.P. and others**, 1993 Supp.(4) SCC 46. Therefore, in

the facts of the case, it is apparent that the ancient temple in which the idol of Bade Baba is installed is no longer in existence.

20. Infact, the idol of 'Bade Baba' which is an ancient monument alone survives. It is a common ground of the petitioner Archaeological Survey of India as well as the respondent-Trust that the idol of 'Bade Baba' should be preserved and protected. Since the original temple which was declared to be an ancient monument by virtue of notification issued under Section 3 of 1904 Act does not survive, therefore, the question whether respondent-Trust can only be permitted to preserve and conserve the monument in question does not arise in the facts of the case.

21. We have already held that the monument in question namely the idol of 'Bade Baba' is governed by the provisions of 1964 Act. Section 19 of the Act provides that no person including the owner or occupier of the State Protected Area shall construct any building within the State Protected Area or carry out any mining or quarrying, excavating, blasting or any other operations of the like nature in such area or utilize such area or any part thereof in any other manner without permission of the State Government, therefore, in our considered opinion, the respondent-Trust cannot be permitted to proceed with the construction without obtaining the permission of the State Government. The contention made by learned counsel for the petitioners that even if the respondent-Trust makes an application for permission to raise construction, the same cannot be granted as it can only be permitted to preserve and conserve the monument in question, cannot be accepted as the original temple is not in existence. Now, the idol of 'Bade Baba' which is an ancient monument alone survives and, therefore, the same is required to be protected and preserved. However, the construction



work cannot be done without obtaining permission from the State Government. We, therefore, direct that in case the respondent-Trust submits an application for grant of permission to raise construction of the temple to preserve and protect the idol in question namely 'Bade Baba', the State Government shall consider the application in accordance with law within a period of two months from the date of submission of such an application. We have fixed the time limit for deciding the application which may be submitted by the Trust as it is necessary to protect and preserve the idol of 'Bade Baba' from the vagaries of nature. In case the State Government refuses to grant permission to raise the construction of the temple, the respondent-Trust shall restore the construction to its position which existed on the date of passing of the interim order dated 20.5.2006 by this Court.

Accordingly, the writ petitions are disposed of.

(Sushil Harkauli)
Acting Chief Justice

(Alok Aradhhe)
Judge



