

*Before K.Kannan, J.*

**KHOKRA KOT RESIDENTS SEWA SAMITI,—Petitioner**

*versus*

**STATE OF HARYANA AND OTHERS,—Respondents**

**CWP No.15930 of 2009**

12th December, 2011

*Constitution of India, 1950 - Art.21 - Ancient Monuments and Archaeological Sites and Remains Act, 1958 - S.2(i), 19 - Ancient Monuments Preservation Act, 1904 - S.2(1), 3(i), 20(1), 20(2), 20-C - State Reorganization Act - S.126 - Notice issued by Archaeological Survey of India to petitioners to remove the construction put on property u/s 19 of the Act challenged - Khokra Kot was declared as 'protected area' under the Act - Disposed of by issuing directions to State to draw up a plan of action and compensate landowners.*

*Held*, that the removal of construction made in contravention which is permissible through the impugned notices grapples with certain serious human problems and will have to be handled with enormous sensitivity. The places reserved for specific purposes are not always used as such. Pavements are meant for walking but get to be occupied by pavement dwellers. They could still not be thrown out on a day. Recognizing the sweep of the right to life under Article 21, the Hon'ble Supreme Court gave them a sense of dignity by requiring the State to make alternative allotment before they were thrown out in *Olga Tellis Versus Bombay Municipal Administration*-(1985) 3 SCC 545. Streets which are meant for pedestrians and vehicles have vendors occupying large places. We have still have a declared national policy to protect street vendors having their wares in mobile units. (See: National policy dated 20.01.2004 by Ministry of Urban Employment & Poverty Alleviation released through D.O. Letter No.N11028/2/2002, UP/III, dated 11.02.2004). It is not uncommon that even unauthorized constructions without conforming to municipal laws and town planning regulations obtain reprieves from demolitions by regularization laws and notifications, thanks to powerful lobbying by colonizers and builders. Govt.

of India had issued guidelines for regularization of unauthorized colonies on 05.10.2007 and the public information on this was given in advertisement published in leading newspapers on 14.10.2007.

(Para 15)

Pawan K. Mutneja, Advocate, *for the petitioner*.

Kirti Singh, DAG, Haryana.

S.S.Sandhu, Advocate, for respondent No.2.

**K. KANNAN, J.**

**I. Khokra Kot - a declared “protected area”**

(1) The writ petition is at the instance of a Society formed by the residents of Khokra Kot challenging the notices issued by the Archaeological Survey of India, arrayed as the 2nd respondent, calling upon the addressees to remove the constructions put up on the property under Section 19 of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (hereinafter called, ‘the 1958 Act’). It is an admitted case that the site of “ancient city” at Khokra Kot, Rohtak district has been declared as protected monument under Section 3(i) of the Ancient Monuments Preservation Act, 1904 (hereinafter called, ‘the 1904 Act’). This notification has been confirmed in the Punjab Gazette dated 17.12.1904, by a notification issued in exercise of powers of the Central Government under Section 20(1) of the 1904 Act. The following area was declared as “protected area”:-

“The site known as Khokhra kot in Rohtak District in the Punjab comprising the Khasra Nos. set out in the annexed schedule.

SCHEDULE

Khasra No.4430 measuring 8 bighas and 10 biswas  
Khasra No.4443 measuring 0 bigha and 3 biswas  
Khasra No.4454 measuring 0 bigha and 17 biswas  
Khasra No.4484 measuring 0 bigha and 19 biswas  
Khasra No.6775 measuring 24 bighas and 1 biswas  
Khasra No.6776 measuring 1 bigha and 17 biswas  
Khasra No.6781 measuring 38 bighas and 17 biswas  
Khasra No.6782 measuring 10 bighas and 19 biswas  
Khasra No.6783 measuring 11 bighas and 16 biswas

Khasra No.6787 measuring 17 bighas and 5 biswas  
Khasra No.6788 measuring 5 bighas and 13 biswas  
Khasra No.6789 measuring 13 bighas and 5 biswas  
Khasra No.6791 measuring 7 bighas and 4 biswas  
Khasra No.6792 measuring 30 bighas and 10 biswas  
Khasra No.6793 measuring 0 bigha and 8 biswas  
Khasra No.6794 measuring 2 bighas and 16 biswas  
Khasra No.6798 measuring 0 bighas and 16 biswas  
Khasra No.6799 measuring 53 bighas and 9 biswas  
Khasra No.6800 measuring 1 bigha and 11 biswas  
Khasra No.6801 measuring 31 bighas and 9 biswas  
Khasra No.6802 measuring 4 bighas and 18 biswas  
Khasra No.6803 measuring 3 bighas and 1 biswas  
Khasra No.6804 measuring 30 bighas and 7 biswas  
Khasra No.6846 measuring 21 bighas and 15 biswas  
Khasra No.6847 measuring 1 bigha and 6 biswas  
Khasra No.6859 measuring 36 bighas and 4 biswas

Total 360 bighas and 4 biswas or 225 acres.

## **II. Petitioner's contention: Effect of declaration on ownership rights**

(2) The contention is that the property which is declared as a 'protected area' under the 1904 Act allows for user of the property without impairing the ownership rights and if it is however proposed to carry out excavations, the Government could do so by acquiring the property and paying compensation under the Land Acquisition Act. The power of acquisition is secured through Section 20-C of the 1904 Act. The petitioner's grievance is that the present notices which are issued directing the removal of constructions under Section 19 of the 1958 Act is untenable, since none of the members of the petitioner-Society could be directed to be evicted or required to be removed without the Government deciding to acquire the property in the manner contemplated under Section 20-C of the 1904 Act.

## **III. State's defence & compulsion to act for removal of construction**

(3) The State has filed its objections stating that the members of the petitioner-Society, namely, the local residents knew all along that the property which is the subject of impugned notices had been declared as

a 'protected area' and constructions of the petitioner are unauthorized. The exercise for removal of these unauthorized constructions has been undertaken by the Government even earlier but they were thwarted by the resistance of the villagers. The State was sensitive to the directions given by the this Court in *Munshi Ram Versus State of Punjab and others in CWP No.17704 of 1997, decided on October 4, 2008*, where this Court has given various directions for the purpose of carrying out the provisions of 1958 Act effectively and the Court directions include, allowing for even any public spirited person to approach the Court within one month from the date of the judgment of this Court, if the encroachments of the ancient monuments had not been carried out. The State action was prompted by the High Court directives and the petitioners shall not be allowed to continue in possession of the property.

(4) The Union has filed its reply contending that the power which is recognized under the 1904 Act has stood whittled down by the 1958 Act and all the petitioners have secured unlawful concession from the local authorities to put up constructions, in spite of the notification as a protected area where no construction could have been put up. The respondent has denied that the members of the petitioner-Society has any larger right under the 1904 Act to retain possession of their constructions in spite of the place being declared as a "protected area".

#### **IV. Archaeological importance of Khokra Kot**

(5) The archaeological site at Khokra Kot has revealed pottery from Pre-Harappan and early historical times just after 1500 BC. Coin moulds from the early first century AD have thrown valuable light on the processes of minting coins. (source: Footprint India by Roma Bradnock.)

(6) The peasant-pastoral PGW culture of the Mauryan Period was distinguished by the use of iron, horse and cattle and a thin grey coloured and painted pottery. It spread from Sutlej to the Ganges and particularly along the Saraswati valley in northern plains. Its discovery from Hastinapur, Panipat, Pehowa, Kurukshetra, Mathura. Indraprastha or Delhi excited the imagination of the traditional archaeologists to associate the culture with the Mahabharat heroes. However, the geographical distribution, chronology

and the cultural milieu of the PGW culture can be well compared with the culture of the Vedic (later phase) literature or Aryans. The discovery of the Painted Grey Ware (PGW) culture from the lowest levels of Khokrakot at Rohtak attests the intrusion of the Vedic people at Rohtak in the later Vedic period. (source: Wikipedia).

(7) Khokra Kot near Rohtak was associated with the tribal republic of the Yaudheyas of the early Christian Period and holds a series of mounds which yielded several Indo-Greek coins when excavated by Birbal Saini in 1938. (source: The archeology of early historic South Asia: The emergence of cities and states by Frank Raymond Allchin and George Erdosy).

(8) According to literary tradition Rohidya was blessed with several visits of Lord Mahavira and that a shrine of Dharana Yaksha existed in the Pudhavivadimasaya garden situated in the town. Many Jain sculptural pieces of this period have been recovered from various places-Pinjore, Sirsa, Khokrakot, Asthal Bohar, Sat Kumbha and Mohanbari of Rohtak district. (Source: Haryana State Gazetteer- Volume 1).

**V. Act of 1904 and Act of 1958-Effect of repeal provision and the respective areas of operations**

(9) The relevant provisions of the 1904 Act and 1958 Act would require to be only examined in brief to ascertain whether they contain any inconsistent provisions. The extent of application of 1904 Act ought to be first seen through the following provision:-

“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 Reorganization 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.”

It can be noticed that while the 1958 Act specifically repealed the 1951 Act and Section 126 of the State Reorganization Act, as regards the 1904 Act, it preserves the continuance of acts done or omitted to be done under the 1904 Act before the commencement of 1958 Act. The 1904 Act had been passed with the avowed object of preservation of ancient monuments and objects of archaeological, historical or artistic interest. The 1958 Act has similar objects but the Statement of Objects and Reasons (SOR) for the passing of the 1958 Act makes it clear that under the Constitution the subject of 'ancient and historical monuments' figures in Union List as Entry 67, in the State List as Entry 12 and in the Concurrent List as Entry 40. In a way that one does not overlap with the other, the 1958 Act purports to distribute the powers of what was centrally located with the Central Government under the 1904 Act. The SOR declares that the 1958 Act is modelled on the Act of 1904, but however, contains a few new provisions which are intended to overcome certain difficulties which had been experienced in the working of the Act of 1904. It specifically records the difficulty experienced under the 1904 Act on issues of refusal of owners to enter into agreement with Central Government for the maintenance of monuments. The power was expressly being given to regulate excavation in archaeological sites which are declared to be of national importance and provision was also being made for compulsory purchase of antiquities and other objects of historical and archaeological importance on payment of compensation. These are not meant to be exhaustive but illustrative of what the 1958 Act was intended to do, namely, to empower the Central Government to take appropriate action for preservation of archaeological monuments and sites.

#### **VI. 'Ancient Monument' & 'Protected area'-meanings**

(10) Both under 1904 and 1958 Acts, the distinction is maintained between 'ancient monument' and 'protected area'. 'Ancient monument' is defined under Section 2(1) of the 1904 Act, but 'protected area', however, is not so defined. The definition of "ancient monument" under Section 2(1) of the 1904 Act is reproduced:-

"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 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.”

(11) It will be noticed that the reference to site of the ancient monument occurring in Section 2(1)(a) above must be understood as including such site on which the ancient monument resides and it cannot be the same as a protected area. The reference to protected area comes under a separate heading of “Archaeological Excavation”. The Central Government has been specifically empowered to make a notification of such protected area. Section 20 (2) is relevant, for, it recognizes the right of ownership in relation to a protected area till it is transferred. The said Section 20(2) is reproduced:-

“(2) From the date of such notification al antiquities buried in the protected area shall be the property of the Government and shall be deemed to be in the possession of the Government, and shall remain the property and in the possession of the Government until ownership thereof is transferred; but in all other respects the rights of any owner or occupier of land in such area shall not be affected.”

Section 20C allows for a power to acquire a protected area. The said Section is also reproduced:

“20C. Power to acquire a protected area.-If the Central Government is of opinion that a protected area contains an ancient monument or antiquities of national interest and value, it may direct the State Government to acquire such area, or any part thereof, and the State Government may thereupon acquire such area or part under the Land Acquisition Act, 1894 (1 of 1894), as for a public purpose.”

This means that an owner who may exercise his right of ownership on the land which is a protected area will hold the property at the peril of the Government’s eminent domain to acquire the property in the manner contemplated in the above Section.

(12) The 1958 Act defines “ancient monument” more or less on same terms but it also defines a protected area which is not defined in the 1904 Act. The definition of “ancient monument” under Section 2(a) is reproduced:

“ancient monument” means any structure, erection or monument, or any tumulus or place of internment, 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 one hundred years, and includes-

- (a) the remains of an ancient monument,
- (b) the site of an ancient monument,
- (c) such portion of land adjoining the site of an ancient monument as may required for fencing or covering in or otherwise preserving such monument; and
- (d) the means of access to, and convenient inspection of an ancient monument.”

The definition of “protected area: under Section 2(i) of the 1958 Act is reproduced:-

“protected area” means any archaeological site and remains which is declared to be of national importance by or under this Act.”

It will be noticed that archaeological sites and remains are seen as distinct from an ancient monument which it might have within the said area. This is seen from the definition of “archaeological site and remains”, which is defined as under:-

“archaeological site and remains” means any area which contains or is reasonably believed to contain ruins or relics of historical or archaeological importance which have been in existence for not less than one hundred years, and includes-

- (i) such portion of land adjoining the area as may be required for fencing or covering in or otherwise preserving it, and
- (ii) the means of access to, and convenient inspection of the area.”



**VII. Manner of user of 'protected area'-1958 Act contains additional restriction**

(13) The protected area which was allowed under the 1904 Act to be used by the owner gets slightly different treatment under the 1958 Act. It comes under a separate caption 'protected area' and the relevant provisions that come under this caption are Sections 19 and 20. Section 19 imposes a restriction, while Section 20 is somewhat a replication of Section 20C of the 1904 Act. Section 19 reads as follows :-

“19. Restrictions on enjoyment of property rights in protected areas.-  
(1) No person, including the owner or occupier of a protected area, shall construct any building, within the protected area or carry on any mining, quarrying, excavating, blasting or any operation of a like nature in such area, or utilize such area or any part thereof in any other manner without the permission of the Central Government. (emphasis supplied)

Provided that nothing in this sub-section shall be deemed to prohibit the use of any such area or part thereof for purposes of cultivation if such cultivation does not involve the digging of not more than one foot of soil from the surface.

(2) The Central Government may, by order, direct that any building constructed by any person within a protected area in contravention of the provisions of sub-section (1) shall be removed within a specified period and, if the person refuses or fails to comply with the order the Collector may cause the building to be removed and the person shall be liable to pay the cost of such removal.” (emphasis supplied)

Section 20 is also reproduced:-

“20. Power to acquire a protected area.-If the Central Government is of opinion that any protected area contains an ancient monument or antiquities of national interest and value, it may acquire such area under the provisions of the Land Acquisition Act, 1894 (1 of 1894), as if the acquisition were for a public purpose within the meaning of that Act.”

Section 19 of the 1958 Act again cast some additional restriction which Section 20 of the 1904 Act did not have. The restriction under Section 19, it can be observed included a bar from putting up any construction in a protected area except with the permission of the Central Government. The only activity in a protected area without such permission could be cultivation for an agricultural purpose that does not involve the digging of not more than one foot of soil from the surface. The right which the owners of the protected area in the places notified under the 1904 Act in the year 1938 came to suffer a further restriction through the 1958 Act. The 1958 Act is clear in its exposition that there can be no construction without the permission of Central Government.

#### **VIII. Impugned notices under 1958 Act conform to law**

(14) Section 20 of the 1904 Act gets supplanted by Section 19 of the 1958 Act. By virtue of Section 39, the only thing which is protected is the notification issued under the 1904 Act, declaring this property as protected area. If there has been already construction made under the protected area, there is no question of those constructions being removed. On the other hand, if any construction had been made subsequent to the coming into force of the 1958 Act, such construction could not have been done without the express permission of the Central Government. If such constructions are made, it shall be possible for the Government to invoke its police power under Section 19(2) to have such constructions made in contravention of Section 19(1) removed within a specified period. That is precisely the act which is sought to be done and it is challenged in the writ petition. I have not the materials before me to see whether all the members of the Society have had their constructions before 1958 itself. Notices will have to be therefore made to each one of the occupants through personally or general publication in the locality and such of those constructions which have come about subsequent to the 1958 could be taken as constructions made in contravention of Section 19(1) that would be susceptible under Section 19(2). It is stated by the petitioner that the schools have been established; houses have been constructed; electrical installations are made; and water connections have been given.

#### **IX. The way forward-disposition, one of temporary suspension of impugned notices**

(15) The removal of construction made in contravention which is permissible through the impugned notices grapples with certain serious

human problems and will have to be handled with enormous sensitivity. The places reserved for specific purposes are not always used as such. Pavements are meant for walking but get to be occupied by pavement dwellers. They could still not be thrown out on a day. Recognizing the sweep of the right to life under Article 21, the Hon'ble Supreme Court gave them a sense of dignity by requiring the State to make alternative allotment before they were thrown out in **Olga Tellis versus Bombay Municipal Administration (1)**. Streets which are meant for pedestrians and vehicles have vendors occupying large places. We have still have a declared national policy to protect street vendors having their wares in mobile units. (See: National policy dated 20.01.2004 by Ministry of Urban Employment & Poverty Alleviation released through D.O. Letter No.N11028/2/2002, UPAIII, dated 11.02.2004). It is not uncommon that even unauthorized constructions without conforming to municipal laws and town planning regulations obtain reprieves from demolitions by regularization laws and notifications, thanks to powerful lobbying by colonizers and builders. Govt. of India had issued guidelines for regularization of unauthorized colonies on 05.10.2007 and the public information on this was given in advertisement published in leading newspapers on 14.10.2007.

(16) In this case, the action of the 2nd respondent in directing the removal comes after the State's own lapse in not protecting its property after declaring it to be a protected area. They cannot be thrown out overnight. The State shall have a policy and a clean blueprint of what it wants to do after removal. It cannot be that the State wants to remove the constructions overnight and keep the place vacant without any further action. Places notified as ancient monuments in the year 1909 and declared as 'protected areas' in the year 1938 has not seen much of archaeological activity. Without a definite blueprint for its activity and a time frame for what it proposes to do, the State shall not remove the constructions. The members of the petitioner will be protected till such time as the Union and the State Government have drawn up a plan of action and publish the same for public consumption before they insist on removal of constructions that have already been made. This is only to take note of the human problem of what could have been avoided if the State had applied a vigil and protected the property

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(1) 1985 (3) SCC 545

which it notified as a protected area. It was allowed to be unprotected by its own lapse and now if they want to exercise the vigil, the vigil shall be in not allowing for any fresh construction. All future activities of construction by private individuals and owners within this protected area shall cease. The local authorities shall not give any sanction for putting up any construction in the places notified and which are reproduced above in this order. No Civil Court/Authority shall grant any interim order in any proceeding with reference to notified area and if done, the State is entitled to bring this order to the attention of the Court/Authority for appropriate modification. The power contained under Section 19(2) of 1958 Act is not tampered with, but attempted to be tempered by a humane approach; that power shall be exercised when the State has drawn up its plan for further action of excavation. Consequently, the impugned notices are ordered to be suspended and not quashed. A decision to excavate would involve the duty to acquire under Section 20 which will compensate the present owners of the property for the property that they are likely to lose.

(17) The writ petition is disposed of on the above terms.

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***J.S. Mehndiratta***

***Before M. M. Kumar & Alok Singh, JJ.***

**COMMISSIONER OF INCOME TAX-III,  
LUDHIANA,—Appellant**

***versus***

**M/S OSWAL KNIT INDIA LTD. LUDHIANA,—Respondent**

**ITA No. 28 of 2004**

12th February, 2012

***Income Tax Act 1961- Ss.143(3), 80-HHC, 80-I, 2(29 BA) & 260-A - Manufacturing and Processing of goods - What is? - Manufacture means transformation, the emergence of a new and different article having a distinctive character, name and use - Benefit of Section 80- I available only to business of manufacturing and not business of processing; AIR 1963 SC 791 Union of India v. Delhi Cloth Mills - Held, processing of flats (pallas) by Assessee***