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THE HIGH COURT OF DELHI AT NEW DELHI

FAO(OS) 414/2002

Judgment delivered on: 23.07.2004

ARCHAEOLOGICAL SURVEY OF INDIA

...Petitioner

- versus -

SHRI NARENDER ANAND AND OTHERS

...Respondents

Advocates who appeared in this case:

For the Appellant : Mr Sanjay Jain
For Respondents : Mr P. N. Lekhi, Sr. Advocate with
Mr R. K. Aggarwal
Ms Hima Kohli for NDMC
Mr K.K. Buchar for the DDA.

with

WP (C) 2635/2002

HERITAGE AND CULTURE FORUM

...Petitioner

- versus -

UNION OF INDIA & ORS

...Respondents.

Advocates who appeared in this case:

For the Petitioner : Ms Usha Kumar
For Respondents : Mr Sanjay Jain for Respondent No.2 (AST)
Mr R. K. Aggarwal for Respondent No.8
Ms Hima Kohli for NDMC
Mr K.K. Buchar for the DDA.
Amicus Curiae : Mr P.N. Lekhi, Sr. Advocate.

FAO(OS) 414.02 & WP(C) 2635.02

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Signature Not Verified

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Certify that the digital file and
physical file have been compared and
the digital data is as per the physical
file and no page is missing.

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CORAM:-

HON'BLE MR JUSTICE B.C. PATEL, CHIEF JUSTICE
HON'BLE MR. JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in Digest?

yes

BADAR DURREZ AHMED, J

1. This judgment will dispose of FAO (OS) 414/2002 as well as the writ petition (CW 2635/2002). Both were heard together as both deal with the famous monument known as the Jantar Mantar at New Delhi.
2. The FAO, which has been filed by the Archaeological Survey of India (appellant) (hereinafter referred to as "the ASI"), arises from an ad-interim injunction granted in favour of respondent Nos 1 & 2 in suit no. 645/2002 for perpetual injunction which was filed by them. The suit had been filed because by a letter dated 23.5.2001 the New Delhi Municipal Committee (NDMC) had asked the respondent nos. 1& 2 to immediately stop construction at plot No. 14, Janpath Lane, New Delhi and obtain the requisite permission from the Archaeological Survey of India (appellant) (hereinafter referred to as the ASI) in the first instance. By the interim order passed under order XXXIX rules 1&2 of the Code of

[Signature]

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Civil Procedure, 1908 (hereinafter referred to as "the CPC"), the operation of this letter dated 23.5.2001 was stayed. The result being that the Respondent Nos. 1 & 2 could continue with the construction of the new building (after demolishing the old one). This building is coming up at plot no.14, Janpath lane, New Delhi and it is within 100 meters of Jantar Mantar and this is being objected to by ASI.

3. The writ petition has been filed in Public Interest seeking orders/directions from this Court for the protection of the said monument (Jantar Mantar) by, inter alia, preventing any new building or construction coming up in the vicinity. In particular, the writ petition was directed against the construction being carried out on the said Plot No.14, Janpath Lane, New Delhi.

4. The Jantar-Mantar¹ is an observatory consisting of masonry-built astronomical instruments which were erected by Maharaja Jai Singh II of Jaipur (1699-1743). Though there is some dispute as to the exact year when the Jantar Mantar was built, it is generally accepted that it was established in 1724. This is the first of the five observatories, including

¹ See: [1] *Delhi and its Neighbourhood*: Y. D. Sharma: published by the Director-General Archaeological Survey of India, New Delhi, 2001 (p 97); [2] *Stone Observatories in India erected by Maharaja Sawai Jai Singh of Jaipur (1686-1743 A.D.) at Delhi, Jaipur, Ujjain, Varanasi, Mathura*: Prahlad Singh: Bharata Manisha: Varanasi: 1978.(p 186 – 187); [3] *Monuments of Delhi - Lasting Splendour of the Great Mughals and Others*: compiled by Maulvi Zafar Hasan: volume II: Delhi Zail: Aryan Books International, New Delhi: 1997 reprint (first published 1919); [4] *The Archaeology and Monumental Remains of Delhi* by Carr Stephen: 1876.

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those at Jaipur, Ujjain, Varanasi and Mathura, that Maharaja Jai Singh built. The need for building the observatory at Delhi arose because Maharaja Jai Singh wanted to prepare new astronomical tables and star catalogues as he found some errors with the existing ones. He expressed his views to the Mughal Emperor Muhammad Shah (1719-1748) who encouraged him to continue his interest in research in the realm of astronomy in the following words:

"since you, who are learned in the mysteries of science, have a public knowledge of this matter, having assembled astronomers and geometricians of the faith of Islam and Brahmins and Pandits and astronomers of Europe and having prepared all the apparatus of an observatory, do you so labour for the ascertaining of the point in question that the disagreement between the calculated times of those phenomena and the times at which they are observed to happen, may be rectified."

Armed with the support of the Mughal Emperor at Delhi, Maharaja Jai Singh embarked upon his mission to build the observatory at Delhi. He was assisted by many astronomers from Persia, India and Europe. But he died before the work was completed.

The Jantar Mantar is not just one building but an entire complex consisting of the following instruments --

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No.	Name of the instrument	Material	Purpose	Accuracy
1	Misra Yantra (composite instrument)	Stone, mortar and plaster
1-A	Daksinovrtti Bhatti Yantra (Meridianal Wall Instrument)	Stone, mortar, plaster, also a metal pointer (gnomon)	Latitude of place, length of Day and night, rising and setting time, Zenith distance, altitude and declination at noon, etc.	45 seconds
1-B	Samrat Yantra (equatorial dial)	Stone, mortar plaster	Local time, I. S. T., Meridian pass time, Zenith distance, altitude, declination etc.	12 seconds
1-C	Karka Rasivalaya (Cancer Zodiac instrument)	Stone, mortar and plaster also a metal pointer (gnomon)	Longitude of planets	1/10 degrees (6 minutes or 6 kalas)
1-D	Agra Yantra (amplitude instrument)	Stone, mortar and plaster	Observation of sun-rise time, the difference between the sunrise time and 6 o'clock	12 seconds
1-E	Niyat Cakra Yantra (fix or stable instrument)	Marble, stone mortar and plaster	Observation of mid-day at Greenwich. Zurich, Notkey (Japan) and Seritchew (in the Pacific Ocean)	8 seconds
2	Brhat Samrat (big equatorial instrument)	Stone, mortar and plaster	Local time, I. S. P. meridian pass time, Zenith distance, altitude, declination etc	Not in serviceable condition (2 seconds)

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No.	Name of the instrument	Material	Purpose	Accuracy
2-A	Sasthamsa Yantra (sextant)	Stone, mortar clusters.	Rising and setting time, length of day and night, altitude, Zenith distance, declination, Meridian pass time etc	No more in use.
3	Jai Prakasa Yantra (2) (The auxillary sphere instrument)	Stone, mortar and plaster. original cross-section of metal wires and the ring missing. a metal pole as gnomon.	Local time, IST, altitude, azimuth, meridian pass time, declination, longitude, Ascendant and starting point of per 10 th house of the zodiac.	Not in serviceable condition
4	Rama Yantra (2) (altitude/azimuth instrument)	Stone, mortar and plaster.	Altitude and azimuth of planets.	1/10 degrees (6 minutes or 6 kalas)

5. The Jantar Mantar represented the attainment of scientific excellence in the field of astronomy in 18th century India. It is another jewel in our treasure-chest heritage. Undoubtedly, it needs preservation for posterity. How do we preserve it and at what cost ? On the one hand we have arguments for the preservation of our heritage at any cost and, on the other, there is view that any preservation must be tempered by the growing need for new and high-rise buildings occasioned by the steep growth in population and the non-availability of vacant land. The matters at hand relate to this tussle between preservation and development.

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FAO (OS) 414/2002:

6.1 This is an appeal directed against the impugned judgment and order dated 30.10.2002 passed by a Learned Single Judge (K. S. Gupta, J.) of this Court while disposing of LA. No.2912/2002 filed under Order XXXIX Rules 1 and 2 of the CPC by the Plaintiffs (respondents 1 and 2 herein) and I.A. No. 4479/2002 filed under Order XXXIX Rule 4 of the CPC by the Defendant No.4 (the appellant herein). These applications which were disposed of by the impugned order dated 30.10.2002 had been filed in Suit No. 645/2002 for perpetual injunction which had been filed by the plaintiffs (respondents 1 and 2 herein).

6.2 It was alleged in the plaint that the plaintiffs (respondents 1 and 2) were the owners of plot No. 14, Janpath Lane, New Delhi. It is alleged that on 11.2.2002/8.9.2002, the defendants Nos. 1 and 2 (respondents 3 and 4 herein)(hereinafter jointly referred to as the NDMC) had conveyed the sanction of building plans which had been submitted by the plaintiffs for construction of a building on the said plot No. 14 after demolition of the old building which was then standing on the plot. Certain conditions were imposed and were required to be complied with by the Plaintiffs (Respondents 1 and 2). The Sanctioned Plans were released by the NDMC on 5.3.2001 and the Plaintiffs (Respondents 1 and 2), after demolishing the old building standing on the said plot No. 14,

commenced digging operations. Apparently, while excavation was in progress, the Plaintiffs (Respondents 1 and 2) received a letter No. D-29-31/CA/STC/N dated 23.5.2001 from the NDMC requiring them to stop construction at the site immediately and obtain the requisite permission from the ASI in the first instance. In the said letter of 23.5.2001, it was indicated that the Superintending Archaeologist, Archaeological Survey of India, Delhi Circle, New Delhi by a letter dated 10.5.2001 had informed the NDMC that unauthorised construction was being carried out at the said plot No.14, Janpath Lane, New Delhi which fell in the prohibited/regulated area of Jantar Mantar which was Centrally Protected Monument.

6.3 The plaint reveals that when the plaintiffs met with defendant No.2 (respondent No.4) they were told that the ASI had objection to the raising of the construction. It was submitted on behalf of the plaintiffs that after the sanctioning of the building plan by the NDMC, the latter had no authority to interfere with the construction of the building which was as per the sanctioned plans. Accordingly, the Plaintiffs (respondents 1 and 2), in the said suit, prayed that a decree of perpetual injunction be granted restraining the NDMC, the ASI and the Lt. Governor, Raj Bhawan, Rajpur Road, Delhi from interfering with the construction to be made by the Plaintiffs in accordance with the sanctioned building plans

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and/or to restrain them from demolishing any part thereof.

6.4 Along with the plaint, the Plaintiffs also filed an I.A. No. 2912/2002 under Order XXXIX Rules 1 and 2 of the CPC read with Section 151 of the CPC. By an order dated 22.3.2002, while issuing notice for 6.5.2002, the learned Single Judge passed an order restraining the NDMC from giving effect to its letter of 23.5.2001 subject to the plaintiffs' filing an undertaking within ten days that the construction on the plot in question would be carried out strictly in accordance with the sanctioned plans upto the height not exceeding 55 ft. It is pertinent to note that this order dated 23.2.2002 had been passed in the absence of defendant No.4 (appellant) (ASI).

6.5 Defendants 1 and 2 (respondents 3 and 4) filed a joint written statement and Defendant No.4 (the appellant) (ASI) filed a separate written statement contesting the suit. The main contesting parties were the Plaintiffs on the one hand and the defendant No.4 (ASI) on the other. In the written statement filed on behalf of the ASI, it was alleged that by a Notification dated 3.5.1957 the Central Government declared the ancient monument, "Jantar Mantar" to be a protected monument within the meaning of the Ancient Monuments Preservation Act, 1904 (hereinafter referred to as the 1904 Act). It was further contended in the written

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statement that by another Notification dated 8.1.1958 the earlier Notification of 3.5.1957 was confirmed whereby the Jantar Mantar was declared to be a protected monument within the meaning of the said 1904 Act.

6.6 The Ancient Monuments and Archaeological Sites and Remains Act, 1958 (hereinafter referred to as the 1958 Act) came to be enacted. In exercise of powers conferred by Section 38 of the 1958 Act, the Ancient Monuments and Archaeological Sites and Remains Rules, 1959 (hereinafter referred to as the 1959 Rules) were framed. Under Rule 32 of the 1959 Rules, the Central Government issued a Notification on 16.6.1992 declaring an area upto 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 both mining operation and construction. Thus, it was stated and submitted on behalf of the ASI that this ban on construction within 100 meters from the protected limits of protected monuments cannot be given a go-by and any sanction or scheme formulated by any authority, body or department permitting construction within such area would be invalid. It was contended that as the said plot i.e. Plot No. 14 Janpath Lane, New Delhi was within 100 meters of the protected Jantar Mantar Monument, no construction activity could be carried out thereon even if it were



sanctioned by the NDMC.

6.7 It is pertinent to note that in I.A. No. 4479/2002 which was filed on behalf of the ASI, the learned single Judge by an order dated 31.5.2002 modified the earlier order dated 22.3.2002 passed in I.A. 2912/2002 to the extent that till the disposal of that application, the plaintiffs would not carry out any construction at the site beyond DPC level and that even such construction upto DPC level would be at the risk and cost of the plaintiffs and that if ultimately the Court came to the conclusion that no construction at the site could be permitted, such construction would be liable for demolition.

6.8 Before the learned Single Judge, on the strength of the Notifications dated 3.5.1957, 8.1.1958, 15.5.1991 and 16.6.1992 it was contended on behalf of the ASI (appellant herein) that the plot No. 14 Janpath Lane, New Delhi fell within 100 meters from the protected limits of the protected monument Jantar Mantar and, therefore, no construction whatsoever could be carried out. Therefore, the *ex parte ad interim* injunction granted on 22.3.2002 in I.A. 2912/2002 ought to be lifted and the application being I.A. 4479/2002 ought to be allowed. According to the Defendant No.4 (appellant herein) (ASI) no prima facie case had been made out for the grant of an interim injunction and in any event the

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balance of convenience lay against the grant of any such injunction. On the other hand, it was contended on behalf of the plaintiffs before the learned Single Judge that the alleged Notification dated 3.1.1957 was never published in the Gazette. As it was not so published, the Notification had no effect in law and, therefore, the ancient monument known as Jantar Mantar was not a protected monument. Since by this line of reasoning Jantar Mantar was not a protected monument, the Notification dated 16.6.1992 placing the ban on construction within 100 meters from the protected limits of protected monuments, would have no application whatsoever. That being the case, there was no impediment to the construction of the building on the site plot No. 14 Janpath Lane, New Delhi, particularly in view of the fact that the local body/authority concerned, i.e. the NDMC had already sanctioned their building plan.

6.9 Thus, as noted by the learned Single Judge himself, the controversy between the parties (the plaintiffs on the one hand and the defendant No.4 - ASI on the other) mainly centered around the issue as to whether Jantar Mantar was a protected monument within the meaning of Section 3 of the 1904 Act. It was noted in the impugned order that at the request of the counsel for the ASI the case was postponed on several dates to enable him to trace out the notification and file a copy of the purported Gazette Notification dated 3.1.1957. However, despite these

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opportunities, no copy of the Gazette Notification was filed. It is further recorded in the impugned order that the learned counsel for the ASI failed to produce the copy of the Gazette Notification dated 3.5.1957 *"conceding that the same had not been published in the official gazette."* Before us, also, the gazette copy of the Notification was not produced. However, the learned counsel for the appellant took serious exception to the recording in the impugned order that he had conceded that the Notification dated 3.5.1957 had not been published in the Official Gazette. The learned counsel made it clear before us that, in fact, what he had stated was that he was unable to trace out the copy of the Gazette Notification it did not mean that it had not been gazetted and that the matter was yet to be established as a matter of fact in the suit itself. The learned counsel was at pains to argue that no such concession, in view of the stand taken by the ASI could have been made. Before us, we close this issue by observing that the purported concession be disregarded and we shall deal with this case as if no such alleged concession had at all been made. However, the fact remains that till date there is no copy of the Gazette Notification dated 3.5.1957. As of today, it can be safely inferred that the Notification dated 3.5.1957 has not been published in the Official Gazette.

6.10 The learned Single Judge was of the view that as the draft

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Notification dated 3.5.1957 was not published in the Gazette of India, it would be of no effect. For this conclusion, the learned Single Judge relied upon Mahindra Lal Jaini v. State of Uttar Pradesh and Others: AIR 1963 SC 1019 and Rajiv Kumar Aggarwal v. UOI: 1996 (38) DRJ 95 (DB.)

6.11 The learned Single Judge concluded as under:-

“Since said draft notification was not published in Gazette as required by section 3(1), the same was ineffective and reference thereof in the notification issued under Section 3(3) dated 8th January, 1958 was of no consequence. As a corollary, aforesaid notifications dated 15th May 1991 and 16th June 1992 cannot be of any help to defendant No.4 in the matter. Decision by the Government Department to declare Jantar Mantar as a prohibited monument itself cannot tantamount to a notification under said Section 3(1).”

The learned Single Judge, in view of the aforesaid observations, held that the Plaintiffs had established a prima facie case for making the order dated 22.3.2002 absolute. He also recorded that the balance of convenience was also in favour of the plaintiffs who were likely to suffer irreparable injury if they were not permitted to raise construction on the suit plot in accordance with sanctioned building plans. Consequently, by the impugned order dated 30.10.2002 the learned Single Judge disallowed I.A. 4479/2002, recalled his order dated 31.5.2002 and by making its order dated 22.3.2002 absolute, allowed the plaintiffs' I.A.

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No. 2912/2002.

6.12 This appeal against the impugned order dated 30.10.2002 was argued at length and in great detail. We may say that the counsel on both sides presented their case with felicity and eloquence and it was apparent that they had researched the matter in depth. We need not refer to all the submissions (oral as well as written) or to all the decisions cited at the bar. Nor is it necessary for us to deal with each and every detail, nuance and aspect of the matter which was unfolded before us by the learned counsel. We need to confine ourselves to the issue at hand. The issue being whether the plaintiffs had in fact made out a prima facie case for the grant of ad interim injunction and secondly, whether the balance of convenience lay in favour of the plaintiffs. In the context of this case, the central issue is with regard to the controversy as to whether Jantar Mantar is a protected monument under the 1904 Act and second, whether plot No. 14, Janpath Lane, New Delhi fell within 100 meters of the protected limits of a protected monuments?

6.13 Before we embark on a discussion on these central issues, it would be necessary to put aside certain aspects of the case. First of all, it is pointed out that we are dealing with this appeal as if no concession had been made by the learned counsel for the ASI. Secondly, it is accepted

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as a matter of fact that till the date of this judgment neither party has been able to place before us the gazette copy of the Notification dated 3.5.1957. Accordingly, we proceed with this case as if the Notification dated 3.5.1957 was not published in the official gazette. Thirdly, it is assumed and accepted that the plans for the building to be constructed by the plaintiffs (respondents 1 and 2) on the suit plot had been sanctioned (subject to certain conditions) by the respondents 3 and 4 (NDMC). Therefore, if the impediment under the Notification dated 16.6.1992 is not to apply to the suit plot, the building to be constructed on the suit plot cannot be objected to. Fourthly, the scheme known as "Janpath Lane Redevelopment Scheme" which was prepared in particular under the Delhi Development Authority Act, 1957 would be applicable if the said ancient monument "Jantar Mantar" is not a protected monument.

6.14 We now consider the first and foremost question that has to be examined in this appeal and that is -- whether Jantar Mantar is a protected monument or not? Let us examine the Notification dated 3.5.1957. Since the entire case turns upon this Notification, it would be appropriate to set it out in full:-

"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.

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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/O.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."

An examination of the Notification dated 3.5.1957 reveals that it was to be published in the Gazette of India Part II Section III. Whether or not it was published is yet uncertain. As indicated above we are proceeding with the matter as if it had not been published in the Gazette of India. The Notification dated 3.5.1957 further reveals that it had been issued in exercise of powers conferred under Sub-Section (1) of Section 3 of the 1904 Act and that it had been issued in supersession of the Notification of the Government of India, Ministry of Education No. F.3-76/50/C.1 dated 4.10.1956. It lastly reveals that by virtue of the Notification dated 3.5.1957 the Central Government declared the ancient monument described in the schedule annexed thereto to be a protected monument within the meaning of the said Act, i.e., the 1904 Act. The schedule is also of great relevance and, therefore, is set out in full:-

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Ct.	Locality	Name of Monuments	Area	Boundry East, South, North West	Ownership
1	2	3	4	5	6
Delhi	New Delhi	Jantar Mantar	Protected 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

The aforesaid schedule reveals that Jantar Mantar is comprised in a protected area of 5.39 acres and is bounded as indicated therein. The ownership is shown as that of the Government of Rajasthan.

6.15 The Notification of 4.10.1956 which was referred to in the Notification of 3.5.1957 was published in the Gazette of India in Part II, Section III on 13.10.1956. A copy of the said Gazette Notification dated 4.10.1956 was placed before us. The said 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 monuments described in the Schedule annexed hereto to be a protected monument within the meaning of the said Act.

SCHEDULE

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SL NO	DISTRICT	LOCALITY	NAME OF MONUMENT	AREA	BOUNDARY: EAST, SOUTH, NORTH, WEST	WHETHER IN RELIGIOUS USE	OWNER SHIP	REMARKS
	DELHI	NEW DELHI	JANTAR MANTAR	PROTECTED 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	No	Maharaja of Jaipur	

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

This Notification of 4.10.1956 although referred to in the Notification of 3.5.1957 was not produced before the learned Single Judge. Under normal circumstances, we would have thought it fit and proper to have remanded the matter to the Trial Court for consideration afresh in view of this Notification dated 4.10.1956 but as the matter had been argued threadbare before us and the parties had invited a decision on this aspect also we are not remitting this matter to the Trial Court but are deciding the issue here itself in appeal.

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Central Government declared Jantar Mantar, having a protected area of 5.39 acres and having boundaries as described in the schedule, to be a protected monument within the meaning of the said Act of 1904. In fact, on a comparison of the two Notifications i.e., the Notifications of 4.10.1956 and 3.5.1957, it is clear that they are virtually identical. Only two differences are apparent. One difference being that while the Notification dated 4.10.1956 was gazetted, the Notification dated 3.5.1957 was not. The other difference been that in the schedule to the Notification dated 4.10.1956 the ownership of Jantar Mantar is shown as that of "Maharaja of Jaipur" whereas the schedule to the Notification of 3.5.1957 shows the ownership of Jantar Mantar as that of "Government of Rajasthan". Apparently, the Notification of 3.5.1957 was only to be brought out to put the record straight as regards the ownership of Jantar Mantar. The Maharaja of Jaipur, as a consequence of the merger of the erstwhile state of Jaipur was no longer the owner of the ancient monument known as Jantar Mantar as it was not his private property. There is no dispute with regard to this. So, the question of ownership apart, by the Notification dated 4.10.1956 itself, which was also published in the gazette of India, the Jantar Mantar stood declared as a protected monument.

6.17 The inter-play between the Notifications dated 4.10.1956 and

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3.5.1957 needs to be considered in the context of the provisions of 1904

Act. Section 3 of the 1904 Act reads as under:-

"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 the 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.

Sub-Section (1) makes it clear that the Central Government may, by notification in the Official Gazette, declare an ancient monument to be a protected monument within the meaning of 1904 Act. Therefore, before an ancient monument could be regarded as a protected monument within the meaning of the 1904 Act, two conditions have to be fulfilled and they are: (1) the Central Government must have by notification declared the ancient monument to be a protected monument; and (2) such notification

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must have been published in the official gazette. We are in agreement with the contentions of Mr. Lekhi, the learned Senior Counsel who appeared on behalf of the Plaintiffs (respondents 1 and 2), that unless the Notification is published in the Official Gazette it would have no meaning at all. When a thing is required to be done in a particular manner by the statute then it must be done in that manner alone or not at all. This proposition is too well settled to require any further argument. We are in full agreement with Mr. Lekhi that without publication of the Notification in the official gazette a Notification purporting to be one under Section 3 would be of no effect in law. Accordingly, the Notification dated 3.5.1957, although it exists in the files of the Central Government, since it was not published in the Official Gazette, would be of no effect in law. Therefore, the position would be as if no Notification at all had been issued on 3.5.1957.

6.18 Now, where does this leave us? The Notification dated 3.5.1957 which "merely" sought to bring about the change in ownership of Jantar Mantar, was issued in supersession of the Notification of 4.10.1956. If the Notification of 3.5.1957 had been published in the Official Gazette, it would have taken effect in law and from that date the earlier Notification dated 4.10.1956 would have stood superseded. But, this is not what has happened. The Notification of 3.5.1957 was not

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published in the official gazette and, therefore, as aforesaid did not have any effect in law. The logical conclusion, therefore, is that the Notification dated 4.10.1956 was not superseded by the Notification dated 3.5.1957 and it survived.

6.19 Clearly, the Notification dated 4.10.1956 having been published in the Official Gazette was valid and by that Notification the Central Government had declared Jantar Mantar as a protected monument within the meaning of the said Act of 1904, the anomaly with regard to ownership notwithstanding. We need to also examine the Notification dated 8.1.1958 which was published in the official gazette whereby the Central Government confirmed its earlier Notification dated 3.5.1957 declaring the ancient monument described in the schedule annexed to the said Notification to be a protected monument within the meaning of the said Act of 1904. As the Notification dated 3.5.1957 cannot be regarded as one issued under Section 3(1) of the Act of 1904 as per the view we have taken, this subsequent Notification of 8.1.1958 would also be of no consequence. We are, therefore, left with only the Notification dated 4.10.1956 which clearly is one which falls under the description of a Notification under Section 3(1) of the said Act of 1904. That Notification has not been withdrawn and, therefore, continues to operate.

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6.20 It is an admitted position that things done under the said Act of 1904 have been saved by virtue of Section 39 (2) of the Act of 1958. Therefore, the declaration of Jantar Mantar as a protected monument by the Notification of 4.10.1956 was specifically saved by the provisions of Section 39 (2) of the 1958 Act, the repeal of the 1904 Act notwithstanding. It is under the powers conferred by Section 38 of the 1958 Act that the said Rules of 1959 came to be made by the Central Government. It would be pertinent to set out the provisions of Section 38 of the 1958 Act which reads as under:-

"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 rules 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;

(c) the right of access of the public to a protected monument and the fee, if any, to be charged therefor;

(d) the form and contents of the report of an archaeological officer or a licensee under clause (a) of sub-section (1) of section 23;

(e) the form in which application for permission under section

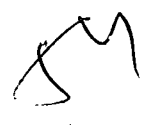
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19 or section 25 may be made and the particulars which they should contain;

- (f) the form and manner of preferring appeals under this Act and the time within which they may be preferred;
 - (g) the manner of service of any order or notice under this Act;
 - (h) the manner in which excavations and other like operations for archaeological purposes may be carried on;
 - (i) any other matter which is to be or may be prescribed.
- (3) Any rule made under this section may provide that a breach thereof shall be punishable.-
- (i) in the case of a rule made with reference to clause (a) of sub-section (2), with imprisonment which may extend to three months, or with fine which may extend to five thousand rupees, or with both.
 - (ii) in the case of a rule made with reference to clause (b) of sub-section (2), with fine which may extend to five thousand rupees;
 - (iii) in the case of a rule made with reference to clause (c) of sub-section (2), with fine which may extend to five hundred rupees.
- (4) All rules made under this section shall be laid for not less than thirty days before each House of Parliament as soon as possible after they are made, and shall be subject to such modifications as Parliament may make during the session in which they are so laid or the session immediately following."

The 1959 Rules came into force on 15.10.1959. Section 2(f) defines "prohibited area" and "regulated area" to mean an area near or adjoining a protected monument which the Central Government has, by notification in the Official Gazette, declared to be a prohibited area, or, as the case may be, a regulated area, for purposes of mining operation or construction or both. Chapter VII of 1959 Rules deals with mining operation and



construction near protected monuments. Rule 31 prescribes that before declaring 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, 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. Sub-Rule (2) of Rule 31 requires that every such notification shall specify the limits of the area which is to be so declared and shall also call for objections, if any, from interested persons. In terms of Rule 32, 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 the purposes of mining operation or construction or both. Once the declaration of the prohibited area or regulated area near a monument is made under Rule 32 of the 1959 Rules, 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, ASI. This is so provided in Rule 33 of the 1959 Rules. Rule 34 provides for the mode of application for a

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licence for construction in a regulated area. Rule 35 provides for the grant or refusal of licence. The cancellation of licence is provided under Rule 36 and any person aggrieved by an order made under Rule 35 or Rule 36 may prefer an appeal to the Central Government in terms of the provisions of Rule 37. Rule 38 empowers the Central Government to direct the owner or occupier of an authorised building in a prohibited area or in a regulated area or of a building or part thereof which has been constructed in contravention of any of the conditions of a licence granted under Rule 35 to remove such building or part thereof within a period specified in that order. Rule 39 sets out the penalty *inter alia* for unlawfully undertaking any mining operation or construction in a prohibited area or in a regulated area. Such an offence would be punishable with imprisonment which may extend to three months or with fine which may extend to five thousand rupees or with both.

6.21 The Notification dated 16.6.1992 has been issued under Rule 32 of the 1959 Rules. The same has been published in the Official Gazette. The Notification reads as under:-

"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

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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's 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"

An examination of the said Notification of 16.6.1992 reveals that earlier by a Notification dated 15.5.1991 published in the Gazette of India, the Central Government, in keeping with the provisions of Rule 31 of the 1959 Rules, gave one month's notice of its intention to declare an area upto 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 both mining operation and construction. It was also recited in the Notification dated 16.6.1992 that the Gazette carrying the earlier Notification dated 15.5.1991 was made

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available to the public on 5.6.1991. The objections that were received from persons interested were considered by the Central Government and thereafter, by virtue of the Notification dated 16.6.1992, in exercise of the powers conferred by Rule 32 of the 1959 Rules, the Central Government declared the areas upto 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. It was made clear that this general declaration with regard to all protected monuments was in addition to similar specific declarations made in respect of certain specified monuments.

6.22 An argument had been raised that an omnibus Notification such as the Notification dated 16.6.1992 could not at all have been issued inasmuch as the provisions of Rule 32 of the 1959 Rules refer to "a protected monument" and not to protected monuments generally. Secondly, it was submitted that a copy of the Notification was required to be affixed on a conspicuous place "near the area." This, also, according to the learned counsel for the respondents 1 and 2, implied that a declaration of a prohibited or regulated area under Rule 32 could only be made, after following the procedure prescribed under Rule 31, with respect to "specific protected monuments" and not to "protected monuments" all over India, generally. Although, this argument seems

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attractive at first blush, it is immediately dispelled by looking at the provisions of Section 13 of the General Clauses Act, 1897 which provides that in all Central Acts and Regulations, unless there is anything repugnant in the subject or context, words in the singular shall include the plural, and vice-versa. Reading the provisions of Rule 31 with the provisions of Section 13 of the General Clauses Act, 1897, it does appear that Rule 31 can be read as referring to not just "a protected monument" but to "protected monuments" and the copy of the Notifications be affixed in conspicuous places not just near the area of "a protected monument" but to "protected monuments". In other words, if the Notification is to apply to all protected monuments then it must be given wide publicity in all the areas. However, we need not labour on this aspect as no argument had been addressed as to whether the Notification under Rule 31 was affixed in the concerned areas. The presumption is that it was so affixed in view of the fact that the Notification dated 16.6.1992 has been published in the Official Gazette.

6.23 The discussion so far reveals that Jantar Mantar is a protected monument by virtue of a Notification dated 4.10.1956 read with Section 39(2) of the 1958 Act and that the Notification dated 16.6.1992 prohibits construction within 100 meters from the protected limits of protected monuments.

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6.24 Faced with this situation, Mr. Lekhi with his usual ingenuity next referred to the provisions of the Delhi Development Act, 1957 (hereinafter referred to as "the DDA Act"). The preamble of the Act indicates that it was to provide for the development of Delhi according to plan and for matters ancillary thereto. Section 2 (d) describes "Development" to mean carrying out of building, engineering, mining or other operations in, on, over or under land or the making of any material change in any building or land and includes redevelopment. Section 7 of the DDA Act contemplates the conduct of a civic survey of and the provision of a master plan for Delhi indicating the land-use in each of the zones. Section 8 deals with zonal development plans which inter alia includes site-plan and use-plan for the development of the zones and which indicate the approximate locations and extent of land uses proposed in the zone. By virtue of Section 9 the Master Plan and the Zonal Development Plan are to be submitted by the DDA to the Central Government for its approval. The procedure to be followed in the preparation of and approval of the plan is prescribed under Section 10. Section 12 (3) of the DDA Act specifically prohibits development of land, after the commencement of the Act, unless (1) where the area is a developed area, permission for such development has been obtained in writing from the DDA in accordance with the provisions of the Act and/or

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(2) where the area is an area other than a development area, approval of, or sanction for, such has been obtained in writing from the local authority concerned or any officer or authority thereof empowered or authorised in this behalf, in accordance with the provisions made by or under the law governing such authority or until such provisions have been made, in accordance with the provisions of the regulations relating to the grant of permission for development made under the Delhi (Control of Building Operations), Act, 1955, and in force immediately before the commencement of the Act. Section 12 (4) categorically provides that after the coming into operation of any of the plans in any area no development shall be undertaken or carried out in that area unless such development is also in accordance with such plans. According to Mr. Lekhi, the suit plot falls in an area which is other than a development area and, therefore, the development that has to be undertaken or carried out in such an area can only be done after sanction in writing has been obtained from the local authority concerned. In this case, the local authority concerned is the NDMC. Mr Lekhi submits that the proposed building that was being constructed on the suit plot was with the sanction of the NDMC and, therefore, the provisions of Section 12 (3) were complied with. According to Mr Lekhi the provisions of the DDA Act had an overriding effect and it was not open to the ASI to stop any construction which had been specifically permitted under the DDA Act. It was also

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submitted that the Notification dated 16.6.1992 has been issued in exercise of the powers under Rule 32 of the 1959 Rules which in turn have been framed by the Central Government under Section 38 of the 1958 Act. The Master Plan for Delhi is also, as pointed out above, approved and authenticated by the Central Government under the DDA Act. It seems that something which is permitted under the Master Plan and the DDA Act is prohibited by the Notification dated 16.6.1992 under the 1958 Act. Both the DDA Act of 1957 and the said Act of 1958 are pieces of Central Legislation. Apparently, there is a conflict between the provisions of the two Acts. Mr Lekhi, therefore, suggested that in such a situation the special provisions of the special act would override the general Act. According to him, the DDA Act was the special Act whereas the 1958 Act was the general Act.

6.25 Mr Lekhi also referred to the provisions of Section 53 (2) and Section 53 (3) of the DDA Act which read as under:-

“53. Effect of other laws--(1) xxx xxxxxx xxxxxx xxxxxx

(2) Save as otherwise provided in sub-section (4) of section 30 or sub-section (8) of section 31 or sub-section (1) of this section, the provisions of this Act and the rules and regulations made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law.

(3) Notwithstanding anything contained in any such other law--

(a) when permission for development in respect of any land has been obtained under this Act such

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development shall not be deemed to be unlawfully undertaken or carried out by reason only of the fact that permission, approval or sanction required under such other law for such development has not been obtained;

- (b) when permission for such development has not been obtained under this Act, such development shall not be deemed to be lawfully undertaken or carried out by reason only of the fact that permission, approval or sanction required under such other law for such development has been obtained."

The aforesaid provisions refer to Sections 30 (4), 31(8) and 53 (1). Section 30 deals with the order of demolition of a building and sub-section (4) thereof specifically states that the provisions of that Section (ie., section 30) shall be in addition to, and not in derogation of, any other provision relating to demolition of buildings contained in any other law for the time being in force. Thus, if demolition is provided for under the 1958 Act, it would be saved by this provision read with Section 53 (2) of the DDA Act. Section 31 of the DDA Act refers to the powers to stop any development activity. Sub-section (8) thereof clearly stipulates that the provisions of this (i.e. Section 31) shall be in addition to, and not in derogation of, any other provision relating to stoppage of building operations contained in any other law for the time being in force. This provision read with Section 53 (2) of the DDA Act also makes it clear that if the 1958 Act provides for the stoppage of building operations then the provisions of Section 31 shall not be in derogation thereof but in

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addition thereto. Section 53 (1) of the DDA Act pertains to the Slum Areas (Improvement and Clearance) Act, 1956 with which we are not concerned. Sub-Section (3) of Section 53 provides that notwithstanding anything contained in any such law including the 1958 Act, when permission for development has been obtained under the DDA Act, such development shall not be deemed to be unlawfully undertaken by reason only of the fact that permission, approval or sanction required under such other law for such development has not been obtained under the DDA Act. A reading of the provisions clearly indicates that insofar as development is concerned the provisions of the DDA Act are to apply to such development independently of provisions contained in any other law. This does not necessarily mean that the provisions of the DDA Act are to apply in supersession of or in derogation of the provisions of the other law. The entire argument of Mr Lekhi is based on the premise that there is a conflict between the provisions of the 1958 Act and those of the DDA Act. We are not in agreement with the submission of Mr Lekhi. It is true that for any development activity in Delhi the provisions of the DDA Act have to be complied with but this does not mean that the provisions of the other applicable Acts such as the 1958 Act are to be given a complete go-by. In fact, proceedings qua demolition and stoppage of building activities have expressly been saved by the provisions of Section 53 (2) of the DDA Act. It cannot be said that where a sanction or an approval of

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the NDMC has been taken and, accordingly, the provisions of Section 12 (3) of the DDA Act have been complied with, this obviates the requirement of complying with the provisions of 1958 Act. Sanction of building plans by the NDMC and authorised development under the DDA Act, *ipso facto* does not imply that the provisions and prohibitions contained in the 1958 Act can be given a complete go-by. The provisions under the DDA Act, insofar as this case is concerned, are independent and have to be complied with additionally and not alternatively to those of the 1958 Act.

6.26 In this context, we find that the other argument of Mr Lekhi that the DDA Act purportedly being the special act would override the the 1958 Act (purportedly being the general act) would not, therefore, arise as, there is in our understanding of the situation, no conflict between the two Acts. In any event, to put matters straight, we feel that the DDA Act although specific to Delhi deals with development generally whereas, the 1958 Act, although applicable all over India deals with protected monuments specifically. Monuments which needed to be preserved, in Delhi as well in other parts of the country, required protection under special laws. When such a law is specifically made for the protection and safeguard of ancient monuments, we find it difficult to understand as to how it could be said to be a general law. The territorial sweep of an

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enactment alone will not decide the question whether it is of a general nature or of a special kind. Therefore, in our view the 1958 Act is the special act and the DDA Act is the general act. In this view of the matter also, even if it is assumed that there is a conflict, the 1958 Act would prevail. Furthermore, the 1958 Act is the later Act and it would in normal circumstances prevail over the earlier enactment. (*See: 2001 (3) SCC 71, 1999 (5) SCC 624 and AIR 1994 SC 1130*). The prohibition contained in the Notification dated 16.6.1992 would be a bar to any construction activity within 100 meters of the limits of the protected monuments.

6.27 It was further contended on behalf of the respondents 1 and 2 that there were other buildings within 100 meters of Jantar Mantar which had already been constructed and, therefore, they also ought to be demolished. In this context, it must be remembered that merely because an illegality is committed by certain persons another person cannot claim a right to perpetrate a further illegality on the foundation of such instances. The wrong, if any, committed by others would not enable the plaintiffs (respondents 1 and 2) to commit the wrong on the reasoning that the wrongs that have been committed by others have not been dealt with by the authorities concerned. In this instance, it was pointed out that there are other buildings in the vicinity, such as the NDMC building itself

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and building of DLF Limited which are within the prohibited zone of 100 meters. In this regard, the appellant (ASI) has filed an affidavit on 24.2.1992 indicating that the buildings - Park Hotel, Bank of Baroda, State Bank of India, DLF Main Building, Narain Bhawan, General William Masonic Clinic and Plot No.1, Janpath Lane, New Delhi, all fall within 100 meters of the protected limits of Jantar Mantar. However, all these buildings had been constructed prior to the issuance of the Notification dated 16.6.1992 and, therefore, would not be covered by it as it is prospective in operation. The NDMC itself has two buildings in its complex. The old building is within 100 meters but was constructed prior to 1992. The other building of the NDMC which has come up after 1992 is beyond the distance of 100 meters from Jantar Mantar. Only a portion of its basement falls within 100 meters and that portion has been undertaken by NDMC not to be used. In any event, this is not the subject matter of the suit. The issue in the suit is whether the NDMC, acting on the basis of the instructions issued by the ASI in view of the Notification dated 16.6.1992, can direct the stoppage of building activity being carried on by the plaintiffs (respondents 1 and 2) in the suit plot. The answer, *prima facie*, is - Yes, because there is a prohibition against the carrying out of any such activity in terms of the Notification dated 16.6.1992.

6.28 There was some dispute with regard to whether the building at

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plot No. 14 Janpat Lane, New Delhi fell within 100 meters of the protected monument or not. It was contended on behalf of the plaintiff (respondents 1 and 2) that the distance of 100 meters ought to be measured from the monument itself. On the other hand, it was contended on behalf of the ASI that the point of reference should be the outer limits of the protected monument i.e., the boundary wall. This issue can be easily resolved by a reference to the Notification dated 4.10.1956 and the Notification dated 16.6.1992. 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 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. Therefore, *prima facie*, there is a prohibition on the carrying on of any building activity on plot No. 14 in view of the Notification dated

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16.6.1992. In this view of the matter the impugned order dated 30.10.2002 cannot be sustained and is set aside.

CW No. 2635/2002.

7.1. This is a writ petition filed in public interest for the protection of the ancient and protected monument known as Jantar Mantar. It is prayed in the writ petition that the NDMC (Respondent No.4) and M/s Rawal Apartment (Pvt.) Ltd. (Respondent No.8) (Plaintiff No.2 in the Suit No. 645/2002) be directed to stop construction of their respective buildings in the vicinity of Jantar Mantar.

7.2 Insofar as Rawal Apartment (Pvt.) Ltd. is concerned, their construction activity related to the construction of the building in plot No. 14 Janpath Lane, New Delhi. They along with Mr Narender Anand had filed the Suit No. 645/2002 for perpetual injunction from interfering with the construction of the building. That suit is pending before this Court. An interim injunction had been granted by a learned single Judge of this Court by his order dated 30.10.2002 which was impugned in FAO (OS) 414/2002. We have just disposed of the said appeal and set aside the order dated 30.10.2002. Thus, insofar as the construction of the building on plot No. 14, Janpath Lane, New Delhi, is concerned, that issue no

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longer survives for the time being till the suit is finally disposed of. No further directions in the writ petition are needed in this respect.

7.3 Insofar as the building being constructed by the NDMC is concerned, we have already touched upon this matter in our judgment and order in the said FAO(OS) 414/2002. We have indicated that the old building of NDMC had already been constructed prior to the Notification dated 16.6.1992 and, therefore, the Notification, being prospective in operation would not apply to it. The second building of NDMC which we referred to as the new building was constructed after the said Notification of 16.6.1992. However, it has been noticed that only a portion of the basement of this building falls within 100 meters of Jantar Mantar. With respect to that portion the NDMC has given an undertaking to the ASI that they shall not use the same. Thus, no further action in respect of this building also is necessary.

7.4 Before parting with this case, since this is a petition filed in public interest, we would like to mention that there is always a trade-off between preservation on the one hand and development on the other. Public interest lies in striking a balance between the opposing forces. On the one hand, we would like to preserve our precious and valuable heritage and on the other we would not like this to be the reason to put a halt to further development and progress. As long as land is freely

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available, one can go on constructing new buildings without disturbing the old structures but, when land becomes scarce and there are no vacant plots left then any new building must be at the expense and cost of an older one. It is in this context that a duty has been cast upon the State to earmark and pick out those buildings and structures which are not to be touched at all and which are the embodiments of our heritage and historical development of our civilization. Jantar Mantar is one such monument. It is the first observatory of its kind in India. As mentioned above, earlier astronomical data was compiled without any scientific study. Maharaja Jai Singh of Jaipur who was also a remarkable astronomer took it upon himself to provide an empirical foundation and a sound scientific basis to the astronomical tables which were prevalent in India and to correct the errors therein. He had the full support of the Mughal emperor Mohd. Shah and he embarked upon this project. Though, he built four other observatories at different places, the one at Delhi (i.e., Jantar Mantar) was the first. It was recognised very early that this observatory at Delhi needed to be protected and preserved. There is no denying this aspect of the matter. As indicated above, while dealing with the FAO, the owner and builder had raised the objection that, in law, Jantar Mantar was not a protected monument. We have already dealt with that argument and held it to be untenable. Even *de hors* the legal question, public interest requires that Jantar Mantar be protected and

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preserved.

7.5 However, there could be some argument on the issue as to whether the stipulation of 100 meters prescribed by the Notification of 16.6.1992 has any scientific, pragmatic or logical basis or is it merely a rule of thumb. In the present writ petition, it was argued on behalf of respondent No.8 as well as by Mr Lekhi who conducted this matter as an *amicus curiae* that the 100 meters rule should not be regarded as infallible. There is no doubt that Jantar Mantar must be protected. This protection must be determined with a pragmatic view of things particularly with respect to development. If buildings in the vicinity can come up without any damage to the preservation of Jantar Mantar then surely they should be permitted. There may be instances where even the 100 meters prohibition would not suffice. A clear-cut case could be that of the Taj Mahal. On the other hand, there may be instances where the prohibition necessary may be much less than 100 meters. In this view of the matter, it was suggested that a pragmatic approach be taken.

7.6 We find ourselves to be in agreement with the submissions made by Mr Lekhi in this regard that a pragmatic and practical approach must be adopted and we must not become slaves to a rule of thumb. At the same time, *prima facie*, we feel that as long as the Notification dated 16.6.1992 holds the field, no construction activity can be permitted within

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100 meters of Jantar Mantar. However, this does not dissuade us from directing the Central Government to review the operation of its Notification dated 16.6.1992 and to consider the provision of a mechanism where the prohibition is imposed or relaxed on a case to case basis. It is true that the 100 meter stipulation brings in a certain degree of objectivity and cuts out subjectivity. But, it also introduces an element of arbitrariness inasmuch as it treats all protected monuments alike, which in fact are quite dissimilar. The degree and type of protection depends upon various variables such as the nature of the protected monument, its locale, the weather conditions, the topography, the soil etc.,. There has to be an application of mind on these and other issues linked with preservation and the ASI ought not to hide behind the said notification and abdicate this vital function of theirs. Public interest lies in protection and preservation. It also lies in development and progress. The two opposing forces have to be harmonised and balanced in the context of time and space. We feel that prohibition of construction must not be left to an inflexible rule of thumb but must be arrived at after a conscious and objective application of mind. There may be instances where larger prohibited and regulated areas are necessary, while in others smaller areas of prohibition and regulation would suffice. Therefore, we direct the Central Government to review its Notification dated 16.6.1992 in the light of the discussion above within a period of six months from the date of this judgement.

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8. The FAO as well as the Writ Petition are accordingly disposed of. The parties shall bear their own costs.

M. Ahmed
BADAR DURREZ AHMED
JUDGE.

B. Paei
CHIEF JUSTICE

JULY 23, 2004

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FAO(OS) 414.02 & WP(C) 2635.02.sxw//final//