



GAHC010170602014

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2024:GAU-AS:12166-DB

In the Gauhati High Court
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

(1) WRIT APPEAL No.225 OF 2014

1. Father Marcus Lakra Parish Priest,
Son of Late Basil Lakra,

St. Josephs Catholic Church, Panbazar, Guwahati, District:
Kamrup (M), Assam, PIN – 781001.

2. Dr. Paul Petta, Secretary Diocese of North East under Church
of North India Cherist Church (CNI), Nehru Park, Panbazar,
Guwahati, District Kamrup (M), Assam, PIN – 781001 (Both are
authorized representatives of the Christian people of the
Catholic Church and the Church of North India residing in the
Guwahati City.

.....Appellants

-Versus-

1. The State of Assam, represented by the Chief Secretary to
the Government of Assam, Dispur, Guwahati, Assam, PIN –
781006.

2. The District Magistrate, Kamrup (M) District, Guwahati,
District: Kamrup (M), PIN – 781001.

3. Chenikuthi Happy Villa Unayan Samiti, Kushal Konwar Path,
Kamrup (M), Guwahati, Assam, PIN – 781003.

4. Pragati Mahila Samiti, Chenikuthi Hill side, Guwahati, Kamrup
(M), Assam, PIN – 781003.



5. Dr. Nivedita Goswami,
Daughter of Late Krishna Sarma,
House No.13, Kushal Konwar Path, Chenikuthi, Guwahati-
781003, Assam.

6. Sri Pradip Kakoty,
Son of Late Satish Kakoty,
House No.1, Kushal Konwar Road, Chenikuthi, Guwahati-
781003, District: Kamrup (M), Assam.

7. Ramen Baruah,
Son of Late Binod Barua,
House No.2, Kushal Konwar Road, Chenikuthi, Guwahati-
781003, District: Kamrup (M), Assam.

8. Mukul Chandra Deka,
Son of Late Rajyamal Deka,
House No.4, Kushal Konwar Road, Chenikuthi, Guwahati-
781003, District: Kamrup (M), Assam.

9. Haren Gogoi,
Son of Late Bhudhar Gogoi,
House No.9, Kushal Konwar Road, Chenikuthi, Guwahati-
781003, District: Kamrup (M), Assam.

.....Respondents

(2) WP(C) No. 6710 OF 2021

Fr. Vincent Xalxo,
Son of Late Marcus Xalxo,
The Parish Priest, St. Josephs Catholic Church, Don Bosco,
Panbazar and in-charge of Christian Cemetery at Kushal Konwar
Road, Chenikuthi, Guwahati, District-Kamrup (M), Assam, PIN-
781003.

.....Petitioner



-Versus-

1. The State of Assam, represented by the Chief Secretary to the Government of Assam, Dispur, Guwahati - 781006.

2. The Commissioner & Secretary to the Government of Assam, Revenue & Disaster Management Department, (Settlement Branch), Dispur, Guwahati, PIN-781006.

3. The Deputy Commissioner, Kamrup (Metropolitan), (Land Settlement Branch), Guwahati-781001, Assam.

4. The District Magistrate, Kamrup (Metropolitan) District, Guwahati - 781001, Assam.

5. Bhagadatta Kr. Das,

Father's name – not known,

Resident of Kushal Konwar Road, Chenikuthi Hillside, Guwahati-781003 in the District of Kamrup (M), Assam.

6. Dr. Nivedita Goswami,

Daughter of Late Krishna Sarma,

House No.13, Kushal Konwar Road, Chenikuthi, Guwahati-781003 in the District of Kamrup (M), Assam.

7. Sri Haren Gogoi,

Son of Bhudhar Gogoi,

House No.11, Kushal Konwar Road, Chenikuthi, Guwahati-781003 in the District of Kamrup (M), Assam.

8. Sri Pradip Kakoty,

Son of Late Satish Kakoty,

House No.1, Kushal Konwar Road, Chenikuthi, Guwahati-781003 in the District of Kamrup (M), Assam.

.....Respondents



- B E F O R E -

HON'BLE THE CHIEF JUSTICE MR. VIJAY BISHNOI
HON'BLE MR. JUSTICE KAUSHIK GOSWAMI

For the Appellants/Petitioner : Mr. R.P. Kakoti, Senior Advocate, assisted by Mr. A.B. Dey,
Advocate in Writ Appeal No.225/2014.

: Mr. A. Dhar, Advocate in WP(C) No.6170/2021.

For the Respondents : Mr. R.K. Borah, Additional Senior Government Advocate,
Assam for respondent Nos.1 & 2.

: Ms. S. Sarma, Advocate for respondent Nos. 6, 7 & 8.

Date of Hearing : 26.11.2024.

Date of Judgment : **03.12.2024.**

JUDGMENT & ORDER (CAV)

(Kaushik Goswami, J)

Heard Mr. R.P. Kakoti, learned Senior Counsel, assisted by Mr. A.B. Dey, learned counsel for the appellants in Writ Appeal No.225/2014 and Mr. A. Dhar, learned counsel appearing for the petitioner in WP(C) No.6710/2021. Also heard Mr. R.K. Borah, learned Additional Senior Government Advocate, Assam appearing for the State respondents and Ms. S. Sarma, learned counsel appearing for the respondent Nos.6, 7 & 8.



2. The present appeal is presented against the impugned judgment & order dated 24.03.2014 passed by the learned Single Judge in WP(C) No.6202/2006, whereby the prayer of the appellants/writ petitioners for setting aside the impugned declaration of the Christian Cemetery in question as a Heritage site was rejected.

3. The facts relevant in this appeal are that the District Magistrate, Kamrup (M), by order dated 25.10.2005, declared the Christian Cemetery located on Dag No.183 of Sahar Guwahati Part-VII as Heritage site and directed that further burial shall not be allowed. It was further directed that the vacant Government plot of land measuring 8.48 acre covered by Dag No.181 of Sahar Guwahati Part-VII be kept as an open space in the interest of local people, so as to enable public in the locality to use the land for community purposes. In the meantime, a complaint regarding the same graveyard was filed before the Assam Human Rights Commission by few residents of the locality.

4. The jurisdictional District Magistrate, in terms of the pendency of the aforesaid complaint, withdrew the Declaration Order dated 25.10.2005. Therefore, the Assam Human Rights Commission, by Order dated 22.02.2006, disposed of the complaint by holding that the jurisdictional Deputy Commissioner, being the custodian of the Government land is the competent authority to pass necessary orders as regards the complaint lodged by the local residents alleging illegal and unauthorized extension of the subject Cemetery.

5. Pursuant to the aforesaid order of the Assam Human Rights



Commission, the jurisdictional District Magistrate, by Order dated 27.11.2006, re-issued his earlier order, i.e. Order dated 25.10.2005 for implementation by the concerning parties. Aggrieved by the above, the authorized representative of St. Josephs Catholic Church and Church of North India Cherist Church (CNI) filed a petition under Article 226 of the Constitution of India before this Court being WP(C) No.6202/2006, wherein by representing the entire Christian population subjected to the above 2(two) Churches residing in inner Guwahati city assailed the aforesaid orders dated 25.10.2005 and 27.11.2006 passed by the respondent No.2.

6. In the aforesaid writ proceedings, the learned Single Judge, by judgment & order dated 24.03.2014, rejected the said prayer of the petitioners. Accordingly, the present appeal has been preferred. Pertinent that this Court, while admitting the present appeal by order dated 04.08.2014, directed continuing of the *interim* order passed by the learned Single Judge by order dated 15.12.2006 in the said writ petition, staying the operation of the impugned order dated 27.11.2006.

7. During the pendency of the said appeal, the respondent Nos.5 to 8 lodged a complaint before the Deputy Commissioner, Kamrup (M), alleging illegal extension of subject Christian burial site in the land covered by Dag No.181 and in pursuance of the same, the respondent authorities issued a notice of hearing to the petitioners on 13.09.2021. Thereafter, the jurisdictional Deputy Commissioner, Kamrup (M), after hearing both the concerned parties, by order dated 12.11.2021, observed that the subject Cemetery does not have



right to initiate a fresh construction work in the nature of erecting boundary wall over the subject land and thereby directed the Cemetery in question to remove all the fresh construction over the subject plot of land.

8. Being aggrieved with the said order, the petitioners filed WP(C) No.6710/2021. Pertinent that this Court, by order dated 13.12.2021, directed both the parties in that writ proceeding to maintain *status quo* with regard to the subject plot of land and not to make any further construction. The issue involved in the said writ petition being connected with the appeal, this Court by its earlier order dated 01.08.2022, directed listing of the said writ petition alongwith the present appeal. Accordingly, both the matters are taken up together for final disposal by this common judgment & order.

9. Mr. Kakoti, learned Senior Counsel appearing for the appellants submits that the jurisdictional District Magistrate, without following any procedure established by law, declared the subject Cemetery as Heritage site and as such, the impugned declaration is totally illegal. He further submits that the decision of the learned Single Judge by the impugned judgment & order dated 24.03.2014, whereby the prayer of the petitioners to set aside and quash the said impugned declaration was rejected, is totally erroneous and accordingly, warrants interference from this appellate Court.

10. Mr. A. Dhar, learned counsel appearing for the petitioner in WP(C) No.6710/2021 submits that the orders of the District Magistrate impugned in the writ proceedings, whereby further construction activities in the impugned writ



petition has been stopped is illegal, as the land in question has been reserved for the subject Cemetery as per the Revenue records.

11. Per contra, Ms. S. Sarma, learned counsel appearing for the respondent Nos.6, 7 & 8, i.e., residents of the locality in question, submits that Dag No.181 has been reserved for way to the subject Cemetery located at Dag No.183 and hence, the same cannot be used for any other purpose except for the purpose reserved. She further submits that the appellants/petitioner by erecting a boundary wall in the said subject land has obstructed the open space, thereby violating the purpose reserved for the use of the subject land and hence, the order of the jurisdictional Deputy Commissioner warrants no interference from this Court.

12. Mr. R.K. Borah, learned Additional Senior Government Advocate appearing for the State respondents submits that the original records indicates that the land in question has been reserved for the subject Cemetery. He further submits that the affidavit filed on behalf of the State respondents does not indicate the power of the jurisdictional District Magistrate to declare a plot of land as Heritage site. He further submits that the writ appeal can be disposed of by remanding the matter to the State Government to take up the matter afresh as regards declaration of the subject Cemetery as Heritage site, in accordance with law.

13. We have given our prudent consideration to the arguments made by the learned counsel appearing for the contesting parties and have also perused



the materials available on record.

14. The issue involved is the legality and validity of the impugned order dated 25.10.2005 and restoration order dated 27.11.2006 issued by the jurisdictional District Magistrate, whereby the subject Christian Cemetery was declared as a Heritage site and also further burial therein was prohibited.

15. Apt to refer to the declaration order dated 25.10.2005, which is reproduced hereunder for ready reference:-

“ORDER

In the greater interest of public, the Christian Cemetery located on Dag No. 183 of Sahar Guwahati is hereby kept as Heritage Site and farther burial shall not be allowed forthwith. The vacant Government plot of land measuring 8.48 Are covered by Dag No. 181 of Sahar Guwahati Part-VII is also hereby kept as an open space in the interest of focal people so as to enable public in the locality to use the land for community purposes.

Inform all concerned accordingly.

*Sd/- Samir Kr. Sinha, IAS
District Magistrate,
Kamrup (Metropolitan) District
-Guwahati-”*

16. Apt also to refer to the restoration order dated 27.11.2006, which is reproduced hereunder for ready reference:-

“ORDER

Seen and perused order dated 22/02/06 passed by the Hon'ble Assam Human Rights Commission in AHRC Case No. 4315/2002 referring the matter to the undersigned to decide the matter. The order stated that "The order dated 25/10/05 of the Deputy Commissioner cannot be faulted".

Accordingly order dated 25/10/05 is hereby re-issued for implementation



by the concerning parties/ departments.

Inform all concerned enclosing a copy of the said order dated 25.10.05.

*District Magistrate,
Kamrup Metropolitan District
Guwahati”*

17. It appears that the jurisdictional District Magistrate, by order dated 25.10.2005 in the garb of greater interest of public, declared the subject Christian Cemetery located in the said Dag No.183 as 'Heritage site' and directed that no further burial shall be allowed in the said subject land.

18. It further appears that in respect of the adjacent land, i.e. Dag No.181, the jurisdictional District Magistrate further directed that the same shall be kept as an open space in the interest of local people, so as to enable the public in the locality to use the land for community purpose.

19. It further appears that the aforesaid declaration was withdrawn by the jurisdictional District Magistrate in view of pendency of a complaint before the Assam Human Rights Commission and after the said complaint was decided by the Commission, the jurisdictional District Magistrate re-issued/restored the earlier order of declaration dated 25.10.2005 by order dated 27.11.2006.

20. During the pendency of the appeal, the learned State Counsel had placed a letter dated 28.02.2024 issued by the Additional District Commissioner, Kamrup (M) District, Guwahati, enclosing the draft chitha copies for the period (1951-55) and (1975-86) for the Dag Nos.181 and 183 to the Additional Senior



Government Advocate, Assam, wherefrom it appears that the land covered under the said 2(two) Dags were reserved for the Christian Cemetery and Kabar Khana.

21. It appears that the order of the District Magistrate declaring the subject Christian Cemetery as a Heritage site is not preceded with any notice to the members of the Christian community, who are using the subject land for burial from time immemorial. Further, it appears that the impugned declaration order does not reflect the reasons for declaration of the land in question as Heritage site.

22. As a corollary to the above, the question that falls for determination is under what power and jurisdiction the District Magistrate had issued the impugned declaration of the land in question as Heritage site.

23. The affidavit-in-opposition which has been filed by the State respondents in the writ petition is silent as regards the power under which the jurisdictional District Magistrate has issued the impugned declaration.

24. Paragraph Nos.3 to 15 of the said affidavit-in-opposition are reproduced hereunder for ready reference:-

“3. That some residents of Chenikuthi Hill Side submitted a petition dated 10.3.1992 to the then Chief Minister, Assam and Revenue Minister Assam requesting that the open space measuring 3(three) kathas covered by Dag No.181 of Ulubari Mouza, Village Sahar, Guwahati Part II adjacent to the Christian Cemetery Hill Side be reserved for public purpose as an open



space. Following that enquiries were made but the outcome is not known.

4. That a report dated 6.4.99 was submitted by the Commissioner appointed by the Civil judge of Division No.1. Guwahati in Title suit No.225/96 which inter-alia indicated that as per revenue record Dag No.181 is a Govt. land reserved for Christian Cemetery and the same is approach road to Dag No.181 which is actual Christian Cemetery.

5. That Guwahati Development Authority (GDA) issued No Objection Certificate for construction of boundary wall on Dag No.181 vide No.GDA/BP/150/92/9 dated 17.3.92 to the Parish priest St. Joseph's Church, Christian Cemetery against their application dated 10.3.92. However vide letter No. GDA/BP/150/92/16 dated 21.3.92 the GMDA directed the petitioner not to construct boundary wall as the petitioner is not the actual owner of the said land.

6. That the enquiry was conducted by the Circle Officer Guwahati Revenue Circle vide No. 92 dated 27.3.92 in which it is state Dag No. 183 having an area of 5 (five) bighas 1 (one) katha land measuring 3 (three) lechas on Dag No.181 is an open space adjacent to the actual burial ground. The report of the Circle Officer was duly forwarded to the Government to the Revenue Department by the then Deputy Commissioner.

7. That the then Deputy Commissioner, Kamrup vide under Memo No. KMJ 28/2001/50 dated 23.2.01 ordered that the area in dispute to be kept as an open space without disturbing the sanctity of the cemetery.

8. That the dispute over the land at Dag No. 181 continued with the Parish priest trying to occupy the land under Dag No. 181 by constructing wall and a gate. In this regard a letter was sent to the then Chief Minister of Assam in the year 2001. On the contrary prominent citizen like Sri Satish Chandra Kakati and others opposed the move construct wall over the property.

9. That Assam Human Rights Commission registered a case bearing AHRC Case No. 7315/2002 called for a report from the Deputy Commissioner, Kamrup.

10. That in the year 2004 local women's organization also submitted a prayer before the Deputy Commissioner, Kamrup requesting to keep the said plot of land in dag No. 181 as open space for public use.

11. That the Govt. of Assam vide letter No. GDD 47/2001/56 dated 30.6.03 directed by the Deputy Commissioner, Kamrup (M) should sort out the matter in the consultation with all concerned.

12. That in the year 2003, the Circle Officer, (A) Guwahati Revenue Circle submitted a report to the then Deputy Commissioner Kamrup vide No. CC--24/2002/492 dated 11.3.03 indicating inter-alia that the Christian Cemetery was situated over land in dag No. 183 and the land Dag No. 181 was an open space. This open space in Dag No. 181 is noted as Government land with the remarks, reserved for Christian Cemetery. In the



said report, the Circle Officer suggested that the Christian Cemetery on Dag No 183 be observed as a Heritage site and no further burial should be allowed there and area under Dag No. 181 be reserved as an open space. Following the report District Magistrate, Kamrup (M) ordered that the Christian Cemetery in Dag no 183 is preserved as heritage site and no further burial be allowed there and Dag No. 181 with an area of 8.48 acre be kept as open space for public use vide order No. KMJ/28/201/201 dated 28.10.05.

Thereafter following representation from the Christian Cemetery that the matter was pending in Assam Human Rights Commission, District Magistrate withdrew the order mentioned above dated vide his order dated 10.11.2005 vide memo No. KMJ/28/2001.

13. That the Assam Human Rights Commission passed a judgment and order dated 2.2.2006 passed in AHRC Case No. 4315/02 referred the matter to the Deputy Commissioner to decide the matter and also held that order dated 25.10.2005 passed by the Deputy Commissioner, Kamrup cannot be faulted with.

14. That upon the representation of the Christian community that there is no alternative burial ground for them in Guwahati the matter was enquired into through the Circle Officer (A), Guwahati Revenue Circle and he submitted his report vide No. GC 14/06/1648 dated 11.8.06 that 3(three) Dag in Sahar Sarania Part-I were already allotted as burial ground for Christian in Silpukhuri Nabagraha area.

15. That the considering the above enquiry report the District Magistrate (M) vide order under memo No. KMJ 28/2001/212-A dated 27.11.2006 re-issued the order passed on 25.10.2005.”

25. What transpires from the above affidavit-in-opposition is that pursuant to a representation filed by the residents of the neighbourhood of the subject Christian Cemetery on 10.03.1992, for reserving the Dag No.181 adjacent to the Christian Cemetery (Dag No.183) for public purpose as an open space, enquiries were initiated. It further appears that in the year 2003, the jurisdictional Circle Officer submitted a report to the jurisdictional Deputy Commissioner, wherein he suggested that the Christian Cemetery on Dag No.183 be observed as Heritage site and to prohibit further burial therein and that the Dag No.181 be reserved as an open space. It appears that pursuant to the said observation of the Circle



Officer, the impugned declaration was made by the jurisdictional District Magistrate.

26. It is thus evident from the aforesaid that the entire dispute started after a representation was made by the residents of the subject locality in respect of Dag No.181, which is alleged to be reserved for the way to Dag No.183, i.e. the burial ground. However, it appears that the jurisdictional Circle Officer unilaterally recommended declaration of Dag No.183 in respect of which there was no complaint from the residents of the locality in question as a Heritage site. Curiously, the jurisdictional District Magistrate, at the stroke of a pen, declared the subject Christian Cemetery at Dag No.183 as a Heritage site and further prohibited burial therein. Despite pointed query being posed to the learned State Counsel, he could not assist the Court as regards the source of power under which such declaration was issued by the jurisdictional District Magistrate.

27. However, Mr. R.P. Kakoti, learned Senior Counsel for the appellants draws our attention to the Assam Ancient Monuments and Records Act, 1959 (hereinafter to be referred as the "Act of 1959"). A perusal of the said Act of 1959 indicates that the object of the said Act is to provide for the preservation and protection of ancient and historical monuments and records in Assam other than those declared by all under law made by Parliament to be of national importance.

28. It appears that the said Act of 1959 lays down the provisions for the

preservation and protection of ancient and historical monuments and records in Assam. Ancient monument is defined under Section 2(a) of the said Act of 1959, which is reproduced hereunder for ready reference:-

“2. Definitions

In this Act unless there is anything repugnant in the subject or context,-

(a) ‘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.

- (i) the remains of ancient monument;*
- (ii) the site of an ancient monument;*
- (iii) such portion of land adjoining the site of an ancient monument as may be required for fencing or covering in or otherwise preserving such monument, and*
- (iv) the means of access to, and convenient inspection of any ancient monument;”*

29. The definition of ancient monument includes place of tumulus amongst others. Apt to refer to Concise Oxford English Dictionary, 12th Edition, which defines tumulus as “*An ancient burial mound; a barrow*”. In common parlance, tumulus is a mound of earth and stones raised over a grave or graves.

30. It is thus apparent that graveyard/cemetery can be construed to be ancient monument if the same is of historical, archaeological or artistic interest and which has been in existence for not less than 100 (One Hundred) years.

31. Apt also to refer to Sections 3, 4 & 5 of the said Act of 1959, which are reproduced hereunder for ready reference:-



“3. Protected Monument

(1) *The State 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 State 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 Government after considering the objection, if any, shall confirm or withdraw the notification.*

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

NOTES

This section is also similar to section 3 of the Central Act and empowers the State Government under the Assam Act to declare an ancient monument to be a protected monument within the meaning of this Act.

4. Acquisition of Right in or Guardianship of an Ancient Monument

(1) *The Superintendent with the sanction of the State Government, may purchase, or take a lease of, or accept a gift or bequest of any protected monument.*

(2) *When a protected monument is without an owner, the Superintendent may, by notification in the official Gazette, assume the guardianship of the monument.*

(3) *The owner of any accepted monument may, by written instrument, constitute the Superintendent the guardian of the monument, and the Superintendent may, with the sanction of the State Government, accept such guardianship.*

(4) *When the Superintendent has accepted the guardianship of a monument under sub-section (3), the owner shall except as expressly provided in this Act have the same state, right, title and interest in and to the monument as if the superintendent had not been constituted guardian thereof.*

(5) *When the Superintendent has accepted the guardianship of a monument under sub-section (3) the provisions of this Act relating to agreements executed under section 5, shall apply to the instrument executed under the said sub-section.*

NOTES

This section is also similar to section 4 of the Central Act and empowers the Superintendent of Archaeology and any Officer authorized by the State Government to perform the duties of the Superintendent, to purchase or take a lease of or accept a gift or the bequest of any protected monument with the sanction of the State Government and such officer is empowered under sub-section (2) thereof to assume the guardianship of the monument when such a monument is without an owner.

5. Preservation of Ancient Monument by Agreement

(1) The Deputy Commissioner, when so directed by the State Government shall propose to the owner of a protected monument to enter into an agreement with the State Government, within a specified period for the maintenance of the monument in his district.

(2) An agreement under this section may provide for all or any of the following matters, namely:

- (a) The maintenance of the monument;*
- (b) The custody of the monument and the duties of any person who may be employed to watch it;*
- (c) The restriction of the owner's rights-
 - (i) To the monument for any purpose;*
 - (ii) To charge any fee for entry into, or inspection of the monument;*
 - (iii) To destroy, remove, alter or deface the monument: or*
 - (iv) To build on or near the site of the monument;**
- (d) The facilities of access to be permitted to the public or any section thereof and to persons deputed by the owner or the Deputy Commissioner to inspect or maintain the monument;*
- (e) The notice to be given to the State Government in case the land on which the monument is situated or any adjoining land is offered for sale by the owner, and the right to be reserved to the State Government to purchase such land, or any specified portion of such land, at its market value;*
- (f) The payment of any expenses incurred by the owner or by the State Government in connection with the maintenance of the monument;*
- (g) The proprietary or other rights which are to vest in the State*



Government in respect of the monument when any expenses are incurred by the State Government in connection with the maintenance of the monument;

(h) The appointment of an authority to decide any dispute arising out of the agreement; and

(i) Any matter connected with the preservation of the monument which is a proper subject of agreement between the owner and the State Government.

(3) The State Government or the owner may at any time after the expiration of three years from the date of execution of an agreement under this section terminate it on giving six months' notice in writing to the other party:

Provided that where the agreement is terminate by the owner, he shall pay to the State Government the expenses, if any, incurred by it on the maintenance of the monument, during the five years immediately preceding the termination of the agreement or, if the agreement has been in force for shorter period, during the period the agreement was in force.

(4) Any agreement under this section shall be binding on any person claiming to be the owner of the monument to which it relates, through or under a party by whom or on whose behalf the agreement was executed.

NOTES

The provisions as contained in this section are also being provided in section 5 of the Central Act. Under this section, an ancient monument can be preserved by the State Government by entering into an agreement with the owner of a protected monument and detailed procedure thereof has been provided in this section.”

32. Reading the above, it is apparent that the Act of 1959 provides provision for the preservation and protection of ancient and historical monuments in Assam. Under Section 3 of the said Act, the State Government is empowered to declare an ancient monument to be a protected monument by publication of notification in the Official Gazette and such notification is required to be fixed up in a conspicuous place on or near the monument, together with an intimation for filing objections, if any, within one month and upon expiry of the said period and after consideration of the objection, if any, the State



Government shall confirm or withdraw the notification, as the case may be. Further, under Section 4 of the Act of 1959, the Superintendent of Archaeology, with the sanction of the State Government, is empowered to purchase or take a lease of, or accept a gift or bequest of any protected monument by entering into agreement either with the owner or the guardian of such monument as the case may be. Furthermore, under Section 5 of the Act of 1959, the Deputy Commissioner, when so directed by the State Government, shall propose to the owner of a protected monument to enter into an agreement with the State Government, within a specified period for the maintenance of the monument in his District and for the said purpose of preservation of such monument, he shall enter into an agreement, wherein the conditions for maintenance/custody/restriction or use, etc., of the monument shall be agreed upon.

33. Apt also to refer to the Assam Ancient Monuments and Record Rules, 1964, (hereinafter to be referred as the "Rules of 1964"), whereunder Chapter-II provides the manner of declaration of protected monuments. Rules 3, 4, 5 & 6 of the said Rules of 1964 are reproduced hereunder for ready reference:-

"3. Manner of enquiry before an Ancient Monuments may be declared to be protected

(1) The Superintendent shall, before a notification under Section 3 is issued, cause a thorough enquiry as to the antiquity of the monument to be protected, and shall determine as accurately as possible the age of the Monument on such evidences as may be available to him.

(2) On obtaining evidences which the Superintendent considers sufficient for protection of a Monument, he shall submit necessary proposals to the State Government for protection of the same under intimation to the Deputy Commissioner concerned.

(3) In submitting a proposal to the State Government the Superintendent shall specify the exact area of the land that is required for the purpose of preserving the Monument in proper manner, with facilities for approach



road, reaction of any structures and for laying out of gardens.

4. *Recommendations of the Deputy Commissioner*

The Deputy Commissioner shall within one month from the date of the receipt of the report from the Superintendent, submit to the State Government his objection if any against the proposal of the Superintendent together with alternative suggestions. The State Government may issue a Notification under Section 3, notwithstanding the fact that no report has been received from the Deputy Commissioner in this behalf.

5. *Demarcation of site*

As soon as a notification has been confirmed under sub-section (3) of Section 3, the Superintendent shall cause necessary pillars and fencings to be fixed demarcating the area appearing in the notification and required for preservation of the protected Monument.

6. *Restriction of Public entry into a Monument during repairs*

(1) Superintendent may, by an order to be fixed up in a conspicuous place near the Monument, prevent entry into the site of the protected Monument of any person not specifically authorized by him to do so, during such periods of time when the Monument is under repairs or when an excavation is carried on in the site or when entry of unauthorized persons is deemed by the Superintendent to be detrimental in the interest of work of preservation.

(2) In the Case of a protected Monument which, or part of which, is used for religious worship or observances by any community, the person or persons whose entry into the Monument is required for the purpose of religious observances, shall be deemed to be persons authorized by the Superintendent for such entry under sub-rule (1).3.”

34. It is apparent reading of the aforesaid Rules of 1964 that a Superintendent which means under sub-section (f) of Section 2 of the Act of 1959, the Superintendent of Archaeology and include any officer authorized by the State Government to perform the duties of the Superintendent, is empowered to undertake a thorough enquiry as to the antiquity of the monument to be protected and shall determine as accurately as possible the age of the monument on such evidences as may be available to him. The Rules



of 1964 further provides how the enquiry shall be made by the Superintendent and also the manner of submitting the proposal thereof to the State Government with intimation to the Deputy Commissioner concerned. The Rules of 1964 further empowers the concerned Deputy Commissioner to make recommendations thereof to the State Government within the specified time period. It is only after the proposal of the Superintendent and the recommendations of the Deputy Commissioner concerned, if any, the State Government may issue the notification of declaration of protection of ancient monuments.

35. Thus, the condition precedent for declaring any monument including tumulus/burial ground/cemetery as an ancient monument, the State Government must first through the Superintendent cause a thorough enquiry as to the antiquity and the age of the monument to be protected. It is only after obtaining such evidences which the Superintendent consider sufficient for protection of a monument, he/she shall make proposal to the State Government thereof. Based on such proposal of the Superintendent and the recommendation of the Deputy Commissioner, if any, the State Government shall issue notification under Section 3 of the said Act of 1959, declaring such monument as protected ancient monument. In the present case, there is nothing on record to show that any enquiry has been conducted by the Superintendent as to the antiquity and age of the Christian Cemetery at Dag No.183. In fact, neither the affidavit-in-opposition nor the impugned declaration indicates any such exercise undertaken by the State Government to determine the antiquity and the age of the subject Christian Cemetery. It is manifestly evident that no procedures whatsoever, as laid down under Section 3 of the Act of 1959 read with Rules 3 &



4 of the said Rules of 1964, have also been undertaken by the State Government. Pertinent that under the said Rules of 1964 it is the Superintendent, who is empowered to enquire the antiquity and age of the concerned monument and submit proposal thereof. However, in the present case, the jurisdictional Circle Officer unilaterally proposed declaration of the Christian Cemetery in question as a Heritage site and the same was mechanically declared by the jurisdictional District Magistrate without both authorities having any power or jurisdiction for recommendation/declaration of Heritage site as the case may be. There is, therefore, no doubt in our mind that under the Act of 1959, the District Magistrate does not have any power to declare the subject Christian Cemetery as Heritage site. Therefore, the impugned declaration is without jurisdiction.

36. It is well settled law that any order passed without power and jurisdiction is *non-est* in the eye of law. That apart, the Act of 1959 having vested the power with the State Government to protect ancient monument and having laid down the manner in which such declaration is to be made, the same has to be made in that manner only and all other methods of declaration/protection are necessarily forbidden. Reference in this regard is made to the decision of the Privy Council in the case of ***Nazir Ahmed Vs. The King Emperor*** reported in **1936 AIR (PC) 253**. Undoubtedly, in the present case, neither the authority conferred under the Act of 1959 has issued the impugned declaration of the subject Cemetery as Heritage site nor the manner prescribed under the Rules of 1964 for making such declaration has been followed. As such, the impugned declaration of the subject Christian Cemetery by the jurisdictional District Magistrate is totally *ultra vires, per-se* illegal and



null and void. We are, therefore, of the firm view that mandamus in the present case lies.

37. In view of the above, we are unable to accept the findings of the learned Single Judge in not interfering with the impugned declaration, which on the face of the record, is illegal and *null and void*. Accordingly, the impugned judgment & order dated 24.03.2014 passed by the learned Single Judge is set aside.

38. Resultantly, the impugned orders dated 25.10.2005 and 27.11.2006 issued by the District Magistrate, Kamrup (M) are also hereby set aside and quashed.

39. Before parting with the records, pertinent that Mr. A. Dhar, learned counsel appearing for the petitioner in WP(C) No.6710/2021 has brought to our notice that the State Government has, in the meantime, also enacted the Assam Heritage (Tangible) Protection, Preservation, Conservation and Maintenance Act, 2020 (hereinafter to be referred as the "Act of 2020") to provide for the protection, preservation, conservation, maintenance and restoration of tangible heritage of the State of Assam other than those declared by or under the law made by the Parliament to be of national importance or those covered under the Act of 1959 and to develop and promote these heritages and matters connected therewith and incidental thereto. Tangible Heritage as defined under sub-section (I) of Section 2 of the Act of 2020 means any material or physical heritage like buildings, structures, artifacts, sculptures, handloom and handicrafts, fabrics,

paintings, traditional music instrument, etc., as dealt with in Section 3.

40. Apt to refer to sub-section (p) of Section 2 of the said Act of 2020, which defines monument, as reads hereunder:-

“2.(p) ‘Monument’ means any ancient monument and sites which is not declared as such by the State Government by notification in the Official Gazette, to be a protected monument under the Assam Ancient Monuments and Records Act, 1959 and by the Central Government under the Ancient Monuments and Archaeological Sites and Remains Act, 1958.”

41. Apparent that any ancient monument, which is not declared under the Act of 1959, is covered under the definition of monument.

42. Apt also to refer to Sections 3 & 4 of the said Act of 2020, which are reproduced hereunder for ready reference:-

“3. For the purposes of this Act, the tangible heritage of Assam shall be, -

(a) Built heritage which includes,-

- (i) Monuments, architectural works, works with monumental sculpture, and painting, elements or structure of an archaeological nature, inscription, cave dwellings, combinations of features, which are of outstanding value for the heritage of Assam from the point of view of history, art or science;*
- ii) tanks, ramparts, buildings, precincts, sites, areas, cultural and religious institutions of people of Assam like Sattras, Monasteries, Stupas, Namghars, Mosques, Dargah, Church and religious institutions of different ethnic groups having historical legacy, social institutions etc.;*
- (iii) groups of separate or connected buildings which because of their architecture, their homogeneity or their place in the landscape are of outstanding value for the heritage of Assam:*
- (iv) vernacular heritage ie. traditional and historical way by which the communities or individuals shelter themselves over a period of time in the state of Assam;*



- (b) *Movable Heritage which includes, -*
- (i) *antiquities such as any coin, sculpture, manuscript, maps, epigraphs, other works of art or craftsmanship or any such object;*
 - (ii) *any article, object or thing detached from building cane, on walls, fossils, geological, and geomorphic formations;*
 - (iii) *any article, object or thing illustrative of science, art, crafts, handlooms, handicrafts, fabrics, film, photography, documents, literature, religion, customs etc.,*
 - (iv) *any article, object or machinery, equipment, recordings, or things that having heritage value as may be notified by the Government to be an antiquity for the purposes of this Act;*

4. *All ancient monuments and all archaeological sites and remains which have not been declared by or under law made by Parliament to be of national importance and which have not been declared by the State Government by notification in the Official Gazette as ancient Monuments to be protected under the Assam Ancient Monuments and Records Act, 1959, shall be deemed to be tangible heritages of Assam for the purposes of this Act.”*

43. It is apparent that under Section 4, all ancient monuments which have not been declared under the Act of 1959 as ancient monument to be protected, shall be deemed to be tangible heritages of Assam for the purpose of the said Act of 2020. That being so, the subject Cemetery shall now be covered under the provisions of the said Act of 2020.

44. In light of the above, it is clarified that the State Government is at liberty to protect and preserve the Christian Cemetery in question, if it falls within the definition of ancient monument under the Act of 1959 or under the Act of 2020, as the case may be, however, the same has to be strictly done in accordance with law.



45. With the aforesaid observation and direction, the Writ Appeal No.225/2014 stands allowed.

46. As far as WP(C) No.6710/2021 is concerned, it appears that the jurisdictional District Commissioner, pursuant to representations filed by residents of the locality in question, conducted hearing, wherein both the residents and representatives of the Church in question appeared. It further appears that the jurisdictional Deputy Commissioner, upon hearing both the parties and examining land records and upon observing that the subject Dag No.181 was reserved for Christian Cemetery, restrained the petitioner from initiating fresh construction work in the nature of erecting boundary and accordingly, directed the Cemetery authorities to remove all the fresh construction over the subject Dag No.181.

47. During the course of hearing, Mr. A. Dhar, learned counsel for the petitioner produced a certified copy of the chitha in question, wherefrom it appears that in the year 1992, Dag No.181 was corrected and reserved for way to the burial ground located at Dag No.183 instead for Christian Cemetery. However, the said chitha was not taken into account by the District Commissioner while passing the impugned restrained order dated 12.11.2021. It further appears that it is not clear from the restrained order as to how the Church authorities have claimed ownership and title over the subject Dag No.181. Therefore, it appears that the entire material were not taken into consideration while passing the impugned restraining order. That being so, we are of the opinion that this writ petition can be disposed of with a direction to



the competent authority to decide the complaint as regard Dag No.181, afresh after taking into account all the relevant material and by giving full opportunity to all the affected parties to prove their respective claims within a period of 3 (three) months from the date of receipt of a certified copy of this order and till then, the status quo order as directed by this Court earlier by order dated 13.12.2021 be maintained with regard to the Dag No.181.

48. Ordered accordingly.

49. Accordingly, WP(C) No.6710/2021 stands disposed of.

JUDGE

CHIEF JUSTICE

Comparing Assistant