

(2001) 08 KAR CK 0056

In the Karnataka High Court

Case No : Writ Petition No. 24363 of 1992 (LB-PIL)

Balappa Basamanappa Kosji and others

APPELLANT

Vs

State of Karnataka and others

RESPONDENT

Date of Decision : 01-08-2001

Acts Referred:

Constitution of India, 1950 — Article 48A

Karnataka Municipal Corporations Act, 1976 — Section 176 (6)

Citation : AIR 2002 Kar 44 : (2002) ILR (Kar) 1524

Hon'ble Judges : G.C. Bharuka, J;A.V Srinivasa Reddy, J

Bench : Division Bench

Advocate : Sri S.M. Chandrashekar, for the Appellant; Sri K. Srinivasa Gowda, A.G.A., Sri B.S. Mali Patil and Sri H.S. Jois, for the Respondent

Final Decision : Allowed

Judgement

A.V. Srinivasa Reddy, J.—This petition is filed by the petitioners in public interest praying for quashing of the impugned orders dated 28th February, 1983, 6th February, 1984 and 24th March, 1988 produced as Annexures-A, B and C respectively.

2. The petition raises interesting questions of law governing local bodies vis-a-vis the State on the question whether the direction by the State to the local body to sell the open space/park was proper and legal and/or whether the same is contrary to the express provisions of law prevailing as on the date of action? These questions fall in the sphere of both Administrative Law and Constitutional Law and they assume special significance in a modern welfare state which is bound by the directive principle enshrined in Article 48A of the Constitution of India, inter alia, providing for protection of environment etc. But, these questions cannot be decided in the abstract. They are required to be considered and determined only against the background of facts as found in the writ petition.

3. The facts necessary for the disposal of this petition, briefly stated, are as follows:

The petitioners are residents of Aiwan-E-Shahi Colony which is a residential layout formed in Sy. No. 24/3 of Aiwan-E-Shahi Road, Gul-barga. The layout was a private layout formed for the benefit of its members. The approved residential layout plan by the second respondent-Corporation as per Annexure-H shows that certain area had been reserved for open space. At the time of approval of the layout plan the open space came to be vested with the Corporation u/s 174 of the Karnataka Municipal Corporations Act, 1976. The third respondent, it appears, had made an application to the second respondent for allotment of a site. The second respondent by a resolution dated 28-2-1983, produced as Annexure-A, proposed to allot the open space in question to the third respondent and sent up the proposal to the first respondent-State for sanction u/s 176(6)(b) (iii) of the Karnataka Municipal Corporations Act, 1976. However, the first respondent has passed the following order according sanction for sale of the said site by its Order vide HUD 26 ACG 82, Bangalore, dated 6th February, 1984 which is produced as Annexure-B to the writ petition. The Government Order is to the following effect:

"Government Order No. HUD 26 ACG 82, Bangalore, dated 6-2-1984

After considering all aspects of the case and in partial modification of the Administrator's resolution CCG/ASSN/33/82-83/60, dated 28-2-1983 Government are pleased to accord sanction u/s 176(6)(b)(iii) of the K.M.C. Act, 1976 to grant an open site of the Corporation measuring 220"+150"x90"/2 in Survey No. 24/3 of Daddapur situated in Aiwan-E-Shahi Road, Station Area, Gulbarga on outright sale in favour of Adi Shankaracharya Seva Samithi, Gulbarga, for construction of Sanskrit Pathashala at Rs. 15/- per sq. feet.

This order issued with the concurrence of Finance Department given in its U.O. Note No. FD 2543/Expr. III/83, dated 15-12-1983".

Thereafter, the third respondent made a representation to the Government to reduce the price at which it was proposed to be sold to it. The first respondent, acting on the representation of the third respondent, reduced the price fixed earlier by its order dated 24-3-1988, produced as Annexure-C to the writ petition. The petitioners are aggrieved by these orders produced as Annexures-A, B and C respectively.

4. The petitioners also claim to be aggrieved by the alienation (sale) of the site in favour of the third respondent by the respondents 1 and 2, on the ground that the area allotted to the third respondent was earmarked for a park. The petitioners contend that the impugned orders passed by the first and second respondents are opposed to the statutory provisions and the public health and general welfare of the people. The alienation of the open space is null and void as the respondents 1 and 2 had no authority in law to permit sale of the property in question and any construction put up thereon would be illegal. The interest of the residents of Aiwan-E-Shahi would be adversely affected as they would be deprived of the open space to which they are in law entitled to and which space

they were using since time immemorial as a play-field. On these grounds, the petitioners seek for quashing of the orders impugned in the writ petition.

5. We have heard the learned Counsel Mr. S.M. Chandrashekar for petitioners, Mr. B.S. Malipatil for respondent 2-Corporation, learned Senior Counsel Mr. H.S. Jois for respondent 3 and Mr. K. Srinivasa Gowda, Additional Government Advocate for respondent 1-State.

6. Learned Counsel for the petitioners relying on clause (g) of Section 2 of the Karnataka Parks, Play-fields and Open Spaces (Preservation and Regulation) Act, 1985 (hereinafter referred as "Act of 1985") submitted that the "open site" in question is a "park" in terms of the said definition. Drawing attention to sub-section (2) of Section 8 of the Act of 1985 it is submitted that, the alienation of the land earmarked for the purposes of developing into a park is prohibited and therefore the action of the respondents-authorities in alienating the land in favour of the third respondent is null and void and has to be struck down. Learned Senior Counsel Mr. H.S. Jois submitted that the piece of land does not come within the purview of the term "park" as defined in the Act and, therefore, the alienation of the said land cannot be found fault with. It is his further submission that the provisions of the Act would have no application to the case on hand as the said enactment is prospective in nature and all the orders impugned had been passed at a point of time which was earlier to the commencement of the Act.

7. So far as the contention of the learned Senior Counsel Mr. Subramanya Jois that the area in question is not a park in the strict sense of the term is concerned, the same lacks merit. Park has been defined by sub-section (g) of Section 2 of Act 1985 as:

"Park" means a piece of land on which there are no buildings or of which not more than one-twentieth part is covered with buildings, and the whole or remainder of which is laid out as a garden with trees, plants or flower beds or as a lawn or as a meadow and maintained as a place for the resort of the public for recreation, air or light".

The definition is an inclusive definition. It would include any land which is not covered by any building. The fact that the land in question was a piece of land not covered by any building is not disputed. It would also include a piece of land maintained as a place for the resort of the public for recreation, air or light. It is not essential that the area must have been laid out as a garden with trees, plants or flower beds or as a lawn or as a meadow. To understand it in any other way would amount to doing violence to the tenor of the definition. This apart, we are relieved of the necessity of determining whether or not the area is a park. This question is taken beyond the realm of dispute by the publication of the notification by the first respondent under sub-section (1) of Section 3 of the Act 1985 whereunder the area in question had been included in the list of park as Item No. 3. The notification is produced as Annexure-G to the writ petition and

the relevant portion is extracted hereunder:

"Government Order No. HUD 17 ACG 85, Bangalore, dated 11-4-1989

In exercise of the power conferred by sub-section (2) of the Section 3 of the Karnataka Parks, Play-fields and Open Spaces (Preservation and Regulations) Act, 1984, the Government of Karnataka hereby approved the list, after deleting the following items from the list published in the Government Notification dated 8th November, 1985.

..... The list as approved is enclosed to this Government Order. It may be published by the executive-authority as required by Rule 5 of the Karnataka Parks, Play-fields and Open Spaces (Preservation and Regulations) Rules, 1985.

List of Parks:

1.....

2.....

3. Park in Aiwan-E-Shahi Housing Co-operative Society Layout".

In the face of the notification as also the tenor of the definition contained in the Act read with other relevant provisions is it open to argue that the area in question is not a park? In order to answer this question it is necessary to examine some of the provisions of Act 1985.

8. The Act came into force on the 26th day of December, 1984 in the cities of Bangalore, Belgaum, Gulbarga, Hubli-Dharwar, Mangalore and Mysore. The Act was promulgated with the avowed object of providing for preservation and regulation of parks, play-fields and open spaces in the State of Karnataka. Section 3 of the Act mandates publication of the list of parks, play-field or open space in the prescribed manner. Section 4 of the Act permits filing of representations, objections or suggestions in writing in respect of anything contained in the list published by the Government. Sub-section (2) of Section 4 of the Act enjoins on the Government that it should inquire into any objections raised and approve the list with or without modification. Section 6 relates to prohibition of the use of the land for a purpose other than the one for which it is earmarked. It reads:

"Prohibition of the use of parks, play-fields and open spaces in certain cases.--No park, play-field or open space specified in the list published u/s 4 or Section 5 shall be used for any purpose other than the purpose or purposes for which it was used on the date of commencement of this Act in such area".

The most relevant provision for our purposes is Section 8 which imposes a twin prohibition. It reads:

"Prohibition of construction of buildings etc.--(1) No person shall construct any building or put up any structure likely to affect the utility of the park, play-field or open space or make any encroachment in or over any park, play-field or open

space specified in the list published u/s 4 or Section 5:

Provided that the executive authority may, subject to such rules as may be prescribed, permit the construction of such buildings or putting up of such structures as may be necessary for the improvement or more beneficial utilisation of the park, play-field or open space.

(2) No land or buildings within a park, play-field or open space specified in the list published u/s 4 or Section 5 shall be alienated by way of sale, lease, gift, exchange, mortgage or otherwise and no licence for the use of any such land or buildings for any other purpose shall be granted and any alienation made or licence granted in contravention of this section shall be null and void".

9. In the light of the provisions excerpted hereinabove the question that arises for our consideration in this petition is, whether a piece of land designated as park by the State could be divested for any other purpose by the local body acting on its own or acting under the direction of the State.

10. A statute is a collective intention of the Legislature and once it is brought into being, all actions governed by the statute must abide by the provisions contained thereunder and any deviation thereof would render the action ultra vires of the Act.

11. It is a matter of record that the land in question, in the present case, had been permitted to be used for a purpose other than the one for which it was earmarked and it was used as such on the date of commencement of the Act. This is in utter disregard of Sections 6 and 8 of the Act and, therefore, ultra vires of the Act.

12. The argument advanced on behalf of the third respondent is that the Act has no applicability to the case on hand as all the crucial decisions regarding the transfer of the land to the third respondent had been taken prior to the coming into force of the Act. This argument cannot be sustained for the simple reason that anything done in contravention of the Act after the advent of the Act would be void. The mere fact that all things required to be done in order to give effect to the ultimate action had all been done prior to the coming into the force of the Act would not save the situation and render the unlawful act lawful. The impugned orders barring Annexure-C have all been passed much earlier to the coming into force of the Act but none of them, including Annexure-C which was made on 24-3-1988 i.e., after the coming into force of the Act, are important for the purpose of deciding whether the alienation is bad in law. The string of orders impugned herein have all been made in consideration of the request of the third respondent for allotment of the land in question. This progression in the matter of consideration of the request of the third respondent culminated in the alienation of the land, ultimately, on 25-4-1988 and it is this act of alienation alone that is relevant for the purpose of determining whether or not the alienation is bad in law. It is needless to emphasise here that no matter what is done in the course of determining an issue at the executive level, what is of

relevance for testing the legality or otherwise of the action is the ultimate and end result and not the preliminaries that go into the making of that final decision. The end result, if the same is bad in the eye of law, cannot be justified on the ground that all the crucial decisions that had been taken in the matter had all been arrived at, at a point of time which was earlier to the coming into force of the statute which nullifies such action. What needs determination is whether the resultant executive action contravenes the provision of the Act. All those orders passed in the course of deciding the issue of allotment, which is ultra vires the provisions of the Act, would amount to nothing if the ultimate faux pas had not been committed by the authorities and the authorities had belatedly, at least after the coming into force of the Act, refrained from doing the thing that is prohibited. Therefore, there can be no doubt that the present petition which challenges the alienation as such which had, admittedly, taken place after the coming into force of the Act cannot be brushed aside merely on the ground that all crucial decisions leading to the alienation had been taken prior to the coming into force of the Act.

13. Learned Senior Counsel Mr, Subramanya Jois may be justified in prevailing upon the Court to desist from testing the impugned orders at Annexures-A and B vis-a-vis the provisions of the Act of 1985, in the light of the fact that these orders were made earlier to the commencement of the Act which is only prospective. But such a defence is not available when it comes to the alienation part which took place after the commencement of the Act. The impugned orders at Annexures-A and B are mere machinations which helped in achieving the object of alienating the land in question which is ultra vires of the Act, It having taken place after the coming into force of the Act the Court cannot desist itself from testing its legality against the touchstone of the provisions of the Act.

14. In this connection it would also be relevant to refer to Section 174 of the Karnataka Municipal Corporations Act, 1976 ("the Corporations Act" for short) since the land in question came to be vested in the Corporation u/s 174 of the Corporation Act. Section 174 of the Corporations Act specifies the various types of properties which vest in and belong to the Corporations and it also specifies the manner in which the properties have to be held and applied to serve the purposes envisaged in the Corporations Act. The said section reads:

"174. Corporation property.--(1) All property of the nature herein specified, and not being specially reserved by Government, shall be vested in and belong to the Corporation and shall, together with all other property of whatsoever nature or kind not being specially reserved by Government, which may become vested in the Corporation, be under its direction, management and control and shall be held and applied by it as trustee, subject to the provisions and for the purposes of this Act, that is to say,--

(a) all public parks, playgrounds, and open spaces reserved for ventilation;

(b) all public lamps, lampposts and apparatus connected therewith or

appertaining thereto;

(c) all gates, markets, slaughterhouses, manure and refuse depots and public buildings of every description.

(2) The Corporation may accept trusts relating exclusively to the furtherance of purposes to which the Corporation funds may be applied".

(emphasis supplied)

Any private property which vests in the Corporation by virtue of Section 174 of the Corporations Act is held by the Corporation as a trustee and in its capacity as a trustee the Corporation is expected to deal with and apply it only to subserve the purposes of the Municipal Corporations Act. The authority of the Corporation is limited to acting as a trustee in order to subserve the interest of the residents at large of that Corporation. Being a trustee the Corporation had no legal right to barter away any property that came to be vested in it, by virtue of operation of Section 174 of the Corporations Act, to any third party. It does not become the owner, as such, of the piece of the land which vests in it, so to say that it can deal with it in any manner as it deems fit. Any application of such property which has come to vest in it, in a manner opposed to the purpose for which it can be applied by the Corporation under the Corporations Act would be patently illegal. The sole purpose of vesting a certain land in favour of the Municipal Corporation is to ensure that the land concerned is put to a certain and a definite use in advancing the object for the attainment of which the Municipal Corporations Act was promulgated. The land in question in the present case belonged to a Co-operative Society and the Society parted with this piece of land on the clear understanding that it would vest with the Corporation for a public purpose which would in turn enure to the benefit of the residents of the layout. The Corporation having thus come into possession of the land in the position of a trustee, could not have dealt with it as if it has acquired ownership over the land. Alienation of such piece of land by the Corporation is, thus, without legal authority and therefore is not valid in law.

15. The land has been alienated and the third respondent is said to have constructed a Sanskrit Vedapatashala and a Kalyana Mantapa. The land is not only divested for a purpose other than the one for which it was earmarked which is quite in contravention of the statutory provisions of the Act but the land has also been alienated to the third respondent. Thus, the action of the authorities concerned in alienating the land earmarked for a park to the third respondent and the action of third respondent in putting up construction on the said land are violative of Section 174 of the Corporations Act, 1976 and various other provisions of the Act to which we have adverted to in the course of this order. The alienation of the land has, therefore, to be struck down as illegal, null and void.

16. In Bangalore Medical Trust Vs. B.S. Muddappa and others, , the Apex Court while dealing with the power of the Government to direct conversion of a site for

a purpose impermissible under the statute, observed:

"An exercise of power which is ultra vires the provisions in the statute cannot be attempted to be resuscitated on general powers reserved in a statute for its proper and effective implementation. The section authorises the Government to issue directions to ensure that the provision of law are obeyed and not to empower itself to proceed contrary to law. What is not permitted by the Act to be done by the authority cannot be assumed to be done by State Government to render it legal. An illegality cannot be cured only because it was undertaken by the Government. The section authorises the Government to issue directions to carry out purposes of the Act. That is the legislative mandate should be carried out. And not that the provisions of law can be disregarded and ignored because what was done was being done by State Government and not the authority. An illegality or any action contrary to law does not become in accordance with law because it is done at the behest of the Chief Executive of the State. No one is above law. In a democracy what prevails is law and rule and not the height of the person exercising the power".

17. The principle laid down in the above case has been followed with approval by the Apex Court in *Sengunthar Trust Vs. Bangalore Development Authority and Others*, . Thus, without more, the action of the second respondent in alienating the land earmarked as a park can neither be sustained on merits nor can it be sustained otherwise merely because it had the blessings of the Government or that it was done at the Government's instance or that it earned the stamp of approval of the State Government later on. The illegality endures and it also does not get cured merely because the user for which the land is subjected is also civic in nature. The Act does not permit of even such switching of usage from one purpose to another even if both of these are ordained in the Act.

18. Though the petitioners have not sought for quashing of the alienation as one of the prayers, it is always open for this Court to mould the relief in order to give effect to the provisions of a statute. The petitioners, nevertheless, have pleaded in their petition as a fact and also as a ground of attack that the alienation is bad and this Court can, on the basis of the pleadings, pass any appropriate order as it deems fit in the circumstances of the case.

19. In the result, for the reasons stated above, this writ petition is allowed. Rule is made absolute. The alienation of the land in favour of the third respondent by the authorities is quashed.

The authorities are directed to take steps to retrieve the land from the third respondent and to develop it for the purpose for which it was earmarked within a period of six months.

20. No order as to costs.