
(1986) 07 CAL CK 0001
In the Calcutta High Court
Case No : C. R. No. 7425 (W) of 1985

Calcutta Youth Front and Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 16-07-1986

Acts Referred:

Calcutta Improvement Act, 1911 — Section 177, 177(2), 35(a), 35C, 43

Calcutta Municipal Corporation Act, 1980 — Section 343, 343(1), 353, 353(1), 353(2)

Citation : 91 CWN 398

Hon'ble Judges : Umesh Chandra Banerjee, J

Bench : Single Bench

Advocate : Sankardas Banerjee, Mohitosh Majumdar, R.M. Das and J. Gupta, Maloy Basu, L.K. Gupta and U.N. Banerjee in C. R. No. 7426 W of 1985, for the Appellant; Somnath Chatterjee, Anindya Mitra and Sumit Panja, Tapas Roy and Aloke Chakraborty for Corporation., for the Respondent

Final Decision : Dismissed

Judgement

Umesh Chandra Banerjee, J.—Calcutta a. sprawling matropolis has grown from the days of Job Charnak right upto the modern era in most unplanned haphard fashion. This metropolis in the truest sense of the term has seen through the process of time a gigantic growth of population. By reason of this influx small open spaces attached to dwelling units do not exist any longer Multi-storied building like gigantic demons loom large on the streets of Calcutta. Environmental pollution has also reached such a state necessitating governmental intervention. Cry for a open space and for a fresh air breath are there from every part of this metropolitan city. It is against this background that this writ petition was filed before this Court in an attempt to stop the work of construction of an underground market at the Satya Narayan Park situated in one of the most thickly populated areas of the city, though upon due authorization from the Municipal Corporation of Calcutta. Apart from the plea that the authorisation to construct an underground market, by the Municipal Authority is utterly illegal and without any statutory sanction, M. Sankar Das Banerjee,

appearing in support of the petition, strenuously contended that there would be a tremendous ecological imbalance in the event the work of construction is allowed to continue at the Satya Narayan Park.

2. Before however dealing with the rival contentions, a brief reference as to the area in question ought to be made at this juncture. Satya Narayan Park has an area of about 20,000 sq. ft. with about eight of ten big peepal trees apart from certain small ones and is situated in the heart of Barrabazar area which is the main business centre of this metropolis. Traffic is in an enormous state in the area in question. Free flow of traffic is an unusual sight even much beyond the business hours. Right round the Park small shop-lets are even now existing making it impossible for the pedestrians to use the footpath resulting in the use of the road by pedestrians, which in its turn adds a further clog onto the traffic problem. Open space in the area in question is thus an undoubtable requirement and cannot be disputed. Ecological imbalance also ought not to be ignored in the present day context.

3. The word "ecology" comes from the Greek word "oikos meaning "home" or "estate" hence, ecology is the study of the home, or how the household of nature is kept in order. Interestingly enough, although ecology comes from the same root as our word "economics", the subject that we now call ecology was not given a name until a century later.

4. Every living thing is surrounded by materials and forces which constitute its environment and from which it must derive its needs. Contact with the environment is inescapable. Elements of Ecology George L. Clarke.

5. An ecological problem, in contrast, is a special type of social problem. To speak of a phenomenon as a social problem is not to suggest merely, or perhaps at all, that we do not understand how it comes about; it is labelled a problem not because, like a scientific problem, it presents an obstacle to our understanding of the world but rather because consider alcoholism, crime, deaths on the road - we believe that our society would be better off without it.

6. This explains why the very existence of ecological problems is sometimes disputed. Even pollution, it is sometimes argued, is simply a price which has to be paid for the maintenance of a high standard of living. Developing countries are not-deterred from industrial expansion by reflection that it would increase the level or perhaps rather, alter the type of pollution. Pollution is a cost they are prepared to meet-not, in their eyes, a problem.

7. In a recent report published by the National Conference on Environmental Planning & Pollution Control it appears that so far as the city of Calcutta taken as a whole is concerned, the pollution is at its minimal in Alipore, New Alipore and Salt Lake areas, whereas, there is an alarming rate of pollution in the Garden Reach, Sealdah and Burrabazar areas. It is no doubt true that pollution or environmental pollution is causing a tremendous problem for our town planners and by no means can be ignored even by the Law Courts. But the issue arises as

to whether the project in question would create a further ecological imbalance in the area in question. The contention of ecological imbalance, in my view, is wholly on an erroneous assumption of facts. It is not that there will be no Park as such a Park would be there, the children's playground would be there and all the other amenities which a modern Park enjoins would be provided for. The difference being whereas the existing one is on the ground level, after the completion of the project the park will be on an elevated level. Incidentally, it is to be recorded that Satya Narayan Park for about a decade is in a deplorable state and excepting the being some tall trees, there was no maintenance of the park as a park by the Corporation Authorities neither the same could be termed to be a place for fresh air breathing of the local residents. The haulers in the area right round the park belies the very concept of park being a place for recreation for Tax-Payers. Stray-hawkers on the streets or hawkers having a temporary shed on the outer boundary wall of a recreation spot does not really enhance the beauty of the city or the area in question and that is exactly what the state of affairs in and around Satya Narayan Park is when one visits the same. Parks in Calcutta, barring a few, are in very bad shape and condition and whatever may be ascribed to the so-called Parks, the same cannot be termed to be a place of recreation for the tax-payers, though it is true that all these Parks in the city of Calcutta contain quite good number of big and tall trees. So far as the tall trees are concerned, it has been categorically stated that the entire area will not be taken for construction of the underground market, but a number of sizeable spaces of land would be left uncovered around the Park and replantation of tall trees would be effected. As a matter of fact, replantation of tall trees has already been effected and the certification in support of the same has already been granted by the Agri-Horticultural Society of India. The contention that greenery would be lost in the Park cannot also be accepted. There was not a blade of grass on the Park. The importance of a green spot in a highly congested area like Barrabazar cannot be disputed but the continuation of the project would not, in the facts and circumstances of the case and as appear from record affect such a green spot. On the contrary, it would ensure the creation of such a green belt. Significantly enough, however, it has been conceded that the grass may be grown atop the proposed underground market. Replantation of the tall trees has been effected in terms of the order of the Appellate Court under the supervision of the Corporation Authorities. Therefore, ecological imbalance, in my view, cannot be taken to be an objection as against the proposed work of construction. A faint attempt has been made by Mr. Banerjee as regards apprehended traffic congestion in support of his plea of ecological imbalance but traffic-disruption or congestion cannot create a further ecological imbalance in the area in question. It is to be noted in this context that the traffic department of the Calcutta Police has cleared the proposal and has granted its approval to the project. In any event, admittedly the traffic in the area in issue is in an alarming state. Slight enhancement thereof, the factum of which can not be accepted by reason of the facts noted below cannot by itself be a ground, for granting an order of injunction against the work of construction of the Project the Writ Court.

8. Mr. Somnath Chatterjee. appearing for the Licensee while disputing the plea of ecological imbalance, submitted that the project is really beneficial to the public at large. The deplorable condition of the park has rendered is anything but a Park. Corporation Authorities have not maintained the Park properly, but if the project is allowed to be continued, it need not spend any fund to improve the park and such funds can be utilised for other public purpose. The park will be improved and developed by the Licensee at its own cost and the Corporation, will keep complete control over the park and the underground market. No shop can be let out at a rate lower than what is fixed by the Corporation and the space for Corporation office will be provided free of charge. Minimum rate of a Sub-licence fee would be Rs. 100/- per square meter and the park is to be maintained by the Licensee at its own cost, under the supervision and control of the Corporation. There is no provision for renewal of licence and as such Mr. Chatterjee submitted that after the expiry of the period of licence, the entire underground Complex and the Park atop would be handed over free of cost to the Corporation and will become the absolute property of the Corporation being a source of very substantial revenue to the Corporation. It was further submitted that the Park will all along remain the property of the Corporation and the Licensee will have no interest or right over and in respect of the Park excepting the obligation to maintain the Park at its own cost under the control and supervision of the Corporation. The deed of licence, Mr. Chatterjee submitted further, expressly contained that the park shall always remain a public park. I am inclined to accept the submission of Mr. Chatterjee that the project in fact is beneficial to the public in general, subject, of course to the authority of the Corporation of Calcutta to grant licence within the statutory limits which will be presently dealt with;

9. The Calcutta Improvement Act, 1911 was engrafted in the Statute Book, providing for the improvement and expansion of Calcutta. From the statement of objects and reasons it appears that it was expedient to make provision for the improvement and. expansion of Calcutta by opening up congested areas, laying out or altering streets, providing open spaces for purpose of ventilation, or recreation, demolishing or constructing buildings. The duty of carrying out the provisions of the Act of 1911 was vested, subject to the limitation and conditions, in a Board for the Trustees for the improvement of Calcutta which was at all material times and is still now a Body Corporate. u/s 35(a) of the Act of 1911 the Board was authorised to undertake any works and incur any expenditure for the improvement and development of any area to which the Act applies. Section 35C provides that an improvement scheme may provide for all or any of the matters mentioned in the Section and Section 35C(G) provides that improvement scheme may be adopted for raising, lowering or levelling of any land in the area comprised in the scheme. Sub-section (i) provides that the scheme may be adopted for formation and retention of open space, gardens, parks, play, grounds, lakes and other recreation buildings and structures. Section 65 of the Act of 1911 is of some consideration and" strenuous submissions have been made on that score, and as such, it would be convenient to set out the same for

proper appreciation of the contentions raised. Section 65 provides as follows :

65(1) When, the Board are of opinion - -

(a) that any street laid out or altered by them has been duly levelled, paved, matted, flagged, channelled, sewered and drained, in the manner provided in the plan sanctioned by the State Government u/s 48,

(b) that such lamps, lamp posts or other apparatus as are necessary for the lighting of such street have been provided and

(c) that water and other sanitary convenience ordinarily provided in a Municipality have been duly provided in such street, they shall report this fact to the Corporation; and it shall be the duty of the Corporation within three months from the date of receipt of such report, after such inquiry as it thinks fit to make either to declare the street to be a public street by written notice affixed in some conspicuous position in such street, whereupon such street shall vest in the Corporation and be maintained, kept in repair, lighted and cleared by the Corporation; or, if the corporation is of opinion that certain works are required to be done before such declaration may be made, to require the Board to complete such works:

Provided as follows

(a) no engineering or accommodation work not included in the scheme as sanctioned by the State Government u/s 43 shall be required to be done by the Board except with the latter's consent as a condition of such transfer,

(b) when certain works in connection with the street can be taken up only after a lapse of time to allow for consolidation of roads or the erection of buildings on both sides, the declaration shall not be put off till they are completed, but shall be made within; the time prescribed under this subsection on the Board giving an undertaking that they shall complete the works when asked by the Corporation to do so.

(2) As soon as the works required to be done by the corporation as aforesaid are completed, the Board shall report the fact to the corporation; and it shall be the duty of the corporation to declare the street to be a public street by written notice affixed in some conspicuous position in such street within two months from the date of receipt of the report, on the expiry of which period the liability of the Board to maintain the street and the lighting or to pay the corporation rate assessed on the lands comprised within such street shall cease.

(3) When any open space for purposes of ventilation or recreation has been provided by the Board in executing any improvement scheme, it shall, on completion, be transferred to the corporation by resolution of the Board, and shall thereupon vest in and be maintained at the expense of the corporation:

Provided that the (Corporation of Calcutta) may require the Board before any such open space is so transferred, to enclose, level, turf, drain and lay out such

space and provide footpaths therein, and, if necessary, to provide lamps and other apparatus for lighting it.

(4) If any difference of opinion arises between the Board and the Corporation of Calcutta in respect of any matter referred to in the foregoing provisions of this section, the matter shall be referred to the State Government whose decision shall be final.

10. Before, however, advertng to the contention centering round Section 65(3), it would be worth while to note the process of development of the city of Calcutta. The development of the city of Calcutta began gradually right from 1530 when the Portuguese settled in a portion of the present city of Calcutta which was then known as villages, Sutanuti, Govindapur and Kalikota covering the present of Bagbazar to Barrabazar and Barrabazar to Esplanade. In 1847 a Board of seven commissioners were appoint for the improvement, of the town of Calcutta. This was followed by the constitution of the Corporation with the municipal funds. In 1876 the Justices handed over their administrative functions to a Corporation consisting of 22 Commissioners of which 2/3rd were elected by the people and 1/3rd were appointed by the Governor. The municipal administration was revised in 1889 and the Calcutta Municipal Act. 1899 was enacted to the Statute Book. Then came the Calcutta Improvement Act, 1911 during the currency of the Act of 1899 and thereafter the Calcutta Municipal Act. 1923. The Calcutta Improvement Act was enacted with a view to provide an agency for preparation of improvement scheme of general development and improvement of the city of Calcutta and upon sanction of such, scheme by the State Government to take up the developmental works and upon completion of the developmental works to hand over the same to the. Calcutta Corporation as provided in Section 65 of the Calcutta Improvement Act, 1911. At this juncture it is noted that Mr. Banerjee submitted that on a proper reading of section 65(3), it cannot but mean vesting of the park for maintenance and not for any other purposes as otherwise there would be a complete breach of trust. The particular park in question was made over to the Corporation authorities in 1939-40 and that is how the park came into existence in a highly congested area. Mr.. Banerjee contended that the statute conferred restrictive rights and not the vesting in its entirety with all its ramifications. It was submitted that the phrese "vest in" is to be read along with the next part of the section, viz., "and be maintained". Therefore, vesting for the purpose of maintenance at the expense of the Corporation. The licensee, on the other hand, contended that the maintenance does not mean "status quo" and vesting means absolute vesting with all its ramifications. In any event, Mr. Chatterjee, appearing for the licensee, submitted that assuming it was maintenance only, but maintenance must mean change, alteration etc. It cannot be a static thing and to keep it in an identical condition would be a totally unworkable situation and misreading of the statutory provisions. Mr. Chatterjee submitted, without admitting, that as long as the park remains a Park, the question of lack of authorisation in so far as the Corporation is concerned, does not and cannot arise. Proper meaning ought to be attributed.

Admittedly, there is a complete cessation on Calcutta Improvement Trust's obligation to maintain the park and the same now vests on to the Corporation authority. Jessel M. R. in the case of *Seven-Oaks, Maid Stone and Tunbridge Railway Co. v. London, Chattham & Dover Railway. Co.* reported in 11 Ch. Div. 625, in a lucid manner dealt with an allied situation and observed as follows :

Now, I have no doubt that these are fairly works of maintenance. It is very difficult to define what works of maintenance are. It is a very large term, and useful or reasonable ameliorations are not excluded by it. For instance, if a company had power to maintain the banks of a river which were faced in a particular way, could it be supposed that they were restricted under the words of maintenance to keeping up the banks in precisely the same way, when the mode which might have been very good when the banks were originally formed had very much improved on by the subsequent advance of science? So where a railway company have to maintain a railway, I. should not at all doubt that in maintaining it they might use any reasonable improvement, if, for instance, the railway were originally fenced with wooden palings, and it were sought when they decayed to replace them by an iron fence, I should say that was fully within their powers. If the railway originally was made in a deep cutting, and it was thought desirable to face the cutting with brick to make it more secure, I should say that was fair maintenance. And if a railway station were found inconvenient, and it was desirable when it required repairs to alter the arrangement of the rooms, or to alter the access or form of access, and so to ameliorate it at the same time that it was put in repair, I should say all that was within the powers of maintenance given by the Legislature: that is, you may maintain by keeping in the same state and improving the state, always bearing in mind that it must be maintenance as distinguished from alteration of purpose. I have no doubt, therefore, that this work is authorised by the power to maintain".

11. Admittedly, upon completion of the project, there would be a park and the children's play ground, though at a slightly raised level and as noted above, park at an elevated or raised level is not unknown in the city of Calcutta and the parks which are unknown in the city of Calcutta and the parks which are existing on such raised level are still now being" treated as parks by all concerned. A sketch plan was produced before this Court depicting the park after the completion of the Project and as appears from the sketch plan, it would be more or less in the nature of the underground market in New Delhi popularly known as *Palika Bazar*". *Palika Bazar* has undoubtedly added to the beauty of the entire *Connaught Circus* area of New Delhi and it can not be said that it has spoiled the area in the question. Is there a tremendous ecological imbalance in the area being the main shopping complex of the capital, in my view, the answer ought to be in favour of the Town Planners of Delhi administration and they were successful in their bid to bring out a decent and beautiful garden within the main hut. of the city. There is no alternative purpose as such. This is apart from the question of interpretation of section 65(3) as regards the absolute vesting which would be dealt with presently. Giving full credence to the submissions of Mr.

Banerjee. I am inclined to agree with the contention of Mr. Chatterjee that maintenance covers the work of addition and alteration, though not the alteration of the purpose. It is definitely an improvement scheme for the benefit of the public in general and for their recreation. Temporary obstruction by closure of the park cannot be said to be an act of such a nature so as to contravene the provisions of Section 65(3). Incidentally there is due sanction of the State Government in this respect. As such, there is compliance of the other provisions of the Act of 1911.

12. Mr. Chatterjee submitted however that the language of Section 65(3) postulates absolute vesting and Corporation may deal with the property in accordance with the provisions of the Calcutta Municipal Act. Mr. Banerjee however, submitted that the corporation is holding a property received from Improvement Trust on trust. The Trustee's function, Mr. Banerjee contended, is restricted only to maintain the park and not otherwise and as such there is no power or authority of the Trustees, viz., the corporation of Calcutta, to grant a lease of the sub-soil right of a park or a open space as has sought to have been done.

13. The language used in Section 65(3) of the Calcutta Improvement Act, 1911, in my view, does not pose any difficulty. The statute provides first, transfer of the property to the Corporation and thereafter vesting. Transfer and vesting makes the position clear enough to indicate that the vesting would not be a qualified vesting or a restricted vesting. The addition of the words "and be maintained at the expense of the Corporation" have been engrafted in. the statute book for the purpose of clarification that so far as maintenance aspect is concerned, there would not be any liability or obligation of the Board. Any other meaning attributed to the word "vesting" would be repugnant to each other. "Vesting" obviously means "absolute vesting". In this context Section 177 of the. Act of 1911 lends assistance to such construction that the vesting is not a restricted vesting, but an absolute vesting. Section 177 provides that when all schemes sanctioned under the Act have been executed or have been so far executed as to render the continued existence of the Board in the opinion of the State Government, unnecessary, the State Government may by notification declare that the Board shall be dissolved from such date as may be specified. Section 177(2) further provides that the properties, funds and dues which are vested in or realisable by the Board shall vest in and be realisable by the Corporation. It further provides that the liabilities which are enforceable against, the Board shall be enforceable against the Corporation and in the event of there being not the complete execution of any scheme, the same shall be discharged by the Corporation. The factum of dissolution, of the Board by itself, therefore, cannot be disputed since statute expressly provides for the same. If the Board is capable of being dissolved and the property under the statute vests in the Corporation, can it be said that vesting and not a total and complete vesting for all purposes? In my view, the answer ought to be in the negative, as otherwise that would lead to a violent departure from the statutory intent. The provisions of the Calcutta

Municipal Act also lends assistance to such an interpretation. Section 343 of the Calcutta Municipal Corporation Act, 1980 provides that all public streets, squares, parks and gardens in Calcutta including the soil, sub-soil side drains, foot paths, pavements, stones and other materials and all erections, materials, implements, trees and other things provided therein shall vest in the corporation. Section 343 therefore, by itself provides for absolute vesting of the public streets, squares and parks within the Calcutta Municipal area and there is no dispute that the vesting is absolute and unconditional. The proviso to section 343(1) however, lays down that in the event however, properties vest in Government, Board of Trustees for the Port of Calcutta and the Board of Trustees for the Improvement of Calcutta, unless so directed by the authority competent to take a decision in this behalf, shall not vest in the corporation by virtue of section 343(1) of the Act of 1980. Therefore, it appears that till such time the Improvement Trust passes a resolution to the effect of such vesting, property would not vest on to the corporation of Calcutta. In the facts of this case there is no dispute that such a resolution exists in favour of vesting of the property by the Board of Improvement of Calcutta in favour of the corporation of Calcutta. In that view of the matter, section 343(1) of the 1980 Act read with section 65(3), it leaves no number of doubt that the vesting is complete, unconditional and absolute and not restrictive in nature as has been submitted by the petitioners. Incidentally, it is to be noted that both the act of 1911 and the act of 1980 are State Acts and there is no disharmony between the two. As such, a narrower or a restrictive interpretation of section 65(3) is not warranted. The legislative intent is clear and unambiguous. In any event, ambiguity, assuming there be any, has been resolved by a statutory provisions. It is a golden rule of construction of statutory provisions that the legislature is aware of the needs of the situation and is aware also of the law of the land. Section 343(1) of the Calcutta Municipal Act being a later statute is in a position to clarify any ambiguity if there be any though there is no such ambiguity in my view, and as such, it resolved the ambiguity, if any, in section 65(3) of the 1911 Act. Any other interpretation of section 65(3) would lead to a disharmony between the provisions of section 65(3) and Section 343(1) which following the golden rule of construction ought not to be allowed, unless the disharmony cannot be explained. In my view this is not the situation in the case under consideration. There is not restriction or limitation and any other construction would render the second limb of Section 65(3) repugnant to the earlier limb. Further I am in agreement with the contention of Mr. Somnath Chatterjee that there is no bar u/s 65(3) of the Calcutta Improvement Act against development of a park which has vested in the Corporation. Section 65(3) of the Calcutta Improvement Act and Section 353 of the Calcutta Municipal Corporation Act can be read without any disharmony and the expression "maintained" in section 65(3) is meant, rebuilding or repair in terms of the decision reported in 11 Ch. Div. noted above, there can also be no disharmony between section 65(3) and section 353. of the Municipal Act of 1980. in that view of the matter, I need not deal with the other submissions of Mr. Chatterjee that since Calcutta Improvement act. 1911 and the Calcutta Municipal Act, 1980 are

both State Acts and the State Legislature can amend or even repeal Calcutta Improvement Act, 1911 by subsequent legislation expressly or By implication and if section 65(3) of the Calcutta Improvement Act cannot be read harmoniously with section 353, the doctrine of implied repeal or abrogation should be adopted in the case. Suffice it to say that the issue of implied repeal or abrogation does not arise for consideration since in any view there is no disharmony or conflict between the two provisions referred to above. In that view of the matter, I need not further deal with the case of Ajoy Kumar Banerjee v. Union of India 6c Ors. and Umed singh & Ors. v. Union of India & Ors. reported in AIR 1984 SC 1130 relied upon by Mr. Chatterjee.

14. The second limb of Mr. Banerjee's submission was that in any event maintenance of Park does not mean and imply dealing with the sub-soil rights. The word "Park", according to the learned Counsel, denotes the surface of the land and not underground strata, I am, however, unable to accept the contention. Drawing inspiration from the decision of the Supreme Court in the case of The Anant Mills Co. Ltd. Vs. State of Gujarat and Others, , I am of the view that the word "Park" includes not only surface of the earth, but everything under or over it. In this context the observations of the Supreme Court in the last cited decision seems to be very apposite :

Mr. Tarkunde on behalf of the petitioner-company has urged that under entry 49 of the State List in the Seventh Schedule to the Constitution, the State Legislature is empowered to enact a law relating to taxes on lands and buildings.. It is submitted that the State legislature has no competence under the above entry to enact a law for levying tax in respect of the area occupied by the underground supply lines. The word "land" according to the learned Counsel, denotes the surface of the land and not the underground strata. We are unable to accede to the above submission. Entry 49 of List II contemplates a levy of tax on lands and buildings or both as units. Such Tax is directly imposed on lands and buildings and bears a definite relation to it. Section 129 makes provision for the levy of property tax on buildings and lands. Section 139 merely specifies the persons who would be primarily responsible for the payment of that tax. The word "land" includes not only the face of the earth, but its legal signification an indefinite extent upward and downward, giving rise to the maxim, *Cujus est solum ejus est usque ad coelum* (see pp. 163 73 Corpus Juris Secundum). According to Broom's Legal Maxims, 10th Edn. p. 259, not only has extent upwards, but in law it extends direct line between the surface and the centre of the earth by the common law belongs to the owner of the surface (not merely the surface, but all the land, down to the centre of the earth and upto the heavens) and hence the word "land" which is *nomen generalissimum*, includes, not only the face of the earth, but everything under it or over it..

15. In Ryde on Rating, 11th Edn., it is stated on page 14

By far the largest number of persons rated are as "occupiers of land or houses". The word "land" as used in the statute, must be understood in the widest

possible sense it includes not only the surface of the earth, but everything under it, or over, it New Pan. In *Electric Telegraph Co. v. Salford Overseers*, (1855) 11 Ex 181 at p. 186," Pollock, C.B., said.

There is no distinction between the occupying land, by passing through a fixed point of space in the air to another fixed point, or by passing in the same manner through land or water, Land extends upwards as well as downward

16. It was next submitted that by reason of the licensing agreement, the corporation has changed the nature and character of the Park which is not permissible under the. law. Section 353 as it stood prior to the amendment by way of an ordinance provided as follows

(1) The Municipal Commissioner, may with the previous sanction of the Corporation permanently close the whole or any part of a public street;

Provided that no public street shall be permanently closed except in accordance with a resolution carried at a meeting of the Corporation and approved by the State Government.

(2) Whenever any public street or a part thereof is permanently closed under subsection (i) the site of such street or of the portion thereof may be disposed of as land vesting in the Corporation.

17. Subsequently, however, by way of an ordinance promulgated being West Bengal Ordinance No. X of 1985, section 353 was substituted and shall deem and to have been always substituted to the following effect :

353.(1) The Municipal Commissioner may, with the previous sanction of the Mayor-in-Council, and subject to the approval of the State Government, permanently or temporarily close the whole or any part of a public street, park, square or garden in the public interest or for the purpose of carrying out the provisions of this Act:

Provided that the Municipal Commissioner shall give a public notice of such closure by insertion in at least three, local newspapers and the notice shall specify the date of and from which the clouser shall be effected.

(2) For the purpose of carrying out ant development work in any public street, park, square or garden or any part thereof, the same or the part thereof or the sub-soil there under may be dealt with or settled or transferred, as the case may be, either temporarily or permanently by way of grant of lease or licence, as the case may be, and on such terms and conditions and for such period as the Municipal Commissioner may, with the prior approval of the Mayor-in-Counsel and subject to the approval of the State Government determine and for such development work the public Street, park, square or garden or any part thereof may, be closed temporarily or permanently, as the case may, be, and in such case a public notice shall be given in the same manner as in subsection (1) specifying the date from which the closure shall be effected:

Provided that the site of so much of the roadway or footpath as would not be required for using as a public road or public thoroughfare by" reason of providing better and alternative public road or public thoroughfare including footpath shall be dealt with or settled or transferred on lease or licence.

Explanation. For the purposes of this section, "development work" shall include all works for development and improvement by way of proper and adequate or better utilization, either underground or on the surface, of a public street, park, square or garden.

18. It is to be noted in this context that the ordinance was subsequently replaced by enactment of the Amending Act of 1985.

19. While referring to amended section 353 Mr. Banerjee for the petitioner submitted that the steps in leasing out Satyanarayan Park were taken prior to the promulgation of the 2nd amendment Ordinance of 1985 and as there has been no provisions to save such actions, the Acts or actions per se are illegal, inoperative and without any authority of law.

20. I am, however, unable to accept the contention of Mr. Banerjee since the Ordinance expressly provides as follows

2. For section 353 of the Calcutta Municipal Corporation Act, 1980, the following section shall be substituted and shall be deemed always to have been substituted.

21. The words "following clauses shall be substituted and shall be deemed always to have been substituted" in the amended provision of 1985 go to show that the legislative intent was clear and to substitute the new section in place of the old one from the very inception. Any other meaning would be contrary to the all recognised principles of construction and interpretation of statute and the legislative intent would be completely defeated. It is no part of the Court's duty while interpreting a particular provision of a statute to defeat the intent of the Legislature than to honour the same. The legislative intent ought to be maintained and honoured without any deviation whatsoever. This view finds support from the decision of the Full Bench Decision in the case of Provakar Kandaji Bhapkar v. Emperor reported in AIR 1944 Bom 119.

22. On this aspect Mr. Banerjee shortly cemented upon the legislative action in engrafting the amendment into the Statute Book, in particular section 353 of the Calcutta Municipal Act. Mr. Banerjee submitted that the new legislation is a colourable piece of legislation only to cure the defect and to approve the action of the Respondent agency, It is not unknown to legal jurisprudence that if the Legislature feels it in a particular way to amend the law if the Legislature is otherwise competent to do so, question of ascribing a motive would not arise and the legislation would not be declared to be invalid only on that ground. In order to be so ascribed as a colourable piece of legislation, it must be an incompetent legislation either for want of legislative competency of the or being violative of any of the provisions of the Constitution. Motive by itself, assuming this to be

so, cannot render a" legislation invalid. There is no bar against the Legislature amending an Act and there will be no estoppel in this regard. On "the contrary, the Law Courts would be bound to took into the changed law at the time when the matter comes up for decision. In this context reference may be made to the decision of the Supreme Court in the case *Laxmi Narayan Gain v. Niranjana Modak* reported in AIR 1985 SC 3 The Supreme Court observed that changes in the law during the pendency of an appeal has to be taken into account and will govern the rights, of the parties. In this context reference may also be made to the decision of the Supreme Court in the case of *Jit Ram Shiv Kumar and Others Vs. State of Haryana and Others*, where the Supreme Court reiterated the earlier decision on the point and observed that there can be no question of estoppel. against the Government in exercise of its legislative powers. The same view has also been expressed by the English Courts since long by a catena of decisions,

23. Mr. Banerjee next contended that substituted, section 353(1) in regard to the permanent or temporary closure of the whole or part of a street, park, public square or garden can be done only in the public interest or for the purpose of carrying, out the provisions of the said Act with the prior sanction of the Mayor-in-Council and subject to the approval of the State Government. Mr. Banerjee submitted that there has been wanton violation of the said requirements. From the records produced, it appears that, all due necessary formalities have been complied with prior to the issuance of the licence by the Corporation authorities.

24. Strong criticism have been effected on the ground that the approval of the State Government has not been granted to the project in question and as such the project is unauthorised and illegal. I am, however, unable to accept the contention of the petitioners inasmuch as section 353(2) of the Calcutta Municipal Act, 1980 as amended provides that such grant of licence shall be subject to the approval of the State Government, The expression "subject to approval" clearly, indicate subsequent approval and in the facts of this case the approval has already been obtained. As such, there is no force in the contention raised by the petitioners in this regard. "Subject to approval of the Government" means, in my view, that the project holds good so long as the Government has not disapproved of it. There is no lack of authority or invalidation by reason of a prior approval not being there. This view finds support from the Full Bench decision of the Allahabad High Court in the case of *Mohammad Ali Vs. The State of Uttar Pradesh and Others*, . In the Full Bench decision of the same High Court in the case of *Shakir Husain Vs. Chandoo Lal and Others* , Sir Shah Sulaiman, Acting Chief Justice (as he then was) observed :

Ordinarily the difference between "approval" and "permission" is that in the first the Act holds goods until disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently obtained may all the same validate the previous Act.

25. Thirdly, Mr. Banerjee submitted that the substituted sections stipulate that permanent or temporary transfer by way of grant of lease and licence can only

be effected for the purpose of carrying out the development work on any public street, park, square, garden etc. In this context, Mr. Banerjee referred to the explanation to the substituted section, 353(2) which provides that developmental work shall include all works of development or improvement by way of proper and adequate utilisation of either underground or the surface of a public street, parks, squares or garden and since Satyanarayan Park was sought to be leased out for the purpose of construction of a multi-stories underground market and thereby demanding the mother-earth of her greens, causing ecological imbalance and apprehensions of higher percentage of air pollution, licence to construct the underground market cannot be said to be a developmental work or in consequence, with the requirements of statute. In the view, I have taken as regards the ecological imbalance and for reasons stated hereinafter, I am unable to accept the third contention of Mr. Banerjee as well. The issue whether the licence in question granted for construction of an underground market complex can be termed a developmental work or not, is therefore now to be considered.

26. As stated hereinbefore, the writ petition proceeds on a wrong appreciation of facts. While it is true that the corporation authorities have allowed work of construction of an underground market, but on top of that market, there would be a park. The area in question would not in any way be denuded of its greenery, even the tall trees have been replanted by the Agri-Horticultural Society and the certificate of which has already been granted in regard to the proper transplantation of tall trees. But only difference as noted above is that the "park would be at a slightly raised level. It is common knowledge that the parks and open spaces in the city of Calcutta have lost its earlier charm and beauty. The open space said to be the Satyanarayan Park could hardly be said a part a park from few tall trees. It was a barren land without even a patch of green grass on it. But with the reconstruction and placement of the park a top the underground construction, it has been proposed to maintain a beautiful bed of grasses with small trees right round and in addition thereto, some tall trees have also been replanted. The glorious example of such a beatification can be found from the Palika Bazar at New Delhi. In the city of Calcutta, the Auckland Square which is also housing a huge underground Tank for the supply of filter water for the entire South Calcutta also to be looked into. Prior to the construction of the underground reservoir, it was not having such utility and beautification as it is now. The contention that there would not be even a bed of grass on top of a huge multi-stories construction is absolutely belied by these two, instances, viz., one at Palika Bazar in Delhi and the other one at Auckland Square in Calcutta.

27. The other aspect of the matter ought also not to be lost sight of by reason of a strenuous submission made on behalf of the petitioner that leasing out of the park is arbitrary and malafide and in gross under-valuation, even the Minister-in-charge of Local Self Government and the officers of the department concerned were said to have brought about a situation which would unmistakably result in private gain rather than gain to the State. It is true that the property belonging to the Government or governmental authority ought not to be dealt with in

manner dehorse the public interest or public purpose. It cannot be dealt with as if it is the owner of a private property in its own ipsedixit. Disposal of public property must be in accordance with the law for the benefit of the Exchequer and there ought not to be any under valuation. It must be done at the best price available so that the purpose for which the public property is disposed of, viz. augmentation of revenue for public interest is safe-guarded. Personal relationship, personal gain or personal sentiment may be relevant factors in the event of a sale of a private property. No such factors ought to have any relevance or consideration whatsoever in the sale of public property. While dealing with the matter, if it comes to the knowledge of the Court that any such thing has actually happened or can reasonably be inferred from the conduct of the officers, the Court ought not to hesitate to strike down the action as not conducive to public interest and not satisfying the public purpose. This view finds support from the decision of the Supreme Court in the case of Ram and Shyam Company Vs. State of Haryana and Others, . In this context the observations of the Supreme Court in the Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, some also to be very pertinent. The Supreme Court observed

It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into constructs or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action "must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences etc. must be confined and structured by rational relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that. the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

28. The governmental action must not be arbitrary and discretion when conferred upon the Executive authority must be exercised within clearly defined limits. The Rule of Law from this point of view means that decisions should be made by the application of known principles and rules and such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule, it is unpredictable and such a decision is the anti-thesis of a decision taken in accordance with the rule of law. Discretion as Lord Mansfield stated in the case of John Wilkes (1770) 4 Burr 2528 means, sound discretion guided by law; it must be governed by rule, not by humour. It means not to be arbitrary, vague and fanciful (Vide Asiatic Oxygen and Acetylene Co. Ltd. and Another Vs. Entry Tax Officer, Banitabile and Others,).

29. In the event the Court finds or there is a reasonable presumption which may

be inferred from the records that the governmental action in the case of grant of lease or a licence suffers from the vice of unjust enrichment of a particular officer or the action have been taken in gross violation of the known principles of law or the decisions suffers from being arbitrary, the Law Courts would not and ought not to hesitate to strike down the action. To do so would a plain exercise of judicial powers - a power vested in courts to enable it to administer justice according to law.

30. It will, therefore, have to be seen that whether the exercise of power by the authority concerned has been such so as to ascribe it to be arbitrary or resultant effect of which would be an unjust enrichment for the officials of the Government as was contended by the petitioners.

31. From the records it appears that the proposal to construct underground market was initiated by one M/s. Happy Homes & Hotels (P) Ltd. A note was sent to the Minister-in-charge of Local Self Government to the following effect :

The city of Calcutta is facing acute problem of road traffic congestion which is further aggravated due to car parking. Parking of car is itself a problem. Similarly, the unemployment particularly among the educated youth is also explosive and deserve immediate attention. Unemployed youths are to be engaged trade

The existing park are not presently maintained as parks and lost its original utility and in most cases there are Addas, anti-social elements, hawkers and Panwalas, Khyayniwalas, Mudiwalas have permanent encroachment. Therefore, respectable citizens are afraid of passing by the parks-what to say of entering into them for leisure or pleasure.

Keeping all these problems in view it is suggested that the so-called "Parks" scattered in north Calcutta particularly in Barrabazar area (the most densely populated and congested area of Calcutta) may be utilised in the following manner:

These parks are to be elevated to a height of about 5" to 6". from the existing road level viz., Md. Ali Park on Chittaranjan Avenue and Auckland Park on Lowden Street, The underground basements will be made under the parks which would be utilised for "car parking -cum-shopping complex.

The space will be utilised in the ratio of 30% for car parking and 70% for shopping complex or as to be mutually decided The park is to be given on lease on suitable terms to be mutually agreed upon

The entire finance will be arranged by the lessee and a reasonable return on the investment is desired

To start with we like to take up Satyanarayan Park on the Kalakar Street and Cotton Street crossing and Trikonika Park on Vivekananda Road.

By elevating the park to a height about 5 to 6" there will be an added advantage.

No water logging as during rains, the existing parks are water-logged and it becomes a menace to the locality.

If the scheme is principally found acceptable details will be worked out. We may mention here that in the Connaught Circus Maidan in New Delhi an underground parking and shopping complex has been built without any inconvenience to the public at large.

32. On the letter itself there is an endorsement by the Minister-in-Charge to the effect:

Shri T. K. Roy Chowdhury, Chief-Engineer, Calcutta Corporation PI. discuss with Mr. Kajoria and report.

Sd/- Prosanta Sur. 1.12.83.

Very strong criticism have been leveled by the petition or on this note of the Minister-in-Charge. I, however, do not find justification in such comments. The city of Calcutta does not have any underground market complex in a public place. The proposal is new and novel having a two-fold advantages over the existing situations :

(a) car parking space and

(b) to restore the lost greenery for a thickly populated area.

The document being unsigned it was submitted that the Minister's personal involvement cannot be ruled out. I am however unable to accept the same. If a citizen wants to give an idea to the Minister for development purpose and the Minister in return directs him to give a proposal in writing and on that an endorsement, is effected by the Minister concerned, directing the Chief Engineer to report fully as regards the proposal, I do not see any justification as to how the action of the Minister can be termed to be unauthorised, arbitrary and for personal gain. Motive and personal gain are not merely fanciful ideas for which the law courts would declare an action as illegal or arbitrary, but there must be cogent evidence on record to ascribe such motive and personal gain. Nothing has been produced before the Court to ascribe such a motive. Admittedly, the per capita open space in the city of Calcutta is 21 Sq. ft. against 250 Sq. ft. in any Modern City, and in more congested localities of the City the area is not even 2 Sq. ft. There is very little open space in the city of Calcutta as per the latest environmental statistic. The people of Calcutta admittedly have been deprived of the benefit of open space due to improper and inefficient maintenance and preservation of parks in Calcutta. Keeping the same in the background, can it thus be said that if in a congested locality there is underground car parking arrangement together with a shopping complex and atop the complex a lush green garden for the city of Calcutta is not a developmental project: Traffic in the area in question is an enormous and more so by reason of parking of cars at any available space even in the main arterial road. The car owners cannot even be strictly blamed since the area in question is the main business centre for the city

of Calcutta. If an alternative arrangement for parking of cars can be made, in my view, the area would have a decent and civilised look which is absent as of date. In that view of the matter, I am not inclined to accept the contention of the petitioner that the unsigned letter as such would be an evidence of collusion between the licensee, M/s. Happy Homes & Hotels (P) Ltd. and the Minister-in-Charge or the officials of the government.

33. The other aspect of the matter is in regard to valuation detailed submission has been made to the effect that there was very great under-valuation of such lease or licence as a result of which the petitioners contended that there was some collusion between the personnel of the Government and the Happy Homes & Hotels (P) Ltd. In order to deal with the same effectively, it would be necessary at this juncture to refer to the facts in this aspect as appears from the records of the case. The undated proposal by M/s. Happy Homes & Hotels (P) Ltd. was sent to the Chief Engineer by the Minister concerned on 1st of December 1983. It appears that on 20th December 1983 one jugal Kishore Kajoria sends a reminder to the Minister-in-Charge for Local Self & Urban Development to the following effect:

As per the conversation the undersigned had with your Honour, we beg to submit herewith a brief outline of the aforesaid project which we are interested to implement for your kind perusal.

We hope, your Honour will consider the proposal for acceptance.

34. Along with the said letter Happy Homes & Hotels (P) Ltd. included therewith a short report as to the estimated cost and the maintenance thereof for the complex. The estimated cost of the project have been shown as Rs. 2 crores and the recurring expenditure per month have been shown as Rs. 5,62,500/-. In addition to that, the cost of development of park and for providing basic amenities was estimated at Rs. 10,00,000/- and its maintenance cost at Rs. 5000/-per month. In terms of the directive of the Minister-in-Charge, the Chief Engineer and the Chief Road Inspector, Corporation of Calcutta on 24th January 1984 formally initiated the proposal stating therein that the market proposal to be constructed with the financial assistance by engaging outside entrepreneur. From the proposal stage the matter eventually after compliance with the required formalities was signed by the Administrator on 21st of August 1984 having duly considered feasibility of the project.. It appears from the records that the tender notice was duly published in the local daily Newspapers on" different dates and only two tenderers were found to have satisfied the conditions of eligibility for submission of tenders. Out of that two, Messrs Happy Homes & Hotels (P) Ltd. was the highest tendered. The proposal by the Happy Homes & Hotels (P) Ltd. was to the effect that an ad hoc payment of a sum of Rs. 23.51 lacs and to pay a rental of Rs. 25,000/- per month after a period of two years stating to be the period of construction was offered, but after acceptance of the tender and by mutual agreement the tenderer was persuaded to agree to payment of lump sum amount of Rs. 30 lacs and Rs. 40,000/- per month as-rent with the provision of

increment of 5% at the end of every 10 years: A formal licensing agreement was entered into between the. successful tenderer and the Corporation of Calcutta and the Commissioner in exercise of power conferred upon him u/s 539 of the Calcutta Municipal Corporation Act, 1980 granted such a licence for a period of 30 years. It is necessary at this juncture to set Out the relevant provisions of the Licensing Agreement:

The licensee has this day paid to the licensor the agreed lump sum amount of Rs. 30 lacs (Rupees thirty lacs) by a pay order bank draft as premium for this licence and shall further pay to the licensor, licensee fee of Rs. 40,000/- (Rupees forty thousand only) per month which shall be increased @5% (five percent) on expiry of every ten years as consideration of this licence. Such monthly licence fee shall be payable after expiry of 2 (two) years from the date of this deed and shall be paid within the seventh day of the month for which the licence fee shall be due. As for example, the licence fee for the month of January of one year shall have to be paid within the seventh day of January of the year.

The terms, conditions, duties and liabilities of the licensee under this agreement are as follows:

The licensee shall construct the said underground market for the purpose of trading and/or business of durable goods with the total financial outlay to be invested borne and paid by the licensee the area of which is around 2500 (two thousand five hundred) sq. meters. The said market will be divided into shops" and/or block of spaces hereinafter called the "said space".

The existing park in the premises have to be located on the said market with better and improved amenities and equipments as would be determined by the licensor in the finally approved plan

Arrangement for proper circulation of traffic for the said market without causing any hindrance to the existing traffic pattern will have to be made by the licensee both during the construction period and during the licence period

During the period of this license, the said market will have to be managed by the licensee. The licensee shall have no right on the park on the top of the said market

The licensee shall at its own cost, satisfactory maintain and provide for daily servicing of the. entire complex including the park during the period of this licence. The licensee shall ensure that there would be no complaint from any quarter on any reasonable ground in the matter of such maintenance and servicing. Such maintenance and servicing shall include clearance of refuse, proper drainage, sewerage and conditions supply of water to the sub-licensees and proper lighting and ventilation arrangement

The licensee shall at its, own cost, maintain the park to be relocated on the top of the said market though the control and use of the park will be absolutely with the licensor. Provided that such use of the park. shall not effect in any manner

ingress to or egress from the said market management of the said market, by the licensee

The licensee shall hand over to the licensor an area measuring not less than 50 (fifty) sq. mts.(nett) in the upper basement floor of the said market for the exclusive use of the licensor free of any rent and charges payable to the licensee. The licensee shall, maintain and provide all services and air conditioning to the licensor in the said area free of any charges

The licensee shall get the plan and design as mentioned above, approved by the Calcutta Development Authority, Police and West Bengal Fire Services as would be required under the law and "no work shall be commenced prior to such approval and commencement of any work and doing of any such work prior to such approval shall be treated as a breach of terms and conditions of the license.

The licensee shall after the expiry of the period of the licence mentioned hereinbefore hand over to the licensor quiet" and peaceful possession of the said market together with ail installations, as would be therein then, in good and working condition subject to usual wear and tear thereof along with the then existing allottees-sub-licensees. Before handling over as aforesaid the licensee shall rectify all reasonable defects or damage to the installation as per requisition of the licensor, usual wear and tear excluded.

The Licensee shall relocate the existing park on the top of the upper basement of the said market with better and improved amenities mentioned hereinbefore and such park shall always remain as a public park of the licensor but the licensee shall its own cost maintain the said park -and shall cause plants and greenaries to be installed in the said park and shall do the necessities for creating better, attractive and hygienic atmosphere in the park in consultation with and under such reasonable direction of the licensor as may be best suited to public interest. The structures to be made by the licensee on the park for ventilation etc and several ancillary to the market will be utilised and maintained by the licensee at its own cost of rendering service to the said market and the licensee shall have free unrestricted access to and from the said structures. The said structures shall not be converted to any other use by the licensee without written permission of the licensor.

35. From the terms noted above, the issue is whether it can be said to be showing of an undue favour at the cost of the State Exchequer. In my view, the answer ought to be in the negative. Another redeeming feature is that, this particular writ petition has had a tremendous publicity in the local Newspapers as also in the Journals. But no-one has come forward with a counter-offer not even the unsuccessful tenderers. The Court cannot, in my view, ascribe a valuation as not inconsistent with the market rates unless there is some material before the Court to come to such a finding. No evidence has been adduced except a bare statement that the Calcutta Improvement Trust has spent a sum of Rs. 1,25,12,139/- in the acquiring the private properties for the improvement of

Kalakar Street and to provide a park in the area. Kalakar Street in the City of Calcutta is not a small bye-lane or an alley. It proceeds from one end to the other of the entire Barrabazar area. This apart for the purpose of providing a park. The Improvement Trust has had to acquire premises Nos. 140, 141, 142, 143 and 144 Cotton Street; premises Nos. 3 and 3/1, Jagmohan Mullick Lane, premises No. 14, Bartola Street, premises No. 365, Kalakar Street and a small alley, known as Shyamabai Goli. On the basis of these facts, the Court cannot come to a conclusion that the valuation was grossly under-valued and the government officers have had a hand in such gross under-valuation. Incidentally public tender notice was issued, tenders submitted their tenders and the licensee offered the highest bid by reason whereof the same was accepted. Can it be said on these facts that there was an unholy alliance between the licensee and the authority concerned - the records, however, do not justify such a stand or criticism to that effect. In that premises, I am unable to accept the contention of the petitioner that the conduct of the respondent-authority smacks of illegality, arbitrariness and for unjust enrichment. Criticism is not justified. Incidentally it is also to be noted that the writ petition by itself does not contain any allegation whatsoever against the Minister except certain vague statements in the affidavit-in-reply filed by the writ petitioners. The Minister has not been made a party. The submissions made from the Bar as such do not find strict justification from the pleadings.

36. While it is true that the Minister-in-Charge of the Local Self Government is not a proper authority and the Municipal Administration ought to be the agency to look into and consider the matter in "detail. But that does not, in my view, preclude the Minister from having a discussion on the subject with an individual citizen of the State and referring to the matter to the proper authorities for doing the needful in the matter. The submission of Mr. Banerjee that the Corporation authority have not applied their mind, but acted mechanically, in my view, on perusal of records cannot be substantiated. The idea of having an underground market in one of the public parks is noble so far as the city of Calcutta is concerned. As such, Minister-in-Charge of the Local Self Government cannot be said to have acted contrary to the powers or authority since developmental work for the city of Calcutta also comes under his jurisdiction. There is neither any impropriety nor any usurpation of higher jurisdiction not conferred on to the Minister by law. Further Mr. Chatterjee submitted for the licensee that this present writ petition purports to be a public interest litigation, but not an iota of evidence of public interest has been disclosed in the pleadings or even during the arguments. Public interest or public benefit cannot be a more fanciful idea or based on emotional feeling or subjective contention without any objective material. "Public interest" ought to be taken with a literal meaning which means and implies that one in the public in general. Individual benefit, individual gain or individual objective cannot be attributed to be a public interest. It must ensure to the benefit of public in general. Can it be said that the complex when completed would be not for the benefit of the public in general Admittedly, the

park has lost its past greenery and it has turned out to be the play ground of the street archins, hawkers and vendors, right round the park has demoded its character as recreation spot for the local people. But when constructed though at a raised level, the original greenery would be restored and the entire area would have a decent lock without any hawkers and vendors encroaching the parents. In that view of the matter whatever shape it takes after the construction of the complex it would not be towards the worst, but definitely would be in a better way. As such, the question of sufferance in any event would not arise. Further there is no affectation of: right as such of the writ petitioner which is a society and has been registered only a few days prior to the initiation of the proceedings. Individual gain or objective ought not to be a basis of a public interest litigation. The litigation must result ensuring to the benefit of the public in general or at least a section of the people. Question of affectation to the public in general in this case would not arise at all.

37. Public interest litigation as noted above cannot be for an individual idea or to vindicate the individual grievances. There must be affectation of right of a section of people or a class of persons who cannot have recourse to the Courts on account of their social and economic disadvantageous position. In that event only, the Court would allow any member of the public to espouse the cause of such person or class of person in order to enforce the fundamental right as guaranteed under the Constitution. In this context reference may be made to the decision in the case of *Bandhua Mukti Morcha Vs. Union of India (UOI) and Others*, . In that decision the Supreme Court observed :

It is clear on the plain language of clause 1 of Article 32 that whenever there is a violation of fundamental right, anyone can move the Supreme Court for enforcement of such fundamental right. Of Course, the Court would not have any exercise of its discretion, intervenes at the instance of a middle some interloper or busy body and would ordinarily insist that only a person whose fundamental right is violated should be allowed to activate the Court, but there is no fetter upon the power of the Court to entertain a proceeding initiated by any person other than the one whose fundamental right is violated, though the Court would not ordinarily entertain such a proceeding since the person whose fundamental right is violated can always approach the Court and if he does not wish to seek judicial redress by moving the court, why should someone else be allowed to do so on his behalf. This reasoning however, breaks down when we have the case of a person or class of persons whose fundamental right is violated, but who cannot have resort to the court on account of their poverty or disability or socially or economically disadvantaged position and in such a case, therefore, the court can and must allow any member of the public acting bonafide to espouse the cause of such person or class of persons and move the court for judicial enforcement of the fundamental right of such person or class of persons. In this context reference may also be made to the decision" of the Supreme Court in the case of *State of Himachal Pradesh and Another Vs. Umed Ram Sharma and Others*,

38. A faint attempt has also been made to the effect by the petitioners that the action of the Municipal authority contravened the provision, of the West Bengal Town & Country Planning & Development Act, 1979. This point has not been taken in the writ petition. But since submissions have been made in regard thereto, judicial conscience dictates that the same ought not to be ignored. In my view, however, the Act of 1979 has no manner of application in the facts of this case. The other issue that the underground water reservoir will be affected by reason of construction of a basement complex also cannot be accepted. The underground water reservoir was constructed during the second world war and since after the war, the same was not in use at all and is in a dilapidated state and cannot be used in future as well. In any event, the scheme has been approved by the West Bengal Fire Services since adequate provision has been made for supply of water in case of necessity. 5.5000 gallons of water will be available at the park once the scheme is implemented. Apart there from a further 38000 gallons of water will be available at the Lily Pool and 17000 gallons of water at the overhead water tank. Two high powered water pumps would also be connected to the deep tube-well which will be at the park and the water pumps will be capable of pumping out about 11000 gallons of water per hour. As such, question of affecting the underground tank having a capacity of 50,000 gallons of water does not arise and does not warrant any further consideration.

39. Mr. Chatterjee appearing for the licensee, however, Contended that the petition ought to be thrown out in limine by reason of (a) gross delay as also on the ground of suppression of facts. But in the view I have taken, I "need not deal with the same in detail. Suffice it to say that the petition cannot be thrown out in limine on the grounds noted above as is contended by Mr. Chatterjee.

40. One other aspect of the matter ought not to be ignored. Relief in a proceeding under Article 226 is discretionary, even when the complaint is in regard to the violation of the fundamental right. Though it is true that the discretion must be a judicial discretion, but the High Court in its discretion can refuse to intervene in a matter in which it appears to Court that intervention would not meet the ends of justice. If the Court is otherwise satisfied in the facts of this case, which it is, that the project when completed would serve the public good, the High Court would be within its discretion to refuse the relief as prayed for. Public benefit and public good ought to be the two most predominant factors which ought to be looked into and considered in a case like the one under consideration. One dreads to go during the business hours at that particular area - traffic problems, the congestion, hawkers and vendors in the area leads to a situation which is not conducive o developing country like that of ours. 30% of the total space would be utilised for car parking" and considering the area in question, the substantial number of cars would have the opportunity of parking underground resulting thereby cessation of traffic hazard by reason of helter scatter car parking. The shoplets vendors and hawkers on the pavement would nowhere to be seen; lovely lush green park soothing to the eyes would be visible since the same would be at a raised level. Tall trees have already been replanted.

The entire are in question would have a different look. The skeptics might say that this is too much to expect. But optimism prompts a judicial conscience to allow such a project so that prospect of having such an area in the heart of the commercial centre of the city "of Calcutta is not ruled out. With respect the writ petition has been filed and moved on a wrong appreciation of facts that there would be no park. Project report, the records and the averments in the affidavits goes to show the contra. In a development work undertaken by the appropriate authority for the benefit of millions, the balance of convenience ought to be the prime consideration and the balance of convenience apparently in the facts of the case under consideration lies not in its restriction, but in its early completion.

41. In any event, the High Court has the power to" refuse a writ, if it is satisfied that there is no failure of justice and in the case under consideration since there is no failure of justice, question of intervention in the matter does not arise. Reference may be made in this context to the decision of the Supreme Court in the case of A.M. Allison Vs. B.L. Sen, The same view has also been expressed by this Court in In Re: Jagannath Hanumanbux and Another, as also a later decision of the Supreme Court in the case of Durga Prashad Vs. Chief Controller of Imports and Exports, .

42. In the premises, the writ petition fails and is dismissed. There will however no order as to costs. All interim orders are vacated.

43. The license is absolved from undertaking given to this -Court in terms of the appellate Court's order.

44. Certified copy when applied be given expeditiously. Since the identical points raised and identical submissions made, the judgment passed in C.R. 7425 (W)/85 shall also govern the other matter being No. CR. 7426(W)/85.

Stay of operation of the order, as prayed for, is refused.