

(2006) 01 RAJ CK 0071

In the Rajasthan High Court

Case No : Civil Writ Petition No. 2186 of 1989

Rajasthan Housing Board Shopping Centre Vikas Samiti

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 20-01-2006

Acts Referred:

Constitution of India, 1950 — Article 21, 47, 48A, 51A

Citation : (2006) 1 RLW 588 : (2006) 2 WLC 372

Hon'ble Judges : Prem Shanker Asopa, J

Bench : Single Bench

Advocate : Prahlad Sharma, for the Appellant; Manoj Sharma, for Respondents No. 2 to 4, for the Respondent

Final Decision : Allowed

Judgement

Prem Shanker Asopa, J.—The instant writ petition is directed against the action of the respondents of carrying out the construction in the park area measuring 18x18 mtrs. marked "A" in the map (Annex.-I) and the marked portion "C" to "D" in the park-A in Annex.III. The petitioner is also seeking direction to restrain the respondents from making any construction in the area marked "B" in Annex.III.

2. In the writ petition the main grievance is only with regard to Park-A situated at Shopping Centre constructed in Sector No. 3 of the Rajasthan Housing Board Colony, Shastri Nagar, Jaipur by Snaking assertion that the respondents have permitted the vegetable vendors to carry on the construction of shops which will reduce the area of the park from 18 mtrs. North-South to 9 mtrs. on the ground that the Housing Board prepared a scheme known as Shastri Nagar Housing Scheme and after approval of the Government, the same was published in Gazette wherein three pieces "A", "B" and "C" marked in Annex. 1 reserved as facility area of the park, therefore, they have no authority to change the scheme.

3. The Housing Board and its officers-respondents No. 2 to 4 have filed common

reply and raised objection that the writ petition filed by the unregistered society is not maintainable. They have admitted the fact of framing of the scheme, construction of 1500 houses, shopping centre and the reservation of facility area as park marked as "A", "B" and "C" in the plan. The Housing Board has further admitted the fact that they have no right to change the scheme. In reply they have also submitted that the vegetable vendors Association "Phal Sabji Vikreta and Thela Vyavsaya Sangh" submitted a representation to the Chairman, Rajasthan Housing Board, on which the decision might have been taken to allot the similar piece of land to the petty traders on depositing Rs. 2,000/-. It is also submitted in the reply that the said scheme was entrusted to Municipal Corporation on 23.2.93 for general maintenance and on 4.1.98 the Mayor of the Municipal Corporation inaugurated the shops of fruit and vegetable vendors which were installed by raising platforms.

4. The petitioner filed rejoinder to the reply submitted by the Housing Board and submitted that the petitioner Vikas Samiti is a registered Society with regard to the objections taken by the Housing Board in its reply and a perusal of the Registration Certification would reveal that the same is of the year 1995-96.

5. Although, there was an order on 6.6.89 for maintaining status quo but still said inauguration is said to have taken place. On 10.10.2001 the Municipal Corporation was impleaded as respondent No. 6. and was directed to appear with record on 12.11.2001. The Municipal Corporation filed the reply on 25.10.2004 and has admitted the fact that the said scheme was handed over to it for general maintenance but the reply of the Municipal Corporation is silent with regard to the fact of grant of any allotment/permission to raise platform to the vegetable vendors and has further submitted that the concerned respondent can file reply in the better manner.

6. The submission of the counsel for the petitioner is that the Board as well as the Municipal Corporation were/are under an obligation to keep the facility area marked as park which vests in public as it is. After publishing the scheme in the official Gazette, they become trustee of the area reserved for the park and have no right of disturb/destroy the same. The only right vests in them is to maintain the same that too in the interest of the public. The counsel for the petitioner in support of his submissions has cited (1) Bangalore Medical Trust Vs. B.S. Muddappa and others, (2) Nizam and Others Vs. Jaipur Development Authority and Others, (3) Virender Gaur and Others Vs. State of Haryana and Others, (4) M.C. Mehta Vs. Kamal Nath and Others, and (5) M.I. Builders Pvt. Ltd. Vs. Radhey Shyam Sahu and Others, .

7. The counsel for the Housing Board has submitted that the Housing Board cannot vary or change the scheme as admitted by them in reply to Para No. 10 of the writ. The further submission of the counsel for the Housing Board is that the park is basic facility and three pieces of land were kept vacant as facility land and were shown as parks in the map. However, the main thrust of the argument of the counsel for the Housing Board is that the writ petition is not maintainable

as no resolution and document to prove that the petitioner is a registered Association.

8. No one appears on behalf of the Municipal Corporation, therefore, the aforesaid contents of the reply of the Municipal Corporation, will be taken as contention on behalf of the Municipal Corporation.

9. I have considered the record of the writ petition and further considered the rival submissions of the parties.

10. First of all, I would like to decide the issue of maintainability of the writ petition filed by the petitioner- Association.

11. The Writ petition has been initially filed by the unregistered society of the shopkeepers, whose shops are situated in front of the park-A, The Secretary and the Chairman namely Ramesh Chand and Satyanarain Pareek respectively, have represented the said Society. There is no dispute to the fact that both the said persons are shopkeepers also, therefore, apart from their official capacity, they have individual capacity also to file the writ petition, although the same has not been filed in individual capacity. The subsequent registration in the year 1995 of the petitioner-Association will also lose significance of the objection taken by the Housing Board.

12. This Court in *Nizam and Ors. v. Jaipur Development Authority and Ors.* (supra), while dealing with issue of locus standi in para No. 7, relied on a Supreme Court judgment in *Bangalore Medical Trust Vs. B.S. Muddappa and others*, , has held that the respondents of the locality are the persons intimately, vitally and developmentally effected by the action of the Authority which is destructive to the environment and which deprives the facilities reserved for the enjoyment and protection of health of public at large. Therefore, the respondents of the locality are the persons aggrieved. Para No. 7 of the judgment of *Nizam and Ors. v. Jaipur Development Authority and Ors.* (supra), is reproduced hereunder for ready reference:-

7...It cannot be disputed that the persons who made complaint by writing letters to a learned judge of this Court are the residents of the locality, who are immensely interested in preservation of open space/spaces meant for public park, garden, or children's play ground in a duly sanctioned scheme having statutory character. Reservation of open spaces for park and play ground etc. is now recognised as a legitimate exercise of statutory power, rationally related to the protection of the residents of the locality from the ill effect of urbanisation. The residents of the locality are the persons intimately, vitally and developmentally effected by the action of the Authority which is destructive to the environment and which deprives the facilities reserved for the enjoyment and protection of health of public at large. They are naturally aggrieved by the action of JDA in the present case, and, they have therefore, necessary locus standi (See : *Bangalore Medical Trust Vs. B.S. Muddappa and others*, . While dealing with the question of locus standi, Justice R.M. Sahai observed as under:-

Law on the former has marched much ahead. Many milestones have been covered. The restricted meaning of aggrieved person and narrow outlook of specific injury has yielded in favour of broad and wide construction in wake of public interest litigation. Even in private challenge to executive or administrative action having extensive fall out the dividing line between personal injury or loss and injury/of a public nature is fast vanishing. Law has veered round from genuine grievance against order affecting prejudicially to sufficient interest in the matter. The rise in exercise of power by the executive and comparative decline in proper and effective administrative guidance is forcing citizens to espouse challenge with the public interest flavour. It is too late in the day, therefore, to claim that petition filed by inhabitants of a locality whose park was converted into a nursing home had no cause to invoke equity jurisdiction of the High Court. In fact public spirited citizens having faith in rule of law are rendering great social and legal service by espousing cause of public nature. They cannot be ignored or overlooked on technical or conservative yardstick of the rule of locus standi or absence of personal loss or injury. Present day development of this branch of jurisprudence is towards freer movement both in nature of litigation and approach of the courts. Residents of locality seeking protection and maintenance of environment of their locality cannot be said to be busy bodies or itnerlopers. Even otherwise physical or personal or economic injury may give rise to civil or criminal action but violation of rule of law either by ignoring or affronting individual or action of the executive in disregard to the provisions of law raises substantial issue of accountability of those entrusted with responsibility of the administration. It furnishes enough cause of action either for individual or community in general to approach by way of writ petition and the authorities cannot be permitted to seek shelter under cover of tech-nalities of locus standi nor they can be heard to plead for restraint in exercise of discretion as grave issues of public concern outweigh such considerations.

13. In the above mentioned circumstances, the said objection is technical in nature and that too in case where not only interest of the shopkeepers Is involved but the residents of the colony also and the objections of maintainability of writ has no force.

14. Again in *Nizam and Ors. v. Jaipur Development Authority and Ors.* (supra), wherein the land of the park was allotted to the School and the allotment was held to be illegal. Para No, 15 and 21 of the said judgment are as under:-

15. As a result of the above discussions, it can be held that JDA had no authority to allot, sale, lease or otherwise transfer a site of open space reserved in the approved plan under the Rules of 1975, to a private person or body. It is also held that the use of an open space cannot be changed or diverted for any other use by the Authority even for the establishment of a school or any other facility. Therefore, the action of the respondent-JDA in making allotment of a site reserved for open space in favour of Modern School for establishment of a school is held illegal and void.

21. The result of the above discussions is that the action of the JDA in making allotment of the site in question in favour of Modern School to establish a school is invalid and without jurisdiction, being contrary to the legislative intent to safeguard healthy, safety and general welfare the people of the locality. It was also opposed to the statutory Scheme/Plan. The impugned action, is, therefore, held to be null and void and of no effect. The JDA is further restrained from allotting the site to any private person or body in future. The amount of Rs. 3,97,100.78/- and Rs. 56,000/- or so deposited by Modern School with JDA as price of the site and cost of boundary walls, in the facts and circumstances of the case, shall be refunded to the depositor with simple interest @ 12% per annum from the date of deposit within three months from the date of receipt of a copy of the judgment. The JDA shall also pay Rs. 3,000/- to Mr. P.J. Jain, Advocate for rendering assistance in the case as an Amicus Curiae.

15. In *Virender Gaur and Ors. v. State of Haryana and Ors.* (supra), Hon'ble the Supreme Court has considered the use of open place for public necessary to maintain ecology and hygienic environment. Para No. 7 of this judgment is as follows:-

7. Article 48-A in Part IV (Directive Principles) brought by the Constitution 42nd Amendment Act, 1976, enjoins that "the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country". Article 47 further imposes the duty on the State to improve public health as its primary duty. Article 51-A(g) imposes "a fundamental duty" on every citizen of India to "protect and improve the natural environment including forest, lakes, rivers and wild life and to have compassion for living creatures". The words "environment" is of broad spectrum which brings within its ambit "hygienic atmosphere and ecological balance". It is, therefore, not only the duty of the State but also the duty of every citizen to maintain hygienic environment. The State, in particular has duty in that behalf and to shed its extravagant unbridled sovereign power and to forge in its policy to maintain ecological balance and hygienic environment. Article 21 protects right to life as a fundamental right. Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contravention or actions would cause environmental pollution. Environmental, ecological, air, water, pollution etc. should be regarded as amounting to violation of Article 21. Therefore, hygienic environment is an integral facet of right to healthy life and it would be impossible to live with human dignity without a humane and healthy environment. Environmental protection, therefore, has not become a matter of grave concern for human existence. Promoting environmental protection implies maintenance of the environment as a whole comprising the man-made and the natural environment. Therefore, there is a constitutional imperative on the State Government and the municipalities, not only to ensure and safeguard proper environment but also no imperative duty to make adequate measures to

promote, protect and improve both the man-made and the natural environment.

16. The Supreme Court in *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu and Ors.* (supra), whereby the doctrine of public trust has been made part of Article 21 on following *M.C. Mehta v. Kamal Nath and Ors.* (supra), in para No. 50 and 51 of this judgment held as under:-

50. Jhandewala Park, the park in question, has been in existence for a great number of years. It is situated in the heart of Aminabad, a bustling commercial cum residential locality in the city of Lucknow. The park is of historical importance. Because of the construction of underground shopping complex and parking it may still have the appearance of a park with grass grown and path laid but it has lost the ingredients of a park inasmuch as no plantation now can be grown. Trees cannot be planted and rather while making underground construction many trees have been cut. Now it is more like a terrace park. Qualitatively it may still be a park but it is certainly a park of a different nature. By construction of underground shopping complex irreversible changes have been made. It was submitted that the park was acquired by the State Government in the year 1913 and was given to the Mahapalika for its management. This has not been controverted. u/s 114 of the Act it is the obligatory duty of the Mahapalika to maintain public places, parks and plant trees. By allowing underground construction the Mahapalika has deprived itself of its obligatory duties to maintain the park which cannot be permitted. But then one of the obligatory functions of the Mahapalika u/s 14 is also to construct and maintain parking lots. To that extent some area of the park could be used for the purpose of constructing an underground parking lot. But that can only be done after proper study has been made of the locality, including density of the population living in the area, the flating population and other certain relevant considerations. This study was never done. The Mahapalika is the trustee for the proper management of the park. When the true nature of the park, as it existed, is destroyed it would be violative of the doctrine of public trust as expounded by this Court in *M.C. Mehta Vs. Kamal Nath and Others*, . Public trust doctrine is part of Indian law. In that case the respondent who had constructed amotel located at the bank of River Beas interfered, with the natural flow of the river. This Court said (at SCC p. 413 para 35) that the issue presented in that case illustrated-

the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change.

51. In the treatise *Environmental Law and Policy: Nature, Law, and Society* by Plaster Abrarns Goldfarb (American Casebook Series, 1992) under the Chapter on Fundamental Environmental Rights, in Section 1 (The Modern Rediscovery of the Public Trust Doctrine) it has been noticed that "long ago there developed in

the law of the Roman Empire a legal theory known as the doctrine of the public trust". In America public trust doctrine was applied to public properties such as shore lands and parks. As to how that doctrine works it was stated:

The scattered evidence, taken together, suggests that the idea of a public trusteeship rests upon three related principles. First, that certain interests "like the air and the sea" have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership. Second, that they partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry without regard to economic status. And, finally, that it is the principal purpose of a Government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted private benefit....

With reference to a decision in *Illinois Central Railroad Co. v. Illinois* 146 US 387 : 37 LE 1018 it was stated that-

the Court articulated in that case the principle that has become the central substantive though in public trust litigation. When a State holds a resource which is available for the free use of the general public, a court will look with considerable scepticism upon any governmental conduct which is calculated either to reallocate the resource to more restricted uses or to subject public uses to the self-interest of private parties.

This public trust doctrine in our country, it would appear, has grown from Article 21 of the Constitution.

17. There is no dispute the park-A was a facility area and further the Housing Board has not revised the scheme under Sections 29, 30 and 32 of the Housing Board provisions which was published in Gazette. The alleged allotment/permission is also contrary to the scheme as well as the provisions of the Housing Board and later on transfer of maintenance to the Municipal Corporation will also not give any right to the Municipal Corporation to issue the allotment order or grant permission to construct the platform.

18. As regard the other submission of the counsel for the petitioner on promissory estoppel, reasonableness, keeping in view the environmental problems, the park is to be preserved and maintained by the respondents as the same vests in the public from the date of publication of the scheme in the official Gazette are concerned, the same are also deserves to be accepted and the respondents are also estopped from revising the character of the park.

19. I am of the view that the submissions of the petitioner have merit whereas the submissions of the respondents are devoid of merit.

20. In view of the above, I hold the action of the respondents of constructing platform in the park-A of Shastri Nagar Housing Scheme is illegal. .

21. Accordingly, the writ petition is allowed. The respondents are directed to

remove any kind of construction made in park-A and keep the same as park only.