

(2013) 08 AHC CK 0071

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 52562 of 2011

Sanjeev Kumar and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 01-08-2013

Acts Referred:

Uttar Pradesh Parks, Play-grounds and Open Spaces (Regulation and Control) Rules, 2005 — Rule 7

Citation : (2013) 7 ADJ 307

Hon'ble Judges : Shiva Kirti Singh, C.J; Vikram Nath, J

Bench : Division Bench

Advocate : Nawal Kishore Mishra, for the Appellant;

Judgement

1. Heard learned counsel for the petitioners, learned counsel for the Nagar Nigam, Varanasi, respondent No. 5, learned counsel for the Jal Nigam, Varanasi - respondent No. 6 and learned counsel for the State. This writ petition has been preferred by some residents of the D.I.G. Colony (Prashantpuri), Varanasi because they are aggrieved by the decision of the concerned respondents to permit use of part of a park in that colony for construction of an overhead water tank. Petitioners have prayed for quashing of an approval granted under Rule 7 of the Uttar Pradesh Parks, Play-grounds and Open Spaces (Regulation and Control) Rules, 2005 (hereinafter referred to as the "Rules"), dated 7.4.2011 and also communication dated 7.6.2011 contained in Annexure 1. Petitioners have also prayed for a mandamus to direct the respondents to stop the construction work in the park and restore the park to its original status.

2. Learned counsel for the petitioners has first taken us to the provisions of The Uttar Pradesh Parks, Play-grounds and Open Spaces (Preservation and Regulation) Act, 1975 (hereinafter referred to as the "Act") to draw our attention to definition of "park" u/s 2(b) and to prohibitory provisions under Sections 6 and 8 of the Act. As per definition, park means a piece of land without buildings or of which not more than one-twentieth part is covered with buildings, further

such land should be laid out as a garden with trees, plants or flower-beds or as a lawn or as a meadow and maintained as a place for the resort of the public for recreation, air or light. This definition applies to the word "park" in the Act unless the context otherwise requires.

3. On the basis of such definition, it has been submitted that if the water head tank is constructed, the area covered with buildings will be more than one-twentieth part of the total piece of land available as park and, therefore, the rest of the land will not be a park protected by the provisions of the Act. It has further been submitted that u/s 6 of the Act the purpose for which the park was being used on the date of commencement of the Act, cannot be changed without previous sanction of the Prescribed Authority. Similarly, it was pointed out that Section 8 of the Act prohibits construction of buildings etc. without the previous sanction of the Prescribed Authority, if such building or structure is likely to affect the utility of the park, play-ground or open space. Reliance was also placed upon Rule 7 of the Rules framed under the provisions of the Act. It also contains prohibition upon erection or setting up of any wall, fence, rail, post, step, booth or other structure whether fixed or movable and whether of a permanent or a temporary nature or any fixture in or upon any park so as to create an obstruction or encroachments upon parks except with the written permission of the Prescribed Authority or any officer authorised in this behalf. The Rules also reiterate that a park approved by the Prescribed Authority under Rule 5 shall not be used for any purpose other than the purpose for which it has been made for without written permission of the Prescribed Authority.

4. There is no dispute that the Prescribed Authority has granted permission for construction of the overhead tank in the park as is apparent from the impugned decision contained in Annexure 1, which discloses that the competent Authority is the Divisional Commissioner and he has granted permission under Rule 7 of the Rules. However, such permission is under challenge on the ground that it violates the provisions of the Act because more than one-twentieth part of the park cannot be covered by any building. It has also been submitted that park in a residential colony serves a very useful purpose by providing the public space for playground, recreation, fresh air and light.

5. So far as argument on the basis of definition of "park" is concerned, in our considered view, a park, if the necessity arises, can always be reduced in size or curtailed in larger public interest and for that power is available u/s 6 as well as u/s 8 of the Act which authorise the Prescribed Authority to permit or grant sanction for use of a park, play-ground or open space for any purpose other than the purpose for which it was used when the Act came into force. Similarly, the prohibition on construction of buildings also contains exception and buildings can be constructed with the previous sanction of the Prescribed Authority.

6. In our considered view, after the prohibition is relaxed by the competent Authority for any good or compelling reasons, the reduced area will become a park and shall be governed by the same definition. Only such a meaning and

interpretation can serve larger interest of the society because at times a park existing from before, may require to be converted into a part of road, parking area or an area of other developmental necessity due to growing needs of the society. Hence, it will not be proper to control the sovereign power of the State and its Authorities from exercising their powers which is available and vested in them under the Act.

7. The only issue that now subsists is that of public interest and interest of the residents of the colony in maintaining a park vis-à-vis the requirement of developing infrastructure for essential purposes such as supply of pure drinking water which is said to be the reason why the overhead tank in question is being constructed. On this issue, it is difficult for this Court to hold that right to enjoy fresh air and light in a park available in the colony is superior to the requirement of supply of potable safe drinking water to the residents.

8. Learned counsel for the petitioners, in such a situation, relied upon pleadings contained in supplementary-affidavit and counter-affidavit to support the submission that the Authorities should have first made a determined effort to locate alternative sites for the construction of overhead tank and only if no other option was available, they should have sacrificed part of a park situated in a residential colony. On this issue, it is relevant to note that some alternative sites suggested by the petitioners were taken note of and on behalf of respondent No. 5 -- Nagar Nigam, Varanasi, reply has been given in respect of the alternative sites suggested on behalf of the petitioners.

9. Learned counsel for the petitioners drew our attention to a site in the counter-affidavit of respondent No. 5 dated 17.1.2013 [mentioned at paragraph 7(b)] as the park located at Mahavir Temple -- Bhojuveer Road in Bhuneshwar Nagar Colony. According to the respondents, the said land measures 40X37 meters and is not sufficient for the construction of overhead tank and clear water reserve and also that objection was also raised by the colonizers. In respect of the space mentioned in paragraph 7(d) which is a very large open land in the campus of Rajya Bhasha Hindi Sansthan and Basic Teacher Training Centre, the reply is that the Director of the Sansthan took the stand that there is no possibility of making available that land for construction of overhead tank. In that regard, report of Nagar Ayukt, Varanasi dated 14.10.2011 also discloses that the said land can be made available only after lengthy procedure if the head office of the Sansthan at Lucknow agrees for the same and that there is very little possibility of the land being available for the purpose.

10. Although it is the stand of the petitioners that no serious attempt was made by the respondents to locate an alternative site, on behalf of the respondents, it has been seriously contested and they have pointed out that the land in question was found suitable and since it is useful for the population living in the vicinity, there should not be strong opposition to erection of such a useful construction. It was pointed out that in many other residential colonies also such overhead tanks have been constructed for the purpose of effective supply under the scheme. It

was also submitted on behalf of the respondents that out of estimated cost of approximately Rs. 98 lacs, about Rs. 22 lacs have already been spent in constructing the foundation and base for the overhead tank. In principle, we are in agreement with the submissions advanced on behalf of the petitioners that even for developmental activities and need of infrastructure for such purpose, the concerned Authorities should not take the easy course of destroying public parks in residential areas and this should be done only as a last resort when no other alternative is available. Since the Commissioner of the Division has been given the power of Prescribed Authority under the Act, we expect him to exercise more caution in such matters in future and permission or sanction should be accorded for changing the user of a park, particularly, in residential areas only after detailed study when it is found that it is not possible to obtain alternative sites.

So far as the present case is concerned, in the facts of the case, we are not persuaded to interfere. The writ petition is, therefore, dismissed.

It is made clear that the minimum area for construction of the overhead tank which has been indicated by respondent No. 5 in the counter-affidavit shall not be increased and only on account of dismissal of this writ petition, the Authorities shall not permit further reduction in the area of the park without establishment of very good reasons after proper scrutiny.