
(2005) 11 KL CK 0030

In the High Court Of Kerala

Case No : Writ Petition No's. 4703 and 23174/05

Shasthri Nagar Colony Welfare Committee

APPELLANT

Vs

Calicut Development Authority

RESPONDENT

Date of Decision : 11-11-2005

Acts Referred:

Constitution of India, 1950 — Article 21, 29(1), 48A
Kerala Building Rules, 1984 — Rule 14(5), 6
Kerala Development Authorities Rules, 1984 — Rule 55, 55(1)
Kerala Municipality Building Rules, 1999 — Rule 27

Citation : AIR 2006 Ker 46 : (2005) 4 ILR (Ker) 823 : (2006) 1 KLT 294

Hon'ble Judges : K. Balakrishnan Nair, J

Bench : Single Bench

Advocate : P. Ravindran, Arliss Trency Antony, Anil Sivaraman and V.G. Sankaran, for the Appellant; S. Venkatasubramonia Iyer P.V. Kunhikrishnan, M.K. Aboobacker, P.R. Ramachandra Menon, Shafik M. Abdulkhadir and M.A. Fayaz, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

K. Balakrishnan Nair, J.

W.P.(C) 23174/2005

1. The petitioner, an Association of the residents of Shastri Nagar Colony, near Eranhilalam in Kozhikode, has filed this Writ Petition, feeling aggrieved by the steps taken by the 1st respondent Calicut Development Authority, to sell 58 cents of open space in that colony, to the Lakshadweep Administration. The brief facts of the case are the following:

2. The 1st respondent acquired 13.09 acres of land and developed it into a housing colony and the members of the Association were sold plots, having various extents, as per Ext.P3 and similar sale deeds. In the said colony, two plots have been set apart as open spaces, having an extent of 42 cents and 58 cents respectively. Ext.P2, the approved lay out plan of the colony, would show

that they are meant for parks, play ground and nursery school. The open space on the eastern side, which was set apart for parks and nursery school, is now presently used as a basket-ball court and play ground for children. The said plot is proposed to be sold to the Lakshadweep Administration. The petitioner submits, as per Ext.P3 sale deed, its members also paid the proportionate value of the area set apart for parks, roads etc. The relevant portion of the said deed which states that the land value was fixed, taking into account the areas set apart for roads, drain, parks etc., reads as follows:

WHEREAS the Vendor Authority had to set apart about 50% of the acquired land exclusively for roads, drains, parks, rehabilitation etc., and develop the same, thereby getting the extent of saleable land reduced to about 50% and

WHEREAS the Vendor Authority has incurred and is incurring expenditure of different Heads of Account such as development charges, establishment charges, interest on investments, and the Vendor Authority having regard to the foregoing facts, fixed the total consideration for the developed land at Rs. 11,750/- cent.

Based on the above clause, the petitioner submits, the allottees have paid the land value for the area set apart for parks, play ground, nursery school etc. When they came to know that the plot remaining as open space, set apart for parks and nursery school, having an extent of 58 cents, is going to be sold to the Lakshadweep Administration, the Association filed Ext.P4 representation before the Chairman of the 1st respondent. Thereafter, this Writ Petition is filed, seeking appropriate reliefs against the sale of the above said plot of land.

3. In the counter affidavit filed by the 1st respondent, it has produced Ext.R1(h) order of the Government dated 10.12.2003, permitting it to sell the said plot of open space to the Lakshadweep Administration. So, the Writ Petition was amended, producing the said order as Ext.P5 and challenging the same. The petitioner would submit that as per the detailed Town Planning Scheme, notified for the Kozhikode Corporation, this particular area is zoned as residential zone. If any modification of the said detailed Town Planning Scheme is necessary, the procedure prescribed u/s 15 of the Madras Town Planning Act, 1920, has to be followed. As per the Kerala Building Rules, 1984, it is mandatory to leave 15% of the total developed land as open space. As per the Kerala Municipality Building Rules, 1999, at least 10% of the developed land has to be set apart as open area. But, in this case, only one acre out of 13.09 acres alone was set apart as open space. Now, a portion of that area is sought to be sold to the Lakshadweep Administration. The petitioner, therefore, submits, the alienation of the land will offend Rule 14(5)(a)(iv) of the Kerala Building Rules, 1984 and Rule 27(iv) of the Kerala Municipality Building Rules, 1999. It is also pointed out that though exemption from Zoning Regulations and permission for sale was sought by the 1st respondent, the Government granted only permission for sale, by Ext.P5 order. The prayer for exemption of the land from Zoning Regulations, was not considered. Rule 55 of the Kerala Development Authorities Rules, 1984, permits the authority to sell land, only for the implementation of the Town Planning

Scheme. The proviso to the said Rule will not enable the Government to pass any order in the nature of Ext.P5, it is submitted. Therefore, the petitioner prays for quashing Ext.P5 and also the action taken by the Development Authority based on it, for disposing of the open space to the Lakshadweep Administration.

4. The 1st respondent has filed a counter affidavit and along with that, it has produced Ext.R1(a), which is stated to be the correct copy of the approved lay out plan of the colony. Ext.R1(b) communication from the Secretary of the 1st respondent to the Government would show that the Authority is indebted to the Government to the tune of Rs. 650 lakhs and by the said letter, the Authority has requested the Government to convert the said amount as a grant. Ext.R1(c) is the communication issued by the Housing and Urban Development Corporation Ltd., requesting the Authority to remit Rs. 23,52,444/- due to it. Ext.R1(d) is the communication issued by the Kerala Urban Development Finance Corporation, calling upon the Development Authority to pay an amount of Rs. 16,65,417/-. Ext.R1(e) is the communication issued by the Director of Local Fund Audit, claiming an amount of Rs. 39,55,407/- towards auditing charges. Ext.R1(f) is the communication issued by the Government, which would show that the present liability of the authority to the Government will come to Rs. 634.79 lakhs. In view of the dismal financial position, the Development Authority moved the Government for permission to sell the above said 58 cents of land, by Ext.R1(g) communication. Pursuant to that, the Government issued Ext.R1(h) sanction order, allowing to sell the said plot of 58 cents. The translation of the said order reads as follows:

The Government hereby issue order granting permission to the Kozhikode Development Authority to sell 58 cents of land out of the 1 acre (that is excluding 18 cents of land from a 76 cents plot) in T.S.No. 172/1C of Kacheri village of Kozhikode Corporation, which is under the control of the Authority and set apart as park/open space in Shastri Nagar Housing Colony, on the basis of the report of the Secretary, Kozhikode Development Authority, mentioned as paper 4.

The 1st respondent would submit that Ext.R1(a) area is divided into eastern and western parts and on the eastern side, there are no residential buildings and the plots on the eastern side were sold out for non-residential purposes. The open space in that area has nothing to do with the residential area and therefore, it is proposed to be sold to the Lakshadweep Administration. It is also pointed out that for commercial site or area, no land for recreational purposes like park, play ground etc. need be left vacant.

5. The petitioner has filed a reply affidavit, in which it is submitted that the eastern area also continues to be a residential area. There are 18 residential quarters occupied by the employees of Provident Fund Commissioner's office on the eastern side. The remaining area is purchased by the State Bank of Travancore for constructing residential quarters for its employees and also for locating its Regional Office, it is submitted.

6. The 2nd respondent Corporation of Calicut has filed a counter affidavit, supporting the petitioner. It is stated in the said affidavit, as follows:

5. It is submitted that the 1st respondent implemented a Housing Project in Ward No. 5 near Eranhipalam, Kozhikode. The said project was implemented for providing house plots to Middle Income Groups (MIG), Low Income Groups (LIG) and Economically Weaker Sections (EWS). The lay out prepared by the 1st respondent was approved by the Town Planner since the same was in compliance with the requirements of the Kerala Building Rules. As per the Kerala Municipality Building Rules 15% (as fixed by the Building Rules then in force) and 10% (as per the current Rules) of the total area should be provided for recreational open spaces for residential development. In the approved lay out plan 88 cents of land is earmarked for recreational parks and nursery. The recreation space provided is for the benefit of the residents in the Housing Colony, which is a statutory requirement. The area provided as per the lay out should be maintained as recreational space and if any change is necessary revised lay out has to be approved. This respondent has not received any application for construction in the Recreational Space of the lay out plan. Hence conversion of the area is not permissible as per the Rules without approving the revised lay out.

7. Heard Mr. P. Ravindran, learned Counsel for the petitioner, Ms. Arliss Trency Antony, learned Counsel for the petitioner in the connected case, learned senior counsel Mr. S. Venkitasubramania Iyer for the 1st respondent Authority, Mr. P.V. Kunhikrishnan, learned standing counsel for the 2nd respondent Corporation and Mr. P.R. Ramachandra Menon, learned standing counsel for the Lakshadweep Administration.

8. The learned Counsel for the petitioners pointed out that Ext.P5 is not authorised by any of the provisions of the Madras Town Planning Act or the Kerala Development Authorities Rules. The open space set apart in a housing colony cannot be allowed to be sold for other purposes. The learned senior counsel for the 1st respondent Mr. S.V.S. Iyer submitted that the Authority decided to sell the property in public interest to save it from indebtedness and its action is validly sanctioned by the Government, as per Ext.P5 order, under the proviso to Rule 55 of the Kerala Development Authorities Rules. The learned Counsel for the Lakshadweep Administration pointed out that the Administration has paid more than Rs. 1 crore to the 1st respondent and the said amount is remaining blocked because of the dispute raised in this Writ Petition.

9. As per the detailed town planning scheme, it is common case that the area in question is a residential area. That is the reason why the Executive Committee of the Calicut Development Authority resolved to request the Government to grant exemption from the Zoning Regulations, by Ext.R1(g), so that the open space could be used for a non-residential purpose. The Government did not consider or allow the said request, but, by Ext.P5 order, granted permission to sell the open space. For varying the town planning scheme, provision is made in Section 15 of the Madras Town Planning Act, which is applicable to the Calicut area. Section 15

reads as follows:

15. Variation or revocation of schemes:--

(1) A town planning scheme sanctioned u/s 14 may at any time be varied or revoked by a subsequent scheme published and sanctioned in accordance with this Act.

Provided that the municipal council shall be competent to modify a scheme after it has been sanctioned by the State Government u/s 14 by an agreement entered into with the persons interested in the scheme and with the concurrence of the State Government.

(2)(a) The State Government may, at any time, by notification in the Official Gazette, vary or revoke a scheme sanctioned u/s 14.

(b) Before issuing such notification the State Government shall publish in the prescribed manner a draft of such notification together with a notice specifying a date on or after which such draft will be taken into consideration and shall consider any objection or suggestion which may be received in respect of such draft from the council or any person affected by the scheme before the date so specified.

Admittedly, the Government have not followed the procedure provided under the above quoted section and did not vary or modify the town planning scheme, which is a condition precedent for using a residential area for non-residential purposes. The learned senior counsel appearing for the Calicut Development Authority tried to canvass that the Government might have thought that exemption from Zoning Regulations may not be necessary for the sale of the land. But, the said contention cannot be accepted, in the face of Section 15 of the Madras Towning Planning Act.

10. But, the learned senior counsel for the Calicut Development Authority sought to support the permission for sale, referring to the power of the Government under Rule 55 of the Kerala Development Authorities Rules, which reads as follows:

55. Power to dispose of land:--

(1) the Authority may retain or may lease, sell, exchange or otherwise dispose of any land vested in it or acquired by it for implementation of Town Planning Schemes;

Provided that the Authority shall obtain the prior approval of Government for the sale, lease, exchange, mortgage or disposal of the whole or substantially the whole of any particular undertaking of the Authority.

(2) The Authority shall maintain a register of immovable property in Form 23 of the Kerala Financial Code, Volume II, for all the property vested in it or acquired by it.

The said Rule provides that sale of land can be made only for implementation of the Town Planning Scheme. If an entire undertaking or substantial portion of an undertaking of the Authority is disposed of, permission of the Government is necessary under the proviso to Rule 55(1). But, the transaction involved in this case, has nothing to do with the said proviso. So, the contention of the respondents that Rule 55 of the Development Authorities Rules will support Ext.P5, cannot be accepted.

11. Further, Ext.P2 is the approved lay out plan, attached to the development permit, contemplated under Rule 6 of the Kerala Building Rules, 1984. Though, the Development Authority produced Ext.R1(a), as the correct approved lay out plan for the housing colony, near Eranhipalam in Kozhikode Corporation, there is no substantial difference between them, as far as the open space in the case is concerned. The eastern portion of the said lay out plan consists of plots for residential accommodation. The Development Authority points out that those plots have already been sold for non-residential purposes to the State Bank of Travancore and Provident Fund Authorities. Therefore, this open space cannot be considered as part of the residential area. The Development Authority has committed grave illegality in allotting residential plots for non-residential purposes. The said illegality will not enable it to repeat another illegality of conversion of open space. The action of the Development Authority in selling the residential plots for other purposes, is not only in violation of the approved lay out plan of the colony, but also against the Zoning Regulations. The pleading regarding illegal conversion, made by the Development Authority, to support further illegal conversion, is seriously disputed by the petitioner, in its reply affidavit.

12. The open space in a residential area or in busy townships is treated as lung space of the area. It provides fresh air and refreshment to the persons in the neighbourhood. Its presence ameliorates the hazards of pollution and it has to be preserved and protected for the sustenance of the men around. The contention that the financial difficulty of the Calicut Development Authority will justify the action, also cannot be accepted. Thus, the statutory requirement to leave 15% of the total area (now 10%), has been included with a laudable purpose. It is for the health and well-being of the inhabitants of the residential area. The same cannot be bartered for the financial gain of the Authority. A fund-starved Government cannot be permitted to sell the valuable trees in the forest and likewise, the 1st respondent Authority cannot be permitted to sell the open space, to meet its financial requirements. Apart from that, in view of the conditions contained in Ext.P3, the Development Authority is estopped from selling the area set apart as open space, as the compensation for keeping the said area as open space, was also charged on the allottees.

13. The courts of this country have come down heavily on those, who tried to convert residential areas for other purposes and open spaces for other profitable ventures. The Andhra Pradesh High Court in T. Damodhar Rao and Others Vs.

The Special Officer, Municipal Corporation of Hyderabad and Others, , considered whether the land owned by the Life Insurance Corporation and the Income Tax Department, Hyderabad, in a recreational zone within the city limits of Hyderabad, can, legally, be used for residential purposes, contrary to the notified developmental plan. The Court's answer was an emphatic "no". It was held that the land acquired by those statutory authorities under the Land Acquisition Act, for the construction of residential buildings, cannot be used for that purpose, as the question was already covered by a notification, notifying it as a recreational area. It was held as follows:

Where the land was reserved under the approved development plan for the purpose of recreational park, a portion of it cannot be used by the person for whom it was acquired, for construction of residential houses.

xxx xxx xxx It is undoubted that under the common law ownership which is a bundle of rights carries with it the right to put the property to any use the owner chooses. Under the common law, therefore, the purchaser could not have been restrained from constructing residential quarters on the plot. The purchaser would have been well within their legal powers as owners of their properties to build residential houses. But that ownership right is now curtailed by a statutory provision contained in the developmental plan. Putting the plot to residential use would be clearly contrary to the restrictions which the developmental plan had imposed on the above land. Developmental plan had forbidden any user of that land except as recreational zone. The common law rights of the owners must give in to the statutory restrictions. The common law use and enjoyment of these ownership rights, should, therefore, be subject to the requirements of the statutory law of the developmental plan. The declarations regarding demarcations of land user contained in a developmental plan published under statutory authority are neither pious aspirations nor empty promises. Such declarations are legally enforceable. Those declarations imposed legal obligations on the land owners and the public authorities. The public authorities should enforce those obligations. If they do not, it becomes the solemn duty of the Court to compel those authorities to perform their mandatory obligations.

xxx xxx xxx The very purpose of preparing and publishing the development plan is to maintain an environmental balance. The object of reserving certain area as recreational zone would be utterly defeated if private owners of the land in that area are permitted to build residential houses. The attempt of the Life Insurance Corporation to build houses in this area is contrary to law and also contrary Article 21 of the Constitution.

14. The Karnataka High Court in V. Lakshmipathy and Others Vs. State of Karnataka and Others, ordered to close down the industries set up in residential areas, in violation of the town planning scheme. Gravely concerned with the degradation of environment, the Court made a fervent plea against it, in the following words:

26. The movement for restoration and maintenance of a livable environment requires curbing the power of narrowly oriented administrative agencies in the appropriation of the dwindling acreage of land and water not already irrevocably appropriated. There have been several proposed and discussed means of easing of burdens and handicaps of the substantial evidence--rational basis rule in environmental cases involving judicial review of administrative agency determinations. Some are based upon concepts found in environmental cases and other cases and also explained and analysed by the acknowledged critical authorities. Others are based not upon authorities but on the sheer importance of the interests affected, for eg. as documented in the National Environment Policy of India.

In a sense the problem is a part of a larger problem--that of rendering big Government more responsive to the needs of the individuals whom it governs.

The remarks of Justice Felix Frankfurter addressed to the problems of the thirties are relevant to 20th century India which is still in a developing stage.

It is idle to feel either blind resentment against "Government of Commission" or sterile longing for the golden past that never was. Profound new forces call for new social inventions or fresh adaptations of old experience. The "great society" with its permeating influence of technology, large scale industry and progressive urbanisation, presses its problems; the history of political and social liberty admonishes us of its lessons. Nothing less is our task than fashioning instruments and processes at once adequate for social needs and the protection of individual freedom.

(See "The Task of Administrative Law"--Frankfurter)

The explosion of grave concern for environment at any private and Government level is the great political phenomenon of recent times. The sporadic and unorganised struggle of environment stragglers, the wild life and bird lovers, wilderness wanderers have identified the conservation movement of the environment and are focussing their attention on denuded forests, balding hills, disappearing prairie, extinct species of rare fish, thinning wild life, and vanishing birds. The movement has become the crusade of anyone almost everywhere for a "livable environment". There is an increasing awareness that in cleansing up our environment, if not in wilderness, lies the preservation of the world.

At the moment we are looking into a decade in which most of the people are living in metropolitan or urban areas choked by traffic, poisoned by water, suffocated by smog, deafened by noise and terrorised by crime.

Restoring nature to the natural state is a cause beyond party and beyond factions. It has become a common cause of all the people. It is a cause of particular concern to young Indians because, they, more than us, will reap the grim consequences of our failure to act on the programmes, which are needed now if we are to prevent disaster later. An onerous obligation which we owe to

posterity is clean air, clean water, greenery and open spaces. These ought to be elevated to the status of birth rights of every citizen.

Commencing on Business Corporations and Environment Protections, Robert Reinow a Professor of Political Science at the State University of New York, Albany observed:--

But worse than Corporation funding is the subversion of Government agencies to the role of environment exploiter. The public interest which should be championed by the agencies with their regulations is ignored or perverted, as the "iron triangle" of special interests, bureaucrats and committee chairperson form their unholy alliance. This means that the public conscience is entrusted to volunteers in public interest groups, a sacrificial burden of weighty dimensions....

The outstanding feature of modern political life is the shifting of the burden of defence of public interest to civic volunteers. Organised, they must dig into their pockets to hold their groups together; they must respond to calls for protests, launch petition drives, simulate letter writing campaigns, conduct rallies, attend hearings and in general, mortgage the time of their personal lives to an unprecedented extent. Keepers of the social conscience, they express themselves openly and aggressively. When the record of the environmental movement is finally registered, the emphasis will be on the new breed of citizenship it fostered. And it will contrast mightily with the sordid strategy of the Corporate Board rooms where they scoff at dogooders and belittle of purpose.

He added:

What is becoming clear is that restructuring of the democratic process has altered the pattern of citizenship. Where once the public official as in the days of Washington or Jefferson had a deep and honest sense of public sacrifice, we are today witnessing the close collaboration of special interests with governmental agencies and elected officials. In the environmental field, Government too often emerges as the advocate of exploitation. This is in large part due to the subtle private and usually corporate pressures. Pressure has become a science that destroys the Governmental shield the citizens have erected to protect themselves. It is necessary for the Government to guard against such pit-falls. The choice is between technological progress which proceeds without adequate regard of its consequences and technological change that is influenced by a deeper concern for the interaction between man's tools and the human environment in which they do their work.

Inserted by the Constitution 42nd Amendment Act 1976, Article 48-A lays down that the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

Article 51-A(g) exhorts the citizen to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures.

Part IV-A on Fundamental duties has been added by the Constitution (42nd Amendment) Act, 1976 in accordance with the recommendations of the Swaran Singh Committee bringing the Constitution in line with Article 29(1) of the Universal Declaration of Human Rights and the Constitutions of China, Japan and U.S.S.R.

The mandate of our Constitution is to build a welfare society and legislations made in that behalf to give effect to Directive Principles of State Policy have to be respected. If the constitutional obligations are not discharged by due enforcement by the administrative agencies, the Court cannot turn a Nelson's eye. The fundamental duties are intended to promote peoples participation in restructuring and building a welfare society and the Directive Principles under Part IV are intended to build the edifice of welfare State. Environment and its preservation is a subject-matter of both, thus emphasising the importance given to it by our Constitution. Protection of environment is a matter of constitutional priority. Neglect of it is an invitation to disaster. The problem is the concern of every citizen and action brought cannot be dismissed on the ground of locus standi. The right to sue in this regard is inherent in the petitioners. When administrators do not mend their ways, the Courts become the battle ground of social upheaval. The paradigm of bureaucracy conducive to public welfare features standard operating procedures, humane outlook, hierarchial authority, prompt law enforcement besides job specialisation and personnel rules among others. If the administrators show indifference to the principle of accountability, law will become a dead-letter on the statute book, and public interest will be the casualty. Entitlement to a clean environment is one of the recognised basic human rights and human rights jurisprudence cannot be permitted to be thwarted by status quoism on the basis of unfounded apprehensions.

15. The Allahabad High Court in D.D. Vyas and others Vs. Ghaziabad Development Authority, Ghaziabad and another, issued a writ of mandamus against the respondent Development Authority to develop a park, as provided in the development plan. Keeping open space earmarked for park without any development was condemned and the Authority was directed to bring into existence a good park there. The attempt of the Authority to use the open space for other purposes was also severely criticised. The Court held as follows:

Where open space for construction of public park is preserved and earmarked in the Plan for Development of a planned town, the Development Authorities cannot ignore or neglect to develop, that open space into a public park within reasonable time. Unless an open space reserved for a public park is developed as such, the execution of the plan will remain incomplete. Buildings, as proposed in the plan, may have come up, amenities and civic amenities may have been provided and the people may have started living in the colony, yet the plan cannot be said to have been fully executed, if an open space meant for a park is not developed as such. The duty of the authorities is to implement the plan in entirety making the town beautiful with attractive public parks. Their job is not over when the area

becomes habitable.

xxx xxx xxx Good parks expansively laid out are not only for aesthetic appreciation, but in the fast developing towns having conglomeration of buildings, they are a necessity. In crowded towns where a resident does not get anything but atmosphere polluted by smoke and fumes emitted by endless vehicular traffic and the factories, the efficacy of beautifully laid out parks is no less than that of lungs to human beings. It is the verdant cover provided by public parks and greenbelts in a town, which renders considerable relief to the restless public. Hence the importance of public parks cannot be under-estimated. Private lawns or public parks are not a luxury, as they were considered in the past. A public park is a gift of modern civilization, and is a significant factor for the improvement of the quality of life. Open space for a public park is an essential feature of modern planning and development, as it greatly contributes to the improvement of social ecology.

xxx xxx xxx The Development Authority cannot amend the plan u/s 13(1) so as to deprive the public of a public park. Not only the Authority even the State Government cannot alter the plan u/s 13(2) so as to enable the Authority to use open space, earmarked for a public park, for a different purpose. Whereas Section 13(1) carries several limitations, Section 13(2) gives the State Government unlimited power to make amendments in the plan of the nature specified in Sub-section (1) or otherwise. The words "or otherwise" occurring in Section 13(2) cannot be interpreted to mean that the State Government has a right to alter the plan so as to enable the Authority to use the open space, reserved for a park, for the purposes having no semblance of a park.

16. The Rajasthan High Court in *Nizam and Others Vs. Jaipur Development Authority and Others*, struck down the transfer of land to third parties, involving change of user of land, attempted by the Development Authority, of an area reserved as open space in the sanctioned plan. The Court held as follows:

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.

xxx xxx xxx The plea that educational facility serves better public purpose than an open space which is ultimately converted into a dumping space for rubbish is wholly misconceived. It is no doubt true that by a legal fiction created by the operation of the Rules, a site reserved for an open space is vested in the Development Authority but this vesting is intended by the reason that the use of such site is meant for the public in general and it cannot be put in private hands

by reason of its dedication to the general public. The Development Authority cannot change its use and its user is limited for the purpose for which it was reserved under the approved scheme. The scheme of sub-division of plots has a statutory object to promote the ordinary development in the city in a planned manner and to preserve open space/spaces for public park, garden, lawn, playground for children etc. with a view to protect the residents from the ill effects of urbanisation. The Authority is under an obligation to act according to the approved scheme/plan. The Development and Planning are primarily for the benefit of the public and a statutory authority is under an obligation to perform its duty in accordance with the provisions of the Act and the Rules. Therefore, the plea that by vesting of an open space in the Trust by operation of law, the open space meant for park, garden or lawn etc. can be transferred by the Authority to private hands for different use which may be for a school even would not be tenable. It is no doubt true that educational facility also serves an important purpose of society but the provisions of the Rules of 1975 make a marked distinction in relation to open space/spaces and the sites left for educational facility. In the former case, it has a statutory dedication to the general public but it is not so in the latter case. The site reserved for educational institution is transferable to a private person or body for the specific purpose for which the area was reserved and its ownership also vests in the developer, but the same is not applicable in the case of open spaces which are intended to be used by the public. Sites reserved for open space in the sanctioned scheme/plan cannot be leased or sold away unless the scheme is duly altered.

17. The Punjab and Haryana High Court in *Ambala Urban Estate Welfare Society Vs. Haryana Urban Development Authority and another*, held that the Urban Development Authority is bound to create the facilities, including parks that are provided in the Development Plan of a particular area and it is not competent to transfer any area set apart for common facilities to others. The Court held as follows:

26. In view of the above, it is clear that in a case like the present one, where the residents of the locality have approached this Court for compelling the respondent - authority to honour its promise of providing modern amenities, the court cannot deny the relief to the citizens on the basis of any technical objection. This is all the more so as it has been clearly established on the record that the authority has failed to provide proper roads, sewerage, community buildings, parks and hygienic conditions. These can hardly be considered to be modern amenities. These are basic for the life and health of the residents of the locality.

xxx xxx xxx 30. After taking all the facts into consideration, it appears clearly that the respondent Authority has not provided the amenities contemplated under the Act. In particular, it has failed to provide the basic amenities like: (i) Drainage; (ii) Sewerage; (iii) Adequate potable water; and (iv) parks. All these have resulted in pollution of environment. It must, therefore, provide all these

amenities within one year from the date of the receipt of this order so that the "right to life" as guaranteed under the Constitution does not become illusory.

31. Before parting with the judgment, it may be mentioned that the plea raised on behalf of the respondent - authority that the plot-holders are liable to contribute towards the construction of open and internal drains at the rate of Rs. 5.67 per square yard is untenable. Initially, the expenditure on account of development cost of public health works which includes sewerage as also towards the building and road works which include levelling etc. was included in the price of the plots. This having been paid, there was no provision for raising any further demand. The price was not tentative. It was full and final. This having been paid, the respondents are bound to provide all the promised amenities.

18. The Madhya Pradesh High Court in *Yogendra Singh Tomar Vs. State of Madhya Pradesh and Others*, struck down the decision of the Municipal Council to convert an open space into a park. While quashing the resolution of the Municipal Council in this regard, the Court held as follows:

8.A. The Statutes in force in India and abroad reserving open spaces for parks and play grounds are the legislative attempt to eliminate the misery of disreputably housing condition caused by urbanisation. Crowded urban areas tend to spread disease, crime and immorality. Reservation of one space for parks and play ground is universally recognised as a legitimate exercise of statutory power rationally related to the protection of the residents of the locality from the ill-effects of urbanisation. Thus when in the case of *Bangalore Medical Trust Vs. B.S. Muddappa and others*, an attempt made to convert a park into a Nursing Home it was nullified and it was specifically stated that protection of the environment or open spaces for recreation and fresh air, play grounds for children, promenade for the residents and other convenience or amenities are matters of great public concern and of vital interest to be taken care of in a development scheme.

xxx xxx xxx 9. The U.S. Supreme Court in *Village Belle Terre v. Bruce Borass* (1974) 39 Law 2d 797 : 416 US I opined that police power is not confined to eliminate filth, stench and unhealthy places. It equally comes into play when lay out zones are proposed which are essential for family values, youth values and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

10. From the decisions referred to above, it becomes apparent that:

(i) the municipal authorities are supposed to act as trustees and should see to it that the property Which vests in it is used for the benefit of the residents of the city it governs; and

(ii) if open spaces are sought to be used in a way which would result in pollution, destruction of scenic beauty or disturbance of the ecology, then the Courts would

step in and would remind the municipal authorities of their obligations.

19. The Honourable Supreme Court in Bangalore Medical Trust Vs. B.S. Muddappa and others, dismissed an appeal filed against the decision of the Karnataka High Court, quashing the decision of the Bangalore Development Authority, to transfer an open space set apart for a park, for opening a hospital. Kochu Thommen, J. in the said decision, held as follows:

24. Protection of the environment, open spaces for recreation and fresh air, playgrounds for children, promenade for the residents, and other conveniences or amenities are matters of great public concern and of vital interest to be taken care of in a development scheme. It is that public interest which is sought to be promoted by the Act by establishing the BDA. The public interest in the reservation and preservation of open spaces for parks and playgrounds cannot be sacrificed by leasing or selling such sites to private persons for conversion to some other user. Any such act would be contrary to the legislative intent and inconsistent with the statutory requirements. Furthermore, it would be in direct conflict with the constitutional mandate to ensure that any State action is inspired by the basic values of individual freedom and dignity and addressed to the attainment of a quality of life which make the guaranteed rights a reality for all the citizens.

25. Reservation of open spaces for parks and playgrounds is universally recognised as a legitimate exercise of statutory power rationally related to the protection of the residents of the locality from the ill-effects of urbanisation.

26. In *Agins v. City of Tiburon*, the Supreme Court of the United States upheld a zoning ordinance which provided...it is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant impacts, such as ...pollution, ...destruction of scenic beauty, disturbance of the ecology and the environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl. Upholding the ordinance, the Court said: (US pp.261-62)

...The State of California has determined that the development of local open-space plans will discourage the "premature and unnecessary conversion of open-space land to urban uses".... The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill effects of urbanization. Such governmental purposes long have been recognized as legitimate....

...The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas.

27. The statutes in force in India and abroad reserving open spaces for parks and playgrounds are the legislative attempt to eliminate the misery of disreputable housing condition caused by urbanisation. Crowded urban areas tend to spread

disease, crime and immorality. As stated by the U.S. Supreme Court in *Samuel Berman v. Andrew Parker*: L Ed pp.37-38: US pp.32-33.

...They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

...The concept of the public welfare is broad and inclusive.... The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values....

(Per Douglas, J.).

Sahai, J. in the concurring judgment in "*Bangalore Medical Trust*" (supra) held as follows:

36. Public park as a place reserved for beauty and recreation was developed in 19th and 20th century and is associated with growth of the concept of equality and recognition of importance of common man. Earlier it was a prerogative of the aristocracy and the affluent either as a result of royal grant or as a place reserved for private pleasure. Free and healthy air in beautiful surroundings was privilege of few. But now it is a "gift from people to themselves". Its importance has multiplied with emphasis on environment and pollution. In modern planning and development it occupies an important place in social ecology. A private nursing home on the other hand is essentially a commercial venture, a profit oriented industry. Service may be its motto but earning is the objective. Its utility may not be undermined but a park is a necessity not a mere amenity. A private nursing home cannot be a substitute for a public park. No town planner would prepare a blueprint without reserving space for it. Emphasis on open air and greenery has multiplied and the city or town planning or development Acts of different States require even private house owners to leave open space in front and back for lawn and fresh air. In 1984 the B.D. Act itself provided for reservation of not less than 15 per cent of the total area of the layout in a development scheme for public parks and playgrounds the sale and disposition of which is prohibited u/s 38-A of the Act. Absence of open space and public park, in present day when urbanisation is on increase, rural exodus is on large scale and congested areas are coming up rapidly, may give rise to health hazard. May be that it may be taken care of by a nursing home. But it is axiomatic that prevention is better than cure. What is lost by removal of a park cannot be gained by establishment of a nursing home. To say, therefore, that by conversion of a site reserved for low lying park into a private nursing home social welfare was being promoted was being oblivious of true character of the two and their

utility.

20. The above quoted decisions of the various High Courts and the Apex Court, fully support the view that the area set apart for park and nursery school, as per the approved lay out plan for Shastri Nagar Housing Colony, cannot be used or transferred for any other purpose.

21. In view of the above position, Ext.P5 is plainly ultra vires and unauthorised. None of the provisions of the Madras Town Planning Act or the Rules framed thereunder, authorises the issuance of an order in the nature of Ext.P5. Accordingly, it is quashed. The 1st respondent Authority is restrained from selling any portion of the above said 58 cents of land, which is set apart as open space, for establishing parks and nursery school, to any third parties. The Writ Petition is allowed as above. Needless to say, the Lakshadweep Administration can claim refund of the amount paid by it to the 1st respondent Authority. No costs.

W.P.(C) 4703/2005

22. The judgment in W.P.(C) 23174/2005 will govern this case also.