BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
ORIGINAL APPLICATION NO. 557 OF 2022

IN THE MATTER OF:

Gaur Atulyam Apartment Owners Association

…Applicant

VERSUS

Greater Noida Industrial Development Authority & Anr.

...Respondents

INDEX

APPLICANT

THROUGH COUNSELS

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Place: New Delhi
Date: 13.12.2023

BEFORE THE NATIONAL GREEN TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

ORIGINAL APPLICATION NO. 557 OF 2022

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WRITTEN ARGUMENTS ON BEHALF OF THE APPLICANT

MOST RESPECTFULLY SHOWETH:

1. That the Applicant is a society registered under the Societies Registration Act with Reg NO. GBN/00387/2021-2022 and is constituted for maintenance and management of daily affairs of Guar Atulyam Apartments addressed Omicron- I, Greater Noida.
2. That the Applicant is seeking an interim stay and quashing of the allotment letter issued by the Greater Noida Development Authority for the construction of mobile tower in the green belt in front of Gaur Atulyam Society which is taken care by the society itself by planting trees at regular intervals and has tried to develop it into a lush green belt.

3. That the Greater Noida Development Authority ('GNIDA') issued an allotment letter on 05.07.2022 with ref. GRENO/Vanijyik/2022/2047 to Indus Towers Ltd. for establishment of mobile towers in the green belts overseeing prominent densely populated residential premises which includes the Gaur Atulyam society and GNIDA upon request of Indus towers dates 08.07.2022 allotted 25 sqm (approx.) of a lush green belt consisting of tees and bunches at plot no. 78 for establishment of mobile tower in front of Gaur Atulyam Apartments.
4. That Guar Atulyam Apartments comprises of a population of 6500 people including children, senior citizens and is among the most densely populated residential societies of Greater Noida, the applicant vide its letter dated 19.07.2022 wrote to sh. Surendra Singh (IAS), CEO of GNIDA raising serious concerns regarding the constructions of mobile towers and hazards caused due to the construction.
5. That GNIDA overlooking directions of this Hon'ble tribunal and the Hon'ble supreme court went ahead to issue and arbitrary allotment letter favoring destruction of greenery of greater Noida which mentions payments in advanced in favour of GNIDA as requisite payment for establishment of mobile towers in the allotted premise. In addition, to our dismay the application was not looked into and neither responded by GNIDA.
6. That the Environment Management Plan (EMP) prepared by Ministry of Environment and Forests mandates that community buildings and townships should build 1-1.5

kilometres of greenbelt. This is suggested to restrict air and noise pollution in the vicinity.

7. That as per the National Forest Policy, 1988 (NFP), emphasizes on the green belt development. The relevant paragraph is reproduced hereinafter:

> "…*Green belts should be raised in urban/industrial areas as well as in arid tracts. Such a programme will help to check erosion and desertification as well as improve the microclimate…"*

It is necessary to encourage the planting of trees alongside of roads, railway lines, rivers and streams and canals, and on other unutilized lands under State/corporate, institutional or private ownership.

8. That the Hon'ble National Green Tribunal in ***Original Application No. 380/2018 'Park Avenue Plot Holders Welfare Society & Anr. v. Union of India'***, observed as under:

> *"The aforesaid narration of facts and the proceedings in this case wherein statements had been made on different occasions for the purpose of ensuring that the land meant for park and green belt would be retained safely without encroachment had all been without any result. We find that ever-since the year 2014 when a representation was given to the concerning department and even during the pendency of the present case before us where many years have been passed, no concrete steps have been taken by State of Uttar Pradesh. We are sure that during*

this intervening period of more than five years much change must has taken place at the site and the land must have been used for different purposes by the individuals by claiming title in the property in question as having been purchased through registered sale deed. All this has happened due to the snail speed with which the respondent Government and its authorities have been proceeding."

The application was against the illegal sale and construction over land reserved for park and open spaces in violation of the Meerut Master Plan 2021. In view of the above an affidavit was filed on 13.03.2020 by the Principal Secretary, Housing and Urban Development, UP, to the effect that certain illegal constructions have been demolished and FIR was also been registered on 04.08.2018.

9. That the Hon'ble National Green Tribunal, in the case of ***Girja Shankar Rai v. State of U.P., 2022 SCC OnLine NGT 214*** observed as under:

"a land reserved for green belt/park in the Master Plan whether belongs to State or private owners cannot be allowed to be used for raising any construction. With respect to the area reserved for 'green belt/park',"

10. That the Hon'ble Supreme Court in another case ***Lal Bahadur v. State of U.P., (2018) 15 SCC 407*** had clearly laid down that such spaces could not be changed from green belt to residential or commercial one. It is not permissible to the State Government to change the

parks and playgrounds contrary to legislative intent having constitutional mandate, as that would be an abuse of statutory powers vested in the authorities.

11. That in **Agins v. City of Tiburon 447 us 255 (1980)**, 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 geology, fire and flood, and other demonstrated consequences of urban sprawl'. Upholding the ordinance, the court said

> *"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"*

12. That the Hon'ble Supreme Court in ***Bangalore Medical Trust v. B.S. Muddappa (1991) 4 SCC 54*** has laid down the importance of open spaces and public parks in the said case and held that said spaces are a "gift from people to themselves". The Apex Court observed as under:

> *"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."

13. That the Hon'ble National Green Tribunal in ***OA NO. 505(THC) OF 2015 - Yogindra Mohan Sengupta v Union of India & Anr*** had set up a High-Powered Committee under the Chairmanship of Mr. Shashi Shekhar. The committee in its recommendations enumerated the importance and significance of green belts and subsequently made recommendations pertaining to nature of activities that may be permitted in those green belts. The relevant para of committee recommendations is reproduced as under:

"No. new construction of any kind or addition to an existing building should be permitted in the Green Areas and Also, any new construction will have its environmental footprint in terms of traffic, waste generation, slope destabilization etc. As opposed to allowing construction in the Green Areas, the boundary of Green Areas should be extended to include adjacent public forest land in the vicinity of green areas"

14. That the actions of the Greater Noida Development Authority (GNIDA) in issuing an allotment letter for the

establishment of a mobile tower in the green belt in front of Gaur Atulyam Apartments not only disregards the concerns raised by the applicant but also violates various environmental guidelines and regulations.

15. That the issuance of the allotment letter goes against the principles outlined in the Environment Management Plan (EMP) prepared by the Ministry of Environment and Forests, which advocates for the creation of green belts to restrict air and noise pollution in densely populated areas. The arbitrary allotment also contradicts the National Forest Policy, 1988 (NFP), which emphasizes the need for green belt development in urban and industrial areas to prevent erosion, desertification, and improve the overall microclimate.
16. That the applicant draws attention to the precedent set by the Hon'ble National Green Tribunal in *Original Application No. 380/2018 'Park Avenue Plot Holders Welfare Society & Anr. v. Union of India*.' The observations made by the tribunal highlight the importance of safeguarding land designated for parks and green belts, preventing unauthorized construction, and ensuring that the government takes prompt and effective measures to protect such areas.
17. That the applicant contends that the GNIDA's failure to adhere to these principles, as demonstrated in the issuance of the allotment letter, not only violates environmental norms but also reflects a lack of commitment to the preservation of green spaces mandated by various legal provisions and judicial precedents.

18. That the Applicant seeks urgent and necessary relief from this Hon'ble Tribunal. The Applicant seeks the quashing of the said allotment letter, emphasizing the potential environmental hazards, threat to public health, and violation of statutory provisions, including the Societies Registration Act, Environment Management Plan, National Forest Policy, and relevant judicial pronouncements. The relief sought is essential to safeguard the well-being of the 6500 residents of Guar Atulyam Apartments and to uphold the principles of environmental protection as enshrined in various legal frameworks and judicial decisions.

PRAYER

In view of the facts and attending circumstances, highlighted above, it is respectfully prayed that this Hon'ble Tribunal may graciously be pleased to: -

i. Pass an order/direction in favour of the applicant quashing the allotment issued by GNIDA dated 05.07.2022 with ref. GRENO/VANIJYIK/2022/2047 (in hindi) for construction of Mobile Tower in Green Belt in front of Gaur Atulyam and stay on other directives in consonance with the said allotment letter.

ii. Direct the respondent to withdraw/ quash all or any directives in consonance with the impugned allotment letter and revoke permissions granted therein.

iii. Pass any other or further order(s) as the Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

APPLICANT

THROUGH COUNSELS

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Contact: 7292099647

Place: New Delhi
Date: 13.12.2023

Item No. 05 & 06 Court No. 1

BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Original Application No. 380/2018
(I.A. No. 114/2020)

Park Avenue Plot Holders Welfare Society & Anr. Applicant(s)

Versus

Union of India & Ors. Respondent(s)

WITH

Original Application No. 999/2019
(I.A. No. 141/2020, I.A. No. 142/2020 & I.A. No. 389/2020)

Dr. Ajay Kumar Applicant

Versus

Union of India & Ors. Respondent(s)

Date of hearing: 19.01.2021

CORAM: HON'BLE MR. JUSTICE ADARSH KUMAR GOEL, CHAIRPERSON
HON'BLE MR. JUSTICE SHEO KUMAR SINGH, JUDICIAL MEMBER
HON'BLE DR. NAGIN NANDA, EXPERT MEMBER

Applicant:	Mr. Raman Yadav, Advocate in O.A. No. 380/2018
Respondent(s):	Mr. Vishwajit Singh and Dr. Sandeep Singh, Advocate for State of UP Mr. Pradeep Misra and Mr. Daleep Dhyani, Advocates for UPPCB Mr. Rachit Mittal, Advocate for MDA Mr. Sanchit Garga, Advocate for R-8

ORDER

Original Application No. 380/2018

1. Grievance in this application is against the illegal sale and constructions over land reserved for park and open spaces in violation of

the Meerut Master Plan 2021, in utter disregard of provisions of U.P. Parks and Play Ground and Open Spaces (Preservation and Regulation) Act, 1974, which poses a serious threat to the environment of the area.

2. The application was filed on 30.05.2018. Notice was issued to the respondents on 31.05.2018 i.e. the State of UP and its officers and two private persons. They have filed their written response. The Tribunal has dealt with the matter by several orders requiring State of UP to take remedial action. The matter was last reviewed on 17.01.2020. The Tribunal noted the stand of the State that a Policy was being prepared to remedy the situation. It was observed:-

> *"The aforesaid narration of facts and the proceedings in this case wherein statements had been made on different occasions for the purpose of ensuring that* ***the land meant for park and green belt would be retained safely without encroachment had all been without any result. We find that ever-since the year 2014 when a representation was given to the concerning department and even during the pendency of the present case before us where many years have been passed, no concrete steps have been taken by State of Uttar Pradesh. We are sure that during this intervening period of more than five years much change must has taken place at the site and the land must have been used for different purposes by the individuals by claiming title in the property in question as having been purchased through registered sale deed. All this has happened due to the snail speed with which the respondent Government and its authorities have been proceeding.***
>
> ***In view of the above, we direct the Chief Secretary, State of Uttar Pradesh to take a final decision, for framing a policy or amending the relevant legislation for the purpose of saving/protecting the land which is meant for park and green belt under the Urban Master Plan of the State, on or before 31st January, 2020."***

3. In pursuance of the above, an affidavit has been filed on 13.03.2020 by the Principal Secretary, Housing and Urban Development, UP, to the effect that certain illegal constructions have been demolished and FIR has also been registered on 04.08.2018. some illegally built houses have been sealed on 16.05.2018, under the Uttar Pradesh Urban

Planning and Development Act, 1973. Vide letter dated 19.02.2020, the Government of U.P., has issued directions for preventing any illegal constructions against the permitted land user in accordance with the provisions of the Uttar Pradesh Urban Planning and Development Act, 1973. To prevent illegal sales, directions have been issued that following details must be mentioned in the Sale Deed:-

> *"(A) Gata number and name of Village, Tehsil and District should be mentioned.*
> *(B) In case the land exists within Regulated Area/ Development Area, the name of the respective Regulated Area/ Development Area should be mentioned.*
> *(C) In case the land is proposed to be used for park, open space, greenbelt, playground and road in the Master Plan, then the land-use must be mentioned.*
> *(D) In the event of construction against the land-use as mentioned in the aforesaid sub-para C, the purchaser will be responsible for all legal proceedings including demolition, such consent must be mentioned in the Sale Deed."*

4. According to the State, the steps taken will prevent fraudulent sales and illegal constructions.

Original Application No. 999/2019

5. O.A. No. 999/2019, Dr. Ajay Kumar v. UOI & Ors., also involves similar issue. The matter was last dealt with on 20.05.2020 as follows:-

> *"1&2xxx……xxx……xxx*
>
> *3. Accordingly, an action taken report has been filed by the MDA on 20.03.2020 inter-alia stating as follows:*
>
> *"(4)* ***Since for compliance of the aforesaid directions mentioned in the G.O. No. 169/Eight-3-20-206 Misc./18TC dated 19.02.2020, it would be necessary to get them superimposed on the location map, which may take some time. Therefore, the Authority has written a letter bearing no. 07/C.T.P./20 dated 17.03.2020 to the office of Stamp and Registration mentioning that till the time the exercise of getting the khasra nos. superimposed on the location map is not over, the office of Stamp and Registration should before registration of the sale deed enquire from the***

Authority about the land use of the said land in the Master Plan 2021.

5. Apart from the above, the Authority in first phase has identified 231 illegal constructions. The show cause notices under Section 26-A (4) and Section 27 of the Uttar Pradesh Urban Planning and Development Act, 1973 have been issued to all 231 violators asking as to why the demolition order is not passed on the constructions raised by the violators.

(6) In addition to that the public notice boards have been installed at various places mentioning that no construction is permitted on the land reserved for Park, Open Spaces, Green Verge and Stadium or Road mentioned in the Meerut Master Plan 2021."

4. ***The above report does not show of tangible final action while the problem is acknowledged. Learned Counsel for the MDA states that requisite action will now be taken expeditiously.***

5. Let the necessary effective steps be taken in accordance with law and further report filed before the next date. Report be sent by e-mail at judicial-ngt@gov.in preferably in the form of searchable PDF/ OCR Support PDF and not in the form of Image PDF.

6. Learned Counsel for the MDA has stated that another matter on the same issue being O.A. No. 380/2018, Park Avenue Plot Holders Welfare Society & Anr. Vs. Union of India & Ors. is also pending before this Tribunal and is fixed for hearing on 17.07.2020."

6. Accordingly, an action taken report has been filed on 18.01.2021 by the Meerut Development Authority to the effect that more than 250 illegal constructions were identified. Orders have been passed for demolition of 185. 20 have been demolished. Four have been sealed. 61 matters are pending in appeal.

7. In view of the above, the Meerut Development Authority may take further action in accordance with law which may be reviewed periodically by the Principal Secretary, Urban Development Department, UP. It may be ensured that the land use is not changed without following due process of law, which may be regulated in terms of the Master Plans by

the concerned authorities. The Principal Secretary, Housing and Urban Development, UP may also ensure that the concerned Development Authorities in the State follow the Master Plan and file periodical reports to that effect.

8. An action taken report as on 30.06.2021 may be furnished by the Principal Secretary, Housing and Urban Development, UP to the Oversight Committee headed by the Justice S.V.S. Rathore, former Judge of Allahabad High Court, who may convey its suggestions for the authorities and if necessary, send a report to this Tribunal.

The applications are disposed of.

A copy of this order be forwarded to the Principal Secretary, Housing and Urban Development, UP. And Justice V.S. Rathore, former Judge, High Court of Allahabad by e-mail.

Adarsh Kumar Goel, CP

S.K. Singh, JM

Dr. Nagin Nanda, EM

January 19, 2021
O.A. Nos. 999/2019 & 380/2018
A

2022 SCC OnLine NGT 214

In the National Green Tribunal[†]

(Before Adarsh Kumar Goel, Chairperson, Sudhir Agarwal, Member (Judicial) and A. Senthil Vel, Expert Member)

Original Application No. 165/2021

Girja Shankar Rai and Others ... Applicant(s);

Versus

State of Uttar Pradesh and Others ... Respondent(s).

And

Execution Application No. 02/2022

In

Original Application No. 114/2021 (I.A. No. 164/2022)

Narendra Kushwaha ... Applicant;

Versus

State of Uttar Pradesh ... Respondent.

Original Application No. 165/2021 and Execution Application No. 02/2022 in Original Application No. 114/2021 (I.A. No. 164/2022)

Decided on September 14, 2022, [Date of hearing : 14.09.2022]

Advocates who appeared in this case:

Mr. Amrit Abhijat, Principal Secretary, UD, Govt. of UP, for the Respondent(s);

Mr. Sanjay Goel, Commissioner, Jhansi Mr. Ravindra Kumar, DM/VC JDA;

Mr. Pulkit Garg, Municipal Commissioner with Mr. Rachit Mittal, Advocate Ms. Soni Singh, Advocate for the CPCB.

ORDER

1. Since both the matters are inter-connected, the same are taken up together. Grievance in OA 165/2021 is against inaction of the statutory authorities in protecting *Laxmi Tal* at Jhansi from unauthorized encroachments and pollution and preventing entry of untreated sewage and sullage. Jhansi Development Authority has been constituted by the State of U.P. and the Jhansi Master Plan 2021 has been prepared but in violation of the said Master Plan, there are illegal encroachments at Laxmi Tal where a big park is proposed to be developed for tourism. Large scale illegal plotting is being done. Jhansi Development Authority has taken action against some persons including 23 persons mentioned in the application. But the action initiated has not been completed. Large scale pollution is also taking place in the lake. The applicant has also filed a copy of order dated 29.03.2019 by the Jhansi Development Authority for removing encroachments under Section 27 of the UP Urban Development Act, 1973.

2. The application was considered along with O.A. No. 114/2021, *Narendra Kushwaha* v. *State of U.P.* and directions were issued for remedial action and filing of status report by several orders.

3. The matter was last considered on 25.01.2022 wherein reference was also made to the orders passed in OA No. 380/18, *Park Avenue Plot Holders Welfare Society* v. *Union of India* and OA No. 999/2019, *Dr. Ajay Kumar* v. *Union of India*, in respect of similar problem at Meerut and order issued by State Government on 19.02.2020, directing prevention of illegal constructions against permitted land user in accordance with the provisions of Uttar Pradesh Urban Planning and Development Act, 1973.

Reference was also made to the order of the Tribunal dated 28.05.2021 in OA No. 114/2021, *Narendra Kushwaha* (Supra). The Tribunal considered the report filed by the District Magistrate, Jhansi dated 22.10.2021 mentioning the steps taken for removing the encroachment and prevention of pollution. Further reference was made to the report of the Additional Chief Secretary dated 21.01.2022 based on the information given by the District Administration. It was held that violations continued in spite of orders of this Tribunal which called for further remediation. Some extracts from the said order are reproduced below:—

> *"16. Further we find that none of the said reports can be said to comply Tribunal's order in entirety. No report refers to District Environment Plan for which there was a specific direction. Reports also withhold information like quantity of sewage entering Laxmi Tal, water quality data, time for completion of TTP, action plan, if any, for desiltation and cleaning of water etc.*
>
> *17. Maintenance of water body is prime responsibility of statutory authorities as well as statutory regulators under Environmental Laws and other enactments dealing with public health and similar issues. Similarly, a land reserved for green belt/park in the Master Plan whether belongs to State or private owners cannot be allowed to be used for raising any construction. With respect to the area reserved for 'green belt/park', it has been repeatedly held by Supreme Court that such spaces cannot be changed to residential or commercial one.*
>
> *21. Despite the law of land referred above and the orders passed by Tribunal expressing similar views, we find that approach of concerned authorities is very casual, lackadaisical and non-serious. We do not find any element of commitment, sincerity, honest intention and will on the part of authorities in taking effective steps for preservation and protection of green belt/land reserved for park in Master Plan.*
>
> *23. In the above backdrop of the facts, we find it appropriate to have an affirmation of factual report from a Committee comprising of different authorities and, therefore, we constitute a joint Committee comprising of MoEF&CC, CPCB, Department of Agriculture, UP, Department of Forest & Environment, UP and Divisional Commissioner, Jhansi, shall make spot inspection, examine relevant records and submit a factual report within two months. CPCB and Divisional Commissioner, Jhansi will be the nodal agency for coordination and compliance. First meeting of Committee shall be held within 15 days.*
>
> *24. On the next day of hearing, Municipal Commissioner, Jhansi; Vice Chairman, Jhansi Development Authority; District Magistrate, Jhansi; Divisional Commissioner, Jhansi and Additional Chief Secretary, Urban Development, UP, shall also remain present in virtual mode."*

4. In pursuance of above, Principal Secretary, UD, UP, Municipal Commissioner, Jhansi, Vice Chairman, Jhansi Development Authority and DM Jhansi are present in person. A report has been filed on 12.09.2022 by the Commissioner, Jhansi Division. The report mentions the steps taken to prevent pollution and to protect the water body i.e. Jhansi *Tal*. It is stated that the water quality is not fit for bathing and thus, is of poor quality. Learned Principal Secretary, UD, UP, assures the Tribunal that by taking remedial action, the situation of pollution will be brought under control soon. With regard to encroachments, it is mentioned in the report of the Commissioner that action has been taken in some cases but there is a stay by the High Court in some matters out of those in which orders have been passed. Further, there is apprehension that taking action against encroachers may adversely affect law and order situation. It has also been observed that several beautification and catchment improvement works are underway and these need to be completed without further delay.

5. However, learned Principal Secretary, UD, UP, submits that upholding the law by removing the encroachment will in fact improve the law and order. We are of the view that the Rule of Law has to be upheld and it is absurd to say that if lawful action is taken law and order situation will deteriorate which means illegality should be tolerated and lawlessness allowed. It is responsibility of the State to protect Water bodies by way of completely stopping entry of sewage into the *Tal* which are significant for environment. The State is to act as trustee and not whimsically as thought by the Commissioner in taking an untenable plea to defeat the law. There is no question of deterioration of law and order in doing so.

6. In this view of the matter, we record the assurance of learned Principal Secretary, UD, UP that further remedial action will be taken for protection of water body by controlling the pollution and removing the encroachments, following due process of law. It appears that against 26 MLD of STPs only 8-10 MLD is treated which needs to be looked into and remedied. In absence of recharging source for the *Tal*, treated sewage compliant with BOD and Fecal Coliform level may be used for filling the *Tal* and growing fisheries into it.

7. The Applications will stand disposed of.

8. A copy of this order be forwarded to the Principle Secretary, UD, UP, by email for compliance.

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† Principal Bench at New Delhi

(2018) 15 Supreme Court Cases 407

(BEFORE ARUN MISHRA AND MOHAN M. SHANTANAGOUDAR, JJ.)

LAL BAHADUR .. Appellant;

Versus

STATE OF UTTAR PRADESH AND OTHERS .. Respondents.

Civil Appeals No. 5606 of 2010† with No. 5607 of 2010
and Contempt Petition (C) No. 494 of 2013 in Civil
Appeal No. 5607 of 2010, decided on September 14, 2017

A. **Environment Law — General Principles of Environmental Law — Public Trust Doctrine — Duty of Government and court to protect environment — Need of open spaces for recreation and fresh air in urban areas — Statutory power to modify Master Plan/to change greenbelt into residential area, held, cannot be exercised in violation of Public Trust Doctrine**

— Breach of public trust doctrine by modifying Master Plan and changing greenbelt to a residential area, even by following statutory procedure, held, illegal and unconstitutional — Change of area from greenbelt to residential, in present case by exercising power under S. 11 of 1973 Act, violated Arts. 21, 48-A and 51-A(g) of the Constitution, thus illegal — 1973 Act cannot be permitted to become a statutory mockery by changing greenbelt into residential area — Therefore, area earmarked for greenbelt, park, open space in town development Master Plan, 1995 could not have been modified to residential area in Master Plan for 2021

— Photographs of "Janeshwar Mishra Park" show that a beautiful park, having lake and large number trees has come up — Considering depletion of forest areas and to preserve fragile ecology urgent steps are required — Government and courts have a duty to protect it — Protection of environment, open spaces for recreation and fresh air, playgrounds for children, promenade for 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 — Such spaces reduce ill-effects of urbanisation

— Government ultimately realised importance of such spaces and decided not to convert park to residential area — Government also released that this low-lying area, otherwise thickly populated provides an outlet for water to prevent flood-like situation — Court has permitted protection by raising bandh

— Local Government — Town Planning — Development/Planning/Building Norms/Master Plan/Scheme — Layout/Master/Zonal Plan — Public trust doctrine and protection of environment — Need of open spaces for recreation and fresh air in urban areas — Statutory power to modify Master Plan/to change greenbelt into residential area cannot be exercised in violation

† Arising from the Judgment and Order in *Molahey* v. *State of U.P.*, 2006 SCC OnLine All 221 : (2006) 64 ALR 639 [Allahabad High Court, Lucknow Bench, WP No. 3768 of 2005 (M/B), dt. 8-2-2006]

of Public Trust Doctrine — Constitution of India — Arts. 21, 48-A, 51-A(g) and 32 — U.P. Urban Planning and Development Act, 1973 (11 of 1973) — S. 11 — Power to modify Master Plan cannot be exercised in breach of Public Trust Doctrine

B. **Land Acquisition Act, 1894 — Ss. 17(1) & (4), 5-A, 4 and 6 — Invoking urgency provision — Urgency clause invoked to acquire land for residential purpose by changing town plan for said area illegally — But ultimately Government utilising land for desired purpose, that is, a park and directions issued that it would not be converted to residential purpose — Effect**

— On facts, there is no need to interfere with acquisition even if S. 5-A procedures were bypassed — But clarified that it shall be held in trusteeship only for purpose of park in future — Photographs of "Janeshwar Mishra Park" show that a beautiful park, having lake and large number trees has come up — Respondents directed to pay costs of appeals to appellants quantified at Rs 5 lakhs in each appeal — Local Government — Town Planning — Development/ Planning/Building Norms/Master Plan/Scheme — Layout/Master/Zonal Plan — Violation of town planning — Effect on acquisition proceedings — Environment Law — Development vis-à-vis Ecology: National, Urban and Rural Development — Urban Ecology/Green Areas/Belt/Town Planning/ Urban Environmental Balance — Generally

Held :

The area had been reserved for greenbelt in 1995 Master Plan. It was absolutely unwarranted to exercise power Section 11 of the U.P. Urban Planning and Development Act, 1973 to change the area from greenbelt to residential one in Master Plan 2021. Some invisible hand was behind the change that is why the respondents acted in tandem and the notification under Section 4 of the Act had been issued on the same very day on which the Master Plan had been finalised by the State Government. Even before the Master Plan was notified in the Gazette on 9-4-2005, under the 1973 Act, the Notification had been issued under Section 4 of the Act on 31-3-2005. The change of the area from greenbelt to residential was, in fact, in flagrant violation of the provisions contained in Articles 21 and 48-A and also 51-A(*g*) of the Constitution. (Para 12)

Molahey v. *State of U.P.*, 2006 SCC OnLine All 221 : (2006) 64 ALR 639, *partly affirmed*
Lal Bahadur v. *State of U.P.*, 2010 SCC OnLine SC 25, *referred to*

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. Free and healthy air in beautiful surroundings was privilege of few. But now it is a, "gift from people to themselves". Such spaces could not be changed from greenbelt to residential or commercial one. It is not permissible to the State Government to change the parks and playgrounds contrary to legislative intent having constitutional mandate, as that would be an abuse of statutory powers vested in the authorities. No doubt, in the instant case, the legislative process had been undertaken. The Master Plan had been prepared under the 1973 Act. Ultimately, the respondents have realised the importance of such spaces. It was, therefore, their bounden duty not to change its very purpose

when they knew very well that this is a low-lying area and this area is otherwise thickly populated and provides an outlet for water to prevent flood-like situation. In fact, the flood-like situation occurred in the area in question. The Supreme Court has permitted the protection by raising bandh. (Paras 13 and 15)

Bangalore Medical Trust v. *B.S. Muddappa*, (1991) 4 SCC 54; *Lal Bahadur* v. *State of U.P.*, SLP (C) No. 4415 of 2006 with IA No. 4 in SLP (C) No. 5095 of 2006, order dated 19-9-2008 (SC), *relied on*

Agins v. *City of Tiburon*, 1980 SCC OnLine US SC 126 : 65 L Ed 2d 106 : 447 US 255 (1980), *cited*

The photographs placed on record show that a beautiful park that has come up, inter alia, in the area in question having a lake and a large number of trees. Though the park has been beautifully developed the very action of change of purpose was wholly uncalled for. The importance of park is of universal recognition. It was against public interest, protection of the environment and such spaces reduce the ill-effects of urbanisation, it was not permissible to change this area into urban area as the garden/greenbelt is essential for fresh air, thereby protecting against the resultant impacts of urbanisation, such as pollution, etc. The provision of the 1973 Act and other enactments relating to environment could not be permitted to become statutory mockery by changing the purpose in the Master Plan from greenbelts to residential one. The authorities are enjoined with the duty to maintain them as such as per the doctrine of public trust. (Para 16)

Considering depletion of forest areas and to preserve fragile ecology urgent steps are required. The State Government is expected to act with a sense of urgency in matters enjoined by Article 48-A of the Constitution keeping in mind the duty enshrined in Article 51-A(*g*). (Para 17)

Animal and Environment Legal Defence Fund v. *Union of India*, (1997) 3 SCC 549, *relied on*

Pradeep Krishen v. *Union of India*, (1996) 8 SCC 599, *cited*

It is the duty of the Government to preserve the ecology of the forest area and regulating of public trust based on the ancient theory of the Roman Empire. The idea of this theory was that the Government in trusteeship held certain common properties for smooth and unimpaired use of public such as land, water and air. Air, sea, waters, forests, parks and open land have such a great importance to the people that it would be wholly unjustified to make them a subject of private ownership. Considering human dependency on the environment, Court cannot sit as a silent spectator and it has to ensure restoration of such areas. Our legal system — based on English common law — includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. The protection of environment is one of the legal duties. The concept of sustainable development has been emphasised. Balancing has to be made between ecology and development. While setting up the industries is essential for the economic development, measures should be taken to reduce the risk for community by taking all necessary steps for protection of the environment. (Paras 17 to 21)

Animal and Environment Legal Defence Fund v. *Union of India*, (1997) 3 SCC 549; *Vellore Citizens' Welfare Forum* v. *Union of India*, (1996) 5 SCC 647; *M.C. Mehta* v. *Union of India*, 1987 Supp SCC 131; *M.C. Mehta* v. *Kamal Nath*, (1997) 1 SCC 388, *relied on*

Article titled *an ecological perspective on property* by David B. Hunter (University of Michigan); *A call for judicial protection of the public's interest in environmentally critical resources* published in Harvard Environmental Law Review, Vol. 12 1988, p. 311; *"Sustainable Development" as defined by the Brundtland*; Blackstone's commentaries on the Laws of England (*Commentaries on the Laws of England of Sir William Blackstone*) Vol. III, Fourth Edn., published in 1876. Chapter XIII, "Of Nuisance", *referred to*

Right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life. Any disturbance to the basic environment, air or water, and soil which are necessary for life, would be hazardous to life within the meaning of Article 21 of the Constitution. In such cases "polluter pays principle" can also be invoked to restore the environment and to control it. (Paras 21 and 22)

Subhash Kumar v. *State of Bihar*, (1991) 1 SCC 598; *M.C. Mehta* v. *Kamal Nath*, (2000) 6 SCC 213, *relied on*

Bandhua Mukti Morcha v. *Union of India*, (1984) 3 SCC 161 : 1984 SCC (L&S) 389; *Sachindanand Pandey* v. *State of W.B.*, (1987) 2 SCC 295; *Ramsharan Autyanuprasi* v. *Union of India*, 1989 Supp (1) SCC 251; *Chhetriya Pardushan Mukti Sangharsh Samiti* v. *State of U.P.*, (1990) 4 SCC 449, *cited*

It is the duty of the State to anticipate, prevent and attack the causes of environmental degradation. Considering Articles 21 and 48-A of the Constitution and also the fundamental duty it has been observed by the officials concerned, it was incumbent upon them to protect such spaces. Residential use of such area would have been contrary to the public interest as such not tolerable. (Para 23)

M.C. Mehta v. *Union of India*, (1997) 3 SCC 715, *relied on*

Rural Litigation and Entitlement Kendra v. *State of U.P.*, 1986 Supp SCC 517, *cited*

Submission raised by the appellant is meritorious that the area should be preserved for greenbelt as done at present and the provisions made in the Master Plan 2021 for its conversion into residential area has to be quashed. Unhesitatingly, the said submission is acceptable. (Para 24)

The exercise of conversion was not a legal one. It will have some impact on the validity of the notification issued under Section 4 and dispensation of enquiry to be held under Section 5-A but in the instant case, since the first prayer of the appellant had been allowed, the area has been ultimately reserved and utilised for the purpose of greenbelt only and, as permitted by the Court, park has been developed and it shall be maintained as such. There is no need to go further into the question of dispensation of inquiry whether it was rightly dispensed with. In view of subsequent development and relief granted to the appellants there is no need to intervene. (Para 25)

The court has seen the photographs: the park has been developed under interim order of the Court including bandh. After acquisition possession had been taken, award had been passed and most of the owners have collected the compensation, the petitioners may also collect compensation in case they have not received so far but non-collection so far due to pendency of matter would not affect validity of

acquisition and development that has been made. There is no need to disturb the decision of the High Court with respect to the acquisition. The land has absolutely vested in the State. It is directed that in future, the purpose shall never be changed in any other manner whatsoever. The Master Plan 2021 changing use of area in question from greenbelt to residential one is therefore, quashed. It shall be held in trusteeship only for the purpose of park in future. (Para 26)

Resultantly, the appeals are partly allowed and the order of High Court is set aside to the aforesaid extent. Acquisition is upheld but for different reasons. The respondents are directed to pay costs of the appeals to the appellants quantified at Rs 5,00,000 to be paid in each appeal to be borne by the State and Lucknow Development Authority equally within a period of three months and compliance thereof be reported to the Court. (Para 27)

In view of the interim order passed by the Court, there is no ground to proceed further with the contempt petition. Accordingly, Contempt Petition (C) No. 494 of 2013 is dismissed. Notice issued is discharged. (Para 28)

Molahey v. *State of U.P.*, 2006 SCC OnLine All 221 : (2006) 64 ALR 639, *partly modified*

Ram Dhari Jindal Memorial Trust v. *Union of India*, (2012) 11 SCC 370 : (2013) 1 SCC (Civ) 320, *referred to*

Appeals partly allowed, contempt petition dismissed SS-D/60066/S

Advocates who appeared in this case :

Kavin Gulati and Rakesh Dwivedi, Senior Advocates [Aniruddha P. Mayee (Advocate-on-Record), Avnish Oza, Ms Apoorwa Garg, P.V. Yogeswaran (Advocate-on-Record), A.P. Mayee and Avnish Oza, Advocates] for the Appellant;

D.K. Singh, Additional Advocate General [Gunnam Venkateswara Rao (Advocate-on-Record), Vivek Singh, Amit Anand Tiwari (Advocate-on-Record), Abhisth Kumar (Advocate-on-Record), Vikrant Yadav, Gaurav Dhingra, M.C. Dhingra (Advocate-on-Record), Ardhendumaulu Kr. Prasad, Ms Komal Mundhra and Saurabh Agrawal, Advocates] for the Respondents.

Chronological list of cases cited ***on page(s)***

16. 1987 Supp SCC 131, *M.C. Mehta* v. *Union of India* 424*g*
17. 1986 Supp SCC 517, *Rural Litigation and Entitlement Kendra* v. *State of U.P.* 427*a-b*
18. (1984) 3 SCC 161 : 1984 SCC (L&S) 389, *Bandhua Mukti Morcha* v. *Union of India* 425*f*
19. 1980 SCC OnLine US SC 126 : 65 L Ed 2d 106 : 447 US 255 (1980), *Agins* v. *City of Tiburon* 416*b-c*

ORDER

1. The appeals have been preferred as against the judgment and order passed by the High Court of Allahabad, Bench at Lucknow, deciding two writ petitions by the common order dated 8-2-2006[1] questioning the change in Master Plan 2021 and land acquisition proceedings.

2. The facts, in short, unfold that the area in question was reserved for greenbelt in the Master Plan that was prepared in the year 1995. A fresh Master Plan was prepared and approved on 31-3-2005. The area was changed from greenbelt to residential one on the prayer being made by the Lucknow Development Authority. Surprisingly the act was done in tandem, the date on which the Master Plan was modified, the area in question was changed from greenbelt to residential one. On the same day, a notification had been issued under Section 4(1) read with Section 17(1) of the Land Acquisition Act, 1894 (in short "the Act"). A corrigendum was issued on 5-5-2005 and later on 24-10-2005 that shows that the notification had been issued under Sections 4(1) and 17(1) of the Land Acquisition Act in utter haste. A declaration under Section 6 was issued on 24-10-2015.

3. The area to be acquired in the notification under Section 4 was 266.661 ha for the purpose of expansion of Gomti Nagar in Lucknow. Out of this, 203.189 ha area belongs to individual landowners and rest of the area belonged to the Government. The declaration under Section 6 was confined to the area 203.189 ha. The total area reserved for the greenbelt in the Master Plan was 266.661 ha.

4. A writ petition was preferred in the month of June 2005. The High Court had passed an interim order of status quo with respect to the disputed property. The petitioner in the writ petition had prayed for the relief to issue a writ in the nature of certiorari for quashing of Master Plan especially challenging the legality and validity of a portion of the Master Plan of 2021 converting greenbelt area to residential. Adarsh Samuhik Sahkari Krishi Samiti Ltd. owned land in area 10.102 ha whereas Lal Bahadur owned 0.512 ha. The prayer was also made in the writ petition to quash the notification issued under Section 4(1) of the Land Acquisition Act invoking the urgency provision.

5. The Lucknow Development Authority had issued a Public Notice on 23-2-2005 inviting objections/suggestions to the Draft Master Plan by 4-3-2005. In the Draft Master Plan, the disputed land was shown for parks and open spaces/greenbelt. After considering the objections/suggestions, the

1 *Molahey* v. *State of U.P.*, 2006 SCC OnLine All 221 : (2006) 64 ALR 639

Master Plan was finalised, which was later approved by the Government on 31-3-2005, and notified on 9-4-2005.

6. It was urged on behalf of the petitioners that the Master Plan of 2021 was in violation of the mandatory provisions of Section 11 of the U.P. Urban Planning and Development Act, 1973 (in short "the 1973 Act"). The area could not have been changed from greenbelt/open spaces to the area reserved for development of residential colonies. The action was based on malice in law. It was unreasonable, arbitrary and tantamounted to the colourable exercise of power, and it was contrary to the reports of the Expert Committee. The action was in violation of Articles 21 and 48-A of the Constitution of India. The authorities were guilty of acting contrary to the public interest and duty to protect the environment that was their constitutional duty and tantamounted to removing of oxygen filled lung spaces that are absolutely necessary for the healthy environment for the inhabitants of Lucknow. There is a paucity of such spaces, it would result in ecological imbalance and be hazardous to health. The notification issued under Section 4 of the Act was bad in law; inquiry under Section 5-A could not have been dispensed with.

7. The stand of the Lucknow Development Authority in the reply was that the writ was not maintainable. The Master Plan had been notified after following the due process of the 1973 Act. The objections were duly invited. Thereafter, the Master Plan had been finalised. The total 278 objections were received from the public against the Draft Master Plan. The Lucknow Development Authority suggested that land in Village Ujariyaon was required for the purpose of residential use that was accepted. It was also submitted that earlier the area had been acquired for Gomti Nagar in the year 1983 which had been developed and for its expansion some more area was necessary. As the Government under Section 4 of the Act had issued such notification and due procedure of law had been followed for preparation of Master Plan duly considering the various aspects particularly the ever increasing population. Other facts were also denied.

8. The High Court by the impugned judgment and order had dismissed the writ petitions. It was held that the precaution has been taken to preserve the environment and safeguarding of forests and wildlife as required by Article 48-A of the Constitution of India. There was no violation of the provisions of Articles 21 and 48-A of the Constitution of India. The provision for urgency had been rightly invoked. Aggrieved by the judgment and order passed by the High Court, the appeals have been preferred.

9. Shri Rakesh Dwivedi, learned Senior Counsel appearing on behalf of the appellant has urged that the change in the Master Plan from greenbelt to residential one was illegal, unconstitutional and change was made to oblige the builders. The respondents have acted in tandem even before the final publication of the Master Plan 2021 in the Gazette on 9-4-2005. The notification under Section 4(1) read with Section 17(1) of the Land Acquisition Act, 1894 had been issued and on the same day, the Master Plan was finalised by the State Government. Though, Master Plan was notified on 9-4-2005 but

issuance of notification under Sections 4, 17(1) and 17(4) on 31-3-2005 clearly indicated that it was the colourable exercise of power to oblige some builder and there was some invisible hand acting illegally to usurp the land as well as to destroy the greenbelt. The learned counsel has submitted that inquiry under Section 5-A of the Act could not have been dispensed with as it provides a safeguard in consonance with Article 300-A. The learned Senior Counsel has referred to the decision of this Court in *Ram Dhari Jindal Memorial Trust* v. *Union of India*[2]. He has prayed for quashing the notifications as well as the part of the Master Plan 2021 changing greenbelt to residential one.

10. The learned AAG appearing on behalf of the State of U.P. and the learned counsel appearing for the Lucknow Development Authority have at the outset stated that the entire area of 266.661 ha has been converted to "Janeshwar Mishra Park" and that this Court had permitted vide order dated 14-7-2010[3]. It is being used as a park and it shall continue to be used as park without putting up any construction and it would not be converted to residential area in future. They have further stated that the area shall not be converted for any other purpose. Its use shall not be changed in future.

11. They have contended that as the appellant did not file any objections to the proposed Master Plan they were precluded from filing writ applications in the High Court as urgent need for expansion of Gomti Nagar was felt and the provisions of Sections 17(1), 17(4) of the Act had been invoked but ultimately the residential scheme has been dropped. Possession had been taken. A large number of incumbents had collected the compensation as per the award that has been passed. Hence, no case for interference is made out in the changed circumstances due to development of the park.

12. Firstly, we take up the issue regarding change of the area from greenbelt to a residential one. It is not in dispute that the area had been reserved for greenbelt in 1995 Master Plan. We find that it was absolutely unwarranted exercise of power on the part of the respondents to change the area from greenbelt to residential one in Master Plan 2021. The learned Senior Counsel is right that some invisible hand was behind the change that is why the respondents acted in tandem and the notification under Section 4 of the Act had been issued on the same very day on which the Master Plan had been finalised by the State Government. Even before the Master Plan was notified in the Gazette on 9-4-2005, under the 1973 Act, the Notification had been issued under Section 4 of the Act on 31-3-2005. We wholly agree with the submission

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2 (2012) 11 SCC 370 : (2013) 1 SCC (Civ) 320

3 *Lal Bahadur* v. *State of U.P.*, 2010 SCC OnLine SC 25, wherein it was directed:

> "The petitioners want to bring on record certain subsequent events with additional documents. They are permitted to do so with liberty to the respondent to file an additional counter. Leave granted. Status quo as on date to be continued which means that no construction shall be put up by either party. If it is being used as a park, it can be continued to be used as a park without putting up any construction."

of the learned counsel on behalf of the appellant that change of the area from greenbelt to residential was, in fact, in flagrant violation of the provisions contained in Articles 21 and 48-A and also 51-A(*g*) of the Constitution.

13. Articles 48-A and 51-A(*g*) are extracted hereunder:

> "**48-A.** ***Protection and improvement of environment and safeguarding of forests and wildlife***.—The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.
>
> * * *
>
> **51-A. (*g*)** to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures;"

14. Law is well settled in this regard. In *Bangalore Medical Trust* v. *B.S. Muddappa*[4], this Court had considered the question whether area reserved for a public park can be converted for other purposes. The State Government by the subsequent order had allotted the area reserved for public parks to a Medical Trust, for the purposes of constructing a hospital. This Court has laid down the importance of open spaces and public parks in the said case and held that the said spaces are a "gift from people to themselves". It observed that: (SCC pp. 75-76 & 80, paras 23-26 & 36)

> "*23*. The scheme is meant for the reasonable accomplishment of the *statutory object which is to promote the orderly development of the city of Bangalore and adjoining areas and to preserve open spaces by reserving public parks and playgrounds with a view to protecting the residents from the ill-effects of urbanisation. It is meant for the development of the city in a way that maximum space is provided for the benefit of the public at large for recreation, enjoyment, "ventilation" and fresh air. This is clear from the Act itself as it originally stood. The amendments inserting Sections 16(1)(d), 38-A and other provisions are clarificatory of this object. The very purpose of the BDA, as a statutory authority, is to promote the healthy growth and development of the city of Bangalore and the areas adjacent thereto. The legislative intent has always been the promotion and enhancement of the quality of life by preservation of the character and desirable aesthetic features of the city. The subsequent amendments are not a deviation from or alteration of the original legislative intent, but only an elucidation or affirmation of the same.*
>
> *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

4 (1991) 4 SCC 54

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 makes 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*[5], 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 adverse impacts, such as ... pollution, ... destruction of scenic beauty, *disturbance of the ecology and environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl*'. Upholding the ordinance, the Court said: (SCC OnLine US SC paras 12 & 13)

> '*12.* ... 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 recognised as legitimate. ...

† See *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329; *Municipal Council, Ratlam* v. *Vardhichand*, (1980) 4 SCC 162 : 1980 SCC (Cri) 933 : (1981) 1 SCR 97; *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi*, (1981) 1 SCC 608 : 1981 SCC (Cri) 212; *Olga Tellis* v. *Bombay Municipal Corporation*, (1985) 3 SCC 545; *State of H.P.* v. *Umed Ram Sharma*, (1986) 2 SCC 68 and *Vikram Deo Singh Tomar* v. *State of Bihar*, 1988 Supp SCC 734 : 1989 SCC (Cri) 66

†† *See for e.g.* the Karnataka Town and Country Planning Act, 1961; the Maharashtra Regional and Town Planning Act, 1966; the Bombay Town Planning Act, 1954; the Travancore Town and Country Planning Act, 1120; the Madras Town Planning Act, 1920; and the rules framed under these statutes; the Town and Country Planning Act, 1971 (England and Wales); *Encyclopaedia Americana*, Vol. 22, p. 240; *Encyclopaedia of the Social Sciences*, Vol. XII at p. 161; *Town Improvement Trusts in India*, 1945 by Rai Sahib Om Prakash Aggarawala, p. 35 et seq.; *Halsbury's Statutes*, 4th Edn., p. 17 et seq. and *Journal of Planning and Environment Law*, 1973, p. 130 et seq. See also *Penn Central Transportation Company* v. *City of New York*, 1978 SCC OnLine US SC 143 : 57 L Ed 2d 631 : 438 US 104 (1978); *Village of Belle Terre* v. *Boraas*, 1974 SCC OnLine US SC 65 : 39 L Ed 2d 797 : 416 US 1 (1974); *Village of Euclid* v. *Ambler Realty Company*, 1926 SCC OnLine US SC 189 : 71 L Ed 303 : 272 US 365 (1926); *Halsey* v. *Esso Petroleum Co. Ltd.*, (1961) 1 WLR 683

5 1980 SCC OnLine US SC 126 : 65 L Ed 2d 106 : 447 US 255 (1980)

13. … 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.'*

* * *

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 BD Act itself provided for reservation of not less than 15% of the total area of the layout in a development scheme for public parks and playgrounds the sale and disposition of which is prohibited under Section 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 the true character of the two and their utility." (emphasis supplied)

15. This Court had clearly laid down that such spaces could not be changed from greenbelt to residential or commercial one. It is not permissible to the State Government to change the parks and playgrounds contrary to legislative intent having constitutional mandate, as that would be an abuse of statutory powers vested in the authorities. No doubt, in the instant case, the legislative process had been undertaken. The Master Plan had been prepared under the 1973 Act. Ultimately, the respondents have realised the importance of such

* *See* comments on this decision by Thomas J. Schoenbaum, *Environmental Policy Law*, (1985) p. 438 et seq. *See also* Summary and Comments, (1980) 10 ELR 10125 et seq.

spaces. It was, therefore, their bounden duty not to change its very purpose when they knew very well that this is a low-lying area and this area is otherwise thickly populated and provides an outlet for water to prevent flood-like situation. In fact, the flood-like situation occurred in the area in question. This Court has permitted[6] the protection by raising bandh.

16. We have seen the photographs that are placed on record by the learned counsel for the respondents. It is a beautiful park that has come up, inter alia, in the area in question having a lake and a large number of trees. Though the park has been beautifully developed the very action of change of purpose was wholly uncalled for. The importance of the park is of universal recognition. It was against public interest, protection of the environment and such spaces reduce the ill-effects of urbanisation, it was not permissible to change this area into urban area as the garden/greenbelt is essential for fresh air, thereby protecting against the resultant impacts of urbanisation, such as pollution, etc. The provision of the 1973 Act and other enactments relating to environment could not be permitted to become statutory mockery by changing the purpose in the Master Plan from greenbelts to residential one. The authorities are enjoined with duty to maintain them as such as per the doctrine of public trust.

17. This Court has considered the preservation of such spaces in *Animal and Environment Legal Defence Fund* v. *Union of India*[7]. This Court has observed that duty is to preserve the ecology of the forest area and regulating of public trust based on the ancient theory of Roman Empire. Considering depletion of forest areas and to preserve fragile ecology urgent steps are required. This Court observed: (SCC pp. 553-55, paras 11 & 15)

> "*11.* Therefore, while every attempt must be made to preserve the fragile ecology of the forest area, and protect the Tiger Reserve, the right

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6 *Lal Bahadur* v. *State of U.P.*, SLP (C) No. 4415 of 2006 with IA No. 4 in SLP (C) No. 5095 of 2006, order dated 19-9-2008 (SC), wherein it was directed:

> "On 20-3-2006 [*Lal Bahadur* v. *State of U.P.*, SLP (C) No. 4415 of 2006, order dated 20-3-2006 (SC)] we had directed status quo to be maintained. The State of U.P. has now filed an application seeking a direction for modification of the interim orders permitting the State Government to complete the construction of bundh measuring 5.95 km in length and 24 m in breadth by using a part of the lands of the petitioners, as the proposed bundh alignment requires it. It is stated that on account of the floods in Gomti River, the work is urgent. It is stated that if the bundh is not constructed human life will be in danger. The learned counsel for the petitioner has no objection for the bundh being constructed using part of their land provided the interim order is continued in regard to the remaining portion. He also submitted that the petitioners in the SLPs withdraw the counter-affidavit filed by way of reply to the said IAs. We accordingly allow IA No. 4 in SLP (C) No. 4415 of 2006 and IA No. 4 in SLP (C) No. 5095 of 2006 and permit the State Government to proceed with the construction of the said bundh through the land of the petitioners. It is made clear that in regard to the land which is not required for the bundh the order of status quo shall continue."

7 (1997) 3 SCC 549

of the tribals formerly living in the area to keep body and soul together must also receive proper consideration. Undoubtedly, every effort should be made to ensure that the tribals, when resettled, are in a position to earn their livelihood. In the present case it would have been far more desirable, had the tribals been provided with other suitable fishing areas outside the National Park or had been given land for cultivation. Totladoh dam where fishing is permitted is in the heart of the National Park area. There are other parts of the reservoir which extend to the borders of the National Park. We are not in a position to say whether these outlying parts of the reservoir are accessible or whether they are suitable for fishing, in the absence of any material being placed before us by the State of Madhya Pradesh or by the petitioner. Some attempts, however, seem to have been made by the State of Madhya Pradesh to contain the damage by imposing conditions on these fishing permits. The permissions which have been given are subject to the following conditions:

(1) The identified families will be given photo identity cards on the basis of which only fishing and transport will be permitted;

(2) During the rainy season (months: July to October) fishing will be totally banned;

(3) During the rest of the year, entry will be permitted in the water from 12 p.m. to 4 p.m. and transport of fish will be allowed before sunset;

(4) The photo identity card-holders will not be allowed to enter the National Park or the islands in the reservoir nor will they be allowed to make night halts;

(5) Transport of fish will be allowed only on Totladoh-Thuepani Road from Totladoh reservoir.

* * * *

15. Since all the claims in respect of the National Park area in the State of Madhya Pradesh as notified under Section 35(1) have been taken care of, it is necessary that a final notification under Section 35(4) is issued by the State Government as expeditiously as possible. In *Pradeep Krishen* v. *Union of India*[8] this Court had pointed out that the total forest cover in our country is far less than the ideal minimum of 1/3rd of the total land. We cannot, therefore, afford any further shrinkage in the forest cover in our country. If one of the reasons for this shrinkage is the entry of villagers and tribals living in and around the sanctuaries and the National Park there can be no doubt that urgent steps must be taken to prevent any destruction or damage to the environment, the flora and fauna and wildlife in those areas. The State Government is, therefore, expected to act with a sense of urgency in matters enjoined by Article 48-A of the Constitution keeping in mind the duty enshrined in Article 51-A(*g*). We, therefore, direct that the State Government of the State of Madhya Pradesh shall expeditiously issue

8 (1996) 8 SCC 599

the final notification under Section 35(4) of the Wild Life (Protection) Act, 1972 in respect of the area of the Pench National Park falling within the State of Madhya Pradesh."

18. In *M.C. Mehta* v. *Kamal Nath*[9], this Court has observed that the idea of this theory was that the Government in trusteeship held certain common properties for smooth and unimpaired use of public such as land, water and air. Air, sea, waters, forests, parks and open land have such a great importance to the people that it would be wholly unjustified to make them a subject of private ownership. This Court has held that the State Government has committed patent breach of doctrine of "public trust" by leasing the ecologically important area. Considering human dependency on the environment, Court cannot sit as a silent spectator and it has to ensure restoration of such areas. The Court observed: (SCC pp. 405-08 & 413, paras 23-25 & 34-35)

"*23. The notion that the public has a right to expect certain lands and natural areas to retain their natural characteristic is finding its way into the law of the land.* The need to protect the environment and ecology has been summed up by David B. Hunter (University of Michigan) in an article titled *An ecological perspective on property: A call for judicial protection of the public's interest in environmentally critical resources* published in Harvard Environmental Law Review, Vol. 12 1988, p. 311 is in the following words:

'Another major ecological tenet is that the world is finite. The earth can support only so many people and only so much human activity before limits are reached. This lesson was driven home by the oil crisis of the 1970s as well as by the pesticide scare of the 1960s. The current deterioration of the ozone layer is another vivid example of the complex, unpredictable and potentially catastrophic effects posed by our disregard of the environmental limits to economic growth. The absolute finiteness of the environment, when coupled with human dependency on the environment, leads to the unquestionable result that human activities will at some point be constrained.

"[H]uman activity finds in the natural world its external limits. In short, the environment imposes constraints on our freedom; these constraints are not the product of value choices but of the scientific imperative of the environment's limitations. Reliance on improving technology can delay temporarily, but not forever, the inevitable constraints. There is a limit to the capacity of the environment to service … growth, both in providing raw materials and in assimilating by-product wastes due to consumption. The largesse of technology can only postpone or disguise the inevitable."

Professor Barbara Ward has written of this ecological imperative in particularly vivid language:

9 (1997) 1 SCC 388

"We can forget moral imperatives. But today the morals of respect and care and modesty come to us in a form we cannot evade. We cannot cheat on DNA. We cannot get round photosynthesis. We cannot say I am not going to give a damn about phytoplankton. All these tiny mechanisms provide the preconditions of our planetary life. To say we do not care is to say in the most literal sense that "we choose death"."

There is a commonly-recognized link between laws and social values, but to ecologists a balance between laws and values is not alone sufficient to ensure a stable relationship between humans and their environment. Laws and values must also contend with the constraints imposed by the outside environment. Unfortunately, current legal doctrine rarely accounts for such constraints, and thus environmental stability is threatened.

Historically, we have changed the environment to fit our conceptions of property. We have fenced, plowed and paved. The environment has proven malleable and to a large extent still is. But there is a limit to this malleability, and certain types of ecologically important resources — for example, wetlands and riparian forests — can no longer be destroyed without enormous long-term effects on environmental and therefore social stability. To ecologists, the need for preserving sensitive resources does not reflect value choices but rather is the necessary result of objective observations of the laws of nature.

In sum, ecologists view the environmental sciences as providing us with certain laws of nature. These laws, just like our own laws, restrict our freedom of conduct and choice. Unlike our laws, the laws of nature cannot be changed by legislative fiat; they are imposed on us by the natural world. An understanding of the laws of nature must therefore inform all of our social institutions.'

24. The ancient Roman Empire developed a legal theory known as the "*Doctrine of the Public Trust". It was founded on the ideas that certain common properties such as rivers, seashore, forests and the air were held by Government in trusteeship for the free and unimpeded use of the general public.* Our contemporary concern about "the environment" bear a very close conceptual relationship to this legal doctrine. Under the Roman law these resources were either owned by no one (res nullious) or by everyone in common (res communious). Under the English common law, however, the Sovereign could own these resources but the ownership was limited in nature, the Crown could not grant these properties to private owners if the effect was to interfere with the public interests in navigation or fishing. Resources that were suitable for these uses were deemed to be held in trust by the Crown for the benefit of the public. Joseph L. Sax, Professor of Law, University of Michigan — proponent of the Modern Public Trust Doctrine — in an erudite article "*Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*", Michigan Law Review, Vol. 68, Part 1

p. 473, has given the historical background of the Public Trust Doctrine as under:

> 'The source of modern public trust law is found in a concept that received much attention in Roman and English law — the nature of property rights in rivers, the sea, and the seashore. That history has been given considerable attention in the legal literature, need not be repeated in detail here. But two points should be emphasized. First, certain interests, such as navigation and fishing, were sought to be preserved for the benefit of the public; accordingly, property used for those purposes was distinguished from general public property which the sovereign could routinely grant to private owners. Second, while it was understood that in certain common properties — such as the seashore, highways, and running water — "perpetual use was dedicated to the public", it has never been clear whether the public had an enforceable right to prevent infringement of those interests. Although the State apparently did protect public uses, no evidence is available that public rights could be legally asserted against a recalcitrant government.'

25. The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. According to Professor Sax the Public Trust Doctrine imposes the following restrictions on governmental authority:

> 'Three types of restrictions on governmental authority are often thought to be imposed by the public trust: first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third the property must be maintained for particular types of uses.'

* * *

34. Our legal system — based on English common law — includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the seashore, running waters, air, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.

35. We are fully aware that the issues presented in this case illustrate 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. The resolution of this conflict in any given case is for the legislature and not the courts. If there is a law made by Parliament or the State Legislatures the courts can serve as an instrument of determining legislative intent in the exercise of its powers of judicial review under the Constitution. But in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership, or for commercial use. The aesthetic use and the pristine glory of the natural resources, the environment and the ecosystems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public good and in public interest to encroach upon the said resources." (emphasis supplied)

19. In *Vellore Citizens' Welfare Forum* v. *Union of India*[10], this Court has observed that protection of environment is one of the legal duties. The concept of sustainable development has been emphasised. Balancing has to be made between ecology and development. While setting up the industries is essential for the economic development, measures should be taken to reduce the risk for community by taking all necessary steps for protection of environment. This Court observed: (SCC pp. 657-58 & 660-61, paras 10 & 16)

"*10. The traditional concept that development and ecology are opposed to each other is no longer acceptable. "Sustainable Development" is the answer.* In the international sphere, "Sustainable Development" as a concept came to be known for the first time in the Stockholm Declaration of 1972. Thereafter, in 1987 the concept was given a definite shape by the World Commission on Environment and Development in its report called "Our Common Future". The Commission was chaired by the then Prime Minister of Norway, Ms G.H. Brundtland and as such the report is popularly known as "Brundtland Report". In 1991 the World Conservation Union, United Nations Environment Programme and Worldwide Fund for Nature, jointly came out with a document called "Caring for the Earth" which is a strategy for sustainable living. Finally, came the Earth Summit held in June 1992 at Rio which saw the largest gathering of world leaders ever in the history — deliberating and chalking out a blueprint for the survival of the planet. Among the tangible achievements of the Rio Conference was the signing of two conventions, one on biological diversity and another on climate change. These conventions were signed by 153 nations. The delegates also approved by consensus three non-binding documents, namely, a Statement on Forestry Principles, a declaration of principles on environmental policy and development initiatives and Agenda 21, a programme of action into the next century in areas like poverty, population and pollution. During the two decades from Stockholm to Rio

10 (1996) 5 SCC 647 : AIR 1996 SC 2715

"Sustainable Development" has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystems. *"Sustainable Development" as defined by the Brundtland Report means 'Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs'. We have no hesitation in holding that "Sustainable Development" as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalised by the international law jurists.*

* * *

16. The constitutional and statutory provisions protect a person's right to fresh air, clean water and pollution-free environment, but the source of the right is the inalienable common law right of clean environment. It would be useful to quote a paragraph from Blackstone's commentaries on the Laws of England (*Commentaries on the Laws of England of Sir William Blackstone*) Vol. III, Fourth Edn. published in 1876. Chapter XIII, "Of Nuisance" depicts the law on the subject in the following words:

> 'Also, if a person keeps his hogs, or other noisome animals, or allows filth to accumulate on his premises, so near the house of another, that the stench incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and benefit of this house. A like injury is, if one's neighbour sets up and exercises any offensive trade; as a tanner's, a tallow-chandler's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is, 'sic utere tuo, ut alienum non laedas'; this therefore is an actionable nuisance. And on a similar principle a constant ringing of bells in one's immediate neighbourhood may be a nuisance.
>
> … With regard to other corporeal hereditaments; it is a nuisance to stop or divert water that used to run to another's meadow or mill; to corrupt or poison a watercourse, by erecting a dye-house or a limepit, for the use of trade, in the upper part of the stream; to pollute a pond, from which another is entitled to water his cattle; to obstruct a drain; or in short to do any act in common property, that in its consequences must necessarily tend to the prejudice of one's neighbour. So closely does the law of England enforce that excellent rule of gospel-morality, of "doing to others, as we would they should do unto ourselves".'" (emphasis supplied)

20. In *M.C. Mehta* v. *Union of India*[11], this Court had issued certain directions appointing the Commissioner regarding hazardous chemicals, relying on Article 21 and considering that life, public health and property cannot be lost sight of.

11 1987 Supp SCC 131

21. This Court in *Subhash Kumar* v. *State of Bihar*[12] has held that right to pollution-free air falls within Article 21. It observed: (SCC pp. 604-05, para 7)

"*7.* Article 32 is designed for the enforcement of fundamental rights of a citizen by the Apex Court. It provides for an extraordinary procedure to safeguard the fundamental rights of a citizen. *Right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.* A petition under Article 32 for the prevention of pollution is maintainable at the instance of affected persons or even by a group of social workers or journalists. But recourse to proceeding under Article 32 of the Constitution should be taken by a person genuinely interested in the protection of society on behalf of the community. Public interest litigation cannot be invoked by a person or body of persons to satisfy his or its personal grudge and enmity. If such petitions under Article 32, are entertained it would amount to abuse of process of the court, preventing speedy remedy to other genuine petitioners from this Court. Personal interest cannot be enforced through the process of this Court under Article 32 of the Constitution in the garb of a public interest litigation. Public interest litigation contemplates legal proceeding for vindication or enforcement of fundamental rights of a group of persons or community which are not able to enforce their fundamental rights on account of their incapacity, poverty or ignorance of law. A person invoking the jurisdiction of this Court under Article 32 must approach this Court for the vindication of the fundamental rights of affected persons and not for the purpose of vindication of his personal grudge or enmity. It is duty of this Court to discourage such petitions and to ensure that the course of justice is not obstructed or polluted by unscrupulous litigants by invoking the extraordinary jurisdiction of this Court for personal matters under the garb of the public interest litigation (see *Bandhua Mukti Morcha* v. *Union of India*[13]; *Sachindanand Pandey* v. *State of W.B.*[14]; *Ramsharan Autyanuprasi* v. *Union of India*[15] and *Chhetriya Pardushan Mukti Sangharsh Samiti* v. *State of U.P.*[16])." (emphasis supplied)

22. In *M.C. Mehta* v. *Kamal Nath*[17], it was held that any disturbance to the basic environment, air or water, and soil which are necessary for life, would be hazardous to life within the meaning of Article 21 of the Constitution. In such

12 (1991) 1 SCC 598
13 (1984) 3 SCC 161 : 1984 SCC (L&S) 389
14 (1987) 2 SCC 295
15 1989 Supp (1) SCC 251
16 (1990) 4 SCC 449
17 (2000) 6 SCC 213

cases "polluter pays principle" can also be invoked to restore the environment and to control it. It held: (SCC pp. 219-20, paras 8-10)

> "*8*. Apart from the above statutes and the rules made thereunder, *Article 48-A of the Constitution provides that the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country*. One of the fundamental duties of every citizen as set out in Article 51-A(*g*) is to protect and improve the natural environment, including forests, lakes, rivers and wildlife and to have compassion for living creatures. These two articles have to be considered in the light of Article 21 of the Constitution which provides that no person shall be deprived of his life and liberty except in accordance with the procedure established by law. Any disturbance of the basic environment elements, namely, air, water and soil, which are necessary for "life", would be hazardous to "life" within the meaning of Article 21 of the Constitution.
>
> *9*. In the matter of enforcement of rights under Article 21 of the Constitution, this Court, besides enforcing the provisions of the Acts referred to above, has also given effect to fundamental rights under Articles 14 and 21 of the Constitution and has held that if those rights are violated by disturbing the environment, it can award damages not only for the restoration of the ecological balance, but also for the victims who have suffered due to that disturbance. In order to protect "life", in order to protect "environment" and in order to protect "air, water and soil" from pollution, this Court, through its various judgments has given effect to the rights available, to the citizens and persons alike, under Article 21 of the Constitution. The judgment for removal of hazardous and obnoxious industries from the residential areas, the directions for closure of certain hazardous industries, the directions for closure of slaughterhouse and its relocation, the various directions issued for the protection of the Ridge area in Delhi, the directions for setting up effluent treatment plants to the industries located in Delhi, the directions to tanneries, etc., are all judgments which seek to protect the environment.
>
> *10*. In the matter of enforcement of fundamental rights under Article 21, under public law domain, the Court, in exercise of its powers under Article 32 of the Constitution, has awarded damages against those who have been responsible for disturbing the ecological balance either by running the industries or any other activity which has the effect of causing pollution in the environment. The Court while awarding damages also enforces the "POLLUTER-PAYS PRINCIPLE" which is widely accepted as a means of paying for the cost of pollution and control. To put in other words, the wrongdoer, the polluter, is under an obligation to make good the damage caused to the environment." (emphasis supplied)

23. In *M.C. Mehta* v. *Union of India*[18], it was held to be the duty of the State to anticipate, prevent and attack the causes of environmental degradation.

18 (1997) 3 SCC 715

Considering Articles 21 and 48-A and also the fundamental duty it has been observed by the officials concerned, it was incumbent upon them to protect such spaces. Residential use of such area would have been contrary to the public interest as such not tolerable. The Court held: (SCC p. 719, para 9)

> "9. This Court in *Rural Litigation and Entitlement Kendra* v. *State of U.P.*[19] held as under:
>
> > 'The consequence of this order made by us would be that the lessee of limestone quarries would be thrown out of business. This would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the right of the people to live in a healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them, to their cattle, homes and agriculture and undue affectation of air, water and environment.' "

24. In our opinion, the submission raised by the learned counsel for the appellant is meritorious that the area should be preserved for greenbelt as done at present and the provisions made in the Master Plan 2021 for its conversion into residential area has to be quashed. Unhesitatingly, we agree with the same.

25. As we have held that exercise of conversion was not a legal one that will have some impact on the validity of the notification issued under Section 4 and dispensation of enquiry to be held under Section 5-A but in the instant case we find that since the first prayer of the appellant had been allowed, the area has been ultimately reserved and utilised for the purpose of greenbelt only and as permitted by this Court park had been developed and it shall be maintained as such. We need not go further into the question of dispensation of inquiry whether it was rightly dispensed with. In view of subsequent development and relief granted to the appellants we decline to intervene.

26. Since we have seen the photographs the park has been developed under the interim order of this Court including bundh. After acquisition possession had been taken, award had been passed and most of the owners have collected the compensation, the petitioners may also collect compensation in case they have not received so far but non-collection so far due to pendency of matter would not affect validity of acquisition and development that has been made. We are not inclined to disturb the decision of the High Court with respect to the acquisition. We hold that the land has absolutely vested in the State. We order, as assured also in future the purpose shall never be changed in any other manner whatsoever. We hereby quash the Master Plan 2021 changing use of area in question from greenbelt to residential one. It shall be held in trusteeship only for the purpose of park in future.

27. Resultantly, in view of the aforesaid discussion, the appeals are partly allowed and the order of the High Court is set aside to the aforesaid extent. Acquisition is upheld but for different reasons. We require the respondents to make payment of costs of the appeals to the appellants which we quantify at Rs 5,00,000 to be paid in each appeal to be borne by the State and

19 1986 Supp SCC 517

Lucknow Development Authority equally within a period of three months and compliance thereof be reported to this Court.

28. In view of the interim order[3] passed by this Court, we do not find any ground to proceed further with the contempt petition. Accordingly, Contempt Petition (C) No. 494 of 2013 is dismissed. Notice issued is discharged.

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3 *Lal Bahadur* v. *State of U.P.*, 2010 SCC OnLine SC 25

1980 SCC OnLine US SC 126 : 447 US 255 (1980) : 100 S.Ct. 2138 : 65 L.Ed.2d 106

Supreme Court of United States

(BEFORE WARREN E. BURGER, C.J. AND LEWIS F. POWELL, JR., HARRY A. BLACKMUN, WILLIAM J. BRENNAN, JR., JOHN PAUL STEVENS, THURGOOD MARSHALL, BYRON R. WHITE, POTTER STEWART AND WILLIAM H. REHNQUIST, JJ.)

Donald W. AGINS et ux., Appellants,

Versus

CITY OF TIBURON.

No. 79–602

Argued April 15, 1980.

Decided on June 10, 1980

1. Gideon Kanner, Los Angeles, Cal., for appellants.

2. E. Clement Shute, Jr., San Francisco, Cal., for appellee.

3. [Amicus Curiae Information from page 256-257 intentionally omitted]

4. Mr. Justice POWELL delivered the opinion of the Court.

5. The question in this case is whether municipal zoning ordinances took appellants' property without just compensation in violation of the Fifth and Fourteenth Amendments.

I

6. After the appellants acquired five acres of unimproved land in the city of Tiburon, Cal., for residential development, the city was required by state law to prepare a general plan governing both land use and the development of open-space land. Cal.Govt.Code Ann. §§ 65302(a) and (e) (West Supp.1979); see § 65563. In response, the city adopted two ordinances that modified existing zoning requirements. Tiburon, Cal., Ordinances Nos. 123 N.S. and 124 N.S. (June 28, 1973). The zoning ordinances placed the appellants' property in "RPD-1," a Residential Planned Development and Open Space Zone. RPD-1 property may be devoted to one-family dwellings, accessory buildings, and open-space uses. Density restrictions permit the appellants to build between one and five single-family residences on their 5-acre tract. The appellants never have sought approval for development of their land under the zoning ordinances.[1]

7. The appellants filed a two-part complaint against the city in State Superior Court. The first cause of action sought $2 million in damages for inverse condemnation.[2] The second cause of action requested a declaration that the zoning ordinances were facially unconstitutional. The gravamen of both claims was the appellants' assertion that the city had taken their property without just compensation in violation of the Fifth and Fourteenth Amendments. The complaint alleged that land in Tiburon has greater value than any other suburban property in the State of California. App. 3. The ridgelands that appellants own "possess magnificent views of San Francisco Bay and the scenic surrounding areas [and] have the highest market values of all lands" in Tiburon. *Id.*, at 4. Rezoning of the land "forever prevented [its] development for residential use. . . ." *Id.*, at 5. Therefore, the appellants contended, the city had "completely destroyed the value of [appellants'] property for any purpose or use whatsoever. . . ." *Id.*, at 7.[3]

8. The city demurred, claiming that the complaint failed to state a cause of action. The Superior Court sustained the demurrer,[4] and the California Supreme Court

affirmed. 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979). The State Supreme Court first considered the inverse condemnation claim. It held that a landowner who challenges the constitutionality of a zoning ordinance may not "sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." *Id.*, at 273, 157 Cal.Rptr. at 375, 598 P.2d, at 28. The sole remedies for such a taking, the court concluded, are mandamus and declaratory judgment. Turning therefore to the appellants' claim for declaratory relief, the California Supreme Court held that the zoning ordinances had not deprived the appellants of their property without compensation in violation of the Fifth Amendment.[5]

9. We noted probable jurisdiction. 444 U.S. 1011, 100 S.Ct. 658, 62 L.Ed.2d 639 (1980). We now affirm the holding that the zoning ordinances on their face does not take the appellants' property without just compensation.[6]

I I

10. The Fifth Amendment guarantees that private property shall not "be taken for public use, without just compensation." The appellants' complaint framed the question as whether a zoning ordinance that prohibits all development of their land effects a taking under the Fifth and Fourteenth Amendments. The California Supreme Court rejected the appellants' characterization of the issue by holding, as a matter of state law, that the terms of the challenged ordinances allow the appellants to construct between one and five residences on their property. The court did not consider whether the zoning ordinances would be unconstitutional if applied to prevent appellants from building five homes. Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions. See *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588, 92 S.Ct. 1716, 1719, 32 L.Ed.2d 317 (1972). See also *Goldwater v. Carter*, 444 U.S. 996, 997, 100 S.Ct. 533, 534, 62 L.Ed.2d 428 (1979) (POWELL, J., concurring). Thus, the only question properly before us is whether the mere enactment of the zoning ordinances constitutes a taking.

11. The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138, n. 36, 98 S.Ct. 2646, 2666, 57 L.Ed.2d 631 (1978). The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, see *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 S.Ct. 332 (1979), the question necessarily requires a weighing of private and public interests. The seminal decision in *Euclid v. Ambler Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), is illustrative. In that case, the landowner challenged the constitutionality of a municipal ordinance that restricted commercial development of his property. Despite alleged diminution in value of the owner's land, the Court held that the zoning laws were facially constitutional. They bore a substantial relationship to the public welfare, and their enactment inflicted no irreparable injury upon the landowner. *Id.*, at 395-397, 47 S.Ct., at 121.

12. In this case, the zoning ordinances substantially advance legitimate governmental goals. 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." Cal.Govt.Code Ann. § 65561(b) (West Supp.1979).[7] 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.[8] Such

governmental purposes long have been recognized as legitimate. See *Penn Central Transp. Co. v. New York City, supra*, 438 U.S., at 129, 98 S.Ct., at 2662; *Village of Belle Terre v.* Boraas, 416 U.S. 1, 9, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797 (1974); *Euclid v. Ambler Co., supra*, 272 U.S., at 394-395, 47 S.Ct., at 120-121.

13. The ordinances place appellants' land in a zone limited to single-family dwellings, accessory buildings, and open-space uses. Construction is not permitted until the builder submits a plan compatible with "adjoining patterns of development and open space." Tiburon, Cal., Ordinance No. 123 N.S. § 2(F). In passing upon a plan, the city also will consider how well the proposed development would preserve the surrounding environment and whether the density of new construction will be offset by adjoining open spaces. *Ibid.* 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. There is no indication that the appellants' 5-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer.

14. Although the ordinances limit development, they neither prevent the best use of appellants' land, see *United States v. Causby*, 328 U.S. 256, 262, and n. 7, 66 S.Ct. 1062, 1066, 90 L.Ed. 1206 (1946), nor extinguish a fundamental attribute of ownership, see *Kaiser Aetna v. United States*, *supra*, at 179-180, 100 S.Ct., at 393. The appellants have alleged that they wish to develop the land for residential purposes, that the land is the most expensive suburban property in the State, and that the best possible use of the land is residential. App. 3-4. The California Supreme Court has decided, as a matter of state law, that appellants may be permitted to build as many as five houses on their five acres of prime residential property. At this juncture, the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land-use regulations has denied appellants the "justice and fairness" guaranteed by the Fifth and Fourteenth Amendments. See*Penn Central Transp. Co. v. New York City*, 438 U.S., at 124, 98 S.Ct., at 2659.[9]

III

15. The State Supreme Court determined that the appellants could not recover damages for inverse condemnation even if the zoning ordinances constituted a taking. The court stated that only mandamus and declaratory judgment are remedies available to such a landowner. Because no taking has occurred, we need not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation.

16. The judgment of the Supreme Court of California is

17. *Affirmed.*

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[1] Shortly after it enacted the ordinances, the city began eminent domain proceedings against the appellants' land. The following year, however, the city abandoned those proceedings, and its complaint was dismissed. The appellants were reimbursed for costs incurred in connection with the action.

[2] Inverse condemnation should be distinguished from eminent domain. Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property. *United States v. Clarke*, 445 U.S. 253, 255-258, 100 S.Ct. 1127, 1129-1130, 63 L.Ed.2d 373 (1980). Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *Id.*, at 257, 100 S.Ct. at 1130.

[3] The appellants also contended that the city's aborted attempt to acquire the land through eminent domain had destroyed the use of the land during the pendency of the condemnation proceedings. App. 10.

[4] The State Superior Court granted the appellants leave to amend the cause of action seeking a declaratory judgment, but the appellants did not avail themselves of that opportunity.

[5] The California Supreme Court also rejected appellants' argument that the institution and abandonment of eminent domain proceedings themselves constituted a taking. The court found that the city had acted reasonably and that general municipal planning decisions do not violate the Fifth Amendment.

[6] The appellants also contend that the state courts erred by sustaining the demurrer despite their uncontroverted allegations that the zoning ordinances would "forever preven[t] . . . development for residential use," *id.*, at 5, and "completely destro[y] the value of [appellant's] property for any purpose or use whatsoever . . .," *id.*, at 7. The California Supreme Court compared the express terms of the zoning ordinances with the factual allegations of the complaint. The terms of the ordinances permit construction of one to five residences on the appellants' 5-acre tract. The court therefore rejected the contention that the ordinances prevented all use of the land. Under California practice, allegations in a complaint are taken to be true unless "contrary to law or to a fact of which a court may take judicial notice." *Dale v. City of Mountain View*, 55 Cal.App.3d 101, 105, 127 Cal.Rptr. 520, 522 (1976); see *Martinez v. Socoma Cos.*, 11 Cal.3d 394, 399-400, 113 Cal.Rptr. 585, 588, 521 P.2d 841, 844 (1974). California courts may take judicial notice of municipal ordinances. Cal.Evid.Code Ann. § 452(b) (West 1966). In this case, the State Supreme Court merely rejected allegations inconsistent with the explicit terms of the ordinance under review. The appellants' objection to the State Supreme Court's application of state law does not raise a federal question appropriate for review by this Court. See *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 461, 27 S.Ct. 556, 557, 51 L.Ed. 879 (1907).

[7] The State also recognizes that the preservation of open space is necessary "for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources." Cal.Govt.Code Ann. § 65561(a) (West Supp.1979); see Tiburon, Cal., Ordinance No. 124 N.S. §§ 1(f) and (h).

[8] The City Council of Tiburon found that "[i]t is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl." *Id.*, § 1(c).

[9] Appellants also claim that the city's precondemnation activities constitute a taking. See nn. 1, 3, and 5, *supra*. The State Supreme Court correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking. See also *City of Walnut Creek v. Leadership Housing Systems, Inc.*, 73 Cal.App.3d 611, 620-624, 140 Cal.Rptr. 690, 695-697 (1977). Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." *Danforth v. United States*, 308 U.S. 271, 285, 60 S.Ct. 231, 236, 84 L.Ed. 240 (1939). See *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, 787 (CA8), cert. denied, 444 U.S. 899, 100 S.Ct. 208, 62 L.Ed.2d 135 (1979); *Reservation Eleven Associates v. District of Columbia*, 136 U.S.App.D.C. 311, 315-316, 420 F.2d 153, 157-158 (1969); *Virgin Islands v. 50.05 Acres of Land*, 185 F.Supp. 495, 498 (V.I.1960); 2 J. Sackman & P. Rohan, Nichols' Law of Eminent Domain § 6.13[3] (3d ed. 1979).

to the Central Government. We think that this approach on the part of the Detaining Authority and the State Government has robbed the appellants of their constitutional right under Article 22(5) read with Section 11 of the Act to have their representation considered by the Central Government. The request of the detenus was not unreasonable. On the contrary the action of the Detaining Authority and the State Government was unreasonable and resulted in a denial of the appellants' constitutional right. The impugned detention orders are, therefore, liable to be quashed.

11. In the result we allow these appeals, set aside the order of the High Court and quash the detention orders on this single ground. We direct that both the appellants who are in detention shall be set free at once unless they are required in any other pending matter.

PUNCHHI, J. (*partly dissenting*)— I agree to the release of the detenus, but in the facts and circumstances of the case I have reservations to Section 11 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 being treated part of the constitutional guarantee under Article 22(5) of the Constitution of India. Section 11 of the Act does not confer any constitutional right on the detenu to have his representation thereunder considered as if under Article 22(5), but merely a provision enabling the State Government or the Central Government, as the case may be, to revoke or modify detention orders. Have Section 11 of the Act repealed, it causes no affectation to the constitutional guarantee under Article 22(5) of the Constitution. Correspondingly, Section 11 of the Act derives no sustenance from the said article. Both operate in mutually exclusive fields, though not as combatants. Both the detenus may be set free as proposed by my learned brother, A.M. Ahmadi, J.

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(BEFORE T.K. THOMMEN AND R.M. SAHAI, JJ.)

BANGALORE MEDICAL TRUST .. Appellant;

Versus

B.S. MUDDAPPA AND OTHERS .. Respondents.

Civil Appeal No. 2750 of 1991†, decided on July 19, 1991

Town Planning — Bangalore Development Authority Act, 1976 (Karnataka Act 12 of 1976) — Sections 19(4), 2(b), (bb), 16, 17, 18, 30, 31, 32, 33, 38 and 38-A — Legislative intent — Open space reserved for public park in

† From the Judgment and Order dated September 13, 1989 of the Karnataka High Court in W.A. No. 162 of 1989

development scheme duly approved and published under the Act — Held, cannot be converted into a civic amenity site for the purpose of hospital/nursing home and allotted to a private person or body of persons for that purpose — Such action would be invalid and ultra vires being contrary to the object and purpose of the Act — Administrative Law — Ultra vires

Administrative Law — Administrative action — Discretion — How to be exercised — When affecting public interest, it should be exercised objectively, rationally, intelligibly, fairly and non-arbitrarily — It should not be taken in undue haste disregarding the procedure, nor should it be ultra vires the powers conferred by the statute — Constitution of India, Article 14

Town Planning — Bangalore Development Authority Act, 1976 (Karnataka Act 12 of 1976) — Section 19(4) — Alteration in scheme — Must be for improvement — Discretion vested in Authority and not in State Government — How to be exercised — Application of mind — Unilateral decision taken by Chairman of the Authority at the instance of Chief Minister of the State to convert an open space reserved under the scheme for public park into a civic amenity site for constructing a hospital/nursing home and to allot the site to a private person or body of persons for this purpose — Held, vitiated by non-application of mind — It is also arbitrary and ultra vires — Constitution of India, Article 14 — Administrative Law — Ultra vires

Town Planning — Bangalore Development Authority Act, 1976 (Karnataka Act 12 of 1976) — Sections 19(4), 65, 3, 8 and 9 — Alteration in user for which an area earmarked under the approved scheme — Authority to take decision following the procedure prescribed by the Act — Chief Minister/Govt. not empowered to direct the Chairman of the Authority to take a particular decision nor the Chairman/Authority bound to act accordingly

Town Planning — Bangalore Development Authority Act, 1976 (Karnataka Act 12 of 1976) — Section 65 — Government's directions to the Authority — Must be reasonable, necessary and expedient for carrying out the object of the Act — Directions to convert an open space reserved under the scheme for public park into a civic amenity site for constructing hospital/nursing home and to allot the site to a private person or body of persons, held, being opposed to the object of the Act, would be ultra vires — Administrative Law — Ultra vires

Town Planning — Bangalore Development Authority Act, 1976 (Karnataka Act 12 of 1976) — Sections 38-A(2) and 16(1) — 'Public parks and playgrounds' and 'civic amenities' — Difference — Words and phrases

Town Planning — Bangalore Development Authority Act, 1976 (Karnataka Act 12 of 1976) — Section 2(bb) and (b) — 'Civic amenity' — Hospital — Not an amenity but a civic amenity — Whether nursing home run by a private body also a civic amenity — Not decided

Town Planning — Amenities — Public park — Purpose, utility and necessity of — Amenity of hospital cannot be treated on par with the amenity of park — Bangalore Development Authority Act, 1976, Section 2(b) and (bb)

Administrative Law — Ultra vires — An action ultra vires a section of the statute cannot be saved by general powers under the statute

Constitution of India — Articles 32, 226, 21 and 14 — PIL — Ecology — Open space reserved for park under development scheme unilaterally converted into a hospital site in favour of a private body by Development Authority at the instance of the Chief Minister of the State — Held, residents of the locality have standing under Article 32/226 to challenge the action in public interest

The City Improvement Board constituted under City of Bangalore Improvement Act, 1945, prepared the development scheme for extension of the city of Bangalore. The scheme reserved an area for being developed as a low level park. The 1945 Act was repealed and replaced by the Bangalore Development Authority Act, 1976 but by Section 76 thereof the scheme was deemed to have been made under the corresponding provisions of the BDA Act. The Act received assent in March 1976 and in the same month the Chairman of the Bangalore Development Authority received a communication from the Chief Minister of the State for granting a suitable site in the Extension area to the appellant Bangalore Medical Trust for its proposed hospital building. The Chairman by his letter dated April 21, 1976, informed the Chief Minister that the appellant was keen to construct a nursing home on the area earmarked for the low level park. On this letter the Chief Minister made an endorsement in his own hand to the effect that the area kept for laying a park may be converted into a civic amenity site. Pursuant to the direction of the Chief Minister the government on May 27 converted the site from public park to a civic amenity site. It was followed by a another order dated June 17, 1976 sanctioning the lease to the appellant. On July 14 the BDA completed the formality by passing the resolution and allotting the site to the appellant. On coming to know of the allotment in 1981, when some construction activity was noticed by the residents, they approached the High Court by way of writ petition. A Division Bench of the High Court allowed the petition. In the present appeal, the appellant, contended that the High Court exceeded its jurisdiction in setting aside an allotment which was purely an administrative action taken by the BDA pursuant to a valid direction issued by the government in that behalf, that in the absence of any evidence of mala fide, the impugned decision of the BDA was impeccable and not liable to be interfered with in writ jurisdiction, that the decision to allot a site for a hospital rather than a park is a matter within the discretion of the BDA, and that the hospital is not only an amenity, but also a civic amenity under the Act, as it now stands, and the diversion of the user of the land for that purpose is justified under the Act. Besides the appellant also urged that even if the conversion of the site suffered from any infirmity procedural or substantive the High Court should have refrained from exercising its extraordinary jurisdiction and that also in favour of those residents many of whom did not have their houses around the park and thus could not be placed in the category of persons aggrieved, and that the hospital with research centre and even free service being more important from social angle the inhabitants of the locality could not be said to suffer any injury much less substantial injury. Dismissing the appeal of the Bangalore Medical Trust with costs the Supreme Court

Held :

Per Sahai, J.

(1) The entire proceedings before the State Government suffered from absence of jurisdiction. Even the exercise of power was vitiated and ultra vires. Therefore the orders of the government to convert the site reserved for public park to civic amenity and to allot it for private nursing home to Bangalore Medical Trust and the resolution of the Bangalore Development Authority in compliance of it was null, void and without jurisdiction. (Para 53)

Shri Sitaram Sugar Company Limited v. *Union of India,* (1990) 3 SCC 223: (1990) 1 SCR 909, 937, *referred to*

Before any other facility could be considered amenity it was necessary for State Government to issue a notification and since no notification was issued including private nursing home as amenity it could not be deemed to be included in it. That apart the definition indicates that the convenience or facility should have had public characteristic. Even if it is assumed that the definition of amenity being inclusive it should be given a wider meaning so as to include hospital added in clause 2(*bb*) as a civic amenity with effect from 1984 a private nursing home unlike a hospital run by government or local authority did not satisfy that characteristic which was necessary in the absence of which it could not be held to be amenity or civic amenity. (Para 48)

The purpose for which the Act was enacted is establishment of the Authority for development of the city of Bangalore and areas adjacent thereto. To carry out this purpose the development scheme framed by the Improvement Trust was adopted by the Development Authority. Any alteration in this scheme could have been made as provided in sub-section (4) of Section 19 only if it resulted in improvement in any part of the scheme. A private nursing home could neither be considered to be an amenity nor it could be considered improvement over necessity like a public park. The exercise of power, therefore, was contrary to the purpose for which it is conferred under the statute. (Para 46)

The exercise of power of alteration of a scheme under Section 19(4) is hedged by use of the expression, if 'it appears to the Authority'. In legal terminology it visualises prior consideration and objective decision. And all this must have resulted in conclusion that the alteration would have been improvement. What is an improvement or when any change in the scheme can be said to be improvement is a matter of discretion by the authority empowered to exercise the power. Sub-section (4) of Section 19 not only defines the scope and lays down the ambit within which the discretion could be exercised but it envisages further the manner in which it could be exercised. Therefore, any action or exercise of discretion to alter the scheme must have been backed by substantive rationality flowing from the section. Absence of power apart, such exercise is fraught with danger of being activated by extraneous considerations. (Paras 47, 49 and 51)

Discretion is an effective tool in administration. It provides an option to the authority concerned to adopt one or the other alternative. But a better, proper and legal exercise of discretion is one where the authority examines the

fact, is aware of law and then decides objectively and rationally what serves the interest better. When a statute either provides guidance or rules or regulations are framed for exercise of discretion then the action should be in accordance with it. Even where statutes are silent and only power is conferred to act in one or the other manner, the Authority cannot act whimsically or arbitrarily. It should be guided by reasonableness and fairness. The legislature never intends its authorities to abuse the law or use it unfairly. Where the law requires an authority to act or decide, 'if it appears to it necessary' or if he is 'of opinion that a particular act should be done' then it is implicit that it should be done objectively, fairly and reasonably. In a democratic set up the people or community being sovereign the exercise of discretion must be guided by the inherent philosophy that the exerciser of discretion is accountable for his action. It is to be tested on anvil of rule of law and fairness or justice particularly if competing interests of members of society is involved. Decisions affecting public interest or the necessity of doing it in the light of guidance provided by the Act and rules may not require intimation to person affected yet the exercise of discretion is vitiated if the action is bereft of rationality, lacks objective and purposive approach. Public interest or general good or social betterment have no doubt priority over private or individual interest but it must not be a pretext to justify the arbitrary or illegal exercise of power. It must withstand scrutiny of the legislative standard provided by the statute itself. The authority exercising discretion must not appear to be impervious to legislative directions. The action or decision must not only be reached reasonably and intelligibly but it must be related to the purpose for which power is exercised. No one howsoever high can arrogate to himself or assume without any authorisation express or implied in law a discretion to ignore the rules and deviate from rationality by adopting a strained or distorted interpretation as it renders the action ultra vires and bad in law. (Paras 48, 47 and 46)

Manner in which the power was exercised in this case fell below even the minimum requirement of taking action on relevant considerations. A scheme could be altered by the Authority as defined under Section 3 of the Act. This Authority functions as a body through committees and meetings as provided under Sections 8 and 9. The power vests in the Authority and not in the State Government or the Chief Minister of the State. The purpose of the Authority taking a decision is their knowledge of local conditions and what was better for them. That is why participatory exercise of powers by different persons representing different interests is contemplated. The only role which the State Government could play in a scheme altered by the BDA is specified in sub-sections (5) and (6) of Section 19 of the Act. That being not the case here the Authority should have applied its mind and must have come to the conclusion that conversion of the site reserved for public park into a private nursing home amounted to an improvement and then only it could have exercised the power. But what happened in fact was that the application for allotment of the site was accepted first and the procedural requirements were attempted to be gone through later and that too by the State Government which was not authorised to do so. Even if it is assumed that the State Government could have any role to play, the entire exercise instead of proceeding from below, that is, from the

BDA to State Government proceeded in reverse direction, that is, from the State Government to the BDA. (Para 49)

Between April 21 and July 14, 1976, that is less than ninety days, the machinery in BDA and government moved so swiftly that the initiation of the proposal by the appellant (a rich trust with 90,000 dollars in foreign deposits), query on it by the Chief Minister of the State, guidance of way out by the Chairman, direction on it by the Chief Minister, orders of Government resolution by the BDA and allotment were all completed and the site for public park stood converted into site for private nursing home without any intimation direct or indirect to those who were being deprived of it. Speedy or quick action in public institutions call for appreciation but our democratic system shuns exercise of individualised discretion in public matters requiring participatory decision by rules and regulations. (Para 46)

The legislature entrusted the responsibility to alter and approve the scheme to the BDA but the BDA in complete breach of faith reposed in it, preferred to take directions issued on command of the Chief Executive of the State. This resulted not only in non-application of mind and error of law but much beyond it. (Para 49)

Financial gain by a local authority at the cost of public welfare has never been considered as legitimate purpose even if the objective is laudable. But in this case the law was thrown to winds for a private purpose. The direction of the Chief Minister, the apex public functionary of the State, was in breach of public trust, more like a person dealing with his private property than discharging his obligation as head of the State administration in accordance with law and rules. The end result having been decided by the highest executive in the State the lower in order of hierarchy only followed with 'ifs' and 'buts' ending finally with resolution of BDA which was more or less a formality. This culture of public functionary, adorning highest office in the State of being law to himself and the administration acting on dictate, for whatever reason disturbs the balance of rule of law. There is no whisper anywhere if it was ever considered, objectively, by any authority that the nursing home would amount to an improvement. Whether the decision would have been correct or not would have given rise to different consideration. But here it was total absence of any effort to do so. The public institutions should be cautious and must not give impression of taking sides. It is destructive of fairness. (Paras 45 to 47)

The main thrust of the power of the Government under sub-section (3) of Section 15 of the Act to direct the Authority to take up any scheme is to keep a vigil on the local body. But it cannot be stretched to entitle the government to alter any scheme or convert any site or power specifically reserved in the statute in the Authority. The general power of direction to take up development scheme cannot be construed as superseding specific power conferred and provided for under Section 19(4). (Para 51)

Though overall power is reserved in government under Section 65 to give such directions to the Authority as it considers expedient for carrying out any purpose of the Act, but an exercise of power which is ultra vires the provisions in the statute cannot be attempted to be resuscitated on general powers

reserved in a statute for its proper and effective implementation. The section authorises the government to issue directions to ensure that the provisions of law are obeyed and not to empower it itself to proceed contrary to law. What is not permitted by the Act to be done by the Authority cannot be assumed to be done by State Government to render it legal. An illegality cannot be cured only because it was undertaken by the government. No one is above law. In a democracy what prevails is law and rule and not the height of the person exercising the power. (Para 52)

(2) Public park as a place reserved for beauty and recreation is associated with growth of the concept of equality and recognition of importance of common man. 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. 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. (Para 36)

(3) Locus standi to approach by way of writ petition and refusal to grant relief in equity jurisdiction are two different aspects, may be with same result. One relates to maintainability of the petition and other to exercise of discretion. 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 challenges with 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 busybodies or interlopers. 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 of 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 technicalities 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. (Para 35)

S.P. Gupta v. *Union of India*, 1981 Supp SCC 87: (1982) 2 SCR 365: AIR 1982 SC 149; *Akhil Bharatiya Soshit Karamchari Sangh (Rly.)* v. *Union of India*, (1981) 1 SCC 246: 1981 SCC (L&S) 50: AIR 1981 SC 298; *Fertilizer Corporation Kamgar Union* v. *Union of India*, (1981) 1 SCC 568: AIR 1981 SC 344, *relied on*

Per Thommen, J. (concurring)

(1) The Act has undergone several changes, but the definition of 'amenity' in clause (*b*) of Section 2 remains unchanged. Section 2 was amended in 1984 by Karnataka Act 17 of 1984 to add clause (*bb*), after clause (*b*), which distinguished a 'civic amenity' from an 'amenity'. A hospital is specifically stated to be a 'civic amenity'. However, it is not clear from sub-clause (*i*) of clause (*bb*) whether a hospital which is not run by the government or a civic 'corporation' but, as in the present case, by a private body, would qualify as 'civic amenity'. Nor is it clear whether a hospital was either an 'amenity' or a 'civic amenity' until it was specifically stated to be the latter by the Amendment Act 11 of 1988. But perhaps Act 11 of 1988 was merely clarificatory of what was always the position, and the hospital has always been regarded as an 'amenity', if not a 'civic amenity'. However, on the facts of this case, it is unnecessary to pursue this point further. Nor is it necessary to consider whether a privately owned and managed hospital, as in the present case, is an 'amenity' for the purpose of the Act. (Paras 9, 10 and 12)

Section 16(1) treats 'public parks and playgrounds' as a different and separate amenity or convenience from a 'civic amenity'. The implication of this conceptual distinction is that land reserved for a public park and playground cannot be utilised for any 'civic amenity' including a hospital. The need for open space for 'better ventilation' of the area is emphasised by Section 16(2). One of the main objects of public parks or playgrounds is the promotion of the health of the community by means of 'ventilation' and recreation. It is the preservation of the quality of life of the community that is sought to be protected by means of these regulations. (Para 14)

Section 19(4) provides that the BDA may, subject to certain restrictions contained in sub-sections (5) and (6), alter the scheme, but such alteration has to be carried out pursuant to a formal decision duly recorded in the manner generally followed by a body corporate. The scheme is a statutory instrument which is administrative legislation involving a great deal of general law making of universal application, and it is not, therefore, addressed to individual cases of persons and places. Alteration of the scheme must be for the purpose of

improvement and better development of the city of Bangalore and adjoining areas and for general application for the benefit of the public at large. Any alteration of the scheme with a view to conferring a benefit on a particular person, and without regard to the general good of the public at large, is not an improvement contemplated by the section. (Para 16)

Shri Sitaram Sugar Company Limited v. *Union of India*, (1990) 3 SCC 223: (1990) 1 SCR 909, *relied on*

Section 38 implies that land once appropriated or applied or earmarked by formation of 'open spaces' or for building purposes or other development in accordance with a duly sanctioned scheme should not be used for any other purpose unless the scheme itself, which is statutory in character, is formally altered in the manner that the BDA as a body corporate is competent to alter. This section, of course, empowers the BDA to lease or sell or otherwise transfer any property. But that power has to be exercised consistently with the appropriation or application of land for formation of 'open spaces' or for building purposes or any other development scheme sanctioned by the government. (Para 18)

The legislative intent is to preserve a public park or public playground in the hands of the general public, as represented by the BDA or any other public authority, and prevent private hands from grabbing them for private ends. The validation clause relates to the period between April 21, 1984 and May 7, 1980 which was long after the impugned allotment. (Para 19)

The scheme is meant for the reasonable accomplishment of the statutory object which is to promote the orderly development of the city of Bangalore and adjoining areas and to preserve open spaces by reserving public parks and playgrounds with a view to protecting the residents from the ill-effects of urbanisation. It meant for the development of the city in a way that maximum space is provided for the benefit of the public at large for recreation, enjoyment, 'ventilation' and fresh air. This is clear from the Act itself as it originally stood. The legislative intent has always been the promotion and enhancement of the quality of life by preservation of the character and desirable aesthetic features of the city. The subsequent amendments inserting Sections 16(1)(*d*), 38-A and other provisions are not a deviation from or alteration of the original legislative intent, but only an elucidation or affirmation of the same. (Para 23)

The original scheme, duly sanctioned under the Act, includes a public park and the land in question has been reserved exclusively for that purpose. Although it is open to the BDA to alter the scheme, no alteration has been made in the manner contemplated by Section 19(4). The action of the government and the BDA resulting in the resolution dated July 14, 1976 have been inspired by individual interests at the costs and to the disadvantage of the general public. Public interest does not appear to have guided the minds of the persons responsible for diverting the user of the open space for allotment to the appellant. Conversion of the open space reserved for a park for the general good of the public into a site for the construction of a privately owned and managed hospital for private gains is not an alteration for improvement of the scheme as contemplated by Section 19, and the impugned orders in that behalf are a flagrant violation of the legislative intent and a colourable exercise of power. Thus no valid decision has been taken to alter the scheme. (Para 22)

The BDA cannot be said to be bound by all directions of the government issued under Section 65, irrespective of the nature or purpose of the direction. The power of the government under Section 65 is not unrestricted. The object of the directions must be to carry out the object of the Act and not contrary to it. Only such directions as are reasonably necessary or expedient for carrying out the object of the enactment are contemplated by Section 65. If a direction were to be issued by the government to lease out to private parties areas reserved in the scheme for public parks and playgrounds, such a direction would not have the sanctity of Section 65. Any such diversion of the user of the land would be opposed to the statute as well as the object in constituting the BDA to promote the healthy development of the city and improve the quality of life. Any repository of power — be it the government or the BDA — must act reasonably and rationally and in accordance with law and with due regard to the legislative intent. In the present case apart from the fact that the scheme has not been validly altered by the BDA, it was not open to the government in terms of Section 65 to give a direction to the BDA to defy the very object of the Act. (Paras 20 and 30)

(2) 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 makes the guaranteed rights a reality for all the citizens. (Para 24)

Kharak Singh v. *State of U.P.*, AIR 1963 SC 1295: (1964) 1 SCR 332: (1963) 2 Cri LJ 329; *Municipal Council, Ratlam* v. *Vardhichand*, (1980) 4 SCC 162: (1981) 1 SCR 97: 1980 SCC (Cri) 933; *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi*, (1981) 1 SCC 608: (1981) 2 SCR 516: 1981 SCC (Cri) 212; *Olga Tellis* v. *Bombay Municipal Corporation*, (1985) 3 SCC 545; *State of H.P.* v. *Umed Ram Sharma*, (1986) 2 SCC 68: AIR 1986 SC 847; *Vikram Deo Singh Tomar* v. *State of Bihar*, 1988 Supp SCC 734: AIR 1988 SC 1782: 1989 SCC (Cri) 66, *referred to*

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. (Para 25)

Karnataka Town and Country Planning Act, 1961; Maharashtra Regional and Town Planning Act, 1966; Bombay Town Planning Act, 1954; The Travancore Town and Country Planning Act, 1120; The Madras Town Planning Act, 1920 and the rules framed under these statutes; Town and Country Planning Act, 1971 (England and Wales); *Encyclopaedia Americana*, Volume 22, page 240; *Encyclopaedia of the Social Sciences*, Volume XII at page 161; *Town Improvement Trusts in India*, 1954 by Rai Sahib Om Prakash Aggarawala, p. 35 *et seq.*; *Halsbury's Statutes*, 4th edn., p. 17 *et seq.* and *Journal of Planning and Environment Law*, 1973, p. 130 et seq., *referred to*

Penn Central Transportation Company v. *City of New York*, 57 L Ed 2d 631: 438 US 104 (1978); *Village of Belle Terre* v. *Bruce Boraas*, 39 L Ed 2d 797: 416 US 1 (1974); *Vil-*

lage of Euclid v. *Ambler Realty Company,* 272 US 365 (1926); *Halsey* v. *Esso Petroleum Co. Ltd.,* (1961) 1 WLR 683; *Agins* v. *City of Tiburon,* 447 US 255 (1980); *Samuel Berman* v. *Andrew Parker,* 99 L Ed 27: 348 US 26, *referred to*

Any reasonable legislative attempt bearing a rational relationship to a permissible State objective in economic and social planning will be respected by the courts. A duly approved scheme prepared in accordance with the provisions of the Act is a legitimate attempt on the part of the government and the statutory authorities to ensure a quiet place free of dust and din where children can run about and the aged and the infirm can rest, breathe fresh air and enjoy the beauty of nature. These provisions are meant to guarantee a quiet and healthy atmosphere to suit family needs of persons of all stations. Any action which tends to defeat that object is invalid. (Para 28)

Village of Belle Terre v. *Bruce Boraas,* 39 L Ed 2d 797: 416 US 1; *Village of Euclid* v. *Ambler Realty Company,* 272 US 365 (1926); *T. Damodhar Rao* v. *Special Officer, Municipal Corporation of Hyderabad,* AIR 1987 AP 171, *referred to*

(3) The residents of the locality are the persons intimately, vitally and adversely affected by any action of the BDA and the government which is destructive of the environment and which deprives them of facilities reserved for the enjoyment and protection of the health of the public at large. The residents of the locality, such as the writ petitioners, are naturally aggrieved by the impugned orders and they have, therefore, the necessary *locus standi.* (Para 29)

R-M/T/10705/C

Advocates who appeared in this case :

B.R.L. Iyengar, S.S. Javali and R.V. Narasimhamurthi, Senior Advocates (E.C. Vidyasagar, G.V. Shantharaju, D.N.N. Reddy, Raju Ramachandran, K. Jagan Mohan Rao, M. Veerappa, R.P. Wadhwani, Advocates, with them) for the appearing parties.

The Judgments of the Court were delivered by

THOMMEN, J.— (*concurring*) Leave granted.

2. I have had the advantage of reading in draft the judgment of my learned brother Sahai, J. and I am in complete agreement with what he has stated. It is in support of his reasoning and conclusion that I add the following words.

3. A site near the Sankey's Tank in Rajamahal Vilas Extension in the City of Bangalore was reserved as an open space in an improvement scheme adopted under the City of Bangalore Improvement Act, 1945. This Act was repealed by Section 76 of the Bangalore Development Authority Act, 1976 (Karnataka Act 12 of 1976) (hereinafter referred to as the 'Act') which received the assent of the Governor on March 2, 1976 and is deemed to have come into force on December 20, 1975. By a notification issued under Section 3 of the Act, the government constituted the Bangalore Development Authority (the 'BDA'), thereby attracting Section 76 which, so far as it is material, reads:

"76. *Repeal and savings.*— (1) On the issue of the notification under sub-section (1) of Section 3 constituting the Bangalore Devel-

opment Authority, the City of Bangalore Improvement Act, 1945 (Mysore Act 5 of 1945) shall stand repealed.

(2) * * *

(3) * * *

Provided further that anything done or any action taken (including any appointment, notification, rule, regulation, order, *scheme* or bye-law made or issued, any permission granted) under the said Act shall be deemed to have been done or taken under the corresponding provisions *of this Act* and shall continue to be in force accordingly unless and until superseded by anything done or any action taken under this Act:

Provided also that any reference in any enactment or in any instrument to any provision of the repealed Act shall unless a different intention appears to be construed as a reference to the corresponding provisions of this Act.

(4) * * *"

(*emphasis supplied*)

Accordingly, the scheme prepared under the repealed enactment is deemed to have been prepared and duly sanctioned by the government in terms of the Act for the development of Rajamahal Vilas Extension. In the scheme so sanctioned the open space in question has been reserved for a public park.

4. However, pursuant to the orders of the State Government dated May 27, 1976 and June 11, 1976 and by its resolution dated July 14, 1976, the BDA allotted the open space in favour of the appellant, a medical trust, for the purpose of constructing a hospital. This site is stated to be the only available space reserved in the scheme for a public park or playground. This allotment has been challenged by the writ petitioners (respondents in this appeal) who are residents of the locality on the ground that it is contrary to the provisions of the Act and the scheme sanctioned thereunder, and the legislative intent to protect and preserve the environment by reserving open space for 'ventilation', recreation and playgrounds and parks for the general public. The writ petitioners, being aggrieved as members of the general public and residents of the locality, have challenged the diversion of the user and allotment of the site to private persons for construction of a hospital.

5. The learned Single Judge who heard the writ petition in the first instance found no merit in it and dismissed the same. He held that, a hospital being a civic amenity, the allotment of the site by the BDA in favour of the present appellant for the purpose of constructing a hospital was valid and in accordance with law. On appeal by the respondents (the

residents of the locality) the learned Judges of the Division Bench held that, the area having been reserved in the sanctioned scheme for a public park, its diversion from that object and allotment in favour of a private body was not permissible under the Act, even if the object of the allotment was the construction of a hospital. The learned Judges were not impressed by the argument that the proposed hospital being a civic amenity, the Act did not prohibit the abandonment of a public park for a private hospital. Accordingly, allowing the respondents' appeal and without prejudice to a fresh allotment by the BDA of any alternative site in favour of the present appellant, according to law, the writ petition was allowed and the allotment of the site in question was set aside.

6. The appellant's counsel submits that the learned Judges of the Division Bench exceeded their jurisdiction in setting aside an allotment which was purely an administrative action taken by the BDA pursuant to a valid direction issued by the government in that behalf. He submits that in the absence of any evidence of mala fide, the impugned decision of the BDA was impeccable and not liable to be interfered with in writ jurisdiction. He says that the decision to allot a site for a hospital rather than a park is a matter within the discretion of the BDA. The hospital, he says, is not only an amenity, but also a civic amenity under the Act, as it now stands, and the division of the user of the land for that purpose is justified under the Act.

7. The respondents, on the other hand, contend that it was improper to confer a largesse on a private party at the expense of the general public. The special consideration extended to the appellant, they say, was not permissible under the Act. To have allotted in favour of the appellant an area reserved for a public park, even if it be for the purpose of constructing a hospital, was to sacrifice the public interest in preserving open spaces for 'ventilation', recreation and protection of the environment.

8. The scheme is undoubtedly statutory in character. In view of the repealing provisions contained in Section 76 of the Act, which we have in part set out above, the impugned actions affecting the scheme will be examined with reference to the Act. The validity of neither the Act nor the scheme is doubted. The complaint of the writ petitioners (respondents) is that the scheme has been violated by reason of the impugned orders. The scheme, they point out, is a legitimate exercise of statutory power for the protection of the residents of the locality from the ill effects of urbanisation, and the impugned orders sacrificing open space reserved for a public park is an invalid and colourable exercise of power to suit private interest at the expense of the general public.

9. The Act, as enacted in 1976, has undergone several changes, but the definition of 'amenity' in clause (*b*) of Section 2 remains unchanged. 'Amenity' includes various 'conveniences' such as road, drainage, lighting etc. and such other conveniences as are notified as such by the government.

10. Section 2 was amended in 1984 by Karnataka Act 17 of 1984 to add clause (*bb*), after clause (*b*), which distinguished a 'civic amenity' from an 'amenity'. Certain amenities were specified as civic amenities, such as dispensaries, maternity homes etc. and those amenities which are notified as civic amenities by the government.

11. By Act 11 of 1988, clause (*bb*) of Section 2 was, w.e.f. April 21, 1984, substituted by the present clause which defines a civic amenity as, amongst others, a dispensary, a hospital, a pathological laboratory, a maternity home and such other amenity as the government may by notification, specify. Clauses (*b*) and (*bb*) of Section 2 read together show that all those conveniences which are enumerated, or, notified by the government under clause (*b*), are 'amenities'; and, all those amenities which are enumerated, or, notified by the government under clause (*bb*), are 'civic amenities'.

12. Significantly, a hospital is specifically stated to be a 'civic amenity'. The concept of 'amenity' under clause (*b*), however, remains unchanged. It is not clear from sub-clause (*i*) of clause (*bb*) whether a hospital which is not run by the government or a civic 'corporation' but, as in the present case, by a private body, would qualify as 'civic amenity'. Nor is it clear whether a hospital was either an 'amenity' or a 'civic amenity' until it was specifically stated to be the latter by the Amendment Act 11 of 1988. The respondents (residents) contend that a hospital did not have the status of an 'amenity' and much less a 'civic amenity' until Act 11 of 1988 so stated. But perhaps the appellant rightly contends that Act 11 of 1988 was merely clarificatory of what was always the position, and the hospital has always been regarded as an 'amenity', if not a 'civic amenity'. However, on the facts of this case, it is unnecessary to pursue this point further. Nor is it necessary to consider whether a privately owned and managed hospital, as in the present case, is an 'amenity' for the purpose of the Act.

13. The question really is whether an open space reserved for a park or playground for the general public, in accordance with a formally approved and published development scheme in terms of the Act, can be allotted to a private person or a body of persons for the purpose of constructing a hospital? Do the members of the public, being residents of the locality, have a right to object to such diversion of the user of the

space and deprivation of a park meant for the general public and for the protection of the environment? Are they in law aggrieved by such diversion and allotment? To ascertain these points, we must first look at the relevant provisions of the Act.

14. Chapter III of the Act deals with 'development schemes'. The BDA is empowered to draw up detailed schemes for the development of the Bangalore Metropolitan Area. It may, with the previous approval of the government, undertake from time to time any work for such development and incur expenditure therefor. The government is also empowered to require the BDA to take up any development scheme or work and execute the same, subject to such terms and conditions as may be specified by the government (See Section 15). Section 16 provides that such development schemes must provide for various matters, such as acquisition of land, laying and re-laying of land, construction and reconstruction of buildings, formation and alteration of streets, drainage, water supply and electricity. In 1984 this section was amended by Act 17 of 1984 by inserting clause (*d*) so as to provide for compulsory reservation of portions of the layout for public parks and playgrounds and also for civic amenities. Section 16(1)(*d*) provides:

> "16. *Particulars to be provided for in a development scheme.*— Every development scheme under Section 15,—
>
> (1) shall, within the limits of the area comprised in the scheme, provide for:
>
> (*d*) the reservation of not less than *fifteen per cent* of the total area of the layout for *public parks and playgrounds* and an additional area of not less than ten per cent of the total area of the layout for *civic amenities*."

This provision thus treats 'public parks and playgrounds' as a different and separate amenity or convenience from a 'civic amenity'. 15 per cent and 10 per cent of the total area of the layout must respectively be reserved for (1) public parks and playgrounds, and, (2) for civic amenities. The extent of the areas reserved for these two objects are thus separately and distinctly stated by the statute. The implication of this conceptual distinction is that land reserved for a public park and playground cannot be utilised for any 'civic amenity' including a hospital.

Section 16(2) says:

> "16. (2) may, within the limits aforesaid, provide for—
>
> (*a*) * * *
>
> (*b*) forming open spaces for the better ventilation of the area comprised in the scheme or any adjoining area;

(*c*) * * *"

The need for open space for 'better ventilation' of the area is thus emphasised by this provision. One of the main objects of public parks or playgrounds is the promotion of the health of the community by means of 'ventilation' and recreation. It is the preservation of the quality of life of the community that is sought to be protected by means of these regulations.

15. Section 17 lays down the procedure to be followed on completion of a development scheme. It deals with, amongst other things, the method of service of notice on affected parties. Section 18 deals with the procedure for sanctioning the scheme. The BDA must submit to the government the scheme together with the particulars such as plans, estimates, details of land to be acquired etc. and also representations, if any, received from persons affected by the scheme. On consideration of the proposed scheme, the government is empowered under sub-section (3) of Section 18 to accord its sanction for the scheme.

16. Section 19 says that when necessary sanction is accorded by the government, it should publish in the official Gazette a declaration as to the sanction accorded and the land proposed to be acquired for the scheme. Sub-section (4) of Section 19 says:

> "19. (4) If at any time it appears to the Authority that an improvement can be made in any part of the scheme, the Authority may alter the scheme for the said purpose and shall subject to the provisions of sub-sections (5) and (6) forthwith proceed to execute the scheme as altered."

This means that the BDA may, subject to certain restrictions contained in sub-sections (5) and (6), alter the scheme, but such alteration has to be carried out pursuant to a formal decision duly recorded in the manner generally followed by a body corporate. The scheme is a statutory instrument which is administrative legislation involving a great deal of general law making of universal application, and it is not, therefore, addressed to individual cases of persons and places. Alteration of the scheme must be for the purpose of improvement and better development of the city of Bangalore and adjoining areas and for general application for the benefit of the public at large. Any alteration of the scheme with a view to conferring a benefit on a particular person, and without regard to the general good of the public at large, is not an improvement contemplated by the section. See the principle stated in *Shri Sitaram Sugar Company Limited* v. *Union of India*[1] et seq.

17. Section 30 has not been amended, and, so far as it is material, reads:

1 (1990) 3 SCC 223: (1990) 1 SCR 909, 937

* * *

"30. *Streets on completion to vest in and be maintained by Corporation.*— a

(2) Any open space including such *parks and playgrounds* as may be notified by the Government reserved for *ventilation* in any part of the area under the jurisdiction of the Authority as part of any development scheme sanctioned by the Government shall be transferred on completion to the Corporation for maintenance at the b expense of the Corporation and shall thereupon vest in the Corporation." (*emphasis supplied*)

Sub-section (2) of this section thus refers to open space, including parks and playgrounds, notified by the government as reserved for 'ventilation'. Section 31 prohibits transfer by sale or otherwise of sites for the purpose c of construction of buildings until all the improvements specified in Section 30, including parks and playgrounds, have been provided for in the estimates. Section 32 prohibits any person from forming any extension or layout for the purpose of construction of buildings without specific sanction of the BDA. Section 33 has empowered the Commissioner of the d BDA to order alteration or demolition of buildings constructed otherwise than in conformity with the sanction of the BDA. These provisions have not undergone any material change.

18. Chapter V of the Act deals with property and finance of the e BDA. Section 38 reads:

"38. *Power of authority to lease, sell or transfer property.*— Subject to such restrictions, conditions and limitations as may be prescribed, the Authority shall have power to lease, sell or otherwise transfer any movable or immovable property which belongs to it, f and to *appropriate or apply any land vested in or acquired by it for the formation of open spaces* or for building purposes or in any other manner for the purpose of any development scheme."

(emphasis supplied)

This section also has not undergone any material change. It says that, g subject to such restrictions, conditions etc., as may be prescribed, the BDA has the power to lease, sell or otherwise transfer any movable or immovable property which belongs to it, and to appropriate or apply any land vested in it or acquired by it for the formation of 'open spaces' or for building purposes or in any other manner for the purpose of any devel- h opment scheme. This implies that land once appropriated or applied or earmarked by formation of 'open spaces' or for building purposes or other development in accordance with a duly sanctioned scheme should not be used for any other purpose unless the scheme itself, which is statutory in character, is formally altered in the manner that the BDA as i

a body corporate is competent to alter. This section, of course, empowers the BDA to lease or sell or otherwise transfer any property. But that power has to be exercised consistently with the appropriation or application of land for formation of 'open spaces' or for building purposes or any other development scheme sanctioned by the government. Property reserved for open space in a duly sanctioned scheme cannot be leased or sold away unless the scheme itself is duly altered. Any unauthorised deviation from the duly sanctioned scheme by sacrificing the public interest in the preservation and protection of the environment by means of open space for parks and playgrounds and 'ventilation' will be contrary to the legislative intent, and an abuse of the statutory power vested in the authorities. That this is the true legislative intent is left in no doubt by the subsequent amendment by Act 17 of 1984, inserting Section 38-A, which reads:

> "38-A. *Prohibition of the use of area reserved for parks, playgrounds and civic amenities for other purposes.*— The Authority shall not sell or otherwise dispose of any area *reserved for public parks and playgrounds* and civic amenities for any other purpose and any *disposition* so made shall be *null and void*." (*emphasis supplied*)

This amendment of 1984, which came into force on April 17, 1984, is merely clarificatory of what has always been the legislative intent. The new provision clarifies that it shall not be open to the BDA to dispose of any area reserved for public parks and playgrounds and civic amenities. Any such site cannot be diverted to any other purpose. Any action in violation of this provision is null and void.

19. The legislative intent to prevent the diversion of the user of an area reserved for a public park or playground or civic amenity is reaffirmed by the Bangalore Development Authority (Amendment) Act, 1991 (Karnataka Act 18 of 1991) which came into force w.e.f. January 16, 1991, and which substituted a new Section 38-A in the place of the earlier provision inserted by Act 17 of 1984. Section 2 of the Karnataka Act 18 of 1991 reads:

> "2. *Substitution of Section 38-A.*— For Section 38-A of the Bangalore Development Authority Act, 1976 (Karnataka Act 12 of 1976) (hereinafter referred to as the principal Act), the following shall be deemed to have been substituted with effect from the twenty-first day of April, 1984, namely:
>
> '38-A. *Grant of area reserved for civic amenities etc.*— (1) The Authority shall have the power to lease, sell or otherwise transfer any area reserved for civic amenities for the purpose for which such area is reserved.

(2) The Authority shall not sell or otherwise dispose of any area reserved for public parks and playgrounds and civic amenities, for any other purpose and any disposition so made shall be null and void:

Provided that where the allottee commits breach of any of the conditions of allotment, the Authority shall have right to resume such site after affording an opportunity of being heard to such allottee."

This new Section 38-A, as clarified in the Statement of Objects and Reasons and in the Explanatory Statement attached to L.A. Bill 6 of 1991, removed the prohibition against lease or sale or any other transfer of any area reserved for a civic amenity, provided the transfer is for the same purpose for which the area has been reserved. This means that once an area has been stamped with the character of a particular civic amenity by reservation of that area for purpose, it cannot be diverted to any other use even when it is transferred to another party. The rationale of this restriction is that the scheme once sanctioned by the government must operate universally and the areas allocated for particular objects must not be diverted to other objects. This means that a site for a school or hospital or any other civic amenity must remain reserved for that purpose, although the site itself may change hands. This is the purpose of sub-section (1) of Section 38-A as now substituted. Sub-section (2) of Section 38-A, on the other hand, emphasises the conceptual distinction between 'public parks and playgrounds' forming one category of 'space' and 'civic amenities' forming another category of sites. While public parks and playgrounds cannot be parted with by the BDA for transfer to private hands by reason of their statutory dedication to the general public, other areas reserved for civic amenities may be transferred to private parties for the specific purposes for which those areas are reserved. There is no prohibition, as such, against transfer of open spaces reserved for public parks or playgrounds, whether or not for consideration, but the transfer is limited to public authorities and their user is limited to the purposes for which they are reserved under the scheme. The distinction is that while public parks and playgrounds are dedicated to the public at large for common use, and must therefore remain with the State or its instrumentalities, such as the BDA or a Municipal Corporation or any other authority, the civic amenities are not so dedicated, but only reserved for particular or special purposes. This restriction against allotment of public parks and playgrounds is further emphasised by Section 3 of the Karnataka Act 18 of 1991 which reads:

"3. *Validation of allotment of civic amenity sites.*— Notwithstanding anything contained in any law or judgment, decree or order

of any court or other authority, any allotment of civic amenity site by way of sale, lease or otherwise made by the Authority after the twenty-first day of April, 1984, and before the seventh day of May, 1988 for the purposes specified in clause (*bb*) of Section 2 of the principal Act, shall, if such site has been made use of for the purpose for which it is allotted, be deemed to have been validly made and shall have effect for all purposes as if it had been made under the principal Act, as amended by this Act and accordingly:—

(*i*) all acts or proceedings, or things done or allotment made or action taken by the Authority shall, for all purposes be deemed to be and to have always been done or taken in accordance with law; and

(*ii*) no suit or other proceedings shall be instituted, maintained or continued in any court or before any authority for cancellation of such allotment or demolition of buildings constructed on the sites so allotted after obtaining building licences from the Authority or the local authority concerned or for questioning the validity of any action or things taken or done under Section 38-A of the principal Act, as amended by this Act and no court shall enforce or recognise any decree or order declaring any such allotment made, action taken or things done under the principal Act, as invalid."

The evil that was sought to be remedied by the validation provision is in regard to allotment of "civic amenity sites", and not public parks or playgrounds (see also the Explanatory Statement attached to the Bill). All these provisions unmistakably point to the legislative intent to preserve a public park or public playground in the hands of the general public, as represented by the BDA or any other public authority, and thus prevent private hands from grabbing them for private ends. It must also be stated here that the validation clause relates to the period between April 21, 1984 and May 7, 1988 which was long after the impugned allotment.

20. Section 65 empowers the government to give such directions to the BDA as are, in its opinion, necessary or expedient for carrying out the purposes of the Act. It is the duty of the BDA to comply with such directions. It is contended that the BDA is bound by all directions of the government, irrespective of the nature or purpose of the directions. We do not agree that the power of the government under Section 65 is unrestricted. The object of the directions must be to carry out the object of the Act and not contrary to it. Only such directions as are reasonably necessary or expedient for carrying out the object of the enactment are contemplated by Section 65. If a direction were to be issued by the government to lease out to private parties areas reserved in the scheme for

public parks and playgrounds, such a direction would not have the sanctity of Section 65. Any such diversion of the user of the land would be opposed to the statute as well as the object in constituting the BDA to promote the healthy development of the city and improve the quality of life. Any repository of power — be it the government or the BDA — must act reasonably and rationally and in accordance with law and with due regard to the legislative intent.

21. It is contended on behalf of the appellant that Section 38-A prohibiting sale or any other disposal of land reserved for 'public parks or playgrounds', and Section 16(1)(*d*) requiring that 15 per cent of the total area of the layout be reserved for public parks and playgrounds, and an additional area of not less than 10 per cent of the total area of the layout for civic amenities, were enacted subsequent to the relevant orders of the government dated May 27, 1976 and June 11, 1976 and the resolution of the BDA dated July 14, 1976 resulting in the allotment of the site in favour of the appellant. Counsel says that at the material time when the government made these orders and the BDA acted upon them there was no restriction on the diversion of the user of land reserved for a public park or playground to any other purpose.

22. Significantly, the original scheme, duly sanctioned under the Act, includes a public park and the land in question has been reserved exclusively for that purpose. Although it is open to the BDA to alter the scheme, no alteration has been made in the manner contemplated by Section 19(4). It is, however, true that certain steps had been taken by the government and the BDA to allot the open space in question to the appellant. My learned brother Sahai, J. has referred to the letter dated April 21, 1976 addressed by the Chairman of the BDA to the Chief Minister and the endorsement made by the Chief Minister on that letter as well as the orders of the government dated May 27, 1976 and June 11, 1976 sanctioning conversion of the low level park into a civic amenity site and allotting the same to the appellant. These orders were followed by a resolution adopted by the BDA on July 14, 1976 reading as follows:

> "393. Allotment of C.A. site to Bangalore Medical Trust for construction of Hospital in Rajamahal Vilas Extension.
>
> * * *
>
> It was resolved—
>
> 'The Government Order No. HMA 249 MNG 76 Bangalore dated June 17, 1976 regarding allotment of C.A. site situated next to the land allotted to H.K.E. Society in Rajamahal Vilas Extension, Bangalore, in favour of Bangalore Medical Trust for construction of hospital to read and recorded with confirmation for further action in the matter'."

These documents leave no doubt that the action of the government and the BDA resulting in the resolution dated July 14, 1976 have been inspired by individual interests at the costs and to the disadvantage of the general public. Public interest does not appear to have guided the minds of the persons responsible for diverting the user of the open space for allotment to the appellant. Conversion of the open space reserved for a park for the general good of the public into a site for the construction of a privately owned and managed hospital for private gains is not an alteration for improvement of the scheme as contemplated by Section 19, and the impugned orders in that behalf are a flagrant violation of the legislative intent and a colourable exercise of power. In the circumstances, it has to be concluded that no valid decision has been taken to alter the scheme. The scheme provides for a public park and the land in question remains dedicated to the public and reserved for that purpose. It is not disputed that the only available space which can be utilised as a public park or playground and which has been reserved for that purpose is the space under consideration.

23. The scheme is meant for the reasonable accomplishment of the statutory object which is to promote the orderly development of the city of Bangalore and adjoining areas and to preserve open spaces by reserving public parks and playgrounds with a view to protecting the residents from the ill-effects of urbanisation. It meant for the development of the city in a way that maximum space is provided for the benefit of the public at large for recreation, enjoyment, 'ventilation' and fresh air. This is clear from the Act itself as it originally stood. The amendments inserting Section 16(1)(*d*), 38-A and other provisions are clarificatory of this object. The very purpose of the BDA, as a statutory authority, is to promote the healthy growth and development of the city of Bangalore and the areas adjacent thereto. The legislative intent has always been the promotion and enhancement of the quality of life by preservation of the character and desirable aesthetic features of the city. The subsequent amendments are not a deviation from or alteration of the original legislative intent, but only an elucidation or affirmation of the same.

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 makes the guaranteed rights a reality for all the citizens.[2]

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.[3]

26. In *Agins* v. *City of Tiburon*[4], 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

2 See *Kharak Singh* v. *State of U.P.*, (1964) 1 SCR 332: AIR 1963 SC 1295: (1963) 2 Cri LJ 329; *Municipal Council, Ratlam* v. *Vardhichand*, (1980) 4 SCC 162: 1980 SCC (Cri) 933: (1981) 1 SCR 97; *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi*, (1981) 1 SCC 608: 1981 SCC (Cri) 212: (1981) 2 SCR 516; *Olga Tellis* v. *Bombay Municipal Corporation*, (1985) 3 SCC 545; *State of H.P.* v. *Umed Ram Sharma*, (1986) 2 SCC 68: AIR 1986 SC 847 and *Vikram Deo Singh Tomar* v. *State of Bihar*, 1988 Supp SCC 734: 1989 SCC (Cri) 66: AIR 1988 SC 1782

3 *See for e.g* : Karnataka Town and Country Planning Act, 1961; Maharashtra Regional and Town Planning Act, 1966; Bombay Town Planning Act, 1954; the Travancore Town and Country Planning Act, 1120; the Madras Town Planning Act, 1920; and the rules framed under these statutes; Town and Country Planning Act, 1971 (England and Wales); *Encyclopaedia Americana*, Volume 22, page 240; *Encyclopaedia of the Social Sciences*, Volume XII at page 161; *Town Improvement Trusts in India*, 1945 by Rai Sahib Om Prakash Aggarawala, p. 35 et seq.; *Halsbury's Statutes*, 4th edn., p. 17 *et seq.* and *Journal of Planning and Environment Law*, 1973, p. 130 *et seq*. *See also*: *Penn Central Transportation Company* v. *City of New York*, 57 L Ed 2d 631 : 438 US 104 (1978); *Village of Belle Terre* v. *Bruce Boraas*, 39 L Ed 2d 797 : 416 US 1 (1974); *Village of Euclid* v. *Ambler Realty Company*, 272 US 365 (1926); *Halsey* v. *Esso Petroleum Co. Ltd.*, (1961) 1 WLR 683

4 447 US 255 (1980)

development of residential property with provision for open-space areas."[5]

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*[6]: (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.).

28. Any reasonable legislative attempt bearing a rational relationship to a permissible State objective in economic and social planning will be respected by the courts. A duly approved scheme prepared in accordance with the provisions of the Act is a legitimate attempt on the part of the government and the statutory authorities to ensure a quiet place free of dust and din where children can run about and the aged and the infirm can rest, breathe fresh air and enjoy the beauty of nature. These provisions are meant to guarantee a quiet and healthy atmosphere to suit family needs of persons of all stations. Any action which tends to defeat that object is invalid. As stated by the U.S. Supreme Court in *Village of Belle Terre* v. *Bruce Boraas*[7]: (L Ed p. 804 : US p. 9)

> "... The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."

5 See comments on this decision by Thomas J. Schoenbaum, *Environmental Policy Law*, (1985) p. 438 *et seq.* See also Summary and Comments, (1980) 10 ELR 10125 et seq.

6 99 L Ed 27 : 348 US 26

7 39 L Ed 2d 797 : 416 US 1

See also *Village of Euclid* v. *Ambler Realty Company*[8]. See the decision of the Andhra Pradesh High Court in *T. Damodhar Rao* v. *Special Officer, Municipal Corporation of Hyderabad*[9].

29. The residents of the locality are the persons intimately, vitally and adversely affected by any action of the BDA and the government which is destructive of the environment and which deprives them of facilities reserved for the enjoyment and protection of the health of the public at large. The residents of the locality, such as the writ petitioners, are naturally aggrieved by the impugned orders and they have, therefore, the necessary *locus standi*.

30. In the circumstances, we are of the view that, apart from the fact that the scheme has not been validly altered by the BDA, it was not open to the government in terms of Section 65 to give a direction to the BDA to defy the very object of the Act.

31. The impugned orders of the government dated May 27, 1976 and June 11, 1976 and the consequent decision of the BDA dated July 14, 1976 are inconsistent with, and contrary to, the legislative intent to safeguard the health, safety and general welfare of the people of the locality. These orders evidence a colourable exercise of power, and are opposed to the statutory scheme.

32. The impugned orders and the consequent action of the BDA in allotting to private persons areas reserved for public parks and playgrounds and permitting construction of buildings for hospital thereon are, in the circumstances, declared to be null and void and of no effect.

R.M. SAHAI, J.— Public park or private nursing home which serves public interest better, is itself an interesting issue in this appeal directed against order of the Karnataka High Court, apart from if the conversion of the site from park to hospital was in accordance with law and whether a private hospital was an amenity or civic amenity under the Bangalore Development Authority Act (Act 12 of 1976) (in brief the Act) and in any case could it be considered as an improvement, under Section 19(4) of the Act, if so whether the authorities while doing so acted within the constraints of law.

34. Factual matrix is quite simple and plain. But before narrating it or entering into merits of various issues it is imperative to sort out at the threshold if a private nursing home with modern facilities and sophisticated instruments is more conducive to the public interest than a park as it was stressed that even if the conversion of the site suffered from any

8 272 US 365 (1926)
9 AIR 1987 AP 171

infirmity procedural or substantive the High Court should have refrained from exercising its extraordinary jurisdiction and that also in favour of those residents many of whom did not have their houses around the park and thus could not be placed in the category of persons aggrieved. It was also emphasised that the hospital with research centre and even free service being more important from social angle the inhabitants of the locality could not be said to suffer any injury much less substantial injury.

35. Locus standi to approach by way of writ petition and refusal to grant relief in equity jurisdiction are two different aspects, may be with same result. One relates to maintainability of the petition and other to exercise of discretion. 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 challenges with 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 busybodies or interlopers.[10] 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 of 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

10 *S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87: (1982) 2 SCR 365: AIR 1982 SC 149; *Akhil Bharatiya Soshit Karamchari Sangh (Rly.)* v. *Union of India*, (1981) 1 SCC 246: 1981 SCC (L&S) 50: AIR 1981 SC 298; *Fertilizer Corporation Kamgar Union* v. *Union of India*, (1981) 1 SCC 568: AIR 1981 SC 344

technicalities 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.

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 under Section 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.

37. Merits, too, raise issues of far-reaching importance. One of them being the efficacy of exercise of individualised discretion whether law or the rules contemplate participatory objective decision or conclusion. Another is the requirement of substantive fairness in dealings by government or local bodies or public institutions with people of any strata of society uniformly and equally. To begin with the factual setting in which the controversy arose it is undisputed that the City Improvement Board constituted under City of Bangalore Improvement Act, 1945, prepared the development scheme for bringing into existence an extension of the city of Bangalore which came to be known as the Palace Upper

Orchards/Sadashiv Nagar, and later came to be known as Rajamahal Vilas Extension. In this an area facing the Sankey tank, was earmarked for being developed as a low level park. In 1976 the Improvement Act was repealed and replaced by Act 12 of 1976 which came into force with effect from December 1975. Section 76 of the Act while repealing Improvement Act by Section 76 saved the scheme by proviso second to sub-section (3) of the section and provided that it shall be deemed to have been done under corresponding provisions of the Act. The Act received the assent in March 1976. And in the same month the Chairman of the Bangalore Development Authority received a communication from the Chief Minister of the State that the Bangalore Medical Trust, the appellant (referred as BMT) was keen to have the plot reserved for park as nursing home. On it the Chairman, without any meeting of any Committee or the Development Authority, wrote a letter to the Chief Minister on April 21, 1976, the contents of which are extracted below:

"No. PS. 56/76-77

Encl. One Blueprint

Respected sir,

Re: Grant of land to Bangalore Medical Trust for construction of a nursing home.

* * *

The Bangalore Medical Trust have applied to your goodself on March 30, 1976 for grant of vacant land situated next to that given to H.K.E. Society, Rajamahal Vilas Extension, on which you have passed orders 'Chairman, BDA — A suitable site for the proposed hospital building may be given'.

I herewith enclose a blueprint showing the location of the said plot, which they have requested. In the blueprint approved by the erstwhile City Improvement Trust Board, Bangalore, this site is marked as a low level park, which measures approximately 13,485 sq. yds. This is a low level area when compared to the surrounding ground level. The sponsors of Bangalore Medical Trust are very keen to secure this land for their use to construct a nursing home with eminent specialists to cater medical relief to the needy public.

In the first instance, it has to be approved by the government to convert this low level park as a civic amenity site. Secondly government has to approve the allotment of the said land to the Bangalore Medical Trust as a civic amenity site. Therefore, I seek your kind orders in the matter, how I should act.

With warm regards,

Yours sincerely

sd/-"

38. On it the Chief Minister made an endorsement in his own hand which reads as under:

"This area which was allowed to be kept for laying a park may be converted into CA site. Another similar bit kept for the same purpose has been given away for Education Society some years back. And this remaining area is said to be not suitable for park."

39. In consequence of the direction by the Chief Minister the government on May 27, 1976 converted the site from public park to a civic amenity. Copy of the order is extracted below:

"*Subject*: Grant of land to Bangalore Medical Trust for construction of a Nursing Home.

* * *

Order No. HMA 249 MNG 76 dated Bangalore May 27, 1976.

Read: Letter No. PS 56/76-77 dated April 21, 1976 from the Chairman, Bangalore Development Authority, Bangalore.

Preamble:

The Chairman, Bangalore Development Authority has requested for sanction of government to the conversion of the low level park, next to the land allotted to the HKE Society, in Rajamahal Vilas Extension as a CA site and to the allotment of the said site to the Bangalore Medical Trust for the construction of a Nursing Home.

Order

Sanction is accorded to the conversion of the low level park, situated next to the land allotted to the H.K.E. Society in Rajamahal Vilas Extension, Bangalore as a civic amenity site.

By order and in the name of the Governor of Karnataka

sd/-

(S.R. Shankaranarayana Rao)

I/c Under Secretary to Government

Health and Municipal Admn. Deptt."

40. It was followed by another order dated June 17, 1976, sanctioning the lease to the BMT. The order reads as under:

"*Subject*: Allotment of a CA site to Bangalore Medical Trust for construction of a hospital.

* * *

Order No. HMA 249 MNG 76, Bangalore dated June 17, 1976.

* * *

Read: (1) Govt. Order No. PLM 18 MNG 64 dated March 17, 1964.

(2) Govt. Order No. HMA 249 MNG 76 dated May 27, 1976.

(3) Letter No. PS 132/76-77 dated June 1, 1976 from the Chairman, Bangalore Development Authority, Bangalore.

Preamble:

Sanction was accorded to convert a low level park situated next to the land allotted to HKE Society in Rajamahal Vilas Extension, Bangalore vide government order read at (2) above.

Now the Chairman, Bangalore Development Authority requests for lease of the aforesaid Civic Amenity Site to the Bangalore Medical Trust, Bangalore.

Order

Sanction is accorded to the lease of civic amenity site situated next to the land allotted to HKE Society in Rajamahal Vilas Extension Bangalore to the Bangalore Medical Trust for construction of hospital with conditions of lease as detailed in the Govt. Order No. PLM 18 MNG 64, dated March 17, 1964.

The trust should strictly adhere to the condition No. 7 of the lease and should complete the building well within 3 years.

By Order and in the name of Governor of Karnataka

sd/-

(K.G. Rajanna)

Under Secretary to Government

Health and Municipal Admn. Deptt."

41. On July 14 the Bangalore Development Authority (hereinafter referred as BDA) completed the formality by passing the resolution and allotting the site to the BMT. The resolution reads as under:

"The Government Order No. HMA 249 MNG 76 Bangalore dated June 17, 1976 regarding allotment of CA site situated next to the land allotted to HKE Society in Rajamahal Vilas Extension, Bangalore in favour of Bangalore Medical Trust for construction of hospital be read and recorded with confirmation for further action in the matter."

42. On coming to know of the allotment in 1981, when some construction activity was noticed by the residents, they approached the High Court by way of writ petition on which the learned Single Judge framed two issues:

"(1) Whether the land had become the property of the Corporation and therefore the allotment of land by the BDA in favour of respondent 4 was illegal and invalid?

(2) Even assuming that the ownership of the land had not been transferred to the Corporation, whether the action of the BDA in allotting the land, originally earmarked for a park, for construction of a nursing home and a hospital, to respondent 4 is illegal and invalid?"

43. Both the issues were answered in the negative. On the first it was held that even though building and street etc. were transferred to the Corporation by the State Government by a notification issued under Section 23(1) of the Act no such notification under sub-section (2) of Section 23 was issued in respect of open space etc. therefore the site reserved for public park did not vest in the Corporation and it continued with the BDA which could deal with it. The finding was affirmed by the Division Bench as well. Its correctness was not assailed by the respondents, in this Court. As regards the second question the learned Judge while agreeing with the Division Bench in *Holy Saint Education Society* v. *Venkataramana*[11], that:

"a site reserved for children's playground under the scheme prepared under the City Improvement Act when came to be vested in the Corporation, it was under a duty to retain it as such and it had no authority to divert it for any other use or grant it to a private person or organisation"

held that the ratio was not helpful as,

"both under the provisions of the City Improvement Act and the BDA Act, the CIT or the BDA, as the case may be, had the authority to improve the scheme by making alteration in the scheme and in exercise of the said power, the purpose for which any space was reserved, could be changed and after such change is effected the land could be disposed of for the purpose for which it is earmarked after such change."

The Judge held that since the site reserved for public park was converted under order of the government it was not possible to hold that the land in question was reserved for a park. It was further held, that,

"since only notification allotting the site was challenged and not the conversion of site from public park to private nursing home and once the scheme was altered and the area reserved for park was converted to be an area reserved for civic amenity the contention of the petitioners that the BDA had allotted the site for a purpose other than to which the land was reserved, had no basis at all for the

[11] ILR (1982) 1 Kant 1

fact that after alteration brought about by government under order dated March 27, 1976, the site in question was only reserved for a civic amenity generally and not for a park specially."

44. Two other subsidiary submissions which in fact are now the principal issues, "that the BDA had no power to alter the scheme, and in any event a site reserved for a civic amenity could not have been allotted for construction of a hospital" also did not find favour as the scheme could be altered under Section 19(4) of the Act and it was done with approval of State Government. In appeal the Division Bench after examining inclusive definition of civic amenity in Section 2(*bb*), added in 1984, amended with retrospective effect in 1988 held that a hospital could not be considered to be an amenity in 1976 as,

> "public amenity civic or otherwise to be a public convenience for purposes of the BDA Act, the government has to notify. If it does not specify whatever may otherwise be a public convenience will not be a civic amenity or amenity under clauses (*bb*) and (*b*) of Section 2 respectively for purposes of the BD Act."

The bench further held that in allowing the site to the BMT largesse was conferred on it in utter violation of law and rules.

45. Did the Division Bench commit any error of law? Was the conversion of site in accordance with law? Were any of the authorities aware or apprised of the provisions under which they could convert a site reserved for public park into a nursing home? Did the authorities care to ascertain the provisions of law or rules under which they could act? Was any precaution taken by the Chief Executive of the State to adhere to legislative requirement of altering any scheme. Not in the least. The direction of the Chief Minister, the apex public functionary of the State, was in breach of public trust, more like a person dealing with his private property than discharging his obligation as head of the State administration in accordance with law and rules. The government record depicted even more distressing picture. The role of the administration was highly disappointing. In their notings even a show of awareness of law and fact was missing. This culture of public functionary, adorning highest office in the State of being law to himself and the administration acting on dictate, for whatever reason disturbs the balance of rule of law. What is more shocking is that this happened in 1976 and not even one out of various departments from which the papers were routed through raised any objection. And the statutory body like BDA with impressive members too succumbed under the pressure without, even, a murmur.

46. Financial gain by a local authority at the cost of public welfare has never been considered as legitimate purpose even if the objective is laudable. Sadly the law was thrown to winds for a private purpose. The

extract of the Chief Minister's order quoted in the letter of Chairman of the BDA leaves no doubt that the end result having been decided by the highest executive in the State the lower in order of hierarchy only followed with 'ifs' and 'buts' ending finally with resolution of BDA which was more or less a formality. Between April 21 and July 14, 1976, that is less than ninety days, the machinery in BDA and government moved so swiftly that the initiation of the proposal by the appellant, a rich trust with 90,000 dollars in foreign deposits, query on it by the Chief Minister of the State, guidance of way out by the Chairman, direction on it by the Chief Minister, orders of Government resolution by the BDA and allotment were all completed and the site for public park stood converted into site for private nursing home without any intimation direct or indirect to those who were being deprived of it. Speedy or quick action in public institutions call for appreciation but our democratic system shuns exercise of individualised discretion in public matters requiring participatory decision by rules and regulations. No one howsoever high can arrogate to himself or assume without any authorisation express or implied in law a discretion to ignore the rules and deviate from rationality by adopting a strained or distorted interpretation as it renders the action ultra vires and bad in law. Where the law requires an authority to act or decide, 'if it appears to it necessary' or if he is 'of opinion that a particular act should be done' then it is implicit that it should be done objectively, fairly and reasonably. Decisions affecting public interest or the necessity of doing it in the light of guidance provided by the Act and rules may not require intimation to person affected yet the exercise of discretion is vitiated if the action is bereft of rationality, lacks objective and purposive approach. The action or decision must not only be reached reasonably and intelligibly but it must be related to the purpose for which power is exercised. The purpose for which the Act was enacted is spelt out from the Preamble itself which provides for establishment of the Authority for development of the city of Bangalore and areas adjacent thereto. To carry out this purpose the development scheme framed by the Improvement Trust was adopted by the Development Authority. Any alteration in this scheme could have been made as provided in sub-section (4) of Section 19 only if it resulted in improvement in any part of the scheme. As stated earlier a private nursing home could neither be considered to be an amenity nor it could be considered improvement over necessity like a public park. The exercise of power, therefore, was contrary to the purpose for which it is conferred under the statute.

47. Was the exercise of discretion under sub-section (4) of Section 19 in violation or in accordance with the norm provided in law. For proper appreciation the sub-section is extracted below:

"19. (4) If at any time it appears to the Authority that an improvement can be made in any part of the scheme, the Authority may alter the scheme for the said purpose and shall subject to the provisions of sub-sections (5) and (6) forthwith proceed to execute the scheme as altered."

This legislative mandate enables the Authority to alter any scheme. Existence of power is thus clearly provided for. What is the nature of this power and the manner of its exercise? It is obviously statutory in character. The legislature took care to control the exercise of this power by linking it with improvement in the scheme. What is an improvement or when any change in the scheme can be said to be improvement is a matter of discretion by the authority empowered to exercise the power. In modern State activity discretion with executive and administrative agency is a must for efficient and smooth functioning. But the extent of discretion or constraints on its exercise depends on the rules and regulations under which it is exercised. Sub-section (4) of Section 19 not only defines the scope and lays down the ambit within which the discretion could be exercised but it envisages further the manner in which it could be exercised. Therefore, any action or exercise of discretion to alter the scheme must have been backed by substantive rationality flowing from the section. Public interest or general good or social betterment have no doubt priority over private or individual interest but it must not be a pretext to justify the arbitrary or illegal exercise of power. It must withstand scrutiny of the legislative standard provided by the statute itself. The authority exercising discretion must not appear to be impervious to legislative directions. From the extracts of correspondence between the Chairman and the Chief Minister it is apparent that neither of them cared to look into the provisions of law. It was left to the learned Advocate General to defend it, as a matter of law, in the High Court. There is no whisper anywhere if it was ever considered, objectively, by any authority that the nursing home would amount to an improvement. Whether the decision would have been correct or not would have given rise to different consideration. But here it was total absence of any effort to do so. Even in the reply filed on behalf of BDA in the High Court which appears more a legal jugglery than statement of facts bristling with factual inaccuracies there is no mention of it. The extent of misleading averments for purpose of creating erroneous impressions on the court shall be clear from the statement contained in paragraph 1 of the affidavit relevant portion of which is extracted below:

"Respondent 4 had made an application for grant of land for purpose of constructing a nursing home. This application was made also to this respondent. Considering the fact that the medical

facilities available in Bangalore were meagre and were required to be supplemented by charitable medical institutions, this authority was required to ascertain whether a suitable site could be given for the hospital building of respondent 4. Upon scrutiny of the Rajamahal Vilas Extension, as early as in 1976, the area in question which had been marked as a low level park measuring 13,485 sq. yards was found suitable to cater to the medical relief to the needy public. However, since the said area had been marked as a low level park, it was necessary to convert the said low level park as civic amenity site. Furthermore, it is essential that the government had to approve allotment of the site to respondent 4 as a civic amenity site. There are proceedings before respondent 1 in relation to allotment of site to public institutions. Under the recommendations which have been made, it was decided that plots could be allotted to public institutions subject to certain conditions."

It was this statement which resulted in erroneous finding by the learned Single Judge to the effect:

> "Therefore, it is clear that though at the time of preparation of the scheme, formation of a park was considered in the interest of the general public, nothing prevents the BDA from taking the view that the construction of a hospital to provide medical facilities to the general public is necessary and therefore, the area earmarked for park should be converted into a civic amenity site. It is in exercise of this power, the BDA decided to convert the area reserved for park into a civic amenity site so as to enable its disposal in favour of respondent 4, for construction of a hospital. Though Section 19(4) does not expressly require the taking of the approval of the government for such alteration, the approval was necessary as the original scheme in which the area was reserved for a park had been approved by the government. Therefore, the BDA considered appropriate, and in my opinion rightly, to seek the approval of the government for making such conversion. The State Government accorded sanction for the conversion. Therefore, the conversion was in accordance with law."

The averment in the affidavit of the BDA that an application was made before it could not be substantiated. Nor it could be established that the BDA or any of its committees ever took into consideration that medical facilities were meagre in the city of Bangalore. Such misleading statements call for serious condemnation. No further comment is needed except that the public institutions should be cautious and must not give impression of taking sides. It is destructive of fairness. The then Chairman's letter in 1976 extracted above was forthright whereas the stand of BDA in 1983 appears to be crude effort to support the executive action. No record was produced to substantiate the averments. It was

necessary as it was not in harmony with the correspondence extracted earlier. The statement by the counsel for the BDA that the records were not traceable was not satisfactory. The executive or the administrative authority must not be oblivious that in a democratic set up the people or community being sovereign the exercise of discretion must be guided by the inherent philosophy that the exerciser of discretion is accountable for his action. It is to be tested on anvil of rule of law and fairness or justice particularly if competing interests of members of society is involved. Was this adhered to by any of the authorities? Unfortunately not.

48. Much was attempted to be made out of exercise of discretion in converting a site reserved for amenity as a civic amenity. Discretion is an effective tool in administration. But wrong notions about it results in ill-conceived consequences. In law it provides an option to the authority concerned to adopt one or the other alternative. But a better, proper and legal exercise of discretion is one where the authority examines the fact, is aware of law and then decides objectively and rationally what serves the interest better. When a statute either provides guidance or rules or regulations are framed for exercise of discretion then the action should be in accordance with it. Even where statutes are silent and only power is conferred to act in one or the other manner, the Authority cannot act whimsically or arbitrarily. It should be guided by reasonableness and fairness. The legislature never intends its authorities to abuse the law or use it unfairly. When legislature enacted sub-section (4) it unequivocally declared its intention of making any alteration in the scheme by the Authority, that is, BDA and not the State Government. It further permitted interference with the scheme sanctioned by it only if it appeared to be improvement. The facts, therefore, that were to be found by the Authority were that the conversion of public park into private nursing home would be an improvement in the scheme. Neither the Authority nor the State Government undertook any such exercise. Power of conversion or alteration in scheme was taken for granted. Amenity was defined in Section 2(*b*) of the Act to include road, street, lighting, drainage, public works and such other conveniences as the government may, by notification, specify to be an amenity for the purposes of this Act. The Division Bench found that before any other facility could be considered amenity it was necessary for State Government to issue a notification. And since no notification was issued including private nursing home as amenity it could not be deemed to be included in it. That apart the definition indicates that the convenience or facility should have had public characteristic. Even if it is assumed that the definition of amenity being inclusive it should be given a wider meaning so as to include hospital added in clause 2(*bb*) as a civic amenity with effect from

1984 a private nursing home unlike a hospital run by government or local authority did not satisfy that characteristic which was necessary in the absence of which it could not be held to be amenity or civic amenity. In any case a private nursing home could not be considered to be an improvement in the scheme and, therefore, the power under Section 19(4) could not have been exercised.

49. Manner in which power was exercised fell below even the minimum requirement of taking action on relevant considerations. A scheme could be altered by the Authority as defined under Section 3 of the Act. It is a body corporate under Section 3 consisting of the Chairman and experts on various aspects, namely, a finance member, an engineer, a town planner, an architect, the ex-officio members such as Commissioner of Corporation of the City of Bangalore, officer of the Secretariat and elected members for instance, two persons of the State legislature, one a woman and other a scheduled caste and scheduled tribe member, representative of labour, representative of water supply, sewerage board, electricity board, State Road Transport Corporation, two elected councillors etc. and the Commissioner. This authority functions through committees and meetings as provided under Sections 8 and 9. There is no section either in the Act nor any rule was placed to demonstrate that the Chairman alone, as such, could exercise the power of the Authority. There is no whisper nor there is any record to establish that any meeting of the Authority was held regarding alteration of the scheme. In any case the power does not vest in the State Government or the Chief Minister of the State. The exercise of power is further hedged by use of the expression, if 'it appears to the Authority'. In legal terminology it visualises prior consideration and objective decision. And all this must have resulted in conclusion that the alteration would have been improvement. Not even one was followed. The Chairman could not have acted on his own. Yet without calling any meeting of the Authority or any committee he sent the letter for converting the site. How did it appear to him that it was necessary, is mentioned in the letter dated April 21, because the Chief Minister desired so. The purpose of the Authority taking such a decision is their knowledge of local conditions and what was better for them. That is why participatory exercise is contemplated. If any alteration in scheme could be done by the Chairman and the Chief Minister then sub-section (4) of Section 19 is rendered otiose. There is no provision in the Act for alteration in a scheme by converting one site to another, except, of course if it appeared to be improvement. But even that power vested in the Authority not the government. What should have happened was that the Authority should have applied its mind and must have come to the conclusion that conversion of the site reserved for

public park into a private nursing home amounted to an improvement; then only it could have exercised the power. But what happened in fact was that the application for allotment of the site was accepted first and the procedural requirements were attempted to be gone through later and that too by the State Government which was not authorised to do so. Not only that the Authority did not apply its mind and take any decision if there was any necessity to alter the scheme but even if it is assumed that the State Government could have any role to play, the entire exercise instead of proceeding from below, that is, from the BDA to State Government proceeded in reverse direction, that is, from the State Government to the BDA. Every order, namely, converting the site from public park to private nursing home and even allotment to BMT was passed by State Government and the BDA acting like a true subservient body obeyed faithfully by adopting and confirming the directions. It was complete abdication of power by the BDA. The legislature entrusted the responsibility to alter and approve the scheme to the BDA but the BDA in complete breach of faith reposed in it, preferred to take directions issued on command of the Chief Executive of the State. This resulted not only in error of law but much beyond it. In fact the only role which the State Government could play in a scheme altered by the BDA is specified in sub-sections (5) and (6) of Section 19 of the Act. The former requires previous sanction of the government if the estimated cost of executing the altered scheme exceeds by a greater sum than five per cent of the cost of executing the scheme as sanctioned. And later if the 'scheme as altered involved the acquisition otherwise than by agreement'. In other words the State Government could be concerned or involved with an altered scheme either because of financial considerations or when additional land was to be acquired, an exercise which could not be undertaken by the BDA. A development scheme, therefore, sanctioned and published in the gazette could not be altered by the government.

50. Effort was made to justify the exercise of power under sub-section (3) of Section 15 which reads as under:

> "15. (3) Notwithstanding anything in this Act or in any other law for the time being in force, the Government may, whenever it deems it necessary require the Authority to take up any development scheme or work and execute it subject to such terms and conditions as may be specified by the Government."

51. In sub-section (1) the Authority is empowered to draw up development scheme with approval of government whereas under sub-section (2) it is entitled to proceed on its own provided it has fund and resources. Sub-section (3) is the power of State Government to direct it to take up

any scheme. The main thrust of the sub-section is to keep a vigil on the local body. But it cannot be stretched to entitle the government to alter any scheme or convert any site or power specifically reserved in the statute in the Authority. The general power of direction to take up development scheme cannot be construed as superseding specific power conferred and provided for under Section 19(4). The Authority under Section 3 functions as a body. The Act does not contemplate individual action. That is participatory exercise of powers by different persons representing different interests. And rightly as it is the local persons who can properly assess the need and necessity for altering a scheme and if any proposal to convert from one use to another was (*sic* not) an improvement for residents of locality such an exercise could not be undertaken by the government. Absence of power apart, such exercise is fraught with danger of being activated by extraneous considerations.

52. Section 65 the overall power reserved in government to give such directions to the Authority as it considers expedient for carrying out any purpose of the Act was another provision relied to support an order which is otherwise insupportable. An exercise of power which is ultra vires the provisions in the statute cannot be attempted to be resuscitated on general powers reserved in a statute for its proper and effective implementation. The section authorises the government to issue directions to ensure that the provisions of law are obeyed and not to empower it itself to proceed contrary to law. What is not permitted by the Act to be done by the Authority cannot be assumed to be done by State Government to render it legal. An illegality cannot be cured only because it was undertaken by the government. The section authorises the government to issue directions to carry out purposes of the Act. That is the legislative mandate should be carried out. And not that the provision of law can be disregarded and ignored because what was done was being done by State Government and not the Authority. An illegality or any action contrary to law does not become in accordance with law because it is done at the behest of the Chief Executive of the State. No one is above law. In a democracy what prevails is law and rule and not the height of the person exercising the power.

53. For these reasons the entire proceedings before the State Government suffered from absence of jurisdiction. Even the exercise of power was vitiated and ultra vires. Therefore the orders of the government to convert the site reserved for public park to civic amenity and to allot it for private nursing home to Bangalore Medical Trust and the resolution of the Bangalore Development Authority in compliance of it was null, void and without jurisdiction.

54. Leave granted.

ORDER

55. In the result this appeal fails, for the reasons stated by us in our separate but concurring judgments, and is accordingly dismissed. We further direct that the respondents shall be entitled to their cost throughout.

(1991) 4 Supreme Court Cases 93

(BEFORE T.K. THOMMEN AND R.M. SAHAI, JJ.)

ASSOCIATED ENGINEERING CO. .. Appellant;

Versus

GOVERNMENT OF ANDHRA PRADESH AND ANOTHER .. Respondents.

Civil Appeal Nos. 338-339 with 2692-93 of 1991†, decided on July 15, 1991

Arbitration Act, 1940 — Section 30 — Misconduct — Jurisdictional error — Award beyond limits of the contract — Arbitrator cannot act arbitrarily irrationally, capriciously or independent of the contract — Award deliberately departing from the contract, apart from constituting misconduct also constitutes mala fide action — Award made disregarding the contract goes to the root of the jurisdiction of the arbitrator — Such jurisdictional error can be proved by evidence extrinsic to the award

Arbitration Act, 1940 — Section 30 — Misconduct — Whether award beyond the limits of the contract — Claim relating to refund of excess hire charges of machinery and payment towards losses suffered as a result of poor performance of machinery supplied by government to the contractor — Under the contract government being bound to compensate the contractor for the excess charges paid due to poor performance of the machinery supplied by it, held, claim rightly allowed by the arbitrator — Award in this respect related to the contract and there was no jurisdictional error

Held :

The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency. If he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it. (Paras 24 and 25)

Halsbury's Laws of England, Vol. II, 4th edn., p. 622; Mustill and Boyd's *Commercial Arbitration*, 2nd edn., p. 641, *relied on*

If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and

† From the Judgment and Order dated December 28, 1985 of the Hyderabad High Court in OMA No. 456 of 1984 and CRP No. 2743 of 1984

2021 SCC OnLine NGT 285

In the National Green Tribunal[†]

(Before Adarsh Kumar Goel, Chairperson, Sudhir Agarwal, Member (Judicial), Brijesh Sethi, Member (Judicial) and Nagin Nanda, Member (Expert))

Yogindra Mohan Sengupta ... Applicant;

Versus

Union of India and Others ... Respondent(s).

Registrar General, High Court of Himachal Pradesh ... Applicant in M.A.

M.A. No. 68/2021 and Original Application No. 121/2014

Decided on October 8, 2021

Advocates who appeared in this case :

Ms. Radhika Gautam, Adv. for Applicant in M.A. 68/2021, for the Applicant.

ORDER

1. This Application has been filed by the High Court of Himachal Pradesh in a decided matter to permit reconstruction of its old building block which is in the core area of Shimla, by modifying order of this Tribunal dated 16.11.2017 in above O.A. No. 121/2014, prohibiting such constructions, having regard to potential threat to public safety and environment, considering expert Committee recommendations referred to in the said order.

2. This Tribunal in its order dated 16.11.2017 inter alia considered the report of Comptroller and Auditor General of India that there was no proper regulation of constructions in hill areas of Himachal Pradesh, resulting in earthquakes and other calamities. There was need to comply with provisions of the Disaster Management Act, 2005 on the subject of regulating such construction activities in the interest of public safety. Further consideration by this Tribunal was of recommendations of Expert Committee comprising of different officers from the State of Himachal Pradesh, National Disaster Management Authority, Senior Scientists from Wadia Institute of Himalayan Geology, Dehradun, Experts from G.B. Pant Institute, Professors from School of Planning of Architecture, New Delhi etc. who gave reports dated 09.11.2016 and 24.05.2017 making following recommendations:

> *"53. Relevant excerpts from the Expert Committee Report filed on 24th May, 2017 are reproduced below:*
>
> *"3.1 Recommendations on Disaster Risk Management*
>
> *From a disaster risk management perspective, Shimla has far exceeded its carrying capacity. Uncontrolled and unsafe construction over decades has created an extremely vulnerable built environment in Shimla. A major earthquake will lead to unprecedented loss of lives, cripple the administration and disrupt all sectors of the economy particularly the tourism sector. Any further increase in the density of the built environment will exponentially increase the risk of damages and losses from disasters. In fact, there is a need to reduce the density of Shimla by taking some bold steps including some "conservative surgery" of the current built environment by removing or retrofitting some of the most vulnerable buildings.*
>
> *The Committee presents its recommendation in three categories:*
>
> *i) Stop the creation of new vulnerabilities and risks;*
>
> *ii) Reduce existing vulnerabilities and risks; and*

iii) Increase local emergency response capacity for a major earthquake.

iv) Stop the Creation of New Risks

Recommendation 1: Revise the current building bye-laws to ensure their suitability for the hill environment. The impact of bye-laws on the safety of the overall built environment must be considered. For example, permissible building height that does not take into account slope stability and sub-soil conditions will lead to a large number of unsafe buildings. The building bye-laws should be left substantially unchanged for at least fifteen years. Frequent changes in bye-laws have affected the safety of buildings adversely in Shimla. In conjunction with BIS codes for earthquake safety, the bye-laws should promote the implementation of BIS codes for slope stability and landslide prone areas.

Shimla should draw upon the experience of two other states-Mizoram and Sikkim—in this regard. In April, 2017, the Government of Mizoram notified, the "The Aizawl Municipal Corporation Site Development And Slope Modification Regulations." The Government of Sikkim has prepared "Proposed Amendments in Sikkim Building Construction Regulations 2013", which is yet to be notified. Both these examples show how site development and building construction regulations can be developed to suit the fragile hill environment.

A corollary of this recommendation is that a land use zoning policy related to slope stability and mass movement must be adopted.

Recommendation 2: Slope Stability Norms. In addition, to the recommendation above on development of detailed slope stability and site development regulations, the Committee would like to make following specific recommendation that should be implemented immediately:

- *The general slope angle for construction should be not more than 35^0 for slope covered with soil and 45^0 for rocky slopes.*
- *Most of the slopes in the area are in meta-stable conditions, therefore any change in geological/geomorphological and environmental conditions will lead to destabilization of the slope and may have consequential affects in terms of landslides. It is strongly suggested that immediate slope intervention in terms of slope stabilization must be adopted, if necessary.*
- *Reports prepared by the HP State department suggest that the safe bearing capacity of the rocks present in the township is 20-25 ton/m^2, thus buildings must be designed taking this into consideration.*
- *Construction may be permitted in the adjoining rural areas, however, as most of the slopes in the area covered within veneer of sediments having overburden of the order of <5m, it is suggested that foundations of the building must be footed firmly on the in-situ rocks, and under no conditions these should be allowed in the landslide prone areas, or in areas that are topographically located below the active landslide zone.*
- *Since most of the mass movement in the Shimla township and its surroundings are due to oversaturation of the overburden materials, it is recommended that proper lined drains on the slopes be constructed to drain water away from the slope so that there is minimum ingress of water into the slope.*

Recommendation 3: There should be no new retention policy to allow deviation from building bye-laws. Over the last twenty years, retention policies, guidelines, compounding rules have been introduced at least seven times for significant deviation from building bye-laws. This has not only allowed but also

encouraged unsafe construction in Shimla. There should be a complete and permanent moratorium on allowing such deviations in the future. There should be no discretionary provisions with regards to application of building bye-laws. New buildings that do not follow that building bye-laws must be demolished at owner's expense and neither the Government nor the legal institution should have any discretion for ratification for any such building.

Recommendation 4: Improve coordination between institutions responsible for land use planning and building bye-laws. Currently building byelaws are developed by Town & Country Planning office (TCPO) and these supersede the building construction rules (if any) of Municipal Corporation. Building byelaws are approved by TCPO and Municipal Corporation has the responsibility for implementation. Coordination between the TCPO and the Municipal Corporation needs to be improved.

Recommendation 5: Streamline the building approval process by introducing an electronic building permit system, to bring about greater transparency. At present, the building approval process has many loopholes. Completion certificates are granted at different steps of construction process compromising the overall safety of the building. This is one of the reasons for proliferation of soft stories in the building stock of Shimla. We recommend structural design of all buildings greater than 2 stories to be peer reviewed. As Municipal Corporation does not have strength and capacity to check every design, it is suggested to establish a panel of practicing engineers for the review of structural designs. It may also be necessary to provide additional capacity (qualified manpower) to the Municipal Corporation. It has been observed that most of the buildings in the town are located in geomorphologically unsafe areas. It is strongly recommended that new construction in these areas should be preceded by a Geological Feasibility Report by a qualified Geologist. For any State Government building, the report must be vetted by Geologists employed by the Central Government.

Recommendation 6: Make certain measures mandatory for building safety. While the provisions of the BIS codes for earthquake safety should be strictly enforced, based on an analysis of the current building practice in Shimla, a few 'non-negotiable' measures should be identified and made mandatory. These may include a combination of the following: sheer walls, no soft stories allowed in lower and intermediate floors without adequate strengthening measures; and minimum standards for detailing in reinforced concrete frame buildings.

Recommendation 7: Identification of no new construction areas. Areas classified as High Sinking Prone area (covering Lakkar Bazar, including Central School extending Auckland Nursery School and extending down below upto Dhobighat below the Idgah Electric Substation) and Sliding area (covering Ladakhi Mohalla, Krishna Nagar, the spurs below the office of the Director of Education and the surrounding areas of Clarks Hotel) must be avoided for any new construction. In order to preserve the ecology of the town and to avoid any further degradation to the heritage area, no new construction in the Heritage Area should be allowed.

Recommendation 8: On Construction in Green Areas. No. new construction of any kind or addition to an existing building should be permitted in the Green Areas. The committee observed during the field visit that a few private vacant plots without any green cover or trees are sandwiched between already constructed buildings. Prima facie it appears unfair that these landowners are not able to construct houses on land that was brought for this purpose before the green area notification came into place. However, given the current (extremely poor) status of implementation of building bye-laws, we do not feel confident that this will not

unleash rampant construction activity on these sites leading to proliferation of unsafe buildings and damage to green areas. Also, any new construction will have its environmental footprint in terms of traffic, waste generation, slope destabilization etc. As opposed to allowing construction in the Green Areas, the boundary of Green Areas should be extended to include adjacent public forest land in the vicinity of green areas.

Reduce Existing Risks

Recommendation 9: Undertake a seismic safety analysis and retrofitting of life-line buildings: As described in Sections above, a large part of the building stock in Shimla is extremely unsafe. It is not possible to make this building stock safe overnight. However, the process needs to be started. It is important to prioritize life-line buildings - hospitals, administrative buildings, schools—in this regard, undertake their assessment and identify structural and non-structural measures for improving their safety. Retrofitting of 5% of current building stock every year combined with strict adherence to building codes in all new buildings will ensure that in two decades majority of the building stock in Shimla will be seismically safe. The beginning needs to be made now.

Recommendation 10: Relocating Institutions: Shimla is home to several state and national level institutions. Some of these institutions were established in Shimla decades ago perhaps to take advantage of its favourable climate. Shimla offers few, if any, other locational advantages to these institutions. However, the presence of these institutions burdens the already overwhelmed carrying capacity of Shimla. The Committee recommends that over a period of next ten years, the government gradually relocates all such institutions, that do not have to essentially be in Shimla by virtue of State Government institutions) and the country (in case of Central Government institutions).

Recommendation 11: Decongesting Shimla: Some part of Shimla, most notably Sanjauli and Dhali, are so over-built that in case of an earthquake even extrication of dead bodies and injured person will be problematic. The State government must initiate a scheme that would provide incentives for owners of existing buildings to systematically demolish some of the most vulnerable buildings and relocate to safer areas. This will require establishment of qualified technical teams including structural engineers, geo-technical engineers, town planners and community organizers to undertake site-specific studies and suggest specific measures for decongestion. Shimla has the opportunity to set an example for other cities in the country.

Increase Emergency Response Capacity.

Recommendation 12: Upgrade the capacities of Shimla Fire Service: As described in Situation Analysis above, the current capacities of the Fire Service are severely limited, which leaves a large part of Shima under-served in normal times. This will get worse in a major disaster. Therefore, there is a need to do a systematic analysis of their current capacities and invest in enhancing their preparedness and capacities.

Recommendation 13: Community preparedness: Building on the excellent work of the municipal corporation of Shimla, it is important that preparedness of communities at the Ward Level and below is enhanced. The Ward Level disaster preparedness plans need to be practiced and updated regularly. Since communities themselves will be first responders, there is a need for providing basic search and rescue training as well as some basic equipment to the community level workers.

Recommendation 14: City level disaster preparedness planning: The city disaster response plan needs to be practiced and updated. This needs to take into account provision of open spaces, emergency water supply, access to emergency

services, emergency communication system etc. in different parts. We recommend that city of Shimla hold a similar mock exercise every year.

3.2 Recommendation on Mobility

- *Widening & maintenance of Shoghi-Mehli Bypass road for movement of traffic bound for upper Shimla must be prioritized.*
- *Widening of all city roads so as to increase their carrying capacity, constructing walls and covered drains so as to increase the effective carriageway for vehicles.*
- *Constructions of new bus stand at Dhalli in place of HRTC workshop.*
- *The private mechanical workshop running along roadsides at panthaghati, Vikasnagar, Sanjauli, Dhalli, Kacchighati & Bhatta Kufar Etc. need to be shifted to the outskirts of Shimla City to prevent congestion on Roads.*
- *Encouraging use of public transport system (buses) by private schools.*
- *Heavy buses of HRTC plying within the city need to be replaced with small buses because of their faster movement*
- *construction of multi-storey parking near H.P. Secretariat, Chakker, D. C. Office, New Shimla Kasampati Commercial complex Panthaghati, Vikasnagar, Mehli, Boileauganj, Totu, Sanjauli, Tara Devi, Hospitals & Schools etc.*
- *Construction of Multi-storey parking complexes near Tata Devi, Tutu, Boileauganj and Dhalli can help tourists and daily commuters to park their vehicles there and visit Shimla by buses. This will help reduce PCUs drastically.*
- *Approval of building maps by M.C./TCP must ensure parking floor/provision. The same should be strictly enforced.*
- *Making all major as well as other roads free from road-side parking, be it on payment basis or otherwise. This will help in utilizing roads to their optimum capacity and also reduce traffic plus accidents. Idle Parking of vehicles on the roads/streets should be prohibited.*
- *To remove all condemned vehicles, debris building material from roads.*
- *Shifting of grain mandi & sabzi mandi from Core Area.*
- *Heavy busies of HRTC plying within Shimla City need to be replaced with small sized buses.*
- *To improve important junctions particularly Crossing near Tuti Kandi, Khalini Chhota Shimla Panthaghati, Sanjauli Boileauganj, Totu etc.*
- *Town and Country Planning Department/Muncipal Corporation has been allowing additional floor as parking floor. It is mostly seen that such floors either were not earmarked or converted to residential floor illegally. Concerned departments must take steps to create/recover the parking floors in the houses abutting the roads.*
- *To improve and provide pedestrian paths along vehicular roads.*
- *To provide traffic lights, zebra crossings and foot bridges wherever feasible.*
- *Proposals given in the Comprehensive Mobility Plan for Shimla City prepared under JNNURM should be implemented.*
- *A fast track Public Transport System needs to be put in place at the earliest. While private vehicles should be taxed in various respects public transport should be almost free so as to relieve the city roads from ever increasing number of PCUs.*
- *PSD/MC Shimla must create lay-byes on the main roads for parking of buses/trucks especially near the bus-stop so that traffic movement does not come to stand still.*
- *The GoHP must take every measure to reduce use of personal vehicles as*

they severely choke the road and the parking areas. The solution does not be in creating more and more of parking areas, but in reducing the number of personal vehicles for individual's mobility. The GoHP should encourage through appropriate policy, cab aggregators like Ola/Uber for mobility of people. The cabs have vehicle utilization factor of nearly 50% as against only 5% of personalized vehicles. Therefore, one cab can displace nearly 10 personalized vehicles from the road and parking areas. The GohP can demand the cab aggregator to provide electric vehicles as cabs with adequate number for batter swapping stations. Aggregators' cabs are available within 10 minutes of call and are found to be much cheaper compared to individual transportation. An electric cab will be more cheaper to people.

3.3 Recommendation on Water Supply System:

Recommendation 1: Addressing the Present Status of Water Supply: With regards to addressing the present status of water supply, the committee would like to present three sub-recommendations:

a) The first priority should be to improve the current bad situation of water supply in Shimla. Water distribution system is inefficient as reflected in 40-50 % water losses in the for of NRW. Other immediate and short term measures such as reduction of losses of water treatment plants & wager distribution lines, replacing old energy inefficient pumps, mapping and hydraulic modelling of water distribution system, water leak detection and timely repair, improved complaint redressal system, metering of build and commercial users, public awareness for judicious use of water etc. should be implements.

b) Water and energy audit should be first completed for operationalizing immediate and short term measures. Water theft and ghost pipes should be identified and users should be severely penalized and their connections should be discontinued. Activities requiring substantial quantity of water such as swimming pool, water sports etc., should be minimized, particularly in summer season. It may be possible to price water supplied to commercial establishments including hotel etc. differently at higher rate. Such resorts/hotels should be encouraged to install decentralized greywater/sewage treatment plants and treated greywater/sewage should be used for non-potable purposes: and

c) It is necessary to prepare an auto-cad map of entire water distribution system. In addition, pipeline crossing sewer, drains, roads having heavy traffic etc. should be appropriately mapped as they are potential hazard sources.

Recommendation 2: Address Increasing Water Demand: Water demand in Shimla is expected to grow from present 62 MLD to 106 MLD by 2050. Uncontrolled growth coupled with unauthorized constructions, appear to be one of the key reasons even for present water & wastewater related situations. Therefore, the same must be checked strictly and possible stopped immediately, otherwise the proposed interventions/projects involving huge investments will not bear desire results.

Recommendation 3: Water Resources - Catchment area protection: The anthropogenic activities namely, overgrazing collection of fuel, fodder, timber and expansions of orchards in the higher elevations have caused rapid depletion of forests due to which catchment efficiency is compromised. Catchment degradation needs to be immediately stopped. Watershed management practices should be encouraged to improve water availability in the rivers and springs. The anthropogenic activities viz., overgrazing, collection of wood as fuel, fodder, timber and expansions of orchards in the higher elevations must be stopped, which has led to the depletion of forests. The natural forests need to be protected and the forest

cover should be increased through plantations of natural species of that area. Degraded land must be rejuvenated scientifically. There is a need to increase the forest cover through plantations of broad leaved species for example, Quercusleucotricchophora, Quercus floribunda, Cornusmacrophylla, C. capitata, Toona, serrata, Aesculusindica, Perseaduthiei, Prunuscerasoides, Fraxinumsicrantha and Alnusnitida and coniferous species such as Cedrusdeodara, Pinuswallichiana and Piceasmithiana in the degraded forests, habitats, agroforestry systems, barren and landslide areas by the local communities in collaboration with Forest Department and relevant R & D organization. Other location specific natural species can also be selected. Nursery of the relevant species at different elevations needs to be developed for ensuring the quality planting material, Bio - engineering techniques using local species including tussock forming grasses for checking the water runoff, soil erosion and siltation in the degraded areas need to be applied. For the conservation of rain water and snow water and checking the soil erosion, trenches may be developed on the slopes. Rain water harvesting should be mandated. The natural forests need to be protected and monitored regularly. Protection of forest areas and plantations from seasonal fires should be ensured. Crate walls and stone walls need to be erected in landslide and flood prone areas to check the soil erosion, landslide and siltation. Education and awareness programmes for the conservation of ecosystems of the water for the inhabitants are urgently required. These practices would help in the restoration of natural habitats, increasing the water recharge, and as a whole in the conservation of ecosystems and environment of the Watershed.

Recommendation 4: It would be essential to declare the catchment areas of the five water sources as eco-sensitive zone under the Environment (Protection) Act, 1986 with a detail list of negative and positive activities for preservation and rejuvenation of the catchment areas that support the water sources. These catchment areas are actually water sanctuaries.

Recommendation 5: Upgradation of water treatment plants & water distribution system: WTPs are very old & water distribution system is inefficient. WTPs at Shimla are very old. Periodic improvement if any done, has been adhoc in nature. Super-chlorination to initially maintain chlorine up to 2 mg/1 is undertaken in view of reported cases of jaundice recently. However, this may lead to formation of disinfection by products. Hence these DBPs should be monitored and public complaints of poor taste of water should be handled appropriately.

3.4 Recommendations on Liquid Waste Management System

Recommendation 1: Sewage & Storm water management:

Sewer network 7 Sewage collection efficiency: SMC issued 27318 domestic water connections and 4900 commercial water connections whereas the total sewerage connections issued were only 13752. This implies that more than 50% households do not have sewer network connection. The city is under served w.r.t. sewer network & collection. The SMC should lay emphasis on providing more sewer network coverage in SMC region as well as peripheral town areas and to make serious efforts to collect 100% of generated sewage. Site specific solutions for effective collection and treatment of sewage should be sought from organization like CSIR - NEERI. The sewage collection systems are mostly old and a regular inspection & maintenance is a must. As planned under the WB and AMRUT schemes, the same be completely changed/upgraded.

Sewage Treatment:

- *Only 9.65 MLD sewage has been collected and treated in STPs while total designed capacity of existing 6 STPs is 35.63 MLD. The STPs are grossly underutilized. This also indicates that there is need for enhancing sewage*

collection efficiency.

• It needs to be checked with respect to each STP as to how much sewage is collected and treated. It is possible only some STPs are operational while some other receive sewage. Moreover, it is not clear as to where the uncollected sewage goes and also as to how and where the treated sewage is discharged/managed. The scenario needs to be linked with available health data.

• SMC to engage professional agency/institute for the needful technical guidance on site specific technological solutions for improving efficacy/adequacy of sewage management & treatment.

However during the site visit of one of the STPs, it was observed that the STP is overloaded resulting in adverse impact on treatment of sewage. Therefore, collection and treatment needs to be optimized.

Recommendation 2: Water availability & Storm Water Drainage & Collection: At present, the maximum available water for Shimla is about 52 MLD against 62 MLD demand. Storm water drainage covering 30% city area exists. However, SMC indicated in SLIP 2017 - 18 documents that no ongoing drainage projects exist in the city. Shimla being hill region receives approximately≥1000mm precipitation annually. If collected, the storm water could be goods supplemental water to the existing water sources. The storm water drainage coverage should be enhanced to capture entire storm water by laying storm water drains in the remaining city areas/adjoining areas. Storm water may be used for agriculture purpose; while adequately treated storm water could be used for different purposes. SMC to engage professional agency/institute for the needful technical guidance on site specific technological solutions for improving efficacy/adequacy of sewage management & treatment. To overcome the problem of choking of storm water drainage, hydrodynamic separators can be used, separators such as CDS, Downstream Defender, Stormceptor, Vortechsetc can be used according to the need. This type of project needs to be taken up on priority as the city does face serious health risks due to water logging. Carrying capacity of these drains is not sufficient and need through design checking. Catchments of the drains improperly selected with respect to their topography. The drains are constructed for longer distances with much lesser gradients than actually required in order to keep the drains at higher level that the water level in the discharging bodies. Thus, these drains are not able to carry the pak flow of the catchment/water shed.

Recommendation 3: Construction activity versus water 7 sewage infrastructure in Shimla: Continuing with construction activities would put pressure on the existing urban infrastructure by demanding more water supply & increase in wastewater generation. The major concern is un-authorized constructions, for which even sewage collection system is not in place. The officials informed the team that they are making lot of efforts for collection of sewage from such houses and other buildings using honey sucker and other means. While local site conditions such as vulnerable slopes & sensitive areas need to be considered such as prime factors for preventing further construction in Shimla city; more construction implies more demand for urban infrastructure. Shimla as of now does not have adequate water resources and sewer network and sewage collection efficiency. Further construction would lead to unmanageable pressure on Local Urban Body to provide for enhanced water supply & wastewater collection and management facilities. These issues also need to be addressed fully before considering permissions for further construction in Shimla.

Recommendation 4: Sewage collection from areas beyond MC limits and those not easily accessible: The city of Shimla is expanded uncontrolled and there are significant number of houses and other constructions beyond the MC limits. Some

of these areas are deprived of sewage collection facilities, which may have adverse impacts on water bodies/streams. The proposed plans suggest provision of sewage collection and treatment in these areas as well, however the same must be implemented adhering to the scheduled and specifications. During the visit officials told the team that some de-centralized systems are also being explored for the places where sewage collection is not feasible. However, most of these localities are those with unauthorized constructions without any adequate access.

Other issues: The committee members also visited a lab, attached to STP and was told that there are other labs for regular monitoring of water and treated wastewater quality. However, these labs need up-gradation as well as regular maintenance of instruments. There is a slaughter house functional at Shimla and the waste and wastewater generated is being treated. Such facilities also need up-gradation to meet future demand. MC officials pointed out the issues of sludge management during the visit of STP. Although the sludge quantity generated is not large, they mentioned that the contractors are not willing to transport or handle the sludge. Sludge digesters can be installed to generate gas fuel which can be used including that for heating of digester in winter. There are advanced options available for sludge drying and utilization and the same should be explored during the proposed projects.

a. Recommendations on Solid Waste Management

Shimla city looked visible clean as no garbage was seen littered during the visit showing the efforts of MC and good inspection of various rules. Door-to-Door collection together with User Fee scheme is functioning very well. Though no polybag was found littered anywhere on the roads or hill slopes, given that waste is not segregated at source as required under the Solid Waste Management Rules, 2016 into three streams, viz. (i) Bio-degradable Wet Waste; (ii) Recyclables and Non Bio-degradables; and (iii) Domestic Hazardous waste, many recyclables waste get soiled rendering them unfit for recycling. Sanitary napkins and diapers are not packed in different pouches for incineration. Segregation of domestic hazardous waste at source would eliminate toxic elements and heavy metals from the waste which would result in good quality compost.

Decentralized treatment of wet waste will reduce transportation cost and thus the carbon foot prints, air pollution and less diesel smell as well. As per the rule, there should be no landfills in the hilly areas and old landfills need to be capped scientifically.

NEERI in its report recommended that "The paper and plastic content of the waste at all the dumping sites is high. Due to comparatively higher moisture content of the solid wastes at all the four disposal sites, the wastes may not be suitable for its use as a material for refused derived fuel (RDF)'. Still the Govt. of HP decided to go ahead with W2E plant which is making RDF first. The viability of the palnt is doubtful. NEERI further recommended that 'the groundwater and surface water quality may get highly polluted in near future. Hence, a scientific way of waste management and handling; and engineered waste processing and disposal would required to be carried out on priority.

Recommendations:

Following are the recommendations of improving solid waste management in Shimla city-

i. Shimla should start waste segregation at source, into three streams as given above, as per the Solid Waste Management Rules, 2016 immediately. They should implement the waste hierarchy and treatment line given in the rules. This would reduce the cost of waste management for Shimla city tremendously.

ii. The parameters such as carbon content, moisture content, C/N ratio and NPK content in the MSW samples indicated that MSW is more suitable for bioprocessing. Therefore, Shimla should recover the energy content of its wet/bio degradable waste through compositing/bio-methanation which would be at a very low cost and shall work out to be cheaper than any other technology. Lessons from past composting projects should be learnt and improved composting should be encouraged. Segregation of waste at source would improve the quality of compost as heavy metals present in MSW would be eliminated.

iii. Decentralized composting/bio-methanation (energy recovery) should be practiced, at least at all commercial establishments, hotels, vegetable and meat markets. Bio-gas may be used for street/park lights or for cooking in kitchen.

iv. Expert guidance and proper technology should be taken by MC for composting/bio-methanation processes. Proper training to the operating staff should be imparted.

v. Public awareness on reduce, reuse, recycle, segregation and house hold composting should be made a regular feature of solid management programme in Shimla and Shimla Planning area.

vi. Health and safety of the sanitation workers should be improved and they should be insisted to wear uniforms, gloves and Gum boots etc. while collecting waste.

vii. All horticulture waste, garden waste, agriculture waste, green leaves should be collected separately and processed in decentralized manner into manure.

viii. Bio-degradable waste and wet waste should be prohibited for land filling in the city.

ix. Landfill site should not be created in the hilly areas in accordance with the SWM Rules.

x. Only the inert residual waste should be disposed of in sanitary landfill (SLF). This would increase the life of SLF and prompt recycling of the other components of waste.

xi. Storage of waste in open must be stopped as it may cause contamination of both, the ground water and surface water sources due to run off from hills during precipitation. Heavy rainfall may even carry the waste with the flood water. Water pollution may create health hazards to the residents and the tourists as well.

xii. Land filling Tax may be started in Shimla city or Landfill charges may be levied to restrict land filling of waste.

xiii. Environmental Clearance for W2E plant may be taken before commissioning to avoid any violation.

xiv. Chaar from W2E should be utilised for brick making or road making or should be disposed of at the secured and fill.

xv. The dry or non-biodegradable waste such as paper/plastic, rubber, metal, glass etc. should be sent to the authorized recyclers; for its use in manufacturing.

xvi. The rural areas must have such set up on self-sustaining basis. It could be on the lines of the Society functioning within M.C. Shimla.

xvii. SADAs and the Gram Panchayats should jointly work together to address this issue.

xviii. Abandoned Landfill should be either mined and waste may sent to the W2E plant or should be capped scientifically, as per the SWM, 2016 Rules and

guidelines of CPCB&MUD. This is supported by the study of NEERI also that reports that the groundwater quality and surface water quality may get highly polluted in near future. Hence, a scientific way of waste management and handling; and engineered waste processing and disposal should be carried out on priority.

xix. C&D waste recycling plant should be set up as soon as possible.

xx. Plastic Waste Management Rules, 2016 should be implemented so that plastic waste goes for recycling rather than to W2E plant.

xxi. State Pollution Control Board should enforce Bio-Medical Waste Rules, 2016 immediately and organize training for HCFs for segregation of their waste and proper disposal. They should monitor HCFs regularly and more vigorously. For monitoring, one outside expert from a good institution should be involved.

xxii. It needs to be ensured that no Bio-Medical waste gets mixed up with the solid waste, for this random checks should be carried out by both SPCB and MC by opening the bags at the HCFs itself.

xxiii. The subject of solid waste management should be included in the curriculum for schools.

CHAPTER 4 CONCLUSION

The Committee made an in-depth analysis of the carrying capacity of Shimla city and Shimla Planning Area (SPA), the trend of growth of population, construction, vehicular population and ecological impacts of solid waste, sewage, destruction of forest, water supply, etc, on the ecology. The Committee studied the carrying capacity in greater detail with reference to disaster risk, mobility, water supply, liquid and solid waste management and forest management.

The Committee analysed the principal natural hazards including the seismic hazard (possibility of earthquakes that will produce peak ground acceleration of ground shaking of destructive potential) and landslide hazard. The Committee took into account other factors such as the geomorphological conditions (nature of subsoil and rocks) and the effects of climate change and the resulting patterns of intense rainfall that may exacerbate the effects of these two principal hazards. The analysis of the principle hazards was complemented with the analysis of exposure (how many buildings of what type) and vulnerabilities (strength of the buildings) based on secondary data sourced from Shimla's Hazard Risk and Vulnerability Assessment (2015) as well as field visits. This gave a picture of the damage and loss potential of the two principal hazards. An analysis of the local level emergency response capacity helped understand the challenges that would arise should a major disaster occur in Shimla.

Based on secondary source analysis as well as field visits, the committee analyses issues around: current situation vis-à-vis availability of water, measures required for ensuring adequate and sustainable supply of water in view of the growing demand; issues around vehicular population and sustainable solutions in view of limited infrastructure for ensuring efficient mobility without environmental side-effects; disposal of solid waste and sewage; and sustainable management of forests.

The Committee unanimously came to several conclusions, which are detailed in the recommendations presented in Chapter 3. However, it was considered necessary to highlight certain issues given their far-reaching implication. They are presented below.

1. The entire Himalayan belt, including Shimla and its surrounding area, falls in Earthquake Zone-IV and V. Shimla can be affected by not only earthquakes occurring in its vicinity, but also the ones that take place in other parts of the State. Earthquake of high magnitude of over 6 on the Richter scale are

entirely possible in this region. It can cause severe ground shaking with peak ground acceleration (PGA) up to 4.0 m/s in and around Shimla. Given the volume and quality of current building stock, this will have huge destructive potential. Given the poor quality of constructions ignoring the underlying geological settings, proneness to earthquake and landslide, as discussed in detail in situation analysis (Chapter-2), most of the buildings will collapse in an earthquake causing PGA of 4.0 m/s and above. The situation will get compounded on account of pounding and cascading effect, which may significantly increase loss of lives, which would be difficult to estimate.

2. *The hazard risk gets further aggravated considering most of Shimla and SPA are prone to landslides, which, it is observed in the recent past, get accentuated due to climate change induced intense rainfall and unscientific cuttings of slopes for construction purpose. The Committee found that most of the buildings are constructed over land with slopes exceeding 45 degrees, and in certain cases the buildings are constructed on the slopes exceeding 70 degrees. Such constructions require huge cutting of the contour that makes the land susceptible to landslides. Subsidence of land in a number of areas and landslides are becoming frequent.*
3. *It is evident that Shimla and surrounding area seem to face great risk of life and property in case of earthquake and big landslide. There is an urgent need to decongest Shimla and SPA-particularly areas like Sanjhauli, Dhali, Tutu, Lower Lakkar Bazar. All the institutions, including the Defence establishments, which are not required to operate from Shimla, must be relocated to the plains or other areas. Secondly, all the buildings, which have been constructed ignoring the seismic sensitivity and load bearing capacity and those which are constructed very close, must be identified by a group of experts and the Government through the process of incentives and disincentives within a time -frame, say 5-10 years, and if required through law, ensure demolition, relocation and reconstruction. For this purpose, detailed new construction guidelines, suitable for the hill environment of Shimla, should be developed with the help of experts in this field. These guidelines should take into account the earthquake and landslide risk, load-bearing capacity of different localities, slope angle, structural design of the buildings and the quality of construction including their foundations (in accordance with applicable BIS codes) that can withstand a probable earthquake. The Government or any institution should have no discretion to regularize any new building which violates the above guidelines. Such buildings should automatically be demolished and there should not be any legal relief to such construction.*
4. *At the current level of population 2.34 lakhs in the SPA, it was reported by the authority that people get water supply for about 990 minutes every day, which reduces to 45 minutes during summer. However, meeting with people gave the Committee to understand that in most of the areas, water supply is once in 3-4 days only. This means that the water supply is not adequate to be able to sustain provide even decent quantity even to the current level of population, leave alone the projected population and water demand by 2020 or 2030. Shimla as of now does not have adequate water resources and sewer network and sewage collection efficiency. Further construction would lead to unmanageable pressure on Local Urban Body to provide for enhanced water supply & wastewater collection and management facilities. These issues also need to be addressed fully before considering permissions for further construction in Shimla.*
5. *The Committee studied the sources of water supply and also studied their*

catchment areas. It is observed that the catchment areas of these water sources, which were full of natural vegetation that would absorb rainwater and sustain the streams on which the water sources have been developed, round the year. The Committee observed that unfortunately the catchment areas have been denuded to a certain extent and are giving way to apple orchards and other anthropogenic activities. Apple orchards, denudation of natural forest and soil erosion, all the three together would result in lower availability of water in the streams, particularly during the lean season. If water supply to the population in SPA is to be sustained at a decent level, the catchment area of the water sources will be required to be declared as eco-sensitive zone under the Environment Protection Act, with the detailed dos and don'ts, some of which are: no further conversion of forest to apple orchard, increasing plantation of trees with native species, construction of trenches at regular intervals and extensive mandatory water harvesting structures in the orchard areas, so that sub-soil system absorbs more rain water to sustain the streams. The already degraded catchment areas should also be rejuvenated on priority to make those water resources sustainable.

6. *The Committee recommends several actions as short term measures to improve the current water supply situation, including reduction of losses at water treatment plants & water distribution lines, mapping and hydraulic modelling of water distribution, water leak detection and timely repair, metering of bulk and commercial users, public awareness for judicious use of water etc.*
7. *Water and energy audit should be quickly completed for operationalizing immediate and short term measures. Activities requiring substantial quantity of water such as swimming pool, water sports etc., should be minimized, particularly in summer season. It may be possible to price water supplied to commercial establishments including hotels etc. differently at higher rate. Such resorts/hotels should be encouraged to install decentralized greywater/sewage treatment plants and treated greywater/sewage should be used for non-potable purposed. In general re-use of treated water for the non-potable purposes within a time-frame will make available huge quantity of fresh water. This would significantly ease water situation in Shimla and SPA.*
8. *Another area, the Committee would like to highlight is transport and mobility. Significant increase in vehicular population in Shimla town and SPA, together with increase in movement of big vehicles carrying goods and passenger, has reached a level, which the current infrastructure is just unable to cope with. In most places, it is not possible to widen the roads. Idle parking and a large number of garages choke the roads. The Government will have to discourage purchase of new vehicles and do well to incentivize Ola/Uber type of cab aggregators for mobility of people. The utilization factors of personal cars is less than 5%, as observed by the Committee; whereas Ola/Uber cabs will have more than 50% utilization. This means that one Ola/Uber cab can displace 10 private cars from the road and free the parking areas. The Government should further encourage Ola/Uber type of companies to provide electric vehicles to reduce pollution. The technology available in the country today would enable such arrangements to do a viable business. The Government will have to significantly increase the parking charges and ensure their enforcement by installing CCTV's at important locations, to discourage parking of private vehicles.*
9. *Evidently, the carrying capacity of Shimla has been far exceeded. There is an urgent need to decongest the town and SPA by shifting certain institutions and establishments and to ensure that further population and construction*

growth are seriously discouraged. The authorities will have to take certain hard decisions, in the right earnest. Any further delay could be only at its peril.

10. In terms of the vulnerability of the built environment to earthquakes and landslides, other hill towns of the country, particularly in the Himalayan belt, are facing similar issues. They are also facing similar environmental challenges. Shimla has the opportunity to set an example as to how our hill cities can be made disaster resilient and environmentally sustainable.

11. The Committee has deliberately decided not to make any recommendation for construction in the 17 Green Belt notified by the GoHP in August/December, 2000 as the earlier Committee has also recommended no construction which has been noted by the Hon'ble NGT in its order Dt 28.2.2017. This Committee has strongly recommended to decongest and depopulate Shimla.

54. Besides submitting the detailed report and its recommendations, the Committee also relied upon and made the following integral part of the comprehensive report:

(a). Natural Hazards exposure vulnerability and disaster risk in Shimla prepared by National Disaster Management Authority.

(b). Engineering Geological Contribution prepared by Wadia Institute of Himalayan Geology, Dehradun.

(c). Water supply system in Shimla, current status, future plans and recommendations including sewage generation, collection and disposal was prepared by G. B. Pant Institute of Himalayan Environment and Development, Himachal Pradesh Unit.

(d). Forest, bio-diversity, water supply systems, watershed management, ecosystem services, climate change, impact of climate change and water sanctuaries in Shimla prepared by the same Institute.

(e). Carrying capacity based, spatial zoning.

These reports are integral part of the main report, which also includes the respective recommendations finalised upon due to deliberation of the High Powered Committee."

3. In view of above, the Tribunal noted the vulnerable areas where there was potential for disasters by constructions as follows:—

"62. There are two prominent subsidence/sinking zones in the area, particularly, Ridge, Grand Hotel, Lakkar Bazar, Central School, Auckland Nursery School, Dhobighat, Ladakhi Mohalla and surrounding areas of Hotel Clark. They have been identified as high sinking zones and any further addition of building load could be disastrous. There are continuous incidences of landslides and subsidence in these two zones. The reports suggest the problem of landslides is a result of mass movement in the area. These phenomena occur either during construction or due to oversaturation of the slope, either by increased rainfall activity or concentrated household disposal. This indicates that most of the slopes in the town are in meta-stable conditions and any change in natural condition, particularly, from slope cutting will destabilize the slope and that would results into landslides. Over urbanization, unplanned and unregulated construction and growth with frequent changes in municipal boundaries and building byelaws has adversely affected the built environment and ecology of the city. Even the residential areas are seen to be extensively commercially used. Mall Road, Lower Bazar, Krishna Nagar, Summer Hill and Totu are

highly commercialized where upto 50% of the total buildings are used for commercial purposes out of which only 9% is used for residential purpose. As a result, agricultural area has shrunk from 21% to 6% of Shimla Planning Area. It means immense construction activity will take place in Shimla with further reduction of open areas used as agricultural/green land. Vulnerability of environment of Shimla is very high. In Shimla most of the RC frame construction is inadequately designed and hardly ever supervised by a qualified person. A visual survey of ongoing construction sites revealed that detailing of reinforcement was always incorrect. Some of the most prevalent and visible causes of physical vulnerability include presence of soft story, irregular plan, pounding effect in buildings made together, lack of frame action in RC frame structure, incorrect detailing of reinforcement including stirrups, short column effect on building built on slope and inadequate foundation design leading to differential settlement of foundation. These comments of the Committee are based upon detailed analysis carried out. Lack of a stable techno-legal regime is one of the important causes of disaster risk in Shimla. Unstudied frequent amendment of byelaws made it difficult, if not impossible, to manage the growth of buildings made in the city. Some of the buildings are built on 70°-75° slope and are covered with average 4 to 5 storeyed buildings and approximately 90% Shimla is built on 45°-60° slope. The debris from slope is dumped in the valley or near water channels, obstructing the natural drainage, which damages the environment and creates possibility for flooding. The buildings to the extent of 7-8 storeys have been permitted. Most of the buildings are taller than the prescribed building heights and similar is the status with regard to floor area ratio. Set back regulations, approval of structural designs, site checks, retention policies/compounding rules and ground coverage are the other relevant factors leading to destabilization of hills and natural assets in Shimla. A hazard risk and vulnerability assessment study of Shimla, undertaken by TRAU Leading Edge with support of UNDP, assessed the vulnerability of building stock of the city. In a severe earthquake, 39% of the buildings will suffer total collapse or severe damage. Due to such earthquake, estimated number of casualties was calculated to 20,446. However, this does not take into account the cascading effect of collapsed buildings on adjoining building, which will further escalate the losses. One of the most important problems of Shimla city is mobility. More than 1,00,000 vehicles routinely cross various traffic points daily with the municipal corporation areas and there are nearly 30,000 vehicles in Shimla during the apple season. The peak hour count is 60,000 vehicles approximately. 6% of the road network has road width less than 5mtr while 73% of the road network has road width from 5 mtr to 10 mtr. There are more than 22 bottleneck points in the city. There is acute shortage of parking space. The water supply system in Shimla is unstable and unsound. We have already noticed that water supply is irregular and sometimes even once in 3-4 days. The quantum of non-revenue water is estimated at 40% to 50%. It is also on record before the Tribunal that water supply in Shimla is around 60-90 minutes every day during non-lean period and for around 45 minutes on alternative days during the lean period. Existing shortfall is about 7 MLD which increases to 17 MLD during summer for various other factors, not even 70% of city is covered by water supply. There is a plan to introduce certain infrastructure and services, as recorded by the Committee and a new department is created for augmenting and improving water supply system but there appears to be

nothing for resolving the issue in the long term. Sewage collection and disposal is a matter of great concern. There is a shortage of public toilets and urinals. The septage collected from households that are not connected to sewer systems is indiscriminately disposed of in low lying areas, which is a completely unacceptable practice. The existing service levels and its efficiency for collection, disposal of sewage and network services are far from satisfactory (65% coverage of sewerage network, 35% efficiency of collection of sewage and 25% less in sewage treatment efficiency).

63. The STP plants are underutilized as the sewage does not reach these plants. There have been repeated incidents of mixing up of sewage with the potable water that has caused serious public health hazards. It is on record of this case, as well as other cases pending before the Tribunal that similar incidents also occurred in 2007-2008, 2010-2011, 2013 and 2015-2016 when more than 20 people died and 1500 suffered from serious hepatitis of various kinds.

64. Solid Waste Management is another serious problem persisting in the entire State of Himachal Pradesh, more particularly, in Shimla. Municipal Corporation of Shimla exercises jurisdiction over 25 wards and the city of Shimla is generating garbage and waste which is increasing day by day. 87 MTD of waste was being generated per day in 2006, which became 116 MTD in 2016 and is estimated to rise to 137 MTD by 2021. Waste generation increases by 30% in peak season. There is complete failure of segregation, transportation and disposal of the waste. There are no proper landfill sites, no segregation is being carried out in Shimla at source or otherwise. Under the orders of the Tribunal, some waste was directed to be sent to Chandigarh because there was no treatment plant in the State of HP, which could treat this quantity of waste. Now under the directions of the Tribunal, M/s. Elephant Energy Pvt. Ltd. was awarded the work for setting up a Waste to Energy Plant near Shimla. However, the said plant has not commenced its operation and presently it is producing Refuse Derived Fuel (RDF) with the capacity of 70 TPD. The plant proposes to use gasification technology at Bhariyal for energy generation. There is a proposal to setup a biogas plant and also to recycle the C&D Waste and plastic waste by segregation.

65. Forests in Shimla were subjected to detailed analysis by the Committee for Forest Management. There are large areas of natural forests. It adds to the value of Shimla by improving air and water supply besides maintaining its quality. The city is dominated by Cedrus deodara (Deodar), Quercus leucotrichophora (Ban Oak), Pinus roxburghii (Chir Pine) and Rhododendron arboretum (Burash) forests. Besides it has shrubs, Berberis lycium and other species within the municipal limits of Shimla. The forests of designated 17 green belt areas help in regulating the environment of the city. As per the revenue records the green belt of Shimla Planning Area cover 414 ha, out of which 78% area is either under 'forests' or 'open area' and the remaining 22% is built-up area. About 42% of the total green area is under forest cover and 36% is open area occupied by shrubs, bushes and grasslands etc. From the representations placed on record as well as the other cases pending before the Tribunal, it is clear that there has been serious destruction of forests. There are cases of enormous illegal and unauthorized tree felling. The authorities are even giving sanctions for cutting of trees without complying with the fundamental requirements of compensatory afforestation. It has to be a condition precedent to diversion of any area which requires felling of trees and the activity must be performed simultaneously with any development activity. Deposit of money with the Forest Department is not compensatory afforestation. The trees, forest must

be permitted to grow along with the development and it should not be a performance left in abeyance.

We do find merit in the submissions made by the applicant. Even if there cannot to be an absolute ban as suggested by the applicant on construction activity in the city of Shimla and its different identified areas, in some of the areas construction activity must be totally prohibited while in the others it should be strictly regulated if the city of Shimla has to be protected from natural and manmade disasters in the coming times. If unplanned, health hazard and unsustainable development continues it will be absolute violations to the principle of intergenerational equity. It is also correct that same areas have repeatedly seen and borne massive environmental disasters due to large scale landslides that have disrupted the arterial Cart road for months. There was a major landslide in Dhalli area that ruptured the Tatukandi-Dhalli Byepass road in September, 2017. The construction outside the core area and particularly, in areas where decongestion is necessary, fresh construction cannot be allowed. Construction in unsafe areas and even in the newly added areas has to be considered with seriousness for its consequential results. The rampant construction must stop. The techno-legal regime should not be mere eyewash but should have effective control and strict penal consequences. It is on record that all unauthorized and illegal constructions are regularized or at least attempted to be regularized without realizing their impact on environment, ecology and sustainability. Complete scarcity of natural and supporting resources is the last consideration that prevails with the authorities. The byelaws are primarily intended to regularize rampant, unauthorized and excessive construction in contrast to compliance of the byelaws in their true spirit and substance and enforcing the required actions contemplated under Section 3a of the Town and Country Planning Act, 1977 (for short, the TCP Act). Regularization of unauthorized construction on public land and particularly, the forest area or the green areas would not only frustrate the Forest Act and other laws but would also encourage discrimination between people who are law abiding and those who are flouting causing serious environmental degradation. The cutting of hill tops should be stopped or at least very sternly regulated and allowed only after proper impact analysis and in rare situations. There must be appropriate determination of zones in that area and only permissible activities should be allowed and rampant construction should be debarred. The vehicular congestion and the population resulting therefrom have to be regulated. The forests and green area have to be protected. The open patches in the forest areas cannot be viewed as land open for construction that would be defeating the entire law relating to the forests and environment."

4. The Tribunal accordingly after considering the relevant statutory provisions and applying the "Precautionary" principle, directed as follows:

"112. Thus, we pass the following directions and order:

I. We hold and declare that the facts and circumstances of the present case, as afore-recorded, clearly demonstrate failure on the part of the State Government, its instrumentalities and local authorities to discharge their constitutional obligations under Article 48A, statutory duties under the Environment (Protection) Act, 1986, under the TCP Act and Municipal byelaws. It is this failure that has exposed the Shimla Planning Area to such vulnerability to natural and man-made disasters. In the event, if such unplanned and indiscriminate development is permitted there will be irreparable loss and damage to the environment, ecology and natural resources on the one hand and inevitable disaster on the other.

II. We hereby prohibit new construction of any kind, i.e. residential, institutional and commercial to be permitted henceforth in any part of the Core and Green/Forest area as defined under the various Notifications issued under the Interim Development Plan as well, by the State Government.

III. Beyond the Core, Green/Forest area and the areas falling under the authorities of the Shimla Planning Area, the construction may be permitted strictly in accordance with the provisions of the TCP Act, Development Plan and the Municipal laws in force. Even in these areas, construction will not be permitted beyond two storeys plus attic floor. However, restricted to these areas, if any construction, particularly public utilities (the buildings like hospitals, schools and offices of essential services but would definitely not include commercial, private builders and any such allied buildings) are proposed to be constructed beyond two storeys plus attic floor then the plans for approval or obtaining NOC shall be submitted to the concerned authorities having jurisdiction over the area in question. It would be sanctioned only after the same have been approved and adequate precautionary and preventive measures have been provided by the special committee constituted under this judgment along with the Supervisory Committee.

IV. Wherever the old residential structures exist in the Core area or the Green/Forest area which are found to be unfit for human habitation and are in a seriously dilapidated condition, the Implementation Committee constituted under this judgment may permit construction/reconstruction of the building but strictly within the legally permissible structural limits of the old building and for the same/permissible legal use. The Competent Authority shall sanction the plans and/or approve the same only to that extent and no more; under any circumstances such plans must not be beyond two storeys and an attic floor and only for residential purpose.

V. There shall be no regularization of unauthorised constructions within the Core area and Green/Forest areas which have been raised without obtaining any prior permission/sanction of plans in entirety. It shall also include constructions in complete violation of the sanctioned plan or where additional floors have been constructed in contradiction to the concept of deviation or variation, to constructed areas for which the plans were sanctioned. In such cases, the authorities shall take action in accordance with law and direct demolition of such property.

VI. The State of HP, its departments and authorities are hereby restrained from permitting cutting of hills/forests without prior submission of application for sanctioning of plans for construction. If any person is found to be damaging Forest/Green area and/or cutting of hills, without grant of permission of the concerned authorities and without construction plan being sanctioned, he/she would be liable to pay environmental compensation as may be determined by the concerned department but not less than Rs. 5 Lakhs for each violation. The compensation, if not paid, shall be recovered as land revenue by the State and will be utilized by the State for restorative purposes and/or for afforestation of the Shimla Planning Area.

VII. Wherever unauthorised structures, for which no plans were submitted for approval or NOC for development and such areas falls beyond the Core and Green/Forest area the same shall not be regularised or compounded. However, where plans have been submitted and the construction work with deviation

has been completed prior to this judgment and the authorities consider it appropriate to regularise such structure beyond the sanctioned plan, in that event the same shall not be compounded or regularised without payment of environmental compensation at the rate of Rs. 5,000/- per sq. ft. in case of exclusive self-occupied residential construction and Rs. 10,000/- per sq. ft. in commercial or residential-cum-commercial buildings. The amount so received should be utilised for sustainable development and for providing of facilities in the city of Shimla, as directed under this judgment.

VIII. We direct the State Government and/or its instrumentalities and more, particularly, the Town and Country Planning Department to finalize the Development Plan within three months from the date of pronouncement of this judgment without default. The Development Plan so finalized shall be notified in accordance with law. While finalizing the development plan, the directions and precautions stated in this judgment shall be duly considered by the concerned departments and the State of Himachal Pradesh.

IX. The Registrar or any other authority vested with the responsibility of registering documents of transfer or division of land shall not do so except with the prior NOC from the Town and Country Planning Department, in accordance with the provisions of the law afore-referred. The Department of Science and Technology, Town and Country Planning, Municipal Corporation, Urban Development, Forest, Revenue and Registrar for documents shall depute their senior officers within a period of three weeks from today, who shall prepare Memorandum of Practice which shall be followed by all the departments in regard to cutting of hills, any activity in the forest areas, division and transfer of land, development activity providing of infrastructure and other facilities in the Shimla Planning Area. This memorandum shall provide due coordination and cooperation between the various wings of the State to ensure sustainable development of the entire Shimla Planning Area. This Memorandum will be approved by the Supervisory Committee appointed under this judgment.

X. The State of Himachal Pradesh, its instrumentalities, departments and local authorities shall prepare an Action Plan for providing appropriate infrastructure, water and sewerage facilities, roads, greenery, other public amenities and retrofitting of existing structures (especially public utilities) particularly with the earthquake resistance structures in the areas which have been indiscriminately developed and lacks such facilities like Sanjauli and other congested areas of Shimla including Lower Bazar etc. The Action Plan shall be prepared within a period of three months from the date of pronouncement of this judgment providing retrofitting to public or private buildings against earthquake effect and be implemented in accordance with the State Policy.

XI. No construction of any kind, i.e. residential, commercial, institutional or otherwise would be permitted within three meters from the end of the road/national highways in the entire State of HP, particularly, in Shimla Planning Area. We direct that all the concerned authorities shall duly enforce the valley view regulation and direct the same.

XII. Within the existing Zoning policy, additional layers of slope, geology, soil type and load bearing capacity of soil should be superimposed on different zones to regulate any construction or development works. The height of constructions should be regulated by such safe bearing load capacity of the underlying rock formations rather than uniformly following 18 mtr. of height requirement. The Interim Development Plan permits 18 mtr. of height

requirement, which again has no rational and is not backed by any study. Thus the same will not be implemented till compliance with the other directions.

XIII. Presently slope of 45° for construction is uniformly applicable in all zones and areas irrespective of soil and geology. This can create vulnerability during seismic events and soil saturation/soil liquefaction. Slope in soft rocky areas with over burden soil should be reduced to 35° while retaining 45° for areas with hard sub surface stratum. The concerned department shall ensure that no construction activity takes place where the slope is more than 45^0/35° in any case, which should be prior to cutting of the hills.

XIV. Rain water harvesting should be a mandatory requirement for all the building plans. Even the old buildings where such RWH structures are not present must be provided with RWH systems within three months. This direction must be complied with particularly in relation to public buildings, schools, colleges, universities, hotels, hostels, etc.

XV. All the storm water available as surface run off in all the concretised areas like roads, lanes, platforms and market places should be diverted in such a manner to ensure that such run off does not go in to over burden or flow along hills and depressions, thereby creating over saturation and affecting soil and slope stability. Options be evaluated for storage and use of such water after proper treatment/dis infection.

XVI. There should be no institutional construction in the Core area and the institutions located in the Core area which requires a further demand for space or facilities should be shifted to other district or to the areas falling under the jurisdiction of SADA.

XVII. We appoint the following Committee to be termed as 'High Powered Expert Committee', which shall be responsible for carrying out the specific directions under this judgment and provide NOC or other necessary permissions to the stakeholders, whether State or private parties. This Committee shall also ensure that there is no further degradation of environment, ecology and natural resources of the Shimla Planning Area. If anything comes to the notice of this Committee, they would be at liberty to move to the Tribunal for appropriate directions. The High Powered Expert Committee shall consist of two components. First would be the Supervisory Committee while the later would be Implementation Committee. The Members of these committees shall be as follows:

I. <u>SUPERVISORY COMMITTEE:</u>

i) Secretary, Urban Development, State of Himachal Pradesh.

ii) Director, Wadia Institute of Himalayan Geology, Dehradun.

iii) Director, Town and Country Planning, Govt. of H.P. shall be the Member Secretary of the Committee

iv) Professor from relevant field nominated by the Director, Punjab Engineering College, Chandigarh.

v) Nominated officer from NDMA not below the rank or equivalent to the Joint Secretary or above. vi) Member Secretary, H.P. Pollution Control Board.

II. <u>IMPLEMENTATION COMMITTEE:</u>

Chairman: Director, Deptt. Town and Country Planning, Govt. of H.P.

<u>MEMBERS:</u>

i) State Town Planner, Govt. of H.P.

ii) Director, Department of Urban Development, Govt. of H.P.

iii) Municipal Commissioner, Shimla.

iv) Nominated officer from Wadia Institute of Himalayan Geology, Dehradun not below the rank or equivalent to Director in Govt. of India.

v) Nominated officer from NDMA not below the rank or equivalent to Director in Govt. Of India.

vi) State Geologist, Department of Industries, Govt. of H.P.

vii) Director, Department of Environment, Science & Technology, H.P.

viii) Architect in-Chief, H.P. PWD.

ix) Member Secretary, H.P. Pollution Control Board.

The Supervisory Committee shall meet atleast once in three months, while the Implementation Committee shall meet every month in the first week to perform the functions and duties assigned to them under this judgment, without default.

XVIII. This High Powered Expert Committee shall carry out a survey of lifeline structures and identify those structures that are vulnerable to damage due to seismic events and other natural hazards. Also it will identify and delineate passages for providing emergency services, for medical assistance and relief works, so that enough openings are created for ingress and egress of fire tenders and emergency medical vehicles/ambulances.

XIX. This Committee shall also advise the State of HP for regulating traffic on all roads, declaring prohibited zones for vehicular traffic, preventing and controlling pollution and for management of Municipal Solid Waste in the Shimla Planning Area. The recommendation of this Committee should be carried out by the State Government and all its departments as well as local authorities, without default and delay.

XX. The Committee shall also deal with the recommendations in relation to zoning policy and would keep in mind the factor of vulnerability risk assessment. The Committee may also make recommendations for permitting construction of buildings of exceptional nature like hospital, fire-brigade or public utility services but strictly in consonance with the laws in force.

XXI. There should be a complete ban on felling of trees in Catchment Forest and Sub-Catchment of water streams and water sources. In such areas, even change of land use to horticulture and agriculture should not be permitted as that can add pesticides and inorganic chemicals to soil which will eventually drain in to water sources.

XXII. The State Government shall ensure that the Municipal Solid Waste generated in the Shimla Planning Area is managed strictly in consonance with the Solid Waste Management Rules, 2016. The Waste to Energy Plant located at Bhariyal should positively be made operational as directed by the Tribunal in the other connected matters by 15th November, 2017.

XXIII. The ban on use of plastic bags and plastic packaging in the Shimla Planning Area is again reaffirmed and reiterated. The State of HP, it's Departments, Himachal State Pollution Control Board and the Municipal Corporation of Shimla shall ensure that no plastic bags or plastic packing or goods are used, stored, sold and/or given with any product, by the shopkeepers in the Shimla Planning Area.

XXIV. The State Government, concerned departments and the local authorities are hereby directed to prepare a complete action plan for collection and disposal of sewage in the Shimla Planning Area expeditiously. The plan should deal with laying of pipeline, putting up of STP and reutilisation of the treated sewage and/or its discharge at the appropriate places wherever there is a discharge in the water body. It shall be ensured that the release of the treated sewage should not be at a point prior to any drain or pipe discharging

untreated sewage into the river/water bodies directly, which must be stopped. The Action Plan should be placed before the Tribunal within a period of three months from today.

XXV. It is directed that wherever the concerned authorities extract water from the river or water bodies it should do so according to law and positively prior to a point where discharge from any drain, nalla, etc. meets the river/water body. Though, every effort should be made that no untreated sewage or other polluted water enters the river at all.

XXVI. Wherever there are trees in the compound or land of an owner or a house adjacent to a forest or green area, it shall be the responsibility of such owner/owners to ensure that the trees are properly protected and maintained and no damage is caused or permitted to be caused to their growth.

XXVII. All the directions issued by the Tribunal in relation to collection and disposal of sewage, passed in the case of Abhimanyu Rathor *v.* State *(supra) should be strictly complied with.*

XXVIII. The concerned departments and the local authorities of the State Government should also prepare a complete and effective Action Plan with regard to disaster management. The Disaster Management Plan should deal with both precautionary and preventive measures that should be taken up presently to ensure that in the event of any untoward incident or natural calamity there is least damage to the natural resources, person and property of the public at large. The action plan should also deal with the preparedness of the concerned wings of the State for the purpose of relief and rehabilitation as a result of disaster.

XXIX. Original Application No. 505 (THc) of 2015 also stands disposed of in terms of this judgment. The Applicant has already submitted the plans for reconstruction of the house on the existing lines on the ground that the same is in dilapidated conditions and is unfit for human habitation. In this judgment, the Tribunal has placed restrictions in consonance with the Notifications issued by the State on the nature and the extent of construction that can be raised in such areas. All these matters are required to be considered by the Supervisory Committee. Therefore, we direct the concerned authorities to consider the application of the applicant afresh, in light of the directions contained in this judgment and pass orders expeditiously in any case not later than four weeks from today. The orders dated 1st August, 2005 and 13th October, 2010 already passed by the authorities would not be given effect to and they will be subject to fresh orders that may be passed by the competent authority."

5. In view of above, constructions in core areas of Shimla being serious hazard to public safety and environment, any modification as suggested in the application will not be viable. Undoubtedly, the requirement of the High Court is highest priority but in view of danger to the public safety, we do not find it possible to modify the earlier order. As regards the recommendation of the Supervisory Committee constituted in terms of order of this Tribunal, we find that it has merely considered the exceptional requirement but not the issue of public safety and desirability of prohibiting constructions in view of vulnerability of the area.

6. The application is accordingly disposed of.

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† Principal Bench, New Delhi