

THE HIGH COURT OF JUDICATURE FOR MADHYA PRADESH AT
JABALPUR
(Division Bench)

Writ Petition No.470/2011

Preeti SinghPetitioner

Versus

The State of Madhya Pradesh and othersRespondents

Coram:

Hon'ble Mr. Justice Mohammad Rafiq, Chief Justice
Hon'ble Mr. Justice Vijay Kumar Shukla, Judge

Presence :

Shri M.K. Tripathi, learned counsel for the petitioner.

Shri Darshan Soni, learned Government Advocate for the respondent
Nos.1 to 3/State.

Shri Sanjay Ram Tamrakar, Advocate for respondent Nos.4 and 5.

Whether approved for reporting- Yes

Law laid down:

- Writ Petition filed for a direction to the respondents to immediately stop the construction of Community Hall in the land of Public Park of Indira Colony in the city of Burhanpur with the further prayer that the respondent-State be directed to conduct an enquiry into illegalities committed by the Respondent No.5 in his functioning as Mayor of the Municipal Corporation, Burhanpur.
- Section 279 of the **M.P. Municipalities Act, 1961** requires the Municipal Council to provide places to recreation such as open space, park, playgrounds, commons, swimming tanks and amenities for the use and employment of the people and may frame bye-laws regulating their use.
- Section 282 of the Act of 1961 provides that the State Government may, either on its own motion or on the request of a Council in respect of any Municipality and after making such inquiry as it deems necessary, notify, by a notice published in the official gazette, any area or areas, to be reserved from a date fixed therein, for use in the future for any special purpose of public utility such a public parks, playgrounds, educational and medical or public health institutions, markets, stands for vehicles and animals, public recreation centres and housing colonies. Sub-section (2) of Section 282 provides that after such reservation has been noticed, no construction shall take place on any area or areas so declared without the special permission of the State Government in this behalf.
- The law enunciated by the Supreme Court in the **Bangalore Medical Trust** when applied to the facts of the present case, we are clear in our mind that the land left as open space can be used only as Public Park and could not be used for construction of a Community Hall to permanently change its character.

- It is trite that the environmental factors should weigh heavily with all the local bodies as also with the Courts while construing a town planning statute. While therefore exercising any powers, such authority should ensure that its outcome does not have the effect of marginalizing the ecological considerations. Reservation of the open spaces for parks and play grounds is universally recognized legitimate exercise of statutory powers rationally related to the protection of the residents of the locality from the ill effects of urbanization.
- It is stated that "statutes in force in India and abroad reserving open spaces for parks and playgrounds are the legislative attempts to eliminate the misery of disreputable housing condition caused by urbanization. Crowded urban areas tend to spread disease, crime and immorality." It is harmonious development with environment that has given rise to the concept of urban development. Urban development is a process in which though the benefits of development may be derived but efforts should always be made to stay immune from its ill effects.
- Taking a holistic and pragmatic view of the matter and keeping with the salutary principles of law laid down by the Supreme Court in very many cases while interpreting various town planning laws, it is expected from the Government authorities/respondents that in discharging all their obligations of planning and development of a city, they should give due importance to the provisions envisaged in the Rules and the Act and in doing so, mandatorily adhere to the requirement of sufficient spaces being left open to be used as parks, gardens, playground and recreational grounds for entertainment and health activity by the local residents and especially the children. Such utilities have been broadly categorized as open spaces in the relevant rules. Such open spaces act as lungs and ventilators for the suffocating growth of population and as rightly observed by the Supreme Court in various judgments from time to time, also add luster and beauty to the township. These open spaces of land have immense importance and utility as buffer zone for maintaining ecological balance and fulfilling environmental demands. Once a Public Park is dedicated to citizens/residents, it is held by the Municipality in trust on behalf of public at large and cannot be put to any other use. Change of its use for any other purpose by Municipal body would tantamount to breach of trust.
- While disposing of the writ petition, the Court directed that Hall constructed in the Park shall be demolished and the construction material shall be removed within a period of two months with further direction that the Park situated in Plot Nos.101, 102, 103 in the map of Town and Country Planning, shall always be maintained only as a Park and shall not be used or allowed to be used, for any other purpose. The Municipal Corporation, Burhanpur shall be responsible for maintaining the Park on regular basis. The Collector, Burhanpur shall be responsible for ensuring compliance of this order.

Reference made to

Bangalore Medical Trust Vs. B.S. Muddappa and others, (1991) 4 SCC 54
Intellectual Forum, Tirupathi Vs. State of A.P. and others, (2006) 3 SCC 549
Municipal Corporation, Ludhiana and anr. Vs. Balinder Bachan Singh, (2004) 5 SCC 182
Padma Vs. Hiralal Motilal Desarda and others reported in (2002) 7 SCC 564
Bombay Dyeing and Manufacturing Co. Ltd.(3) Vs. Bombay Environmental Action Group, (2005) 5 SCC 61
Yogendra Singh Tomar Vs. State of M.P., AIR 1997 MP 124
Attorney General Vs. Corporation of Sunder Land - 1875-76 (2) Ch. D 634,
Sections 279 and 282 of the M.P. Municipalities Act, 1961.

Significant Paragraphs:- 5 to 14

Hearing convened through Video Conferencing:

ORDER (ORAL)

(26.08.2021)

Per: Mohammad Rafiq, C.J.

This writ petition has been filed by petitioner – Mrs. Preeti Singh seeking a direction to the respondents to immediately stop the construction of Community Hall in the land of Public Park of Indira Colony in the city of Burhanpur, with the further prayer that the respondent-State be directed to conduct an enquiry into illegalities committed by the Respondent No.5 in his functioning as Mayor of the Municipal Corporation, Burhanpur. The petitioner has placed on record few colour photographs of the Park showing unfinished construction of a Hall.

2. This Court while issuing notices of this writ petition vide its order dated 10.01.2011 directed that no further construction shall be made in the Park in question until further orders. The District Magistrate, Burhanpur was directed to ensure compliance of the said order. When the matter was listed before the Court on 02.03.2012, this Court noticed that the return filed by the respondent Nos.4 to 6 makes it evident that there was an encroachment in the form of shed on the public way by none other than the Mayor herself, in front of her house, who is wife of respondent No.6. This Court, therefore, directed the respondents to immediately remove such encroachment made on the public way. Thereafter, when the matter was listed on 20.03.2012, the learned Government Advocate appearing for the State Government informed the Court that direction has been issued to the Collector, Burhanpur (Respondent No.3) for immediately stopping the construction in the Park. In response to pointed query by the Court whether such construction work was approved by the Town and Country Planning and whether it was lawful construction, the learned Government

Advocate fairly submitted that it was not a legal construction. The Court then required the respondents to inform as to what action has been taken against the Commissioner, Municipal Corporation, Burhanpur (Respondent No.4) for carrying out the aforesaid illegal construction. Unfortunately, the matter has been getting adjourned thereafter on every date and has come up for hearing today.

3. The Supreme Court has dealt with the issue of importance of Public Parks and their preservation in the case of **Bangalore Medical Trust Vs. B.S. Muddappa and others** reported in (1991) 4 SCC 54 which judgment still holds field. Observations made by the Supreme Court, in our considered view, are of great relevance even in the present times, as would be seen from Para 24 and 36, which read as under:-

“24. Protection of the environment, open spaces for recreation and fresh air, play grounds 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 play grounds 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.

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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 lease 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 urbanization 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.”

4. Under challenge before the Supreme Court in **Bangalore Medical Trust** (supra) was the judgment of Division Bench of the Karnataka High Court by which the decision of the Bangalore Development Authority in converting the site of a public park into a nursing home and then allotting the same to Bangalore Medical Trust, was set aside. The Supreme Court while upholding the judgment of the High Court in Para 48 of the judgment held as under:

“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 purpose 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.”

5. Section 279 of the **M.P. Municipalities Act, 1961** (hereinafter referred to as “**the Act of 1961**” for short) requires the Municipal Council to provide places to recreation such as open space, park, playgrounds, commons, swimming tanks and amenities for the use and employment of the people and

may frame bye-laws regulating their use. Section 282 of the Act of 1961 provides that the State Government may, either on its own motion or on the request of a Council in respect of any Municipality and after making such inquiry as it deems necessary, notify, by a notice published in the official gazette, any area or areas, to be reserved from a date fixed therein, for use in the future for any special purpose of public utility such as public parks, playgrounds, educational and medical or public health institutions, markets, stands for vehicles and animals, public recreation centres and housing colonies. Sub-section (2) of Section 282 provides that after such reservation has been noticed, no construction shall take place on any area or areas so declared without the special permission of the State Government in this behalf. The law enunciated by the Supreme Court in the **Bangalore Medical Trust** (supra) when applied to the facts of the present case, we are clear in our mind that the land left as open space can be used only as Public Park and could not be used for construction of a Community Hall to permanently change its character.

6. It is trite that the environmental factors should weigh heavily with all the local bodies as also with the Courts while construing a town planning statute. While therefore exercising any powers, such authority should ensure that its outcome does not have the effect of marginalizing the ecological considerations. Reservation of the open spaces for parks and play grounds is universally recognized legitimate exercise of statutory powers rationally related to the protection of the residents of the locality from the ill effects of urbanization. The Supreme Court in **Bangalore Medical Trust** (supra) in this regard rightly stated that "statutes in force in India and abroad reserving open spaces for parks and playgrounds are the legislative attempts to eliminate the misery of disreputable housing condition caused by urbanization. Crowded

urban areas tend to spread disease, crime and immorality." It is harmonious development with environment that has given rise to the concept of urban development. Urban development is a process in which though the benefits of development may be derived but efforts should always be made to stay immune from its ill effects.

7. The Supreme Court in **Intellectual Forum, Tirupathi Vs. State of A.P. and others** reported in **(2006) 3 SCC 549** has succinctly summarized the law in this behalf as under:-

“84. The world has reached a level of growth in the 21st century as never before envisaged. While the crisis of economic growth is still on, the key question which often arises and the courts are asked to adjudicate upon is whether economic growth can supersede the concern for environmental protection and whether sustainable development which can be achieved only by way of protecting the environment and conserving the natural resources for the benefit of humanity and future generations could be ignored in the garb of economic growth or compelling human necessity. The growth and development process are terms without any content, without an inking as to the substance of their end results. This inevitably leads us to the conception of growth and development which sustains from one generation to the next in order to secure "our common future". In pursuit of development, focus has to be on sustainability of development and policies towards that end have to be earnestly formulated and sincerely observed. As Prof. Weiss puts it, "conservation, however, always takes a back seat in times of economic stress." It is now an accepted social principle that all human beings have a fundamental right to a healthy environment, commensurate with their well being, coupled with a corresponding duty of ensuring that resources are conserved and preserved in such a way that present as well as the future generations are aware of them equally.”

8. In **Municipal Corporation, Ludhiana and another Vs. Balinder Bachan Singh (dead) by LRS and others** reported in **(2004) 5 SCC 182**, the dispute was regarding open spaces earmarked for developing the parks used by the inhabitants of the locality. The scheme was approved by the Municipal

Corporation under the Punjab Municipal Act, 1911. When the scheme had been approved and duly developed and the open space was being used by the inhabitants, the respondent filed a suit claiming the said land, which was dismissed. Appeal there against was allowed by the first appellate Court. The Municipal Corporation went in appeal to the Supreme Court against that judgment. The Supreme Court again in Para 18 of the judgment held as under:

“18.Rajinder Kaur and the plaintiff respondents could not have sold the land without getting the Scheme sanctioned as plots. It is well known and judicial notice can be taken of the fact that residential plots sell at a much higher price than the agricultural land. To sell the land as plots, a part of the land has to be left to provide for common purposes such as roads, community centre, schools and parks. Having taken advantage of selling the plots in a developed colony and charging a higher price, which were purchased by the inhabitants with the understanding that civil amenities including the park were well-provided-for, the plaintiff-respondents cannot be permitted to turn around to claim the land left in the Scheme for being used as a park as their personal property.”

9. In Padma Vs. Hiralal Motilal Desarda and others reported in (2002) 7 SCC 564, the Supreme Court while explaining the paramount consideration/utilisation of the land reserved in future in accordance with the requirement of the later times, criticized the approach of the City and Industrial Development Corporation, Maharashtra and held that it was supposed to carry out its activities "on no profit no loss basis". While upholding the order of the High Court, it was held that the decision to dispose of the land in bulk cannot be said to have been taken in public interest and High Court rightly observed in the judgment that "local residents and children must have place enough to be used as parks, gardens and for entertainment which not only act as lungs and ventilators for the suffocating growth of pollution but also add luster and beauty to the township, the utility of such piece of land acting as a buffer for maintaining ecological balance and environmental demand needs no

emphasis". In fact, the Supreme Court while explaining the concept of town planning had made certain pertinent observations in Paras 31 and 32 of the report which we are tempted to incorporate hereunder for the purpose of guidance:

“31. Laws dealing with development planning are indispensable to sanitation and healthy urbanisation. Development planning comprehensively takes care of statutory, manual, administrative and land-use laws hand in hand with architectural creativity. In the words of a well known architect, development planning is the DNA of urbanization - the genetic code that determines what will get built. A development plan is essential to the aesthetics of urban society. American Jurisprudence, 2d (Vol. 82, at p. 388) states:

'Planning', is that term is used in connection with community development, is a generic term, rather than a word of art, and has no fixed meaning. Broadly speaking, however, the term connotes the systematic development of a community or an area with particular reference to the location, character, and extent of streets, squares, and parks, and to kindred mapping and charting. Planning has in view the physical development of the community and its environs in relation to its social and economic well-being for the fulfillment of the rightful common destiny, according to a 'master plan' based on careful and comprehensive surveys and studies of present conditions and the prospects of future growth of the municipality, and embodying scientific teachings and creative experience.

32. The significance of a development planning cannot therefore be denied. Planned development is the crucial zone that strikes a balance between the needs of large-scale urbanization and individual building. It is the science and aesthetics of urbanization as it saves the development from chaos and uglification. A departure from planning may result in disfiguration of the beauty of an upcoming city and may pose a threat for the ecological balance and environmental safeguards.”

10. The Supreme Court in *Bombay Dyeing and Manufacturing Co. Ltd.(3) Vs. Bombay Environmental Action Group and others* reported in (2005) 5 SCC 61 held that "ecological factors indisputably are very relevant considerations in construing a town planning statute. The Court normally

would lean in favour of environmental protection in view of the creative interpretation made by this Court in finding a right of environment protection including the right to clean water, air etc. under Article 21 of the Constitution." The Supreme Court in Para 100 of this judgment observed that "both open space as also the other factors relevant for making the regulation would be in public interest. The question would, however, be as to which is of greater public interest. The public interest, thus, would be a relevant factor also for interpretation of the statute. Public interest so far as maintenance of ecology is concerned pertains to a constitutional scheme comprising Articles 14, 21, 48A and 51-A(g) of the Constitution, the other factors are no less significant."

11. The Division Bench of this Court in **Yogendra Singh Tomar Vs. State of M.P. and others** reported in **AIR 1997 MP 124** was dealing with a Public Interest Litigation where the allegation of the petitioner was that already congested locality of Ambah, District Morena is further sought to be congested by converting open space into a shopping complex. Disputed land was earmarked as Park in between two rows of building. Photographs of the area were placed on record. This according to the petitioner, if allowed to take place, would lead to obliterating an open space and thus, ecological balance would be disturbed. The Municipal Council, however, opposed the writ petitioner. The Court observed that all Indian cities like Jupiter are perpetually enveloped in thick dusty and gaseous substances. The Statutes in force in India and abroad reserving open spaces for parks and play grounds are the legislative attempt to eliminate the misery of disreputably housing condition caused by urbanisation. Crowded urban areas tend to spread disease, crime and immorality. Reservation of one space for parks and play ground is universally recognised as a legitimate exercise of statutory power rationally related to the

protection of the residents of the locality from the ill-effects of urbanisation. The Division Bench relied on the judgment in **Attorney General Vs. Corporation of Sunder Land - 1875-76 (2) Ch. D 634**, wherein the position of the municipal authorities with regard to public parks, gardens, squares and streets was put at par with a trustee, and it was held that the municipal authorities would be guilty of breach of trust in employing any part thereof for purposes other than those contemplated by the relevant statute. Following the aforesaid judgment in **Bangalore Medical Trust** (supra) and on various other decisions, this Court in **Yogendra Singh Tomar** (supra) in paragraph Nos.3, 10 and 11 of the report has held as under :-

“3. We are of the opinion that open space in this case should not be converted into shopping complex. In this regard it would be apt to remind the Municipal Council of its obligations to the citizens.

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

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

(ii) if open spaces are sought to be used in a way which would result in pollution, destruction of scenic beauty or disturbance of the ecology, then the Courts would step in and would remind the municipal authorities of their obligations.

11. From the aforementioned judicial precedents it becomes apparent that the municipal authorities are supposed to act as trustees and should see to it that open spaces should not be converted into shopping complexes. In fact, open spaces are lungs of the city. If these lungs are not there, then the citizens of the city can have no better life. Something may be said regarding locus standi also. In this regard, there can be no dispute with the proposition that this is a public interest litigation. This aspect be examined in detail.”

12. Taking a holistic and pragmatic view of the matter and keeping with the salutary principles of law laid down by the Supreme Court in very many cases while interpreting various town planning laws, it is expected from the Government authorities/respondents that in discharging all their obligations of planning and development of a city, they should give due importance to the provisions envisaged in the Rules and the Act and in doing so, mandatorily adhere to the requirement of sufficient spaces being left open to be used as parks, gardens, playground and recreational grounds for entertainment and health activity by the local residents and especially the children. Such utilities have been broadly categorized as open spaces in the relevant rules. Such open spaces act as lungs and ventilators for the suffocating growth of population and as rightly observed by the Supreme Court in various judgments from time to time, also add luster and beauty to the township. These open spaces of land have immense importance and utility as buffer zone for maintaining ecological balance and fulfilling environmental demands. Once a Public Park is dedicated to citizens/residents, it is held by the Municipality in trust on behalf of public at large and cannot be put to any other use. Change of its use for any other purpose by Municipal body would tantamount to breach of trust.

13. On consideration of the matter in its entirety and taking note of the submissions made by learned counsel for the parties and perusing the colour photographs of the Park showing the unfinished construction of the Hall, it is directed that Hall constructed in the Park shall be demolished and the construction material shall be removed within a period of two months. It is further directed that the Park situated in Plot Nos.101, 102, 103 in the map of Town and Country Planning, shall always be maintained only as a Park and shall not be used or allowed to be used for any other purpose. The Municipal

Corporation, Burhanpur shall be responsible for maintaining the Park on regular basis. The Collector, Burhanpur shall be responsible for ensuring compliance of this order.

14. A copy of this order be forwarded to and the Collector, Burhanpur and the Commissioner, Municipal Corporation, Burhanpur for compliance.

15. The writ petition is **disposed of** accordingly with no order as to costs.

(Mohammad Rafiq)
Chief Justice

(Vijay Kumar Shukla)
Judge

Amitabh