

G. B. Mahajan and others

Vs

Jalgaon Municipal Council and others

C.A. No. 6266 of 1990

(N. D. Ojha, J. S. Verma, M. N. Venkatachaliah JJ)

13.09.1990

JUDGMENT

VENKATACHALIAH J

1. Petitioners seek special leave to appeal to this Court from the order dated 18-9-1989 made by the Bombay High Court, Aurangabad Bench, dismissing appellants' Writ Petition No. 2404 of 1989 in which they assailed certain contracts of the Municipal Council of Jalgaon with a Developer of real estate for the execution of a project for 'Administrative Building' and a 'Commercial Complex' on a plot of land belonging to the Municipality.

2. We have heard Sri R. K. Jain, learned Senior Advocate for the Petitioners; Sri K. K. Singhvi, Sri A. S. Bhasme and Dr. Y. S. Chitale, learned Senior Advocates for Respondents 1, 4, 5 and 6 respectively. Special leave granted. The main appeal is taken up for final hearing, heard and disposed of by this judgment.

3. The controversy relates to a project for the development of real estate sponsored by the Town Municipal Council, Jalgaon, in the State of Maharashtra. In the year 1913 the Municipal Council, it would appear, received by way of gift of a piece of land of an extent of 5 acres and 32 guntas from a certain Lila Dhar Bhatia. The land had been in the use of the Agricultural Produce Market Committee, Jalgaon, as a cotton-market and wholesale fruit and vegetable market. The Municipal Council having entertained the idea of putting the land to a better and more profitable use persuaded the Market Committee to yeild-up possession. The terms of the original gift, it would appear, stipulated conditions that the land be put to use for only as a cotton and vegetable market. In order to enable itself to put the land to uses other and more beneficial uses and to exploit the commercial-potential which the property had with the passage of time acquired, the Municipal Council appears to have approached the heirs of the original donor who appear to have agreed to amend the terms of the gift accordingly. But the permission was not without strings attached. The project as envisaged by the Municipal Council, contemplated, amongst other things, the erection of a commercial complex. The heirs appear to have bargained for and secured a benefit that they should be given five-shops free of cost in the commercial complex.

4. The Municipal Council invited competitive proposals as to the ways in which the potential of the land could be commercially exploited and invited competitive plans and designs on the basis of which the Architects could be selected from architects all over the country. By its Resolution dated 17-3-1988 the Municipal Council selected M/s. Kabra Chaudhary Associates as Architects for the

project.

The project envisaged a Central Administrative Building with ground plus 17 floors intended to be utilised by the Municipal Council for locating its own offices and an adjacent structure with a basement plus five upper floors to be used as a vegetable-market and a commercial complex. The broad aspects as to the funding of the project were that the project was to be executed by a "Developer" who would be required to take up and execute the project at his own cost; that the developer would be obliged to rehabilitate 486 small-time vegetable vendors who were in occupation of the land in various units by providing them small stalls at, what was described as, a concessional-premium of Rs. 3,000/- per stall; that 83 more shops, at fixed premia of Rs. 40,000/- each, be given to Adatias who were carrying on their business on the property and that, further, another 60 shops, at the same rate, be allotted to some traders who are stated to have encroached upon the land. This was in addition to the five shops, which had to be made available to the heirs of the original donor free of cost. The nature of the rights conferred on to these beneficiaries is stated to be "occupancy rights" for a period of 50 years u/ S. 272(1) of the Maharashtra Municipalities Act, 1965 (Act for short) which regulated the matter. The municipality would get rents from those occupants at rates stipulated. The administrative block comprising of ground plus 17 floors was, however, intended to be handed over to the Municipal Council free of cost for its own use and of its tenants.

5. The project-scheme contemplated a mode of financing which contemplated that in consideration of the "developer" putting-up the entire construction at its own cost and making various allotments to the shop-keepers to whom the Municipal Council had given assurances of alternative accommodation at fixed rates of premia and providing Ground plus 17 floors of the Administrative building free of cost to the Municipality, the developer would be entitled and at liberty to dispose of the occupancy rights in respect of the rest of the accommodation in "commercial-Complex" and retain the premia paid by the disponees so to reimburse itself the financial outlays on the project plus its profit. The occupiers, including those who would have the benefit of the allotments at such fixed-rates as well as those to be inducted by the developer, were expected to pay rents to the Municipal Council for the period of 50 years at rates envisaged in the scheme, though, however, certain incentives and concessions :were afforded for the first two periods of 3 years each. According to the financial estimates prepared by the Municipal Council with the assistance of its architects as to the economics of the scheme the project was to involve a financial outlay of about Rs. 11 crores. On certain estimates prepared by it the Municipal Council was of the view that the project would benefit the local community both from the immediate as well as long-term advantages if this mode of financing and execution of the project was adopted. It was the Council's view that while the project would help to rehabilitate all those businessmen and traders who were carrying on business on the land and obviate protracted litigation for their eviction, the Municipal Council would, in addition, get a building consisting of a Ground plus 17 floors in the Central Administrative Block which would be an impressive structure 70 metres in height adding greatly to the value of the municipal estate. It was also said that the rents from those occupants in the commercial complex would considerably augment the municipal revenues.

6. After enunciating these criteria the project was put to tender. Advertisements were taken out in the Newspapers and it is stated that five Developers responded and submitted their tenders. After a process of scrutiny of the tenders and elimination of ineligible and non-competitive ones, the tender of respondent No. 6 was accepted by the Municipal Council by its unanimous resolution dated 8-10-1988. On 9-10-1988, a "Letter of Intent" was issued to the respondent No. 6, which, in turn, on 15-10-1988 issued its own advertisement of the project. On 18-10-1988, a formal agreement was

entered into between the Municipal Council and the respondent No. 6 in this behalf.

7. Appellants who are residents of Jalgaon and who entertained serious misgiving as to the legal permissibility, the economic soundness and propriety of the policy of this venture petitioned to the Collector of the District under the provisions of the 'Act' to suspend the resolutions of the Municipal Council undertaking the project and the agreement with respondent 6 for its execution. They urged that the transaction was really amounted to grant of a lease for 50 years prohibited u/ S. 92 of the "Act"; that under the Act a scheme of this kind could not be embarked upon without the sanction of the Development Department of the Government of the State of Maharashtra; that the transaction resulted in the creation of an impermissible encumbrance on the property of the Municipal Council in favour of the developer and lastly that the intended user violated the original terms of the gift. The Collector suspended the impugned resolutions. But the Minister, in a revision-petition preferred against the Collector's order, stayed the operation of that order. Simultaneously, some persons, including some of those who had moved the Collector, filed Writ Petition No. 1765/ 1988 in the High Court assailing the said resolutions. It is unnecessary to refer in any great detail to the several proceedings that ensued. Suffice it to say, in WP No. 1765/1988, in which the resolutions touching the clearance of the project and the agreement with respondent No. 6 had been assailed and the writ-petition 1825/ 1988 in which the Minister's order staying the Collector's order was challenged came up together before a Division Bench of the High Court on 20-12-1988. The contention that was pressed appears to be that in the calculations forming the basis of the financial estimates of the project were made grossly under-estimating the probable receipts by way of premia for the grant of occupancy-rights with the intention of giving an opportunity for unjust enrichment to respondent 6 as, according to the appellants, the occupancy-rights for the shops were capable of fetching far higher premia than those estimates made by the Municipality. Learned Judges of the Division Bench who dealt with the writ-petitions were of the opinion that any apprehension in that behalf would be allayed if it was ensured that any such excess should go to the benefit of the Municipality. Accordingly, the Division Bench directed that in the matter of disposal of the occupancy-rights in regard to the shops - other than those ear-marked for the preferential category of existing businessmen and traders - tenders' should be called from the public so that the difference between what was taken into account in the estimates of the project and what was actually secured in response to the advertisement might go to the benefit of the Municipality. The order said:

"Shri Singhvi, appearing for the Jalgaon Municipal Council, states that the Council will invite tenders for sale of 68 shops on the ground floor with basement on the eastern side facing Sane Guruji Road, stipulating Rs. 3,50,000/ - per shop as the floor price, and of 32 shops on the ground floor without basement, on the rear of the above 68 shops, i.e. on the western side and facing Jaikisanwadi, stipulating Rs. 2,50,000/ - per shop as the floor price. The advertisement will be given within a week from today and it will be repeated within a space of two days in between. The advertisement will mention that Rs. 25,000/- have to be paid at the time of submitting the tender for the shop.

If the applications are received tendering more amount than is stipulated in the notice, then the surplus amount will be credited to the Municipal Council and only the floor-price. shall be paid to the contractor.

If applications for all the shops are not received, or, if the applications received tender less amount than the floor-price, then the Council is at liberty to go ahead with their present scheme ....."

W.P. No. 1765/1988 dated 20-12-1988

It would appear that the advertisement issued in that behalf did not elicit any favourable response from the public. The matter was listed again before the High Court on 21-1-1989. The Division Bench held that its earlier order dated 20-12-1988 was self-executory and had put an end to the writ-petition finally and nothing really survived in the writ-petition. That was how WP No. 1765/1988 came to an end. Writ-petition 1825/ 1988, directed against the stay order granted by the Minister was disposed of on 8-2-1989. In review-petition 223 of 1989 appellants had sought a review of the order dated 20-12-1988 which was also dismissed on 7-2-1989. The advertisement issued pursuant to the order dated 20-12-1988, was itself challenged in a separate writ-petition and that writ-petition was also dismissed on 8-2-1989.

8. All these orders were assailed before this Court in Special Leave Petition No. 3293/1989, SLP No. 3222/1989, SLP No. 3268/1989 respectively. The SLP 3293/ 1989 which arose out of the writ-petition challenging Minister's order was disposed of on 17-4-1989 by this Court with the following observation:

"Since the order made by the Hon'ble Minister is evidently in the nature of ad-interim order, it is open to the petitioner to move the Minister for final disposal. It is hoped that the Minister, having regard to the importance of the matter, will expeditiously dispose of the matter. The minister will also consider whether the scheme in question is in conformity with the statutory provisions. With these observations the special leave petition is dismissed."

Special Leave Petition (Civil) No. 3293 and 3268/1989 which arose out of the orders in W.P. 1765 of 1988 and the writ-petition preferred against the advertisement were also dismissed with the following observation:

"In view of the above order in Special Leave Petition (Civil) No. 3222/ 1989 these special leave petitions are dismissed."

9. Later, the Minister disposed of the revision application by his order dated 3-8-1989. The Minister took into account the order made by the High Court in Writ Petition No. 1765/1988 and was persuaded to the view that that decision could not be ignored by him. That apart, he also went into the merits of the scheme and recorded findings against the appellants. Against this order of the Minister, appellants preferred a fresh Writ Petition No. 2404/ 1989 before the High Court. The present appeal before us arises out of the High Court's order dismissing the said W.P. 2404/1989. The High Court was of the view that the orders made by this Court in the earlier SLPs indicated that this Court had really intended that all the controversies should conclude with the decision of the Minister. The High Court, however, also went into the merits as well and held . that there were no grounds to interfere.

10. Sri R. K. Jain, strenuously contended before us that the High Court misdirected itself as to the scope of the proceedings before it on an obviously erroneous view that this Court, while disposing of the earlier SLPS, had precluded any further enquiry into the merits after the Minister's decision. Sri Jain submitted that this Court while disposing of the special leave petitions had merely indicated its disinclination to interfere at that stage and had left the matter to be dealt with under the statute by the Minister which obviously meant that at an appropriate stage when the correctness of the

Minister's order came to be assailed the matter would require to be examined on its own merits. It was erroneous to think, contended Sri Jain, that the effect of the orders of this Court was to impart a finality to the Minister's order whatever its vitiating features. There might be some force in what Sri Jain says if the observations which Sri Jain takes exception to are alone taken into account. The High Court was possibly wrong in its view as to the effect of this Court's earlier order. But what appears clear is that the High Court also went into the merits of the matter. Therefore the grievance that the High Court abdicated its jurisdiction on an erroneous interpretation of this Court's earlier order may not be correct. However, in order that there be no dissatisfaction on the question that the matter did not receive adequate consideration in the High Court, we asked the appellants to present their case on the merits also so that any need for a remit of the matter to the High Court at this late stage was obviated. Parties placed their case fully before us.

11. Sri Jain raised a number of contentions touching the power of the Municipal Council to make such disposal of Municipal property as was implicit in the scheme and on, what Sri Jain called, a manifest susceptibility of the scheme for arbitrariness in the matter of the choice of the developer. The main thrusts of Sri Jain's argument are, first, that the project, in substance, envisaged a disposal of the property-rights of the Municipal Council in favour of respondent No. 6 which, in turn, became entitled to further deal with the properties squarely attracting the prohibition u/ S. 92 of the Act; and secondly, that the scheme was a wholly non-conventional one unknown to settled principles of public finance. Sri Jain strenuously urged that the non-conventional and unorthodox features of the scheme particularly as to the mode of its finances were tailored with respondent 6 in mind and were intended to, and did, confer on respondent 6 a pre mediated largesse, in flagrant violation of financial disciplines and morality. It was also urged that the project gave enormous pecuniary advantage to respondent 6 wholly disproportionate to its outlay of funds on the project.

In the ultimate analysis, the contentions of Sri Jain admit of being formulated thus:

- (a) That the scheme of financing of the project was not one that was, as a matter of policy, open and permissible to a Governmental authority. The Municipal authority. could either have put-up the construction itself departmentally or awarded the execution of the whole project to a building contractor. The method of financing and execution of the project are, in short, ultra vires of the powers of the Municipal authority under the Act.
- (b) That the terms of the agreement with the developer that the latter be at liberty to dispose of the occupancy-rights in the commercial complex in such manner and on such terms as it may choose would amount to an impermissible delegation of the statutory functions of the Municipal Council u/ S. 272 of the Act to the developer.
- (c) That the project, in effect, amounted to and involved the disposal of Municipal property by way of a long term lease with rights of sub-letting in favour of the developer violative of S. 92 of the 'Act'.
- (d) That the scheme is arbitrary and unreasonable and is violative of Art. 14 of the Constitution. The project is patently one intended to and does provide for an unjust enrichment of respondent No. 6 at public expense. We may now deal with these contentions.

12. Re: Contention (a)

The mode of financing of the project is stated to be unconventional one and does not accord with any recognised or accepted norms of functioning and financial discipline of Governmental bodies. It is urged that while the Municipal Council could have engaged a contractor to execute the work against payment in accordance with well accepted procedures for Government contracts or could have executed the works itself departmentally. It is said that the method now chosen for the development involves a policy impermissible for a Government body. This contention of the appellants, as a legal contention is not somewhat vague and does not admit of clear-cut legal contours. As we apprehend the contention, it pertains to the legality or propriety of a policy-option. However, reliance was placed on certain observations of this Court in *Ramana Dayanand Shetty v. International Airport Authority* (1979 (3) SCR 1014 : (AIR 1979 SC 1628) and *Kasturilal Laxmi Reddy v. State of J & K* (1980 (3) SCR 1338): (AIR 1980 SC 1992).

In those cases relied this Court pointed out that with the growth of a welfare state and with the Government assuming a pluralist role as provider of social welfare services and with the corresponding increase in the magnitude of the governmental functions and the consequent evolution of new forms of wealth and new forms of property, the scope for conferment of largesse by Government had increased and the discretion of Government in the disposal of such properties, rights or privileges should not be unlimited and arbitrary.

Sri Jain said that in the present case the project involved purely commercial considerations and had no social objectives and the securing of terms to the best advantage of the Municipal Council should have been the objective. It is urged that the Municipal Council disregarded this criterion and resorted to a method which gave uncontrolled discretion and authority to respondent 6 to exploit the commercial potential of the property for its own aggrandisement. Sri Jain said that the avowed reason why the Municipal Council did not itself, with all its vast financial resources, undertake the execution of the project was that the Municipal Council wanted to save itself from the difficulties involved in the process. Sri Jain said that if the developer could finance the project by the income received from a disposal of the occupancy-rights and make huge profits, there was no reason why the Municipal Council itself could not have done the same.

13. Sri Singhvi, for the Municipal authority submitted that the execution of the project of this magnitude involved a degree of financial outlay and management expertise well beyond the immediate sources of the Municipal Council and that though the Municipal Council had, a budget which indicated crores of rupees on the receipt side, the increasing revenue expenditure and other financial commitments rendered it well nigh impossible to set apart the financial inputs requisite for this project. Sri Singhvi said that in the matter of management of the transactions relating to the disposal of occupancy rights and prompt mobilisation of funds, the deficiencies and limitations of the bureaucratic machinery should not be put out of consideration in assessing the value and utility of the alternatives. Sri Singhvi pointed out that despite the heterogeneity of their political affiliations, the members, the Municipal Council, passed all the resolutions in regard to this project unanimously. Sri Singhvi said that although popular support could not validate an ultra vires action, it might become relevant to the question whether a certain action was reasonable or not and that the circumstance that all the resolutions had been passed unanimously would lend credence to the propriety and wisdom of the measure. Sri Singhvi claimed that the estimates and calculations on which the scheme was worked out by the Municipal Council would show that the developer would not have any opportunity of making any runaway profits or exploitative gains.

14. On a consideration of the matter, it appears to us that the argument that a project envisaging a self-financing scheme, by reason alone of the particular policy behind it, is beyond the powers of

the local authority is somewhat too broadly stated to be accept . A project, otherwise legal, does not become any the less permissible by reason alone that the local authority, instead of [executing the project itself, had entered into an agreement with a developer for its financing and execution. The criticism of the project being 'unconventional' does not add to or advance the legal contention any further. The question is not whether it is unconventional by the standard of the extant practices, but whether there was something in the law rendering it impermissible. There is, no doubt, a degree of public accountability in all governmental enterprises. But, the present question is one of the extent and scope of judicial review over such matters. With the expansion of the State's presence in the field of trade and commerce and of the range of economic and commercial enterprises of government and its instrumentalities there is an increasing dimension to governmental concern for stimulating efficiency, keeping costs down, improved management methods, prevention of time and cost over-runs in projects, balancing of costs against time-scales, quality-control, cost-benefit ratios etc. In search of these values it might become necessary to adopt appropriate techniques of management of projects with concomitant economic expediencies. these are essentially matters of economic policy which lack adjudicative disposition, unless they violate constitutional or legal limits on power or have demonstrable pejorative environmental implications or amount to clear abuse. of power. This again is the judicial recognition of administrator's right to trial and error, as, long as both trial and error are bona fide and within the limits of authority. We might recall the memorable words of what Justice Brandeis said:

"The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation♦♦♦♦."

"♦♦♦♦.There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs♦♦♦♦.."

"To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment♦♦♦♦."

"♦♦...But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles♦♦♦♦."

(See: New State Ice Company v. Ernest A. Liebmann, 285 US 262 at 310-11 - Dissenting opinion of Brandeis, J.,)

In regard to Courts and policy we might recall the following words of a learned author:

"The Courts are kept out of the lush field of administrative policy, except when policy is I inconsistent with the express or implied provisions of a statute which creates the power to which the policy relates or when a decision made in purported exercise of a power is such that a repository of the power, acting

reasonably and in good faith, could not have made it. In the latter case, 'something overwhelming' must appear before the Court will intervene. That is, and ought to be, a difficult onus for an applicant to discharge. The Courts are not very good at formulating or evaluating policy. Sometimes when the Courts have intervened on policy grounds, the Court's view of the range of policies open under the statute or of what is unreasonably policy has not won public acceptance. On the contrary, crucial views of policy have been subjected to stringent criticism. In the world of politics, the Court's opinions on policy are naturally less likely to reflect the popular view than the policies of a democratically elected Government or of expert administrators....."

"The considerations by reference to which the reasonableness of a policy may be determined are rarely judicially manageable....."

(Emphasis Supplied)

[See : "The Purpose and Scope of Judicial Review" - by Sir Gorard Brennan in "Judicial Review of Administrative action in the 1980s" Oxford University Press.]

In *Forward Construction Co. v. Prabhat Mandal*, (1986 (1) SCC 100): (AIR 1986 SC 391), a similar self-financing project was embarked upon by the Municipal Corporation of Bombay. It is true, the present argument as to the manner of execution of the project being ultra vires the powers of the local authority was not in terms raised there. But some of the arguments have a familiar ring. This Court, noticing the financial feature of the scheme observed (at page SC 399: AIR 1986):

"The mere fact that the Corporation was to make a gain of the non-refundable premium did not mean that that was the only purpose which was in view. The purpose obviously was the best utilisation of the available space. If in a commercial zone the Corporation was able to make available accommodation for commercial purposes we do not see why such a venture cannot be one either for the purpose of promoting public safety, convenience or in the nature of facilities being made available as a part of the improvement of the city. If commercial activities are to be pin-pointed in a commercial zone and for that purpose the Municipal Corporation takes a step to provide accommodation for commercial purposes it cannot be said that the property of the Corporation was being acquired or held for purposes other than the purposes of the Act." (p. 115)

While the concern of public law is to discipline the public power by forging "legal techniques as both part of the way in which public power is made operational and part of the process through which it is attempted to render such public power legitimate and to think of issues of legal regulation of public power in a way that goes deeper than particular instances and seeks to elaborate issues of general principle". There is, however, as Professor Wade points out, ample room, within the legal boundaries for radical differences of opinion in which neither side is unreasonable. In *Tameside* case Lord Denning pointed out the error of confusing differences of opinion, however strong, with unreasonableness on the part of one side or the other. Lord Diplock said that the very concept of administrative discretion involves a right to choose between more than one possible course of action upon

which there is room for reasonable, people to hold differing opinions as to which is to be preferred.

In the ever increasing tempo of urban life and the emerging stresses and strains of planning, wide range of policy options not inconsistent with the objectives of the statute should be held permissible. Referring to the "Role of the judge in Public Law Litigation" a learned author says:

"Administrative law is, in essence, a search for a theory of how public policy should be made. Two powerful traditions mark the boundaries of that search. On one side, we leave the choice among competing values to a largely unstructured process of pulling and hauling by individuals directly accountable to the citizenry. On the other side, we demand a highly structured process of party-controlled proof and argument before a neutral arbiter to resolve disputes over the application of rules to specific facts. Between these extremes is that vast landscape we call policymaking - the reconciliation and elaboration of lofty values into operational guidelines for the daily conduct of society's business."

(See: "Policy making Paradigms in Administrative Law" - Colin S. Diver - Harvard Law Review - vol. 95 - 393)

It appears to us that in the context of expanding exigencies of urban planning it will be difficult for the Court to say that a particular policy option was better than another. The contention that the project is ultra vires of the powers of the Municipal Council does not appeal to us.

15. We hold that Contention (a) does not justify quashing of the impugned Resolution of the Municipal Council.

16. Re : Contentions (b) and (c) Sri Jain contended that the transaction essentially concerns the disposal of Municipal property by way of a lease and violates Section 92 of the "Act". Section 92 of the Act provides:

"(1) No Council shall transfer any of its immovable property without the sanction of the State Government,

(2)..... Omitted as unnecessary

(3) Notwithstanding anything contained in sub-section (1), a Council may lease its immovable property for a period not exceeding three years, and the lessee shall not be allowed to make any permanent constructions on such immovable property. Such lease may be renewed by the Council beyond the period of three years with the permission of the Director, so, however, that the total period of any lease shall not exceed seven years.

No such lease or any renewal thereof shall be granted unless supported by a resolution passed at a meeting of the Council."

The question is whether the present transaction amounts to lease. Sri Singhvi submitted that the transaction is limited to the disposal of occupancy-rights covered

by Section 271(1) of the Act and is not one of transfer or lease of immovable property under Section 92. Sri Singhvi says that even otherwise the two areas of the statute are mutually exclusive and provisions of S. 272(1) were intended to and did meet a special situation pertaining to municipal markets while S. 92 dealt with transfer or lease of other properties. It is unnecessary in the present case to examine the larger question raised by Sri Singhvi whether Section 92 has no application at all to "municipal markets". But the transaction would be out of Section 92 if it is not a lease or a transfer prohibited by that section. On this Sri Singhvi says that the transaction relates to mere rights of user without transfer of an interest in the property.

In the present case it is possible to fit the power exercised by Municipal authority into Section 272(1) of the Act. The relevant provisions say:

272. (1) The Council may

(a) (i) to (iv) omitted as unnecessary

(b) put up to public auction or dispose of by private sale, the privilege of occupying or using any stall, shop, stand, shed, pen or space in a municipal market or municipal slaughterhouse for such period and on such conditions as it may think fit.

(2) to (4) omitted as unnecessary

If it is reasonably possible to fit in the basic conceptions of this project into what can be held to be comprised in the power under S. 272(1), there is no reason why the provision to stifle be interpreted unduly restrictively to exclude such enterprise.

As to the contention of an impermissible delegation of power to the developer Sri Singhvi would say that the occupancy rights in respect of certain portions of the commercial complex were granted to the developer in lieu of the monetary outlay that he would make on the project and that the fact that the developer in respect of such accommodation was enabled to induct his nominees would not, in principle, detract from the character of the transaction as long as the Municipal Council, in turn, recognised such nominees as grantees of the occupancy.

On a consideration of the matter it appears to us that the appellants have not been able to establish that the essential elements of the transaction are such that Section 92 of the Act is violated. It would, indeed, be unduly restrictive of the statutory powers of the local authority if a provision enabling the establishment of markets and disposal of occupancy-rights therein are hedged in by restrictions not found in the statute. The point to note is that the developer to the extent he is authorised to induct occupiers in respect of the area earmarked for him merely exercises, with the consent of the Municipal Council, a power to substitute an occupier in his own place. This is not impermissible when it is with the express consent of the Municipal Council.

Indeed, in the course of his submissions, Dr. Chitale for respondent 6 stated that the project had turned out to be white-elephant for respondent No. 6; that the shops and other commercial accommodation made available to him are not, indeed, goods selling propositions and that the project had proved quite burdensome. Dr. Chitale,

on behalf of his client frankly stated that in view of the adverse and embarrassing publicity the litigation had generated, respondent 6 was ready and willing to surrender the agreement and all his rights thereunder if the work done by him so far was valued and paid for in terms of the specific clauses of the agreement in this behalf. Dr. Chitale also submitted that the allegation that respondent No. 6 could make disproportionately high returns is unfair and that while in respect of some of the shops the financial estimates of the Municipal Council were built on the expectations of a return of Rs. 3,40,000/- per shop and in respect of others at Rs. 2,50,000, respondent No. 6 has not been able to get even so much from the intending or prospective occupants.

17. On a consideration of the matter we find no substance in contentions (b) and (c) either

18. Re : Contention (d) The contention is that the resolutions of the Municipal Council touching the approval of the project and authorised its execution by respondent 6 are vitiated by 'unreasonableness' and 'arbitrariness'. The unreasonableness is said to consist in the choice of the manner of the execution of the project and arbitrariness in the process enabling the choice of respondent 6. Both these sins, according to the contention, were the result and in furtherance of the anxiety on the part of the Municipal Council to favour respondent 6.

Sri Jain urged that in the process of putting the project to tender the criteria on which the competitive merits of the tenders could be evaluated were not susceptible of such comparative assessment at all as, according to Sri Jain, there was no common denominator or objective-standard with reference to which one specific offer could be evaluated in comparative terms against the other.

19. It was urged that the basic concept of the manner of the development of the real-estate and disposal of occupancy rights were vitiated by unreasonableness. It is a truism, doctrinally, that powers must be exercised reasonably. But as Prof. Wade points out:

"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the Court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The Court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended. Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the Court's function to look further into its merits. 'With the question whether a particular policy is wise or foolish the Court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority

(See: Administrative Law: H.W.R. Wade, 6th Edn. p. 407)

In the arguments there is some general misapprehension of the scope of the "reasonableness"-test in administrative law. By whose standards of reasonableness that a matter is to be decided? Some phrases which pass from one branch of law to another - as did the expressions 'void' and 'voidable' from private law areas to public

law situations carry over with them meanings that may be in apposite in the changed context. Some such thing has happened to the words "reasonable", "reasonableness" etc. In *Tiller v. Atlantic Coast Line Rail Road Company*, (318 US 54 at 68): (143 ALR 967), Justice Frankfurter said :

"A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula in discriminatingly used to express different and sometimes contradictory ideas."

Different context in which the operation of "reasonableness" as test of validity must be kept distinguished. For instance as the arguments in the present case invoke, the administrative law test of 'reasonableness' as the touchstone of validity of the impugned resolutions is different from the test of the 'reasonable man' familiar to the law of torts, whom English Law figuratively identifies as the "man on the clapham omnibus". In the latter case the standards of the 'reasonable man', to the extent such a 'reasonable man' is Court's creation, is in a manner of saying, a mere transferred epithet. Lord Radcliffe observed:

"By this time, it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. of the fair and reasonable man, who presents after all no more than the anthropomorphic conception of justice, is, and must be, the Court itself ♦♦.."

(Emphasis Supplied)

(See : *Davis Contractors v. Fareham U.D. C.*; 1956 (2) All ER 145 at 160).

Yet another area of reasonableness which must be distinguished is the constitutional standards of 'reasonableness' of the restrictions on the fundamental rights of which the Court of judicial review is the arbiter.

The administrative - law test of reasonableness is not by the standards of the "reasonable man" of the Torts Law. Prof. Wade says:

"This is not therefore the standard of 'the man on the Clapham omnibus'. It is the standard indicated by a true construction of the Act which distinguishes between what the statutory authority may or may not be authorised to do so. It distinguishes between proper use and improper abuse of power. It is often expressed by saying that the decision is unlawful if it is one to which no reasonable authority could have come. This is the essence of what is now commonly called 'Wednesbury unreasonableness', after the now famous case in which Lord Greene MR expounded it."

(Emphasis Supplied)

(See: *Administrative Law - HWR Wade, 6th Edition - 407*)

To the same effect are the observations in "Legal Control of Government" (Bernard Schwartz and H.W.R. Wade) at page 253:

"❖❖❖❖❖. Confusion has perhaps arisen because the test of reasonableness in this context is the law of tort and elsewhere. In applying the latter standard the judge merely enforces what he thinks is reasonable. But in condemning unreasonable administrative action he asks himself whether the decision is one which a reasonable body could have reached. In other words he allows some latitude for the range of differing opinions which may fall within the bounds of reasonableness❖❖❖"

The 'reasonableness' in administrative law must, therefore, distinguish between proper use and improper abuse of power. Nor is the test the Court's own standard of 'reasonableness' as it might conceive it in a given situation. This is the essence of Lord Greene's dictum now familiar as the 'Wednesbury 1991 G. B. Mahajan v. Jalgaon Municipal Council S. C. 1165unreasonableness', in (1948) 1 K B 223). It was observed:

"It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretion's often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short v. Poole Corporation, (1926 Ch 66) gave the example of the red-haired teacher dismissed because she had red hair. This is unreasonable in one sense. In another it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

Referring to the doctrine, Prof. Wade says:

"This has become the most frequently cited passage (though most commonly cited only by its nickname) in administrative law. It explains how 'reasonableness', in its classic formulation, covers a multitude of sins. These various errors commonly result from paying too much attention to the mere words of the Act and too little to its general scheme and purpose, and from the fallacy that unrestricted language naturally confers unfettered discretion.

Unreasonableness has thus become a generalised rubric covering not only sheer absurdity or caprice, but merging into illegitimate motives and purposes, a wide category of errors commonly described as 'irrelevant considerations', and mistakes and misunderstandings which can be classed as self-misdirection, or addressing oneself to the wrong question❖❖❖."

(See: Administrative Law: H.W.R. Wade; Sixth Edn., p. 408)

The point to note is that a thing is not unreasonable in the legal sense merely because the Court thinks it is unwise. Some observations of Lord Scarman in

Nottinghamshire County Council v. Secretary of State for Environment, (1986 AC 240 at 247) might usefully be recalled:

"♦♦♦♦.But I cannot accept that it is constitutionally appropriate, save in very exceptional circumstances, for the Courts to intervene on the ground of "unreasonableness" to quash guidance framed by the Secretary of State and by necessary implication approved by the House of Commons, the guidance being concerned with the limits of public expenditure by local authorities and the incidence of the tax burden as between taxpayers and ratepayers. Unless and until a statute provides otherwise, or it is established that the Secretary of State has abused his power, these are matters of political judgment for him and for the House of Commons. they are not for the judges or your Lordships' House in its judicial capacity."

"For myself, I refuse in this case to examine the detail of the guidance or its consequences. My reasons. are these. Such an examination by a Court would be justified only if a prima facie case were to be shown for holding that the Secretary of State had acted in bad faith, or for an improper motive, or that the consequences of his guidance were so absurd that he must have taken leave of his senses♦♦♦"

When Lord Denning MR stated in the Court of Appeal that "Not only must (the probationer-Counsellor) be given a fair hearing, but the decision itself must be fair and reasonable" (emphasis supplied), the House of Lords thought that the statement of the learned Master of the Rolls, if allowed to pass into law, would wrongly transform the remedy of judicial review, as the statement would imply that the Court can itself sit, as in appeal, in judgment of the reasonableness of the decision instead of on the correctness of the "decision making process". "The purpose of judicial review", it was stated : "..... is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the Court." (See: Chief Constable v. Evans; (1982 (3) All ER 141 at 144).

20. While it is true that principles of judicial review apply to the exercise by a government body of its contractual powers, the inherent limitations on the scope of the inquiry are themselves a part of those principles. For instance, in a matter even as between the parties, there must be shown a public law element to the contractual decision before judicial review is invoked. In the present case the material placed before the Court falls far short of what the law requires to justify interference.

21. In regard to the allegation that the Project Scheme was tailored to suit respondent 6 alone or that the project as put to tender did not admit of tenders on fixed comparable parameters, we find no merit. Sri K. K. Singhvi submitted that the tender papers were prepared by reputed architects and the precise points on which comparative quotations were invited were specifically incorporated in the tender-papers. The point again is that no other tendered expressed any grievance. The tenders were such that the tendered could identify the terms which form the basis of comparative evaluation. The charge of arbitrariness cannot be upheld. Tests to be applied in a given case may be influenced by the extent to which a decision is supported by a democratic unanimity which evidences the decision - granted, of course, the power.

22. Sri R. K. Jain stated that the scheme enables respondent 6 to resort to certain well-known financial malpractices for tax-evasion now known to be rampant when properties change hands. Sri Jain said that the Court ought to take judicial notice of so rampant and pervasive an evil and interdict anything that tends to promote such unhealthy economic trends. While it is true that large scale tax-evasion and evils of unaccounted money bedevils the nations economic discipline and that with the increasing erosion of morality in public life and the serious personal degradations for unjust gains one sees all-round, the situation is, indeed, serious. But we fail to see what the Court can do in a case like this. The present argument proceeds on two assumptions. The first is that respondent No. 6 has, in fact, indulged in such practices in the matter of disposal of occupancy-rights. This is a mere allegation which is emphatically repudiated by respondent No. 6. The second is that the accommodation in this commercial complex is such good competitive selling proposition that there is great demand and limited supply enabling respondent 6 to exploit the situation. This again is a matter of mere allegation. To condemn the municipal authority's decision, otherwise valid, on the ground alone that the developer is likely to resort to transactions of unaccounted money would, as a judicial remedy, be plainly unthinkable. Contention (d) requires to be and is also held against appellants.

23. On a consideration of the matter, we think that the conclusion reached by the High Court does not call for interference. These appeals are accordingly dismissed. In the circumstances, we make no order as to the costs.

Appeals dismissed.

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