Bangalore Medical Trust

Vs

B.S. Muddappa and Others

Civil Appeal No. 2750 of 1991

(Dr. T. K. Thommen, R. M. Sahai JJ)

19.07.1991

JUDGMENT

THOMMEN, J. - (concurring) Leave granted.

2. I have had the advantage of reading in draft the judgment of may 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 This Act was repealed by Section 76 of the Bangalore Development Authority Act 1976 (Karnataka Act 12 of 1976) (hereinafter referred to as the 'Act') which received the assent of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the Bangalore Development Authority, the City of Bangalore Improvement Act, 1945 (Mysore Act 5 of 1945) shall stand repealed.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or taken under the corresponding provisions of this Act and shall continue to be in force accordingly unless and until superseded by anything done or any action taken under this Act :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 Provided also that any reference in any enactment or in any instrument to any provision of the repealed Act shall unless a different intention appears to be construed as a reference to the corresponding provisions of this Act.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) * * *"##
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> Accordingly, the scheme prepared under the repealed enactment is deemed to have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, ever if the object of the allotment was the construction of the 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 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 part is a matter within the discretion of the BDA. The hospital, he says, is not only on amenity, but also a civic amenity under the Act, as it now stands, and the division of the user of the land for the 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 part, 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 part is an invalid and colourable exercise of power to suit private interest at 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 mush 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 part 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 therefore. 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 be 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 that 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 served for a public part an 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 of 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 BDA may, subject to certain restrictions contained in sub-section (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 grate 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 ((1990) 3 SCC 223 : (1990) 1 SCR, 909, 937) et seq.

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

* * *##

"30. Streets on completion to vest in and be maintained by Corporation. -

(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 expense of the Corporation and shall thereupon vest in the Corporation."

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 of construction of buildings until all the improvements specified in Section 30, including parks and playgrounds, have been provided for 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 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 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, 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."

This section also has not undergone any material change. It says that, 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 with belongs to it, and to appropriate or apply any land vested in it or acquired by it for the formation of 'open space' or for building purposes or in any other manner for the purpose of any development 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 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 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 or 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 purpose. - 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."

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 areas 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 condition 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 civil 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 or 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 sits 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 sits 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 ne 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 of 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 of 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 our 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 then 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.
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> # * * *##
>
> It was resolved -
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> '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. Conversation 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 the 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 of 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 had always been the promotion and enhancement of the quality of life any 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. (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)

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. (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)

26. 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 to geology, fire and flood, and other demonstrated consequences of urban sprawl'. Upholding the ordinance, the Court said : (US pp. 261-62)

> "... The State of California has determined that the development of local open-space plans will discourage the 'premature and unnecessary conversion of open-space land to urban uses'... The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill effects of urbanization. Such governmental purposes long have been recognized as legitimate...
>
> ... The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas." (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.)

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 (99 L Ed 27 : 348 US 26) : (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 authorised 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 (39 L Ed 2d 797 : 416 US 1) : (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."

See also Village of Euclid v. Ambler Realty Company (272 US 365 (1926)). See the decision of the Andhra Pradesh High Court in T. Damodhar Rao v. Special Officer, Municipal Corporation of Hyderabad (AIR 1987 AP 171).

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 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 of interlopers (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). 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 furnished 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 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 of 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 being 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 sits. 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 nest 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 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 BAD 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 (ILR (1982) 1 Kant 1), 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 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 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 purpose 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 largess 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 of 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 part 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' of 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 stand 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 felt 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. Where 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 in 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 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 broad, 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 not 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 lay, 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 part 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 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 of 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.

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