

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

WPIL no. 06/2008,
CMP nos. 6/2008 and D- 20/2010

Date of Order: 05.04.2011

Kanwarjeet Singh and Ors
Vs.
State of J&K and Ors

Coram:

Hon’ble Mr. Justice F. M. Ibrahim Kalifulla, Judge.
Hon’ble Mr. Justice Hasnain Massodi, Judge.

Appearing Counsel:

For petitioner(s)	M/S S. S. Lehar & M. K. Bhardwaj, Sr. Advocates with Mr. Ajay Abrol & Meharban Singh, Advocates.
For Respondent (s)	Mr. Gagan Basotra, AAG for R- 1to 4. Mr. N. A. Choudhary, Advocate for R- 5&6.

i)	Whether to be reported in Press, Journal/Media	:	Yes
ii/	Whether to be reported in Digest/Journal	:	Yes

Per: Kalifulla-J (Oral)

1. This is a public interest litigation in which the petitioners seek for a direction by issuance of writ of mandamus for removing the entire illegal construction raised by the Power Development Department Authorities by enforcing the order dated 17-04-2008 of respondent No.6, namely, Housing Board with a further direction to restore the public park to its original status. The petitioners also seek for a direction to the State Government to allow the said park to be used for the purpose as envisaged in the layout plan in accordance with the

directions of the Hon'ble Supreme Court. Petitioners further seek for issuance of a writ of prohibition to restrain the PDD Authorities from adopting any revengeful attitude towards the residents of the said area or creating any hindrance with regard to the use of the electricity.

2. Brief facts which are required to be stated are that the petitioners are the residents of Shastri Nagar, Jammu, that Power Development Department Authorities illegally encroached into the park shown in the lay out plan and started raising construction and thereby creating hindrance to the residents of the locality, that the Power Development Department Authorities under the behest of respondents 2 to 4 encroached into part of the land of the park by locating two transformers in it and that Pacca construction was also made for running their regular office. It is stated that at the instance of the residents of Shastri Nagar, respondents 5 and 6 initiated action against the officials of respondents 2 to 4 and that in pursuance of such steps taken, an order came to be issued on 17-04-2008 for demolition of the unauthorized construction put up by the respondents 2 to 4. However, it is stated that the Power Development Department Authorities continued to remain in the premises of the park and thereby causing grave prejudice to the residents of Shastri Nagar. It is with the above

stated allegations, the petitioners have come forward with this writ petition seeking for the directions as stated above.

3. After issuance of notice, initially opportunities were extended to the respondents to file their respective statements,. Thereafter, on 16-12-2010 an order came to be passed by this Court in the presence of respondents 2 to 4. It is stated in the order that the room constructed inside the park, which was being used for the purpose of collecting revenue be removed and six weeks time was granted for the said purpose. Unfortunately, instead of complying with the said directions, respondents 2 to 4 have placed an affidavit before this Court where it was sought to be contended that the Housing Board themselves are inclined to allow that part of land in which the construction now stands in favour of Power Development Department in order to maintain the power supply uninterruptedly by maintenance of 630 KVA transformer which was installed in the said premises of the park.

4. Learned Additional Advocate General brought to our notice a letter issued by the 5th respondent dated 29-01-2011 and contended that the Housing Board itself has come forward to state that the land under the occupation of PDD is of no use for the Housing Board as the land use of the same is park and, as such in case the Government intends to assign the said land

in favour of PDD the land use is required to be changed from park to public utility. Learned AAG, therefore, contended that when the Housing Board has virtually no objection for transferring the land in favour of respondents 2 to 4 the usage of which is required to be changed from park to public utility, the PDD should be allowed to work out its remedy for retention of the land by approaching the State Government.

5. We are not inclined to accept the submission of the learned AAG. In the first place it is not for the Housing Board to authorize transfer of land which was originally earmarked for the use of public park. Moreover, Public park having been established while getting the lay out sanctioned by the Housing Board for creating a Housing colony, it is not for any other authority to change the character of the said land by merely taking note of the encroachment made by Power Development Authorities by putting up the office inside the public park, that too a larger area of 1/4th of the park. We, therefore, do not find any right in the respondents 2 to 4 in relying upon the letter dated 29-01-2011 of the 5th respondent in order to consider their claim for retention of the land in their favour. The Housing Board has also not stated that they are inclined for the transfer of the land in favour of Power Development Department. The said submission, therefore, does not merit any consideration.

6. We heard senior counsel for the petitioners, learned AAG for respondents 1 to 4 and learned Standing Counsel for the respondents 5 and 6. We also perused the stand of the respondents 5 and 6 as stated in their objections. Perusal of the said objections disclose that the authorities of the Power Development Department came into possession of that part of the land of the park on their own in which the construction came to be made by the authorities of PDD. According to 5th and 6th respondents, the PDD encroached into the park which was meant for the public at large and that, action was initiated against them for the removal of the said encroachment. It is stated that on 11-10-2006, a communication was addressed to the Assistant Executive Engineer, PDD Sub Division-II Shastri Nagar Jammu to remove the encroachment from the Government Park of Shastri Nagar within seven days. In response to the said communication, the Executive Engineer, Electric M&RE Div-II in his letter dated 17-10-2006 made a request to Deputy General Manager to give 4 to 5 months time i.e till the end of the Financial year for removal of the encroachments. Thereafter, by letter dated 27-01-2007 on behalf of Housing Board, a further request was made to the Executive Engineer Electric M&RE Division-II, Jammu for removal of the encroachment and that, it was also followed by

further reminders dated 02-03-2007 and 16-04-2007. Finally, by a letter dated 12-01-2008 Senior Manager of the Sub Unit, Gandhi Nagar gave a final opportunity to the Assistant Engineer M&RE Sub Division-II Shastri Nagar Jammu to remove the encroachment from the government park at Shastri Nagar, failing which, necessary action to be taken to remove the encroachment at their risk.

7. Thereafter, Additional District Magistrate Jammu by his order dated 15-04-2008 appointed Naib Tehsildar, Satwari, Jammu for the removal of the encroachment and an order for such removal was also stated to have been passed on 17-04-2008. Unfortunately, none of the steps initiated by the respondents 5 and 6 been fruitful, the petitioner came forward with the present writ petition seeking for appropriate direction to enforce the order dated 17-04-2008.

8. Having considered the stand of the respondents 5 and 6 and also the report of the Commissioner appointed by this Court and having perused the sketch placed before this Court along with the commissioner's report, we are convinced that substantial part of the park i.e. to the extent of 1/4th has been unauthorizedly occupied by the officials of respondents 2 to 4 and thereby causing grave prejudice to the residents of Shastri Nagar from making full use of the public park established by 5th

and 6th respondents while creating a Residential layout of Shastri Nagar. The submission of learned AAG that the removal of the office of PDD would cause severe dislocation to the Authorities of the Power Development Department, cannot be a ground for justifying their unauthorized occupation of the land of a public park. A perusal of the affidavit of 2nd respondent states that the need of the Power Development Department for establishing their office was in order to maintain the subdivision in which updating of revenue records of twenty five thousand electrical consumers were being processed which relate to different areas in the city of Jammu. It is stated that the complete revenue records of twenty five thousand consumers is being maintained in this office located in the park and that due to the present modernization of the Power Development Department further infrastructure was being created in order to generate more revenue to the State in the future years.

9. It is also stated that computerization was also taking place by installing more computers for monitoring the revenue as well as the energy parameters on day to day basis for the better maintenance of the records of 25000 electrical consumers, apart from their need for maintenance of 630 KVA transformer which was also set up in the corners of the park.

10. Conspectus consideration of the various averments contained in the affidavit of 2nd respondent only disclose that their need for locating their sub division in that locality requires more space and therefore continuance or allowing the unauthorized occupation of 1/4th part of the park would seriously impinge upon the rights of the Residents of Shastri Nagar Jammu for whose benefits the public park came to be established. Time and again Hon'ble Supreme Court has cautioned that the space in the residential locality can never be allowed to be occupied authorizedly or un-authorizedly by any other wings of the State and thereby causing prejudice to the residents of the locality.

11. In this context it will be appropriate to refer to the necessity for providing a lung space in the form of a public park and play ground in a Residential Colony, as has been highlighted by the Hon'ble Supreme Court in the well known decision rendered in *Bangalore Medical Trust vs. B. S. Muddappa and ors*, reported in **(1991) 4 SCC 54**. While making a detailed reference to the provisions contained in the Karnataka Town and Planning Act, the Hon'ble Supreme Court has stated in paragraph nos. 14, 18, 23, 24, 25, 32 and 36, as under:-

“14.....The need for open space for ‘better ventilation’ of the area is thus

emphasized by the provisions. One of the main objects of public parks or play grounds 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 I sought to be protected by means of these regulations.

18.Any unauthorized deviation from the duly sanctioned scheme by sacrificing the public interest in the preservation and protection of the environment by means of open space for parks and playgrounds and 'ventilation' will be contrary to the legislative intent, and an abuse of the statutory power vested in the authorities.

23. The scheme is meant for the reasonable accomplishment of the statutory object which is to promote the orderly development of the city of Bangalore and adjoining areas and to preserve open spaces by reserving public parks and playgrounds with a view to protecting the residents from the ill-effects of urbanisation. It meant for the development of the city in a way that maximum space is provided for the benefit of the public at large for recreation, enjoyment, and 'ventilation' and fresh air.

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 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.

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

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.

36. Public park as a place reserved for beauty and recreation was developed in 19th and 20th century and is associated with growth of the concept of equality and recognition of importance of common man. Earlier it was a prerogative of the aristocracy and the affluent either as a result of royal grant or as a place reserved for private pleasure. Free and healthy air in beautiful surroundings was privilege of few. But now it is a, 'gift from people to themselves'. Its importance has multiplied with emphasis on environment and pollution. In modern planning and development it occupies an important place in social ecology. A private nursing home on the other hand is essentially a commercial venture, a profit oriented industry. Service may be its motto but earning is the objective. Its utility may not be undermined but a park is a necessity not a mere amenity. A private nursing home cannot be a substitute for a public park. No town planner would prepare a blueprint without reserving space for it. Emphasis on open air and greenery has multiplied and the city or town planning or development Acts of

different States require even private house owners to leave open space in front and back for lawn and fresh air. In 1984 the B.D.Act itself provided for reservation of not less than 15 per cent of the total area of the layout in a development scheme for public parks and playgrounds the sale and disposition of which is prohibited under Section 38-A of the Act. Absence of open space and public park, in present day when urbanization is on increase, rural exodus is on large scale and congested areas are coming up rapidly, may give rise to health hazard. May be that it may be taken care of by a nursing home. But it is axiomatic that prevention is better than cure. What is lost by removal of a park cannot be gained by establishment of a nursing home. To say, therefore, that by conversion of a site reserved for low lying park into a private nursing home social welfare was being promoted was being oblivious of true character of the two and their utility.”

12. The importance of maintaining such a lung space in the form of a Park or any other open space in a residential locality has been stressed by the Hon'ble Supreme Court in the subsequent decision reported in **(1995) 2 SCC 577**, *Virender Gaur and Ors vs. State of Haryana and ors*. The Supreme

Court expressed its concern for a hygienic environment as under in paragraph nos. 7 and 8:-

“7.....Therefore, hygienic environment is an integral facet of right to healthy life and it would be impossible to live with human dignity without a humane and healthy environment. Environmental protection, therefore, has now become a matter of grave concern for human existence. Promoting environmental protection implies maintenance of the environment as a whole comprising the man-made and the natural environment. Therefore, there is a constitutional imperative on the State Government and the municipalities, not only to ensure and safeguard proper environment but also an imperative duty to take adequate measures to promote, protect and improve both the man-made and the natural environment.

8. Section 203 of the Act enjoins the Municipality to frame the Scheme providing environmental and sanitary amenities and obtain sanction from the competent authority to provide, preserve and protect parks, open lands, sanitation, roads, sewage, etc.

to maintain ecological balance with hygienic atmosphere not only to the present residents in the locality but also to the future generation.”

13. Therefore, there is no scope to have any rethinking of allowing respondents 2 to 4 to continue to remain in the area earmarked for the park by retaining their construction and thereby continue to allow them to occupy 1/4th of the public park. Therefore, the respondents 2 to 4 are bound to comply with the order issued by the 6th respondent dated 17-04-2008 by which the Power Development Department Authorities were directed to remove the encroachment and hand over possession of the premises earmarked for the park to the authorities of 6th respondents.

14. The writ petition is, therefore, allowed. Respondents 2 to 4 are hereby directed to vacate the premises by removing the construction put up by them in the park for locating their sub division office within three months from the date of production of copy of this order. In the event of the respondents failing to comply with the above directions, respondents 5 and 6 are hereby authorized to enforce the order dated 17-04-2008 by approaching the concerned Magistrate for the removal of encroachment made by respondents 2 to 4 who shall remove such encroachment and hand over possession to respondents

5 and 6 after removal of such encroachment. Respondents 5 and 6 are hereby directed to restore the park to its original status.

15. We, however, make it clear that in the interest of public at large, the transformers located in the extreme corners of the park, which were stated to be functioning for nearly three decades, shall however be allowed to remain. Respondents 2 to 4 are also directed to maintain the transformers without any default and thereby continue to provide uninterrupted power supply to the Residents of Shastri Nagar and the adjoining area.

16. Writ petition bearing WPIL No.06/2008 stands disposed of with the above directions along with connected CMP(s).

(Hasnain Massodi)
Judge

(F. M. Ibrahim Kalifulla)
Judge

JAMMU:
05.04.2011
Sanjeev