Down Mangor Valley Residents

v.

Mormugao Municipal Council,

Writ Petition No. 251 of 2001

dd. 8-01-2002

F.I. REBELLO, J. A.S. AGUIAR,J.

Judgment:

1. This Court while adjourning the matter on 12th December, 2001, had adjourned it with notice to the parties that the matter on the adjourned date would be heard both on admission and final hearing. In the light of that, Rule. Heard forthwith.

2. Petitioners, M/s. Down Mangor Valley Residents Welfare Association, are registered under the Societies Registration Act. One of its aims and objectives is to provide for a childrens park/garden in the open space identified as Plot C of property known as Babquiadi surveyed under Survey No.59, P.T. Sheet No.150, Mangor Hill, Vasco da Gama. The petitioner no.2 is the Joint Secretary of petitioner no.1. The President and the Joint Secretary have been duly authorised by a Resolution of petitioner no.1 to file the present petition.

A few facts which are relevant for the purpose of disposal of this petition may now be set out. Late Bruno Lizardo Fernandes was the owner of the property which is the subject-matter of the present petition. The said owner had applied to the respondent no.1 for permission for development of the said property. By a letter dated 30th December, 1966, President of respondent no.1 communicated to the owner, the Town Planning Committee the decision which reads as under:-
"The Town Planning Committee, has no objection to the sale of plots marked A,B,D.12 with plot C left as open space but this does not give approval for the plots already sold.

The road pattern will affect the plots as shown in blue". Next document is a Deed of Exchange dated 9th October, 1967, entered into between the owner and the second executing party, being one Daud Abubakar, by which a portion of the land belonging

to the owner was exchanged. However, what is relevant in respect of the exchanged land is that on the western side was shown Plot C destined as open space. Next is the letter dated 11th January, 1979, by the Chief Town Planner addressed to the predecessor-in-title of the first respondent, wherein the Chief Town Planner informed that they had received a communication from one Maria Virginia Da Silva Fernandes of Mangor Hill, Vasco da Gama, regarding the compulsory open space reserved by the original owner Bruno Fernandes to be converted into a garden/park at Mangor Hill. The Chief Town Planner requested the President to take necessary action in the matter under intimation to their office. Letter dated 21st June, 1980, is addressed by the Chief Town Planner to the Member Secretary, Mormugao Planning & Development Authority. One of the subjects to which the attention of the investigators carrying out land survey had been referred to included the approved sub-division plan of late Bruno Fernandes, wherein one plot was reserved as open space in Babquiadi at Mangor Hill, in which it was stated was now occupied by illegal huts. On 4th July, 2001, respondent no.1 had issued a public notice and in the public notice under the signature of respondent no.2, it was informed that the respondent no.1 proposed to take possession of the property described in the Schedule attached to the notice to develop as garden/park for the benefits of the resident of Down Mangor Valley. More importantly, the notice set out that the said property was handed over to the Council by the then landlord Bruno L. Fernandes by his formal letter dated 30th March, 1978, addressed to the Ex-President of the Council. It seems that the owners of the plot/occupants, from the affidavit of Mrs. Virginia Da Silva Fernandes, annexed as annexure to the petition, have been personally writing to various authorities regarding vacating the plot and building a garden/park on it, for which it was originally designated. There are averments to that effect in paragraph 4 of the petition which have not been denied in the affidavit-in-reply filed by the respondent no.1. The grievance of the petitioners also is that protection was being given to the illegal hutments by politicians by putting pressure on the Municipal authorities. On record is also Notice dated 29th August, 1980, issued by the Chief Officer of the first respondent under Section 184 of the Goa Municipalities Act, 1968 (hereinafter referred to as the Municipalities Act"). In the said Notice, it is pointed out that illegal constructions had been carried out without due licence from the respondent no.1 and to stop the work of construction of the buildings forthwith and to demolish/pull down the entire work already completed within fifteen days of the service of the Notice. It was then mentioned that if the noticee did not comply with the demand in terms of the Notice, the Chief Officer proposed to act under the powers conferred on him.

3. On 30th March, 2001, the residents of Down Mangor Valley again intimated to the Chief Officer that illegal constructions galore are taking place under the nose of the petitioner no.1 and would like to know the action that had been taken. Copies of the illegal constructions with photographs were forwarded. This communication was received in the office of the second respondent on 9th April, 2001. On 18th April, 2001, the second respondent issued notices to those occupying the constructions put up in the plot reserved as open space. It was set out that in the inspection held on 12th April, 2001, the occupants had carried out illegal construction without taking prior permission as required under the Municipalities Act. It was further pointed out that the

construction being illegal was in contravention of Section 184 of the Municipalities Act. The noticees were called upon to show cause as to why an order under Section 184 (1) (a) of the Act should not be passed for demolition of the said structure. The noticees, it seems, showed cause by the reply of 19th April, 2001. It was then set out that the houses/tenements were existing for the last more than 40 years and they had been inherited from their parents after their death; that the noticees were born in the same residences. In support they also produced the election voters list, ration cards and postal letters.

It was mentioned that the constructions were old and no new changes had been recently done and in view of the above, requested the Council to withdraw/cancel the demolition notices and regularize the dwellings. On 4th June, 2001, the second respondent addressed a letter to the Director of Municipal Administration. In the said letter it was pointed out that a complaint was received from the residents of Down Mangor Valley in the matter of illegal construction with a request to demolish the same as it was kept as an open space for the purpose of garden/park by the owner of the land. A news item had also been published in the newspapers. In that connection, the second respondent set out that he had issued notices to the concerned persons. Reference is then made to the Reports submitted by the Junior Engineer of the Council that nearly nine families had constructed houses illegally on that land and three persons had obtained the assistance of house tax receipts from the Council by submitting false documents. The letter also points out that in that matter investigation was on going and in the meantime, the house tax of the aforesaid three persons has been revoked to avoid further complications.

It was pointed out that the complainants were pressing hard for issuance of final notices to the nine persons who had constructed houses illegally in the open space bearing Chalta no.59 of P.T. Sheet no.150, which is reserved for garden/park. More important is the following extract from that communication:-
" Once the final notices are issued under Section 184(8) of the Municipalities Act, 1968 I am bound to take necessary action to demolish the said illegal constructions after completion of 14 days."

It is then set out that the Government had a policy decision to rehabilitate such persons before they are evicted from the land if they continue on such land for a long period. In the instant case, it was contended that 11 families have claimed that they are residing in the aforesaid land for the last 30 to 40 years and that their claim was supported by delegation from that area consisting of nearly twenty persons. It is then set out that no supporting documents had been produced to prove their plea; that the second respondent had personally inspected the illegal constructions and confirmed that the same are not less than 20 years old on the said open space. Request was made that the matter be placed before the Government for consideration and intimation to the Council whether the Government had any plans to rehabilitate these 11 families either on Government or Comunidade land nearby the said area and if so, to intimate the decision of the Government. In response to that letter the Additional Director of Municipal Administration wrote to the second respondent that the

Municipalities Act had specific provisions to deal with cases of illegal constructions. The second respondent was directed to take appropriate action against illegal constructions as per the provisions of the Act. On considering the representations made by the noticees, by a Final Notice dated 20th July, 2001, the second respondent held that cause shown was found unsatisfactory for the reasons that:-
(a) no permission/licence for the said structure/hutment had been produced; and (b) no document had been produced in support of ownership.

In these circumstances, the second respondent in exercise of the powers vested in him under Section 184 (8) of the Municipalities Act, called on the noticees to demolish the illegal construction of structures/hutments within fifteen days from the service of notice and if no demolition is commenced within the said time, the second respondent would cause the illegal structures to be demolished. Subsequent to this Notice the Deputy Collector, Vasco da Gama by letter of 13th August, 2001, informed the second respondent that the Government had no scheme of rehabilitation; that in the matter of regularization of illegal construction, on the Government/Comunidade land they had no instructions till that date. On 31st July, 2001, a representation was made to the second respondent that mundkar cases have been filed and not to take any action till the matters are decided by the Mamlatdar of Mormugao. On 2nd August, 2001, in respect of the Final Notice dated 20th July, 2001, further representation was made not to take any action in the matter and more so as mundkarial applications had been filed.

In the meantime, by an Order of 31st May,2001, in respect of those who had obtained house numbers, the second respondent in view of the false information and false documents submitted for obtaining the house numbers, cancelled the same and forfeited the amounts paid to the Municipal treasury. At this stage it may be relevant to note that to enable the occupants on the open space who had construction thereon to obtain house registration numbers, affidavits had been submitted to the office of the first respondent. In the said affidavit it was set out as under:-
" The illegal structure would continue to be illegal for all practical purposes and structure will remain as illegal."

4. On 6th August, 2001, the second respondent by an order withdrew the Final Notice issued to the persons set out in the said Notice. The reasons given for withdrawal of the Final Notice were as under:-
(i) that the families of the said persons were residing in that area for the last more than twenty years peacefully and without causing disturbances to the nearby residents; (ii) that the original landlord late Bruno Fernandes has not filed any complaint personally with the Council for eviction of the residents till the date of the Order and the present complaint is lodged by a third party without considering the question of their rehabilitation in view of the fact that they are residing there for quite a long time; (iii) that the aforesaid persons are born and brought up in the said area and are continuing there for the last more than 20 years. Accordingly they had produced the true copies of the same in support of their claim; (iv) that they had obtained permanent ration cards from the Mamlatdar of Mormugao and their names are already

appearing on the electoral rolls of that area; (v) that another group of twenty residents residing nearby that area had filed an application before the second respondent that the dwellers are residing at the site for the last 40 years and they have not caused any disturbance in the neighbourhood and had appealed that they should be allowed to continue until alternate arrangements for rehabilitation are made; (vi) that one of the applicants from the complainants side requested in the year 1998 to the Council and the Government to rehabilitate those families somewhere else to vacate the area and Government had assured that as and when general rehabilitation programme in Mormugao Taluka is taken, her request would be considered; (vii) that the Government had taken a policy decision recently to regularise illegal constructions of such persons on Government and Comunidade lands and not to demolish the houses of such families unless they are rehabilitated; (viii) that the families are residing for more than 20 years and they desire to rehabilitate them either on Government or Comunidade of Municipal land with the approval of the Government on humanitarian grounds before their homes are demolished; (ix) that the aforesaid persons during the personal hearing given by the first respondent had claimed that they are staying in that area for the last 40 years with the permission of the landlord; and (x) that the matter is subjudice as the said persons had filed cases before the Mamlatdar of Mormugao, Vasco da Gama on 31st July, 2001.

Immediately after that, the Health Officer of the first respondent addressed a letter to the Chairman of the first respondent based on a complaint received by him dated 11th September, 2001. Therein he cited the report of the Sanitary Inspector where it was reported that there are constructions there without any sanitary facilities. Due to the absence of toilet facilities the dwellers defecate and urinate behind the wall of the house belonging to the complainant in the open space, creating unhygienic conditions. The public tap located in the area is without a drainage system resulting in stagnation of water and breeding of mosquitoes. It was requested that early action be taken in the matter.

5. The case of the petitioners is that the first respondent allowed the late Bruno Fernandes to develop the land by imposing a condition on the plot that it would be reserved as an open space. That condition was accepted by the late Bruno Fernandes, who left Plot C as an open space. The correspondence including the Public Notice issued by the second respondent itself would show that the said open space was handed over to the first respondent on 30th March, 1978, though the first Notice indicates that that the first respondent proposes to take possession. Once the area is left as an open space, it is an amenity for the residents who have purchased plots in the land which has been allowed to be developed and no construction can be permitted on the said land. It is further pointed out that the very fact that the Plot C was allowed to be kept as an open space by itself would indicate that there were no constructions at the relevant time, as otherwise it would not be an open space, nor was there any direction to the late Bruno Fernandes to remove the structures before permission to develop was granted. It is further pointed out that therefore, in these circumstances, the space has to be kept open and the first and second respondents by virtue of the mandatory duty cast upon them are bound to keep the space open.

6. It is then contended that once the Final Notice was issued, the second respondent had no power to review the said Order which is styled as a Final Notice, by virtue of the provisions of Section 184(13) of the Municipalities Act, as an appeal is provided. In other words, it is sought to be pointed out that the order passed by the second respondent after hearing the persons affected, is a quasi-judicial order and once there is a quasi-judicial order, in the absence of any power under the Municipalities Act to review the decision, the second respondent could not have recalled the Final Notice by the subsequent Order dated 6th August, 2001.

7. Next it is contended that the reasons given for withdrawing the Notice are extraneous to the provisions of the Municipalities Act. The second respondent has been conferred certain statutory powers under the Act. In the exercise of those statutory powers all that can be examined are the provisions of the Municipalities Act, Rules and Bye-laws and other relevant statutes, if applicable. Various considerations given for recalling the Order or reviewing the Order are extraneous to the Act and unconnected with the discharge of power by the second respondent and on that count itself the Order is liable to be quashed and set aside.

8. On the other hand on behalf of respondents no.1 and 2, Shri A.S. Awale as Chief Officer of the second respondent has filed a reply dated 6th January, 2002. The first contention taken is that the petition is not a pro-bono petition and the petitioners are not pursuing the petition bona fide. The structures on the site are there for the last more than 20 years to the knowledge of the petitioners. It is then set out that the property where the structures are situated does not belong to the Municipal Council and continues to be in private ownership and that there is no formal handing over of the property to the Municipal Council. It is then set out that regarding the petitioners claim regarding the property being earmarked as open space for garden/park and being handed over to the Council, necessary records were searched, but the Municipality records do not disclose that the property Babquiadi had been handed over to the Municipal Council in terms of law. It is pointed out that subsequent to the Notice issued by the Council for taking possession, a legal notice from the advocate of the heirs of the late Bruno Fernandes was received resisting municipal claims over the property and that the petition filed on the basis that the property is an open space belonging to the Mormugao Municipal Council is without any basis and foundation. Therefore it is set out as to what transpired after the Final Notice was issued which is practically a reiteration of what is set out in the order recalling the Final Notice. The second respondent then has set out that the Government has taken a policy decision to regularize illegal constructions on the Comunidade lands and on the aspect of rehabilitation of the people therein, he found it desirable that the occupants of the structures are rehabilitated either on Government/Comunidade/Municipal land with the approval of the Government, on humanitarian grounds before their homes were demolished. It may also be pointed out that it was sought to be contended on behalf of respondents no.1 and 2 that possession or ownership of the land not being there of the respondent no.1, the petition itself was not maintainable and further, that the occupants are residing therein for over 20 years. No affidavits have been filed on behalf of the other respondents.

9. With the above background, the first question to be considered is whether the second respondent has the power of recalling the Final Notice issued under Section 184 (8) of the Municipalities Act. It is now a settled proposition of law that the power of review or recall has to be specifically conferred if a quasi-judicial authority has to review an order passed. If authority be needed in support thereof, gainful reference may be made to the Judgment of the Apex Court in the case of Dr. (Smt.) Kuntesh Gupta vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) & Ors, (1987) 4 SCC 525. The Apex Court therein held that it is now well-established that a quasi-judicial authority cannot review its own order unless the power of review is expressly conferred on it by the statute under which it derives its jurisdiction. Under Section 184 of the Municipalities Act no person can construct a building without following the procedure complying with the requirements therein. On failure by a party to comply with the requirements, powers have been conferred on the Chief Officer under Sub-section (4) of Section 184 of the Municipalities Act. Thereafter, in Sub-section (8) of Section 184 on failure to give notice or comply with the other requirements, there is power conferred on the Chief Officer to direct or stop the construction and to alter or demolish any construction made as specified in the notice. Against an order passed under Sub-section (8) of Section 184, an appeal lies to the Appellate Tribunal under Sub-section (13). Therefore, it would be clear that before passing an order an opportunity has to be given to the party and after hearing him an order can be passed.

There can be, therefore, no difficulty in holding that the Final Notice/Order is quasi-judicial in character, or has all the trappings thereof, as the second respondent acted on a complaint. Once that be the case, the second respondent acted without jurisdiction in passing the Order dated 6th August, 2001, as the Municipalities Act has no power of review. That order dated 6th August, 2001, therefore, will have to be quashed and set aside, being without jurisdiction.

10. We may now deal with the main issue of open spaces which are reserved as part of a development project. It is no doubt true that there is some material on record to indicate that respondents no. 4 to 15 have been occupying the structures on the said land. The question is whether because of long existence of constructions which admittedly are illegal, this Court would be precluded from exercising its extraordinary jurisdiction in the matter. The Goa, Daman and Diu Town & Country Planning Act, 1974 is an enactment which provides for development of land. There are regulations framed under the said Act whereby a mandatory duty is cast in the matter of development on the owner/owners of the sub-divided plots and if transferred to the local authority, by the local authority, to keep open spaces. Similarly, there are bye-laws in the matter of building constructions which require set backs to be maintained when building constructions are to be put up and further area to be left open, which cannot be built upon. It has now been judicially recognized that the need to keep set back areas/open spaces is a recognition by the State for maintaining environment and ecology of the area and to ensure for the people of the area a place for recreation, or leisure, whilst at the same time serving as green lungs for the area. If the objective therefore is to provide a better environment for the residents, can that

objective be defeated on the specious plea that encroachers on the land are residing there for a long time? Neither the provisions of the Municipalities Act, nor the provisions of the Town and Country Planning Act provide for any regularization of such encroachment on open spaces. Once an open space, it has always to be an open space to be used for the purpose for which it is kept. The issue of open spaces has come for consideration before Courts in various forms, whether it be in the form of regulations for land development of the area, or in the matter of building bye-laws of various Corporations and Municipalities, which require maintenance of such open spaces. As far back as 1991 the Apex Court in the case of Bangalore Medical Trust vs. B.S. Muddappa & Ors., (1991) 4 SCC 54, recognized the need for planned development of the area and the importance of the open areas and/or reservation for open areas. Reaching out to new frontiers in the development of law after the judgment in Udipi Municipalitys case, the Apex Court held that residents of an area would have a right in the event the land meant and reserved for public amenities was sought to be changed for some other purpose. While considering the law, the Apex Court noted the developments around the world and the necessity of the residents of the locality to enjoy and live in a healthy environment. In paras 24 and 25 of the judgment the Apex Court observed as under:-

" Protection of the environment, open spaces for recreation and fresh air, playgrounds for children, promenade for the residents, and other conveniences or amenities are matters of great public concern and of vital interest to be taken care of in a development scheme.....

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 in direct conflict with the constitutional mandate to ensure that any State action is inspired by the basic values of individual freedom and dignity and addressed to the attainment of a quality of life which makes the guaranteed rights a reality for all the citizens.

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

In Virender Gaur & Ors. vs. State of Haryana & Ors., (1995) 2 SCC 577, the Apex Court noted that open lands vested in the municipalities are meant for public amenities of the residents of the locality to maintain ecology , sanitation, recreation, playground and ventilation purposes. The buildings directed to be constructed necessarily affect the health and the environment adversely, sanitation and other effects on the residents in the locality. It is in these circumstances that where land was acquired for a public purpose, the Municipality is required to use the land for protection and preservation of hygienic conditions of the local residents in particular and the people in general and not for any other purpose. The Apex Court further noted that in providing legislation for reserving places for parks and open spaces, the

legislative intent has always been the promotion and enhancement of the quality of life by preservation of character and desirable aesthetic features. The 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. In Pt. Chet Ram Vashist (dead) by L.Rs. vs. Municipal Corporation of Delhi, (1995) 1 SCC 47, the issue before the Apex Court was whether a condition requiring for vesting of the open space reserved in the Municipality is legal. The Apex Court observed that reserving any site for any street, open space, park, school, etc. in a lay out plan is normally a public purpose as it is inherent in such reservation that it shall be used by the public in general. The effect of such reservation is that the owner ceases to be a legal owner of the land in dispute and he holds the land for the benefit of the society or the public in general. It may result in creating an obligation in nature of trust and may preclude the owner from transferring or selling his interest in it. The Corporation by virtue of the land specified as open space may get a right as a custodian of public interest to manage it in the interest of the society in general.

It would therefore be clear that even if what the second respondent has set out in the affidavit that legal possession of the land had not been taken by the first respondent, or title in the land had not vested in the first respondent, yet by virtue of the fact that the condition was imposed on the developer, which was accepted, and the land kept as an open space, and in fact at least by a letter possession was handed over, the Corporation became the custodian to maintain it for the purpose for which it was reserved. It is too late in the day for respondents no.1 and 2 to argue before this Court and contend that as they have not come in possession and as the petition has been filed on that basis, the petition is not maintainable. The decision in Pt. Chet Ram Vashist (supra) would be an answer to that argument advanced on behalf of the respondents. Apart from that the respondent no.1 has a statutory duty imposed by law to see that no illegal constructions came up within its jurisdiction.

11. The decision in Dr. G.N. Khajuria & Ors. vs. Delhi Development Authority & Ors., (1995) 5 SCC 762, again was in a matter of land reserved for one purpose being diverted to another. In that case, a part of a park was sought to be allotted for the purpose of setting up a school. The Apex Court held that a place reserved for a park could not be diverted for any other purpose. The observations in paragraph 10 of the said judgment are relevant in the context of the Legislature conferring power on the Executive with the hope and object that they will discharge those statutory powers honestly, faithfully and in the spirit in which such powers have been conferred by the statute on public functionaries. It is increasingly coming to the notice of the courts that public functionaries, meaning thereby the Executive, which is an important arm in our constitutional set up, are failing to discharge their duties by the other constitutional wing, the Legislature. In this vacuum, increasingly Courts are being called upon to play the role which the constitutional fathers perhaps never expected the Courts to discharge. As there never should be a vacuum, Courts as protectors of constitutional values and upholders of law, are presently occupying this vacuum. It is only a strong Executive discharging its duties, that can help bring the constitutional

scheme on rails. That is required so that both our democratic set up, as well as the spirit of the federal constitution is maintained. It is in that context that para 10 of the judgment needs to be reproduced:-

" Before parting, we have an observation to make. The same is that a feeling is gathering ground that where unauthorized constructions are demolished on the force of the order of courts, the illegality is not taken care of fully inasmuch as the officers of the statutory body who had allowed the unauthorised construction to be made or make illegal allotments go scot free. This should not, however, have happened for two reasons. First, it is the illegal action/order of the officer which lies at the root of the unlawful act of the citizen concerned, because of which the officer is more to be blamed than the recipient of the illegal benefit. It is thus imperative, according to us, that while undoing the mischief which would require the demolition of the unauthorised construction, the delinquent officer has also to be punished in accordance with law. This, however, seldom happens. Secondly, to take care of the injustice completely, the officer who had misused his power has also to be properly punished. Otherwise, what happens is that the officer, who made the hay when the sun shined, retains the hay, which tempts others to do the same. This really gives fillip to the commission of tainted acts, whereas the aim should be opposite."

A Division Bench of this Court in the case of Sindhu Education Society vs. Municipal Corporation of City of Ulhasnagar & Ors., 2001(1) Mh.L.J.894, observed that the Municipal Corporation as the custodian of the rights of the people, has been given by law the right to enforce its bye-laws by refusing sanction, preventing constructions and by demolishing buildings that may violate any law and/or bye-law. That judgment has reiterated the right of an affected person, including neighbours, for whose benefit the open spaces were reserved, to approach the Court and exercise its extraordinary jurisdiction under Articles 226 and/or 227 of the Constitution.

12. It is therefore clear that where by virtue of a condition imposed in a licence or pursuant to any statutory provision, whether it be building bye-laws or open spaces in development of land are to be reserved, those open spaces have to be reserved and cannot be changed for any other purpose, unless Legislature so provides. In the instant case nothing has been brought to the notice of this court so as to show any enactment whereby the direction of the Town Planning Committee, which was a forerunner to the authorities under the Town and Country Planning Act, which imposed on the developer, a condition for reserving Plot C as an open space and which was accepted by the developer, can be used for any other purpose. The respondent no.1 as custodian of the open spaces which possession was, at least according to a notice of the respondent no.1, handed over on 20th March, 1978, whether possession was properly handed over or not, was bound to keep the land open. It is not that the respondent no.1 totally failed to discharge this function. The record shows that in the year 1980, Notice was issued under Section 184 of the Municipalities Act. However, it transpires that subsequent thereto, for reasons not available before this Court, but what the petitioners plead as interference by politicians, no action was taken. However, acting on a complaint, the second respondent did take action, but for totally extraneous reasons chose to withdraw the said Order.

The second respondent is an authority under the Municipalities Act, who has to discharge the powers conferred by virtue of Section 74(1)(a) of the Municipalities Act generally, subject to the control, direction and supervision of the Chairperson and to supervise the financial and executive administration of the Council and exercise such powers and perform such duties and functions as may be conferred or imposed upon him, or allotted to him by or under the Municipalities Act. Under Section 184 a specific power in the matter of unauthorised construction has been conferred on the second respondent alone. In the instant case acting on public complaints and after giving a hearing to the noticees the second respondent acted according to law by directing removal of the illegal construction in the open spaces. The open spaces once reserved as open spaces, could not be changed, altered or put to any other use, except under statutory provisions. It is further clear that once open spaces were kept the respondent no.1 as a custodian, had the additional duty to see that it maintains the said open spaces. Failure to discharge that duty would be violating the trust conferred as a trustee of the land. The respondent no.1 has been constituted as a legal body to see that there is orderly development in its jurisdiction.

13. We now come to the last issue, namely whether respondent no.1, assuming that the Order passed was not as a quasi-judicial authority, could have recalled or reviewed the Order by his subsequent Order of 6th August, 2001, for reasons set out therein. As noticed earlier, respondent no.2 has been conferred statutory powers under the Municipalities Act. Whatever may be his personal reservations, or noble intentions, they should not come in the matter of discharge of his duties under the Municipalities Act. Matters of rehabilitation or alternate sites are, at least, matters not conferred upon him under the Municipalities Act. That would lie in some other province and it is for those authorities on whom such power is conferred to consider that aspect. Respondent no.2 at least, cannot act as a Robin Hood, taking from one and giving to another. In the instant case, we find initially that while issuing the Final Notice respondent no.2 noted that the constructions are illegal on the ground that no documentary evidence was produced in support of the constructions. Secondly, it was noted that the respondents had failed to produce any title to the land. Thereafter in his report addressed to the Director of Municipal Administration before issuance of the Final Notice, the second respondent was fully aware that once he issued the Final Notice he is statutorily bound to demolish the construction after completion of 14 days. It is further clear from the representation made on 4th June, 2001, that he was fully satisfied that the construction was illegal. However, in a somersault, in the Order of 6th August, 2001, the respondent no.2 has taken up defences which, to our mind, are indefensible. The law laid down by the Apex Court is binding not only on courts, but on all public authorities, including the first and second respondents. Once an open space is set aside as an open space, in case of any encroachment or interference with the open space, neighbours or affected public have a right to file a petition. That has been settled a long time ago. The mere fact therefore, that the late Bruno Fernandes had not filed a complaint and the complaint filed was by other persons, is immaterial. Complaints are filed by those who hold plots in the developed land. Apart from that, the second respondent had entertained the complaints from such third parties and had issued Final Notice of demolition.

The next ground is that the persons have been born there. Assuming for a moment that it may be so, the Court too perhaps can sympathise with that fact, but that does not mean that the rule of law has to be given a go-by. If every encroacher on private or public property is entitled to rehabilitation, it can only be at the cost of public exchequer and those honest citizens who diligently pay taxes and perform their duties according to law. To our mind, this is not the spirit of the constitutional scheme, nor why the Municipalities Act or the Town and Country Planning Act are enacted. The other grounds also as to ration cards or names in the electoral rolls are irrelevant insofar as considering the issue under Section 184 of the Municipalities Act. The various grounds cited therefore,for withholding the order of Final Notice, are totally unsustainable or unconnected with the exercise of power by the second respondent. It is impossible to consider as to how the second respondent, on whom the duty is cast to examine the matter within the strict confines of Section 184 of the Municipalities Act, could have travelled beyond those confines. That could only be for reasons other than those which are on record. It is unfortunate that the Court had to do this exercise. It may be that the second respondent has acted under pressure, but then if he cannot discharge his functions independently, it is for him to quit office rather than continue in that post.

14. It is no doubt true that the respondents have taken a plea that they have filed applications under the provisions of the Goa, Daman and Diu Mundkar Act. Firstly, from the records, it appears that those applications were filed after the Final Notice dated 20th July, 2001. The learned counsel on behalf of the petitioners has now produced communication dated 1st October, 2001, whereby the President of the first petitioner has been informed that the applications under the Mundkar Act which had been filed have been dismissed. We do not propose to go into that aspect of the matter. Suffice it to say that at least as on date, there are no applications pending.

15. From the above, the following conclusions emerge:-
(i) Open spaces maintained as part of a development project or pursuant to a building licence, have to be kept open as per the development permission or building licence as a condition for development or construction in terms of the relevant Act, Rules and Bye-laws or other executive directions; (ii) These open spaces as referred to in conclusion (i) cannot be altered, converted or changed without hearing the beneficiaries or the parties for whose benefit they were maintained and that too only if there is specific provision under any enactment, Rules, Regulations or other enactment having the force of law, including Bye-laws; (iii) Those who have put up constructions or changed user on such open spaces as referred to in conclusion (i), can have no equitable consideration in their favour on the ground that the constructions are existing for a long time, whether the constructions are legal or illegal, as the open spaces have been kept for the benefit of the beneficiaries at the time the development permission or building licence was granted, in furtherance of their right to life. This consideration outweighs all other considerations.
(iv) The authorities who grant the development permission/licence and who have been conferred powers by any enactment, including Rules, Regulations, Bye-laws, etc.

and who fail to discharge their duties by acting according to law on complaints being made of illegal constructions, or on change of user or the like, have to expeditiously take action in the matter, as otherwise in terms of law declared by the Apex Court, they are liable for action, including disciplinary action; (v) a copy of this Judgment and Order be sent to the Chief Secretary of the State of Goa, for taking further steps in the matter of issuing instructions and/or guidelines to all officers entrusted with these duties, including all local bodies and Planning Authorities, so that they act upon the complaints within a specified time, failing which they ought to be made liable for disciplinary action; (vi) A copy of the guidelines/instructions so issued by the Chief Secretary to be placed before this Court within six months from today; and (vii) The Chief Secretary to send copies of this Judgment to all bodies referred to in conclusion (v) and seek their compliance within six months and thereafter to file a status report through any officer designated by him.

16. Before parting, we may note that we must express our total unhappiness in the manner in which the second respondent has conducted this matter. However, considering the fact that earlier Notices of demolition had been issued and as the learned counsel on behalf of the second respondent also points out, the second respondent is due to retire shortly, though, in the first instance, we were inclined to direct some action, taking into consideration all these facts, we hesitate and decline to direct any action against respondent no.2. However, it may be made clear that the judgment of the Apex Court as expressed in the case of Dr. G.N. Khajuria & Ors. (supra) continues to hold the field. Officers who refuse to discharge their functions and/or allow mushrooming of illegal constructions when the same is brought to their knowledge, would be liable for action, including disciplinary action.

17. With the above, rule made absolute in terms of prayer Clauses (a), (b) and (c). In the event the respondents no.1 and 2 are not in a position to develop the space after removal of the encroachment, the respondents no.1 and 2 to authorize the petitioners to develop the open space as a garden/childrens park.
Costs by the respondents no.1 and 2.