Supreme Court of India
M.I. Builders Pvt. Ltd vs Radhey Shyam Sahu And Others on 26 July, 1999
Author: D Wadhwa
Bench: S.B.Majmudar, D.P.Wadhwa

PETITIONER:
M.I. BUILDERS PVT. LTD.

Vs.

RESPONDENT:
RADHEY SHYAM SAHU AND OTHERS

DATE OF JUDGMENT: 26/07/1999

BENCH:
S.B.Majmudar, D.P.Wadhwa

JUDGMENT:

D.P. Wadhwa, J.

These appeals are directed against the judgment dated August 23, 1994 of a Division Bench of the High Court of Judicature at Allahabad, (Lucknow Bench). By a common judgment in three writ petitions, High Court speaking through Shobha Dixit, J. held that the decision of the Lucknow Nagar Mahapalika ('Mahapalika' for short), also now called Nagar Nigam or Corporation, permitting M.I. Builders Pvt. Ltd. (the appellant herein) to construct underground shopping complex in the Jhandewala Park (also known as Aminuddaula Park) situated at Aminabad Market, Lucknow, was illegal, arbitrary and unconstitutional. High Court set aside and quashed the relevant resolutions of the Mahapalika permitting such construction and also the agreement dated November 4, 1993 entered into between the Mahapalika and the appellant for the purpose. Writ of mandamus was issued to the Mahapalika to restore back the park in its original position within a period of three months from the date of the judgment and till that was done, to take adequate safety measures and to provide necessary safeguard and protection to the public, users of the park. High Court had noticed that the fact that the park was of historical importance was not denied by the Mahapalika and also the fact that perseverance or maintenance of the park was necessary from the environmental angle and that the only reason advanced by the Mahapalika for construction of the underground commercial complex was to ease the congestion in area. High Court, however, took judicial notice of the conditions prevailing at the Aminabad market. It said it was so crowded that it was bursting from all its seams. Construction of the underground shopping complex in question would only complicate the situation and that the present scheme would further congest the area. It said that the public purpose, which is alleged to be served by construction of the underground commercial complex, seemed totally illusory.

Aggrieved by the impugned judgment of the High Court, appellant has come to this Court. Mahapalika also felt aggrieved and filed appeals (Civil Appeal Nos. 9326-28 of 1994) but these appeals by the Mahapalika were subsequently allowed to be withdrawn by order dated February 6, 1997. There is controversy as to how the Mahapalika which had earlier justified its action later turned round and sought to withdraw the appeals. The order allowing withdrawal of the appeals by the Mahapalika is as under: -

> "I.A. Nos. 10 TO 12 IN CIVIL APPEAL NOS. 9326-28 OF 1994 Nagar Mahapalika Appellants Versus Radhey Shyam Sahu & others Respondents O R D E R Taken on board.

The learned counsel for the appellant seeks leave to withdraw the appeals and states that Mr. S.V. Deshpande who appears for the other side has no objection to the withdrawal. The appeals will, therefore, stand disposed of as withdrawn with no order as to costs.

Sd/- .....CJI New Delhi, Sd/- February 6, 1997 .....,J."

Mahapalika also cancelled the building plans. This action of the Mahapalika was subject matter of criticism by the appellant as to how a duly sanctioned plan could be revoked without any notice to the appellant. We may, at this stage, itself reproduce the relevant portion of the resolution dated August 6, 1996 of the Mahapalika for withdrawal of its appeals which is as under:-

"The Lucknow Bench of Hon'ble High Court of Allahabad has declared the agreement dated 4.11.1993 executed between the Nagar Mahapalika, Lucknow and M.I. Builders, Karamat Market Lucknow in respect of construction of underground Palika Bazar and Multistoreyal parking on Jhandewala Park Aminabad, Lucknow as invalid and not in the public interest vide their judgment dated 23.8.1994.

The Hon'ble High Court rendered the above said Judgment by accepting the writ petitions preferred by several elected sabhasad of the then Nagar Mahapalika and the citizens.

On the directions of the then Nagar Pramukh Shri Akhilesh Das, who wanted to cause undue profit to M.I. Builders against the interest of Nagar Mahapalika now Nagar Nigam Lucknow, the citizens of Lucknow, the Nagar Nigam Lucknow filed Special Leave Petition No. 17223-25 of 1994 in the Hon'ble Supreme Court against the Judgment of the Hon'ble High Court.

It is proposed that in the interest of the citizen of Lucknow and the Lucknow Nagar Nigam and pending Special Leave Petition No. 17223-25 of 1994 in the Hon'ble Supreme Court be withdrawn and the Nagar Nigam Lucknow be further directed to oppose the Special Leave Petition filed by M/s. M.I. Builders in the Hon'ble Supreme Court against the Judgment dated 23.8.1994 of Lucknow Bench of Hon'ble High Court of Allahabad.

Unanimously decided that the aforesaid resolution be passed and accordingly the action may be taken."

The letter revoking the sanctioned building plans is dated April 17, 1997 and is as under:-

"To M/s M.I. Builders (P) Ltd. Karamat Market, Nishatganj, Lucknow Sir, Vide this office letter No. 223/Sa.Sa.A./95 dtd. 23.1.1995 the building plans for construction of underground shopping and parking complex at Jhandewala Park, Ameenabad were sanctioned.

After taking legal advice by the Hon'ble Nagar Pramukh from the standing counsel of the Nagar Nigam and Add. Advocate General the earlier sanctioned building plans has been revoked vide order dated 17.4.97. As such these have no legal sanctity.

Please be informed.

Yours faithfully, Sd/- S.K. Gupta Mukhya Nagar Adhikari 17.4.97 Copy to: The Vice Chairman, Lucknow Development Authority, for information.

Sd/- S.K. Gupta Mukhya Nagar Adhikari"

There were three writ petitions before the High Court and during the course of hearing of those petitions High Court had directed maintenance of status quo. At that time, it would appear only digging in some part of the park had been done and there was no construction. When the matter came before this Court, by order dated December 14, 1994 the Court passed the following order:-

"Exemption from filing official translation is allowed.

Liberty to add the omitted parties in the cause title.

Leave granted.

We have heard counsel on the question of grant of interim relief.

Printing dispensed with.

The operation of the impugned order of the High Court is stayed on the following conditions:

Taking all the facts and circumstances into consideration and having regard to the fact that it may not be possible for this Court to hear the appeal within a short time having regard to the pressure of work and pendency of old cases, we direct that the appellant shall be permitted to construct an under ground shopping complex by raising its own funds without collecting any additional funds from individuals or concerns to whom the promise of allotment of shop is made. To clarify the matter, we say that the funds can be raised from agencies other than those to whom the shops are ultimately allotted. It will be made clear to the agencies from whom the funds are raised that they will not be entitled to allotment of shops. The appellant will maintain accounts and file an undertaking to the above effect in this Court within two weeks from today. In addition the undertaking will contain a statement to the effect that in the event the appeals fail, the appellant will

not raise questions as to equity or the ground on its having invested a huge amount and will be totally amenable to such directions and orders that this Court may make in regard to the maintenance or otherwise of the shopping complex. In other words, if the Court directs removal of the shopping complex in the event of failure of the appeals, the shopping complex will have to be removed at the appellant's cost without claiming anything in return. The construction will be so carried out that the open space will remain available for the public and the entire complex will be so constructed that it will be an underground one except for the ingress and egress portions to the complex. The total area to be constructed on the surface of the plot shall not exceed 10% of the plot.

SLP (C) Nos. 17223-25/94 Exemption from filing official translation is allowed.

Leave granted.

Tag on with appeals arising from S.L.P. (C) Nos. 16907-09 of 1994 in which interim orders have already been made."

It is contended by the appellant that after the aforesaid interim order, it got necessary building plans sanctioned by the Mahapalika and started construction. Respondents, however, filed an application complaining that construction was in violation of the building plans and was also against the provisions of the U.P. Urban Planning and Development Act, 1973 (for short, the 'Development Act'). To ascertain the nature of construction being carried out at that time this Court appointed a Local Commissioner. These applications were then disposed of by passing the following order:-

"I.A. Nos. 10-12 The Commissioner, Mr. Justice Loomba, a retired Judge of the High Court of Allahabad, has pursuant to this Court's order, submitted his Report dated February 15, 1996. In paragraph 3 of the Report he identifies the points on which the Report was required and then proceeds to indicate the actual physical condition in regard to the construction of the market and states that the entire market is being constructed underground and not above the ground and that the total area on the surface of the market for the ingress and egress (with Chabutras) and light purposes etc. does not exceed 10 per cent of the plot and is about 9.74 per cent of the area in which the market is being constructed. He, however, notes that the level of the park at the periphery appears to be higher than the estimated average level of the original park by about 3.21 feet = 3 feet 2.5 inches as worked out on the basis of available old signs and that the same does not appear to be in any manner offensive and is of no consequence. He also points out that the park made on the market area is and will be available for the public in the form of park less the structures made on the surface, which as pointed out above; does not exceed the permissible limit of 10 per cent of the total plot area. He also states that the Chabutras constructed on the back of the structures will also be available to the public and may serve as benches in the park. In view of this Report which precisely indicates the actual physical condition existing on the date of the Report and the plan appended thereto which shows beyond any manner of doubt that the entire construction is underground, the total surface area does not exceed the permissible limit of 10 per cent and the raising of the height on the periphery is of no consequence because it does not in any manner affect the surface area. We, therefore, accept the Report of the learned Judge and see no merit in these I.As."

The Court, however, did not go into other issues raised in the applications. By a subsequent order dated May 7, 1997 the Court stopped further construction.

Before we consider the details of the case we may note in brief the contentions of the parties.

Petitioners (now the respondents) in the writ petitions submitted that the park was not only of great historical significance but its maintenance was necessary from the environmental point of view as mandated by law. Admittedly, the park is the only open space in the Aminabad market, which is an over-crowded commercial and residential area of the city. Possession of the park was handed over to the appellant (M.I. Builders) in violation of the provisions of law to construct an underground shopping complex and underground parking with the ostensible purpose of decongesting the area. It is not that the encroachers would be removed from the area as the underground shops were not allotted to any one of them. They would nevertheless remain at the places occupied by them. Challenge to the action of Mahapalika in allowing construction was on the grounds: -

1. It was against the public purpose to construct an underground market in the garb of the decongesting area of the encroachers to destroy a park of historical importance and of environmental necessity. It would be in breach of Articles 21, 49, 51-A(g) of the Constitution as the existing park which is the only open space in the busiest commercial area in the heart of the city of Lucknow can be destroyed and the citizens particularly the residents of the area would be deprived of the quality of life to which they are entitled under the law and to maintain ecology of the area.

2. It is in violation of the statutory provisions as contained in the U.P. Nagar Mahapalika Adhiniyam, 1959 (now called Uttar Pradesh Municipal Corporation Adhiniyam, 1959 - by Amending Act 12 of 1994) (for short the Act), U.P. Regulation of Buildings Operations Act, 1958 (for short the 'Building Act'), Uttar Pradesh Urban Planning and Development Act, 1973 (for short the 'Development Act') and also Uttar Pradesh Parks, Playgrounds and Open Spaces (Preservation and Regulation) Act, 1975 (for short the 'Parks Act').

3. No tenders were invited by the Mahapalika before entering into the agreement with the builder. This was against the established procedure and thus it acted arbitrarily in the matter of disposing and dealing with its immovable property which was of immense value. The agreement is wholly one sided and gives undue advantage to the builder at the cost of the Mahapalika.

4. The agreement between Mahapalika and the builder smacks of arbitrariness, is unfair and gives undue favour to the builder and this was done with mala fide motives of personal gain by the authorities of the Mahapalika particularly the Mukhya Nagar Adhikari (Chief Executive Officer) and the Adhyaksh (the Mayor).

5. The resolution of the Mahapalika by which it has agreed to enter into the agreement with the builder was against the provisions of the Act which were mandatory.

6. The whole action of the Mahapalika was against public interest. Lucknow Development Authority (for short LDA) which was constituted under the Development Act and was responsible for

development in the area which would mean construction of the underground shopping complex and underground parking lot was side-lined and no sanction was obtained from the Vice Chairman in accordance with the provisions of the Development Act.

The builder as well as the Mahapalika filed their respective counter affidavits in the High Court opposing the writ petitions. No counter affidavit was filed either by the State or by LDA though they were parties in the writ petitions. Chief Executive Officer and the Mayor were impleaded by name as respondents in the writ petitions and allegations of mala fides and favourtism made against them but none of them choose to file any counter affidavit controverting those allegations. In the High Court a very strange scenario emerged and that was that though the stand of Mahapalika and LDA as spelled out from documents was at variation with each other, yet both were represented by one counsel. Builder was represented by the Advocate General of the State while State was represented by its standing counsel. Before us though Mahapalika earlier supported the builder as noted above and also filed appeals against the impugned judgment but subsequently it reversed its stand, withdrew its appeals and filed an affidavit supporting the impugned judgment of the High Court. The State Government and the LDA also filed their affidavits supporting the judgment of the High Court with full vigour though as seen earlier before the High Court they were just mute spectators. We may also note that in reply to the applications IA Nos. 10 and 11 in this Court the Mahapalika lent its support to the builder. This action of the Mahapalika changing its stand midstream was subjected to severe criticism by the appellant and it was stated that there was estoppel by deed in the case and Mahapalika could not go back on its earlier stand.

The impugned judgment has been challenged by the builder on the following grounds: -

a) There was no disposal of the property by Mahapalika in favour of the builder and therefore provisions of Section 128 of the Act were inapplicable. Even assuming it was so, provisions of Sections 129 and 132 of the Act stood complied.

b) There was no arbitrariness or unreasonableness vitiating the agreement between Mahapalika and the builder particularly in view of the express finding of the High Court that there was no lack of bona fides and that it was not disputed that the builder was competent to execute the job. This was having regard to special features of the construction and further on account of the fact that no party had come forward at any time to execute the project. In such a situation omission to invite tenders would not vitiate the agreement particularly when the proposal for construction of the project by the builder was widely known.

c) In view of its stand before the High Court and in the Special Leave Petition of the builder and its own appeals filed in this Court it is not open to Mahapalika to advance any contention or take a stand contrary to what had been taken earlier.

d) High Court exceeded its jurisdiction as it did not apply correct parameters of its power of judicial review as laid by this Court in Tata Cellular vs. Union of India (1994 (6) SCC 651) and other cases and the High Court went wrong in going into the question of expediency and wisdom of the proposed project.

e) Mahapalika could not revoke the building plan without notice to the builder and without hearing it in the matter.

This last submission we need not go into the question if cancellation of the sanctioned building plans by the Mahapalika was valid as that was not the issue before the High Court.

Mahapalika is a body corporate constituted under the Act. The Act provides for various functions of the Mahapalika and how these are to be performed. Its various authorities are described in Section 5 which is as under: -

"5. Corporation Authorities.- The Corporation authorities charged with carrying out the provisions of this Act for each city shall be -

(a) the Corporation; (aa) the Ward Committees; (b) an Executive Committee of the Corporation; (bb) the Nagar Pramukh; (c) a Development Committee of the Corporation;

(d) A Mukhya Nagar Adhikari and an Apar Mukhya Nagar Adhikari appointed for the Corporation under this Act; and

(e) in the event of the corporation establishing or acquiring electricity supply or public transport undertaking or other public utility services, such other committee or committees of the Corporation as the Corporation may with the previous sanction of the State Government establish with respect thereto."

Chapter II provides for constitution of various committees and Chapter III for proceedings of the Mahapalika, Executive Committee, Development Committee and other Committees. In view of the applicability of the Development Act, 1973, the Executive Committee of Mahapalika has ceased to be in operation to that extent. Under Section 91 falling in this Chapter, a list of the business to be transacted at every meeting except an adjourned meeting, shall be sent to each member of the Mahapalika or of other Committees at least ninety-six hours in the case of a meeting of the Corporation before the date fixed for the meeting and seventy two hours in the case of a meeting of any such Committee and "no business, except as provided in sub- section (2), shall be brought or transacted at any meeting other than a business of which notice has been given". Sub-section (2) is as under: -

"(2) Any member of the Corporation or of a Committee referred to in sub- section (1), as the case may be, may send or deliver to the Mukhya Nagar Adhikari notice of any resolution with a copy thereof proposed to be moved by him at any meeting of which notice has been sent under sub-section (1). The notice shall be sent or delivered at least forty-eight hours in the case of a meeting of the Corporation and twenty four hours in the case of a meeting of any committee before the date fixed for the meeting and thereupon the Mukhya Nagar Adhikari shall with all possible despatch cause to be circulated such resolution to every member in such manner as he may think fit. Any resolution so circulated may, unless the meeting otherwise decides, be considered and disposed of thereat."

Under Section 95 of the Act, the Mahapalika may from time to time by special resolution constitute a special committee to enquire into and report upon any matter connected with its powers, duties or functions. Every such special committee shall conform to any instruction that may be given to it by the Mahapalika. The report of the special committee shall, as soon as may be practicable, be laid before the Mahapalika which may thereupon take such action as it thinks fit or may refer back the matter to the special committee for such further investigation and report as it may direct. Section 97 provides for constitution of sub-committees by the Executive Committee or any committee appointed under clause (e) of Section 5 and any such sub- committee shall possess such powers and perform such duties and functions as the committee appointing it may from time to time delegate or confer. Section 105 of the Act provides that no act done or proceeding taken under this Act shall be called in question in any court on the ground merely of any defect or irregularity in procedure not affecting the substance. Under Section 119 of the Act falling under Chapter V which prescribes duties and powers of the Mahapalika and its authorities, there is provision for delegation of functions which we reproduce, in relevant part, as under: -

"119. Delegation of functions, - (1) Subject to the other provisions of this Act and the rules thereunder and subject to such conditions and restrictions as may be specified by the Corporation -

(a) the Corporation may delegate to the Executive Committee or to the Mukhya Nagar Adhikari any of its functions under this Act other than those specified in Part A of Schedule I."

It is not necessary to refer to Part A of Schedule I mentioned in Section 119 as none of the functions of Corporation on which there is prohibition has been delegated. Under Section 119, reproduced above, delegation can only be to the Executive Committee or to the Mukhya Nagar Adhikari and to no other person or authority or Committee. Sections 421, 422 and 423 of the Act were referred to contend that it is only for the Mahapalika itself to establish private markets. These sections fall in Chapter XVI dealing with regulation of markets, slaughter-houses, certain trades and acts, etc. Chapter VI of the Act deals with property and contracts. Under Section 125 falling in this Chapter, Mahapalika has power to acquire, hold and dispose of property or any interest therein whether within or without the limits of the city. Under sub-section (3) of Section 125 any immovable property which may be transferred to the Corporation by the Government shall be held by it, subject to such conditions including resumption by the Government on the occurrence of a specified contingency and shall apply to such purpose as the Government may impose or specify while making the transfer. Section 128 deals with power of the Mahapalika to dispose of the property. As to what are the provisions governing disposal of property these are mentioned in Section 129. Sections 128 and 129, in relevant part, are as under: -

"128. Power to dispose of property. - (1) The Corporation shall, for the purpose of this Act, and subject to the provisions thereof and rules made thereunder, have power to sell, let on hire, lease, exchange, mortgage, grant or otherwise dispose of any property or any interest therein acquired by or vested in the Corporation under this Act.

Provided that no property transferred to the Corporation by the Government shall be sold, let on hire, exchange or mortgaged or otherwise conveyed in any manner contrary to the terms of the

transfer except with the prior sanction of the State Government.

129. Provision governing disposal of property. - With respect to the disposal of property belonging to the Corporation the following provisions shall have effect, namely:

(1) Every disposal of property belonging to the Corporation shall be made by the Mukhya Nagar Adhikari on behalf of the Corporation.

(2) XXX XXX XXX (3) The Mukhya Nagar Adhikari may with the sanction of the Executive Committee dispose of by sale, letting out on hire or otherwise any movable property belonging to the Corporation, of which the value does not exceed five thousand rupees; and may with the like sanction grant a lease of any immovable property belonging to the Corporation, including any such right as aforesaid, for any period exceeding one year or sell or grant a lease in perpetuity of any immovable property belonging to the Corporation the value of premium whereof does not exceed fifty thousand rupees or the annual rental whereof does not exceed three thousand rupees.

(4) the Mukhya Nagar Adhikari may with the sanction of the Corporation lease, sell, let out on hire or otherwise convey any property, movable or immovable, belonging to the Corporation.

(5) xxx xxx xxx (6) the sanction of the Executive Committee or of the Corporation under sub-section (3) or sub-section (4) may be given either generally or any in class of cases or specially in any particular case.

(7) the aforesaid provisions of this section and the provisions of the rules shall apply to every disposal of property belonging to the Corporation made under or for any purposes of this Act."

Sections 131, 132 (in relevant part) and 133 prescribe the manner of execution of Contract and these are as under:

-

"131. Powers of Corporation to the making of contracts. Subject to the provisions of this Act, the Corporation shall have power to enter into contracts which may be necessary or expedient under or for any purposes of this Act.

"132. Certain provisions relating to the execution of the contracts. (1) All contracts referred to in Section 131 including contracts relating to the acquisition and disposal of immovable property or any interest therein made in connection with the affairs of the Corporation under this Act, shall be expressed to be made, for and on behalf of the Corporation, and all such contracts and all assurances of property made in exercise of that power shall be executed, for and on behalf of the Corporation, by the Mukhya Nagar Adhikari or by such other officer of the Corporation as may be authorised in writing by the Mukhya Nagar Adhikari either generally or for any particular case or class of cases.

(2) .....

(3) .....

(4) No contract involving an expenditure exceeding five lakh rupees shall be made by Mukhya Nagar Adhikari unless it has been sanctioned by the Corporation."

"133. Manner of execution. - (1) Every contract entered into by the Mukhya Nagar Adhikari on behalf of the Corporation shall be entered into in such manner and form as would bind him if it were made on his own behalf and may in like manner and form be varied or discharged :

Provided that : -

(a) the common seal of the Corporation shall be affixed to every contract which, if made between private persons, would require to be under seal, and

(b) every contract for the execution of any work or the supply of any materials or goods which will involve an expenditure exceeding two thousand and five hundred rupees shall be in writing, shall be sealed with the seal of the Corporation and shall specify-

(i) the work to be done or the materials or goods to be supplied as the case may be;

(ii) the price to be paid for such work, materials or goods; and

(iii)the time or times within which the contract or specified portion thereof shall be carried out.

(2) The common seal of the Corporation shall remain in the custody of the Mukhya Nagar Adhikari and shall not be affixed to any contract or other instrument except in the presence of a Sabhasad, who shall attach his signature to the contract or instrument in token that the same was sealed in his presence.

(3) The signature of the said Sabhasad shall be distinct from the signature of any witness to the execution of such contract or instrument.

(4) No contract executed otherwise than as provided in the section shall be binding on the Corporation."

Relevant part of Section 136 on which some arguments addressed, is reproduced hereunder: -

"136. Estimates exceeding rupees fifty thousand - (1) Where a project is framed for the execution of any work or series of works the entire estimated cost of which exceeds fifty thousand rupees-

(a) the Mukhya Nagar Adhikari shall cause a detailed report to be prepared including such estimates and drawings as may be requisite and forward the same to the Executive Committee who shall

submit the same before the Mahapalika with its suggestions, if any;

(b) the Mahapalika shall consider the report and the suggestions and may reject the project or may approve it either in its entirety or subject to modifications."

(By the amending Act 12 of 1994 w.e.f. 30.5.1994 the amounts in sub-sections (1) and (2) of Section 136 are now respectively 5 lakhs and 10 lakhs of rupees.) Part IX of the Constitution was inserted by the Constitution (74th) Amendment Act, 1992. Article 243W under this part prescribes the powers, authorities and responsibilities of Municipalities etc. It provides, in relevant part, that the legislature of a State may, by law, endow the Committee or the Municipality such powers and authority with respect to performance of functions and the implementation of schemes as may be entrusted to it including those matters listed in the Twelfth Schedule. If we refer to the Twelfth Schedule, Entries 8, 12 and 17 would be relevant and are as under: -

"8. Urban forestry, protection of the environment and promotion of ecological aspects.

12. Provision of urban amenities and facilities such as parks, gardens, play-grounds.

17. Public amenities including street lighting, parking lots, bus stops and public conveniences."

Keeping this aspect in view, the Act was amended and some of the relevant duties of Mahapalika, which are obligatory as given in Section 114, are as under:

"114.Obligatory duties of the Corporation.- It shall be incumbent on the Corporation to make reasonable and adequate provision, by any means or measures which it is lawfully competent to it to use or to take, for each of the following matters, namely: -

(viii) guarding from pollution water used for human consumption and preventing polluted water from being so used;

(ix) the lighting of public streets, Corporation markets and public buildings and other public places vested in the Corporation;

(ix-a) the construction and maintenance of parking lots, bus stops and public conveniences;

(xxx) planting and maintaining trees on road sides and other public places.

(xxxiii-a) promoting urban forestry and ecological aspects and protection of the environment;

(xli) providing urban amenities and facilities such as parks, gardens and play-grounds."

The Development Act is in force and it is not disputed that whole of the city of Lucknow has been declared as development area within the meaning of Section 3 of this Act. "Development" is defined in clause (e) of Section 2 of the Act and it is as under:-

"(e) "development", with its grammatical variations, means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in any building or land, and includes re-development."

Lucknow Development Authority (LDA) has been constituted under Section 4 of the Development Act. Chapter III of the Development Act provides for preparation of Master Plan and zonal development plan for the development area. Section 13 provides for the procedure for amendment of the Master Plan or zonal development plan. Section 14 provides for development of land in development area and this section is as under:-

"14. Development of land in the developed area. - (1) After the declaration of any area as development area under Section 3, no development of land shall be undertaken or carried out or continued in that area by any person or body (including a department of Government) unless permission for such development has been obtained in writing from the Vice-Chairman in accordance with the provisions of this Act.

(2) After the coming into operation of any of the plans in any development area no development shall be undertaken or carried out or continued in that area unless such development is also in accordance with such plans.

(3) Notwithstanding anything contained in sub-sections (1) and (2), the following provisions shall apply in relation to development of land by any department of any State Government or the Central Government or any local authority --

(a) when any such department or local authority intends to carry out any development of land it shall inform the Vice Chairman in writing of its intention to do so, giving full particulars thereof, including any plans and documents, at least 30 days before undertaking such development;

(b) in the case of a department of any State Government or the Central Government, if the Vice-Chairman has no objection it should inform such department of the same within three weeks from the date of receipt by it under clause (a) of the department's intention, and if the Vice Chairman does not make any objection within the said period the department shall be free to carry out the proposed development;

(c) where the Vice Chairman raises any objection to the proposed development on the ground that the development is not in conformity with any Master Plan or zonal development plan prepared or intended to be prepared by it, or on any other ground, such department or the local authority, as the case may be, shall -

(i) either make necessary modifications in the proposal for development to meet the objections raised by the Vice- Chairman; or

(ii) submit the proposals for development together with the objections raised by the Vice- Chairman to the State Government for decision under clause (d);

(d) the State Government, on receipt of proposals for development together with the objections of the Vice- Chairman, may either approve the proposals with or without modifications or direct the department or the local authority, as the case may be, to make such modifications as proposed by the Government and the decision of the State Government shall be final;

(e) the development of any land begun by any such department or subject to the provisions of Section 59 by any such local authority before the declaration referred to in sub- section (1) may be completed by that department or local authority with compliance with the requirement of sub-sections (1) and (2)."

The Development Act also contains provision for penalties and power of the LDA to demolish buildings and to stop development in case of contravention of the provisions of this Act. When the Development Act is in operation, then under Section 59 of this Act, certain functions of the U.P. Municipal Corporation Adhiniyam, 1959 become inoperative so far as these are relevant for the purpose :

"59. Repeal etc., and Savings. - (1)(a) The operation of clause (c) of Section 5, Sections 54, 55 and 56, clause (xxxiii) of Section 114, sub- section (3) of Section 117, clause (c) of sub-section (1) of Section

119..."

The provisions of the U.P. Regulation of Buildings Operation Act, 1958 also become inoperative by virtue of Section 59 of the Development Act.

The Parks Act provides for preservation and regulation of parks, play-grounds and open spaces in the State of Uttar Pradesh. The Parks Act applies to an area included in every Nagar Mahapalika under the Uttar Pradesh Nagar Mahapalika Adhiniyam, 1959. It is not disputed that this Act is now in force (w.e.f. February 1, 1995). Park has been defined in clause (b) of Section 2 of the Act to mean a piece of land on which there are no buildings or of which not more than one-twentieth part is covered with buildings, and the whole or the remainder of which is laid out as a garden with trees, plants or flower-beds or as a lawn or as a meadow and maintained as a place for the resort of the public for recreation, air or light. The Act provides for maintenance of parks and prohibits construction of building, except with the previous sanction of the concerned authority, which is likely to affect the utility of the park.

As to how the impugned agreement dated November 4, 1993 came to be executed between the Mahapalika and the builder we now consider the proceedings of the Mahapalika, the Executive Committee and its sub- committee called the High Power Committee.

On July 6, 1993 notice was issued for meeting of the Mahapalika for July 12, 1993 with following agenda:

"1.Discussions on the accepted proposals passed by the Executive Committee on 27.5.1993, and 27.6.1993.

2. Discussions on the various proposals.

3. Other subjects, subject to the permission of Presiding Officer."

There were no details regarding agenda item No. 3, which, it is said, pertained to Palika Bazaar, i.e., the underground shopping complex. On that day following resolution constituting the High Power Committee for disposal of the properties of the Mahapalika was passed under aforesaid agenda item No.3:-

"The full details, maps, conditions of allotment in respect of Shri Rafi Ahmad Kidwai Nagar Yojna and Rajaji Puram Vistar Yojna may be prepared at the earliest. And for this act a committee may be constituted under the chairmanship of the Nagar Pramukh in which two Honble Sabhasad and three officers be appointed. For nominating the members, the Nagar Pramukh may be authorised. The powers of disposing of the entire land, allotment and transfer in respect of both the schemes shall be vested in the above committee.

It was also decided that the Committee constituted under the Chairmanship of the Nagar Pramukh shall have the rights of disposing of all the properties, allotment, transfer etc. situated within the limits of the Nagar Mahapalika and the above committee shall have the right to give the final shape to the conditions of allotment and agreement etc. In this manner this sub Committee is authorised to exercise the aforementioned rights of the Mahapalika conditions of allotment and agreement etc. In this manner this Sub Committee is authorised to exercise the aforementioned rights of the Mahapalika."

Meeting of the High Power Committee so constituted under the aforesaid resolution of the Mahapalika, was held on October 13, 1993 and was adjourned to October 19, 1993. In the meeting of the High Power Committee held on October 19, 1993, presided over by Mr. Akhilesh Das, Nagar Pramukh as Chairman, there is discussion regarding construction of the underground air conditioned Palika Bazar at Aminabad Jhandewala Park on the lines of Palika Bazar in New Delhi. It was recorded that the Vice-Chairman, Lucknow Development Authority by his letter No.279/Architect dated October 16, 1993 intimated that as per the Master Plan, the land use of the Aminabad, Jhandewala park is commercial. The draft of the contract to be entered into between the Mahapalika and the MI Builders was approved. The minutes ended with the recording as under: "Amended and final draft of the contract was read by the Advocate before the Committee on this, the opinion of the members was asked for by the Chairman on which all the members were unanimous that all the members after discussing over the suggestions and conditions set out by the Mahapalika Advocate took this decision that the prescribed project may got executed by M.I. Builders Pvt. Ltd. And the Mukhya Nagar Adhikari should be authorised for conducting all the forthcoming actions and formalities.

The Honble Chairman also directed that the entire proceedings may be presented for information in the meeting of the Executive Committee dated 20.10.93 and meeting of the Mahapalika house held on 21.10.93.

Sd/- Sd/- B.K. Singh yadav Sushil Dubey Sabhasad Member. Mukhya Nagar Adhikari Member.

Sd/- G.C. Goyal Architect Sd/-D.K. Doal, Member Member, UP Nagar Adhikari.

Sd/- Akhilesh Dass Sd/- Laxmi Narain Nagar Pramukh Sabhasad, Chairman of the Committee Member."

In view of the directions of the High Power Committee the matter was placed before the Executive Committee on October 20, 1993 which passed the following resolution: -

"Resolution No. (85) As per the decision taken in the meeting dated 12.7.1993 of the Mahapalika, Sub- Committee constituted under the Chairmanship of the Honble Nagar Pramukh was entrusted with the powers of developing, leasing and to transfer the immovable property of the Mahapalika. In exercise of these powers, the Sub- Committee, keeping in view the grave problem of encroachment and parking in Aminabad Submitted the proposal of the Honble Members namely Sh. Kalraj Mishra (President Bhartiya Janta Party U.P.) and Shri Ejaj Rijvi, Ex. Minister for the construction of an Air Conditioned Palika Bazar and parking place in the Jandewala park (Aminabad Park) on the pattern of the Delhi Bazar, with a parking place for about 1000 vehicles through M/s. M.I. Builders Pvt. Ltd. Presented before the Executive Committee for information which was welcomed by all and the proposal was approved."

Thereafter, the matter came to be placed before the Mahapalika in its meeting dated October 21, 1993 and the following minutes were recorded: -

"In view of the decision taken by the General House of Mahapalika dated 12.07.93, a subcommittee under the Chairmanship of Mayor was entrusted to transfer, to develop and to give on lease of immovable properties of Mahapalika. In exercise of these powers, the Sub-Committee, keeping in view the grave problem of encroachment and parking in Aminabad submitted the proposal of Sh. Kalraj Misra (President) Bhartiya Janta Party U.P. and Sh. Eagaz Risvi (Ex-Minister) for construction of an air-conditioned Palika Bazar and parking place in the Jhandewala Park (Aminuddaula Park) on the pattern of Delhi (Air-conditioned) Palika Bazar and a parking in which there should be a provision for parking of about 1000 vehicles through M.I. Builders Pvt. Ltd. presented before the House for information which was welcomed and a unanimous resolution was passed and the Nagar Pramukh was congratulated for this important work."

It will be advantageous to reproduce the impugned agreement dated November 4, 1993, which is executed between the Mahapalika and the builder: -

"WHEREAS, the party No.1 is an absolute owner of the plot of land situated at Aminabad popularly known as Jhandewala Park measuring about 2,45,000 sq.ft. and bounded as below :

> NORTH Chhedilal Dharamshala Road SOUTH Ganga Prasad Road EAST Road locating Central Bank of India WEST Road locating Hyder Husain building.

More specifically mentioned in the site- plan attached herewith.

WHEREAS, the party No.1 is a body constituted under the UP Nagar Mahapalika Adhiniyam (Act II 1959), managing the parks, roads street lights and other such maintenance of amenities in the city.

WHEREAS, owing to high increase in urban population (according to 1991 Census, Lucknow Urban agglomeration has a population of 16,69,204) because of the migratory character of Rural Population to Urban Areas which is too congested due to overflow of population, the city is also being faced overwhelmingly with day to day problem of encroachment causing much of acrimony perpetrating high guilts and discrete errors.

WHEREAS, the party No.1 remained ever conscious to keep the city hygienically sound free from all adverse effects but the problem of encroachment is no less than a headache for the Lucknow Nagar Mahapalika which has emerged like a growing nightmare and becoming unmanageable by the Lucknow Nagar Mahapalika owing to its limited and scanty resources and flow of supplementary income. The eagerness of Nagar Mahapalika to maintain proper road, construction of new roads with street lighting and the cleanliness derive during monsoon for removing sand and silt from the nallahs is too often inadequately met by the Local Bodies Department of the Government as the Schedule of New Demands for providing requisite funds are not available timely as well as sufficiently. This is one of the major hindrances in keeping the functioning of the Lucknow Nagar Mahapalika at low ebb.

WHEREAS, considering the above points M/s. M.I. Builders Private Limited had prepared a viable and constructive proposal keeping in view the interest of Lucknow Nagar Mahapalika in all respects and, the same was submitted to Lucknow Nagar Mahapalika as it dealt exhaustively the benefits that will be oriented after its implementation to the Lucknow Nagar Mahapalika as well as to the Lucknow Populace. The proposal was found beneficial to the Nagar Mahapalika Lucknow as well as to the general public. The proposal which will be known as PALIKA BAZAR if given affect will be a source of control over the traffic and will reduce the congestion in the vicinity.

WHEREAS, the aforesaid proposal was accepted by the Lucknow Nagar Mahapalika in its Meeting thereby procuring a No Objection Certificate from the Lucknow Development authority under Section 14 of Urban Building Planning and Development Act, 1973 for constructing the PALIKA BAZAR on the land mentioned above 279/vastuvid dated 16.10.1993.

NOW this agreement witnesseth as under :-

1. That party no.2 shall construct the said PALIKA BAZAR according to the plan (attached herewith) with respect to which No Objection Certificate has been obtained by party no.1 from the prescribed authority.

2. That the PALIKA BAZAR shall be constructed by party no.2 at his own cost and party no.2 shall be entitled to realise the cost of construction with reasonable profit which in any case shall not be more than 10% with respect to each shop as may fixed by party no.2 in lieu of construction and

when the project of Palika Bazar is completed and cost of construction has been realised the PALIKA BAZAR shall be handed over to the Lucknow Nagar Mahapalika as its owner.

3. That the party no.2 shall also provide air-conditioning facility in the PALIKA BAZAR at his own cost as well as the installation of the plant and construction of the infrastructure in this regard.

4. That the party no.2 shall have the right to fix the amount of cost of construction while the rent of the shops shall be at the rate of Rs.2.50 p. only per sq. ft. and 50 p. will be charged as lease rent as 1/5th of the rent of covered area and Rs.300/- per shop for maintenance subject to enhancement of the air Conditioning plant, maintenance of the complex as well as the electric charges.

5. That party no.2 shall be at liberty to lease out the shops as per its own terms and conditions to the persons of their choice on behalf of party no.1 which shall be binding on party no.1 but the conditions as mentioned in para 4 as aforesaid in this agreement regarding rent shall remain in force.

6. That the party no.2 shall also have the right to sign the agreement if necessary on behalf of party no.1 as person authorised by party no.1 on the terms and conditions which the party no.2 may deem fit and proper and the copy of the agreement shall be given to party no.1 after its execution and the terms of the deed shall be binding upon both the parties of this deed provided the party no.2 executes only that much of agreement which number of shops are available in Palika Bazar and in any case shall not exceed the same but the rent of the shops shall remain the same as mentioned above.

7. That the construction of PALIKA BAZAR shall start within three months from the date of registration of this agreement and, shall be completed within three years from the date of its start.

8. That party no.2 shall have the right to publicise the project and take advances from the buyers and to give them proper allotment receipts.

9. That party no.1 shall co-operate in all manners in the constructional work activities of party no.2 and shall extend all its co-operation and help as and when needed by party no.2 from time to time.

10. That the party no.1 shall be responsible to help and assist party no.2 in completing the project and party no.1 shall also be exclusively responsible for getting the electric sewer and water connection from concerned department for the above project at the cost of party no.2.

11. That party no.1 shall help the party no.2 in getting the Project completed and meeting all the needs and requirements in completing the project.

12. That in case there is in any obstruction from Mahapalika or legal proceedings resulting in the non- completion or carrying out the constructional work of the project resulting in the non-completion stoppage of the work, the party no.1 shall be responsible for all the losses and damages that may accrue to party no.2.

13. That party no.2 shall not allot the 5% shops before completion of parking and other services of the complex to ensure the proper compliance of the agreement and further ensure the quality of construction.

14. That party no.2 shall give the bank guarantee of Rs.25,00,000/- (Rs. twenty five lacs) for its performance within 3 months from the date of registration of this agreement but this clause is subject to all necessary co-operation of party no.1.

15. That party no.1 shall charge Rs.5,000/- per shop for every second and subsequent transfer of the shops.

16. That after the completion of the project the party no.2 shall hand over the entire documents in original to the party no.1 for keeping the final records.

17. That in case of any disputes or differences arising out of the project between the parties to the agreement, the same shall be referred for arbitration to the mutually appointed arbitrator who shall in all cases be the retired justice of Honble High Court or its equivalent and his award shall be binding upon both the parties.

18. That the agreement between the party no.2 and the shop keeper shall be duly approved by the Nagar Mahapalika Lucknow and the party no.2 has made that agreement available to the party no.1 and the party no.1 has approved the said agreement.

19. That all the legal expenses in executing this agreement shall be borne only by the party no.2.

IN WITNESS WHEREOF, the parties of this deed have signed the deed on the day and the year mentioned herein below in presence of the following witnesses and the terms of this agreement shall be binding upon the legal heirs, successors, assignees and legal representatives. Sd/- Lucknow : dated Party No.1 November 4, 1993. For M.I. Builders Pvt. Ltd.

WITNESSES Sd/- Managing Director Party No. 2 1. Sd/- Drafted by: Sd/- 2. Sd/- (Arvind Razdan) Advocate. Civil Court, Lucknow"

Mr. Soli Sorabjee, learned counsel for the builder, submitted that the agreement was not against public interest and could not have been revoked by the Mahapalika. He said the petitioners in the writ petitions did not bring forward any contractor who could say that he was more competent than M.I. Builders to execute the job and at a cost less than that to be incurred by M.I. Builders. He said case of the builder was covered by a judgment of this Court in M/s. Kasturi Lal Lakshmi Reddy and others vs. State of Jammu and Kashmir and another (1980 (4) SCC 1). In this case the State of J & K awarded a contract to the second respondent for tapping of 10 to 12 lakhs blazes annually for extraction of resin from the inaccessible chir forests in the State for a period of 10 years. This was in accordance with the policy of the State Government and it was agreed upon that a part of resin so extracted would be delivered to the State for running the State-owned industry and the rest would be retained by the second respondent for establishing and running its own factory in the State. The

petitioners in the writ petition assailed the order of the State Government on the following main three grounds:-

"(A) That the order is arbitrary, mala fide and not in public interest, inasmuch as a huge benefit has been conferred on the 2nd respondents at the cost of the State.

(B) The order creates monopoly in favour of the 2nd respondents who are a private party and constitutes unreasonable restriction on the right of the petitioners to carry on tapping contract business under Article 19(1)(g) of the Constitution.

(C) The State has acted arbitrarily in selecting the 2nd respondents for awarding tapping contract, without affording any opportunity to others to complete for obtaining such contract and this action of the State is not based on any rational or relevant principle and is, therefore, violative of Article 14 of the Constitution as also of the rule of administrative law which inhibits arbitrary action by the State."

This Court, after examining the whole facts of the case and applying the parameters laid in Ramana Dayaram Shetty vs. International Airport Authority of India (1979 (3) SCC 489) negatived all the pleas raised by the petitioners. Referring to its earlier decision in International Airport Authority of India case this Court had observed that there are two limitations imposed by law which structure and control the discretion of the Government in giving largess. The first is in regard to the terms on which largess may be granted and the other in regard to the persons who may be recipients of such largess. Then the Court said as under: -

"So far as the first limitation is concerned, it flows directly from the thesis that, unlike a private individual, the State cannot act as it pleases in the matter of giving largess. Though ordinarily a private individual would be guided by economic considerations of self-gain in any action taken by him, it is always open to him under the law to act contrary to his self-interest or to oblige another in entering into a contract or dealing with his property. But the government is not free to act as it likes in granting largess such as awarding a contract or selling or leasing out its property. Whatever be its activity, the government is still the government and is, subject to restraints inherent in its position in a democratic society. The constitutional power conferred on the government cannot be exercised by it arbitrarily or capriciously or in an unprincipled manner; it has to be exercised for the public good. Every activity of the government has a public element in it and it must therefore, be informed with reason and guided by public interest. Every action taken by the government must be in public interest; the government cannot act arbitrarily and without reason and if it does, its action would be liable to be invalidated. If the government awards a contract or leases out or otherwise deals with its property or grants any other largess, it would be liable to be tested for its validity on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid."

The Court said that the State of J & K, in view of its policy of industrialization, was interested in the setting up of the factory by the second respondents, particularly since the second respondents had two factories for manufacture of resin, turpentine oil and other derivatives and they possessed large

experience in the processing of resin and reprocessing of resin, turpentine oil and other derivatives. The Court considered the nature of the contract and observed that it was obvious that, in view of the policy of the State Government, no resin would be auctioned in the open market and in this situation, it would be totally irrelevant to import the concept of market price with reference to which the adequacy of the price charged by the State to the second respondents could be judged. If the State were simply selling resin, there could be no doubt that the State must endeavour to obtain the highest price subject, of course, to any other overriding considerations of public interest and in that event, its action in giving resin to a private individual at a lesser price would be arbitrary and contrary to public interest. But, where the State has, as a matter of policy, stopped selling resin to outsiders and decided to allot it only to industries set up within the State for the purpose of encouraging industrialization, there could be no scope for complaint that the State was giving resin at a lesser price than that which could be obtained in the open market. The yardstick of price in the open market would be wholly inept because in view of the State policy, there would be no question of any resin being sold in the open market.

After examining this judgment it is difficult to appreciate the argument of Mr. Sorabjee as to how the principles laid in this case can be applicable to the present case.

To substantiate his argument that there was "estoppel by pleading" against the Mahapalika Mr. Sorabjee referred to the stand of the Mahapalika as reflected in the proceedings before the High Court as well as in this Court. It was also pointed out that in the counter affidavit filed by the State Government in the High Court it supported the builder. There was no disposal of property by the Mahapalika within the meaning of Section 128 of the Act. Resolution of Mahapalika to enter into the agreement with the builder was validly passed. The project was the brainchild of M.I. Builders and the nature of the transaction was such that it was unconventional and there is no universal rule that tender be invited in every case. There was no secrecy. Everything was done in open and discussed freely at various stages. In the affidavit dated January 8, 1994 of Mr. B.K. Singh, Chief Executive Officer of the Mahapalika filed in the High Court he had explained why it was necessary to have the project executed in order to avoid congestion in Aminabad commercial area. In the affidavit dated October 19, 1995 of Mr. T.K. Doval, Upnagar Adhikari which was filed in answer to IAs 10-12/95, complaining breach of this Court's order dated December 14, 1994, again the earlier stand of Mahapalika was re-affirmed. Mr. Sorabjee criticised the action of the Mahapalika in withdrawing its appeals in this Court on February 6, 1997 on mere mentioning in the Court. He said plan, which had been sanctioned by order dated January 23, 1995, was revoked illegally on April 17, 1997 without any notice to the builder. There is, however, resolution of the Mahapalika dated August 6, 1996 filed by Mr. S.K. Gupta, Mukhya Nagar Adhikari of the Mahapalika opposing the present appeals by the builder. Mahapalika took a summersault and gave a complete go- bye to its earlier stand. That there could be estoppel by pleadings reference was made to a decision of this Court in Union of India vs. M/s Indo-Afghan Agencies Ltd. (1968 (2) SCR 366) approving the earlier decision of the Calcutta High Court in The Ganges Manufacturing Co. vs. Sourujmull and others (1880 ILR Calcutta 669 at 678). Mr. Sorabjee said a party could not change its stand even if it was legally wrong in its earlier stand as otherwise it could be a negation of everything.

In the Ganges Manufacturing Co. vs. Sourujmull & Ors. [(1880) 5 ILR Cal 669] a Division Bench of the Calcutta High Court held that "a man may be estopped not only from giving particular evidence, but from doing any act or relying upon any particular argument or contention, which the rules of equity and good conscience prevent him from using as against his opponent".

In Union of India and others vs. M/s. Indo-Afghan Agencies Ltd. [(1968) 2 SCR 366] in a certain scheme called the Export Promotion Scheme incentives were provided to the exporters for woolen goods. M/s. Indo- Afghan Agencies Ltd. Exported woolen goods to Afghanistan of F.O.B. value of over Rs.5 crores. The Deputy Director in the office of the Textile Commissioner, Bombay, issued to them an Import Entitlement Certificate for about Rs.2 crores only. When the representations made to the Government for grant of Import Entitlement Certificate for full F.O.B. value, it produced no response and writ petition under Article 226 of the Constitution was filed in the High Court. High Court allowed the writ petition. In the appeal filed by Union of India to this Court various contentions were raised. This Court said: -

"Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen."

And further: -

"The defence of executive necessity was not relied upon in the present case in the affidavit filed on behalf of the Union of India. It was also not pleaded that the representation in the Scheme was subject to an implied term that the Union of India will not be bound to grant the import certificate for the full value of the goods exported if they deem it inexpedient to grant the certificate. We are unable to accede to the contention that the executive necessity releases the Government from honouring its solemn promises relying on which citizens have acted to their detriment. Under our constitutional set-up no person may be deprived of his right or liberty except in due course of and by authority of law: if a member of the executive seeks to deprive a citizen of his right or liberty otherwise than in exercise of power derived from the law -- common or statute

-- the Courts will be competent to and indeed would be bound to, protect the rights of the aggrieved citizen."

It was also held: -

"We hold that the claim of the respondents is appropriately founded upon the equity which arises in their favour as a result of the representation made on behalf of the Union of India in the Export Promotion Scheme, and the action taken by the respondents acting upon that representation under the belief that the Government would carry out the representation made by it. On the facts proved in this case, no ground has been suggested before the Court for exempting the Government from the equity arising out of the acts done by the exporters to their prejudice relying upon the

representation."

Mr. Sorabjee then referred to Section 128 of the Act and to the expression "disposal" and also to Sections 129(4), 131 and 132 of the Act. According to him there was no disposal of any property and no interest in the land had been transferred by the Mahapalika to the builder. In this connection reference was made to the agreement dated November 4, 1993. Reference was also made to the counter affidavit filed earlier by Mr. B.K. Singh, Mukhya Nagar Adhikari, wherein he had stated that the property vested in Mahapalika and that there was no disposal or transfer of any interest in the property to the builder. As to what is meant by the expression "disposed of" reference was made to another decision of this Court in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam vs. M/s. Thomas Stephen and Co. Ltd. (1988 (2) SCC 264 at

266). This judgment was of course in context of sale of goods. Reference was also made to a decision of House of Lords (1959 (1) WLR 465 at 472) to contend that "disposal" means disposal absolutely.

If it was necessary to call tender reference was made to a decision of this Court in G.B. Mahajan and others vs. Jalgaon Municipal Council and others (1991 (3) SCC 91) where tender was invited to construct the building but authority was given to the developer to grant occupancy rights. In this case, this Court considered the scope of judicial review in the case of contractual transaction of Government, its policy decision and right of the Government on its instrumentality to evolve any method for execution of the project. In this case respondent Jalagaon Municipal Council entered into a contract with a private developer/builder for construction of a commercial complex. The project contemplated its execution by the developer on self-financing basis subject to handing over the administrative building of the complex to the Municipal Council free of cost and allotting some shops at a fixed rate/free of cost to certain specified persons while having right to dispose of the remaining accommodation at its own discretion and to retain the premia received by way of reimbursement of its financial outlays plus profits. The execution of the project was challenged on the ground that it was unconventional and thus untenable. This Court said that the Government or its instrumentality policy option to adopt any method or technique for management of the project provided the same is within the constitutional and legal limits. This Court held that the project was not ultra vires the powers of Municipal Council and such a case was not open to judicial review. The following main contentions were raised apprising the project: -

"a) That the scheme of financing of the project was unconventional and was not one that was, as a matter of policy, open and permissible to a governmental authority. The municipal authority could either have put up the construction itself departmentally or awarded the execution of the whole project to a building contractor. The method of financing and execution of the project are ultra vires the powers of the Municipal authority under the Act.

b) That the terms of the agreement with the developer that the latter be at liberty to dispose of the occupancy rights in the commercial complex in such manner and on such terms as it may choose would amount to an impermissible delegation of the statutory functions of the Municipal Council under Section 272 of the Act to the developer.

c) That the project, in effect, amounted to and involved the disposal of municipal property by way of a long term lease with rights of sub-letting in favour of the developer violative of Section 92 of the 'Act'.

d) That the scheme is arbitrary and unreasonable and is violative of Article 14 of the Constitution. The project is patently one intended to and does provide for an unjust enrichment of respondent 6 at public expense."

This Court negatived all these contentions. It said that the project, otherwise legal, does not become any the less permissible by reason alone that the local authority, instead of executing the project itself, had entered into an agreement with a developer for its financing and execution. This Court did not find any violation of any provisions of the Maharashtra Municipalities Act, 1965 governing the Municipal Council. On the question of reasonableness this Court said that a thing is not unreasonable in the legal sense merely because the court thinks it is unwise. Then this Court said: -

"The contention regarding impermissible delegation is not tenable. The developer to the extent he is authorised to induct occupiers in respect of the area earmarked for him merely exercises, with the consent of the Municipal Council, a power to substitute an occupier in his own place. This is not impermissible when it is with the express consent of the Municipal Council. It would be unduly restrictive of the statutory powers of the local authority if a provision enabling the establishment of markets and disposal of occupancy rights therein are hedged in by restrictions not found in the statute."

Reference was then made to a decision of this Court in Tata Cellular vs. Union of India (1994 (6) SCC 651) where this Court considered the scope of judicial review and adduced the following principles: -

"(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of

Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

Lastly, Mr. Sorabjee said that after this Court allowed builder to construct, in upholding the judgment of the High Court, equities would have to be balanced. Of course, it would be different matter if the appeals were to be allowed, he said.

Fifty prospective allottees of the shops, who had made payment to M.I. Builders for allotment of shops before High Court granted order of stay, filed an application in this Court seeking permission to intervene in these appeals. We heard Mr. Salve, learned senior counsel, who appeared for them. We record his submissions as under: -

1. It is not in public interest to dismantle the shops if the court ultimately upholds the judgment of the High Court.

2. Advertisement was made by the builder on December 24, 1993 offering to allot the shops and required each of the prospective allottee to pay Rs.25,000/- with application for allotment. 500 such applications were received out of which 380 applications were accompanied with cheque of Rs.25,000/- each. Remaining 120 prospective allottees deposited the amount of Rs.25,000/- each by mean of cash. When, however, possession of the area was handed over to the builder it was found that it was less than that agreed earlier and that the total number of shops to be constructed would be now in 263 in number. Shops were of two sizes of 10 x 15 ft. and 10 x 20 ft.

3. Question raised now is: if by putting in possession any interest in land was created in favour of the builder? Could it be said that there was charge created in favour of the builder on the property including the land and the structure built upon it till the builder got whole of the amount invested by it plus 10% of the profit over and above that? No interest in the land was created in favour of the builder. The agreement was something like a lien on a property of an unpaid creditor as understood in law. Builder in that situation would have right to possession till it was paid its dues. As per the terms of the contract builder would retain the property by way of security till it was paid but it could not claim to have any interest in the property. It is like an unpaid creditor. When the term "disposed of" is used it means that full title had passed but when we say any interest in the property is passed then we mean a slice of that title has passed.

4. Agreement though is silent as to what is the legal right of the builder on the land, it grants merely a right to the builder to enter upon the land and to build upon as per its terms. Provisions of Section 128 of the Act are not attracted.

5. It is a moot point if in a Public Interest Litigation the petitioner can tell the court to consider a document whether it is favourable or not. Court cannot use a magnified glass to see whether any interest had been created and then to strike down the agreement being violative of Section 128 of the

Act. Ultimately it boils down to the intention of the parties otherwise it will be straining the point too far which is not permissible.

6. If this Court decides to uphold the judgment of the High Court the applicants would request that the relief be moulded. In Public Law relief can be moulded even where the court found irregularity or illegality to deny relief. That can be done under Article 142 of the Constitution. After all what the High Court has found was that the resolution was not properly considered before passing the same; that requirements of the provisions of Sections 128 and 129 of the Act were not adhered to; and that tenders were not invited in order to favour the builder.

7. It is not the case of the writ petitioners that any extraordinary advantage was conferred on the builder or that funds of the taxpayers have been drained out. If it was a hospital or an industry or a dangerous building it would be imperative that the building be pulled down but here construction is underground made to remove congestion and the only complaint of the petitioners was that it would create more congestion. Therefore, a mere irregularity or even illegality would not result in destroying the construction, particularly, when there is no clear finding of any mala fide by the High Court. It is not that any other builder has been aggrieved by the action of the Mahapalika and had come forward to complain. In fact one of the persons who himself is a party to the resolution was one of the petitioners. In the Administrative Law there is an authority that relief could be moulded. There is no affidavit of the Lucknow Development Authority that building was in any way dangerous. Shopping complex and the parking lot, which has been built upon, is for public good and an order of demolition would not be in general public interest. Discretion should be used not to invalidate the whole process even if provision of Sections 128 and 129 were violated. Some mechanism could be evolved so that fair price for the shops and use of parking lot is fixed and the case of every prospective allottee could be examined and so also perhaps the terms of the agreement between the builder and the Mahapalika. It would be an extraordinary order if demolition is ordered.

Reference was made to Wade on Administrative Law, 7th Edition, page 720 and to De Smith on Judicial Review of Administrative Action, 5th Edition, page 271 to support the contention that relief could be moulded in law. In Wade's treatise the following part is relevant: -

"The freedom with which the court can use its discretion to mould its remedies to suit special situations is shown by two decisions already encountered. One was the case where the House of Lords refused mandamus to a police probationer wrongly induced to resign, although he made out a good case for that remedy, in order not to usurp the powers of the chief constable, and instead granted him an unusual form of declaration to the effect that he was entitled to the remedies of unlawful removal from office except for reinstatement. The other was the case of the Take-over Panel, where in fact no relief was granted but the Court of Appeal explained the novel way in which remedies should be employed in future cases, with the emphasis on declaration rather than certiorari and on 'historic rather than contemporaneous' relief. The same freedom to mould remedies exists in European Community law, where the European Court of Justice may declare non-retroactivity when holding some act or regulation to be void."

In De Smith it is as under: -

"The principle that failure to observe formal or procedural rules in the administrative process may be venial if no substantial prejudice has been caused to those immediately affected now appears in a number of statutory contexts, but it is too early to say that it has established itself as a general principle of law in contexts where the enabling Act is silent on the point, though some of the cases on the effect of disregarding statutory time limits point vaguely in this direction.

Administrative inconvenience Is administrative inconvenience a proper reason for rebutting the presumption that a decision which violates a statutory provision is unlawful (and therefore that the provision is, in the circumstances not "mandatory")? Administrative inconvenience is an accepted criterion in relation to remedies provided by the courts in judicial review. For example, where a series of commercial transactions have been undertaken in reliance upon the impugned decision the court may, in its discretion, fail to quash that decision in view of the administrative chaos that would result from such a remedy. Judicial discretion is employed here to balance fairness to the individual against the general public interest. The task, however, of deciding the force of a statutory provision does not involve judicial discretion. It involves the faithful construction of the objects and purposes of an act of Parliament in the context of the particular decision. Although aspects of public policy may play a part in this exercise, it would be wrong of the courts to impute any general implication that Parliament may intend administrative inconvenience to excuse in advance the violation of its statutes. Such an implication invites careless administration and assumes that the legislature would too easily excuse a breach of its statutes. It is suggested, therefore, that administrative inconvenience is not normally a proper criterion to guide the question of whether a statutory provision is "mandatory"."

Mr. Sorabjee and Mr. Salve were opposed by a formidable cohort of lawyers. Mr. N.M. Ghatate appeared for the corporators who filed writ petition in the High Court and were present themselves in the meetings of the Mahapalika on July 12, 1993 and October 21, 1993; Mr. G.L. Sanghi appeared for the Mahapalika; Mr. Adarsh Goel for the State of U.P.; Mr. Arun Jaitley for the LDA; and Mr. Dushyant Dave for Amrit Puri, who had separately filed the writ petition. Their submissions can be summarised as under: -

1. There was no proper convening of the meetings of the Executive Committee and the Mahapalika, which granted approval to the construction of underground shopping complex. There was also no such agenda in the meeting of the Mahapalika. Constitution of the High Power Committee by the Mahapalika was itself not legal. Regulations had been framed under the Act for conduct of the meetings. Under Section 91 of the Act the requirement is four days notice for the general body meeting of the Mahapalika and three days notice for the meeting of the Executive Committee. Regulation 7 prescribes as to how the business of the meeting is to be conducted, as to which item is to be taken up first and rest in seriatim. Regulation 7(f) requires that resolution of the Executive Committee should be separately circulated to the members and the business respecting that should not be transacted in the heading "any other business with permission of the chair". Under Regulation 30 it is necessary for a resolution to be valid that there should be a proposer and a seconder.

2. The impugned agreement was not executed as per the requirement of Section 133 of the Act and on that account it is not binding on the Mahapalika. Reliance was placed on a decision of this Court in Dr. H.S. Rikhy & Ors. vs. The New Delhi Municipal Committee [AIR 1962 SC 554]. In this case the question for consideration before this Court was whether the provisions of Section 8 of the Delhi and Ajmer Rent Control Act, 1952 (the Rent Act) applied to the transactions between the appellants and the New Delhi Municipal Committee (the Committee) constituted under the Punjab Municipal Act, 1911. The Committee had constructed a market and allotted the shops and flats by inviting tenders in pursuance to an advertisement. On an application filed under Section 8 of the Rent Act by an allottee, an objection was raised by the Committee that there was no relationship of landlord and tenant between the parties. High Court held that there was no relationship of landlord and tenant between the parties inasmuch as there was no 'letting', there being no properly executed lease. In coming to the conclusion that there was no valid lease between the parties, High Court relied upon the provisions of Section 47 of the Punjab Municipal Act. High Court negatived the contention that the Committee was estopped from questioning the status of the applicants as tenants, having all along admittedly accepted rent from them. On an appeal against the judgment of the High Court to this Court, it was held that use of the term 'rent' cannot preclude the landlord from pleading that there was no relationship of landlord and tenant. The question must, therefore, depend upon whether or not there was a relationship of landlord and tenant in the sense that there was a transfer of interest by the landlord in favour of the tenant. This Court said that in its opinion the Rent Act applied only that species of 'letting' by which the relationship of landlord and tenant is created, that is to say, by which an interest in the property, however, limited in duration is created. This Court referred to the provisions of Section 47 of the Punjab Municipal Act which is as under :

"47. (1) Every contract made by or on behalf of the Committee of any municipality of the first class whereof the value or amount exceeds one hundred rupees, and made by or on behalf of the Committee of any municipality of the second and third class whereof the value or amount exceeds fifty rupees shall be in writing, and must be signed by two members, of whom the president or a vice-president shall be one, and countersigned by the secretary :

Provided that, when the power of entering into any contract on behalf of the committee has been delegated under the last foregoing section, the signature or signatures of the member or members to whom the power has been delegated shall be sufficient.

(2) Every transfer of immovable property belonging to any committee must be made by an instrument in writing, executed by the president or vice-president and by at least two other members of committee, whose execution thereof shall be attested by the secretary.

(3) No contract or transfer of the description mentioned in this section executed otherwise than in conformity with the provisions of this section shall be binding on the committee."

This Court said that in order that the transfer of the property in question should be binding on the Committee, it was essential that it should have been made by an instrument in writing, executed by the President or the Vice-President and at least two other members of the Committee, and the execution by them should have been attested by the Secretary and If these conditions are not

fulfilled, the contract of transfer shall not be binding on the Committee. It was observed that provisions of Section 47(3) are mandatory and not merely directory. Finally considering the argument that the Committee is estopped by its conduct from challenging the enforceability of the contract this Court said :

"The answer to the argument is that where a statute makes a specific provision that a body corporate has to act in a particular manner, and in no other, that provision of law being mandatory and not directory, has to be strictly followed."

3. It was the appellant, the builder, who was building the underground shopping complex. It was not undertaking the construction as an agent of the Mahapalika. In this connection reference was made to a decisions of this Court in Akadasi Padhan vs. State of Orissa (1963 (2) Supp. SCR 691 at 722). It was, therefore, mandatory that the building plan be approved by the LDA.

In Akadast Padhan vs. State of Orissa (1963 Supp. (2) SCR 691) the State of Orissa acquired a monopoly in the trade of Kendu leaves. Prior to this the petitioner used to carry on extensive trade in the sale of Kendu leaves. He filed a petition under Article 32 of the Constitution complaining restrictions put on his fundamental rights. In the course of discussion this Court said:-

"When the State carries on any trade, business or industry it must inevitably carry it on either departmentally or through its officers appointed for that purpose. In the very nature of things, the State cannot function without the help of its servants or employees and that inevitably introduces the concept of agency in a narrow and limited sense. There are some trades or businesses in which it may be inexpedient to undertake the work of trade or business departmentally or with the assistance of State servants. In such cases, it is open to the State to employ the services of agents, provided the agents work on behalf of the State and not for themselves."

The Court then said: -

"It is true that an agent is entitled to commission in commercial transactions, and so, the fact that a person earns commission in transactions carried on by him on behalf of another would not destroy his character as that other persons agent. Cases of Delcredere agents are not unknown to commercial law. But we must not forget that we are dealing with agency which is permissible under Art. 19(6)

(ii), and as we have already observed, agency which can be legitimately allowed under Art. 19(6)(ii) is agency in the strict and narrow sense of the term; it includes only agents who can be said to carry on the monopoly at every stage on behalf of the State for its benefit and not for their own benefit at all. All that such agents would be entitled to would be remuneration for their work as agents. That being so, the extended meaning of the word agent in a commercial sense on which the learned Attorney-General relies is wholly inapplicable in the context of Art. 19(6)(ii)."

4. Mahapalika had disposed of the land in favour of the builder in contravention of the provisions relating to disposal of property under Sections 128 and 129 of the Act. If the substance of the

impugned agreement is looked into it is the transfer of interest in land by the Mahapalika to the builder.

5. Even Section 128 of the Act was not applicable as the land was a park which could not be disposed by the Mahapalika. As a matter of fact Mahapalika was the trustee of the park and the doctrine of public trust, which was applicable in India as held by this Court in M.C. Mehta vs. Kamal Nath and others (known as Span case) (1997 (1) SCC

388), was applicable to the park in question. Mahapalika, therefore, could only manage the park and could not alienate it or convert it something different from the park. Park was held by the Mahapalika on trust for the citizens of Lucknow.

In M.C. Mehta vs. Kamal Nath and others (1997 (1) SCC 388) the case, which is also known as that of 'Span Resorts case', owned by Span Motels Pvt. Ltd., this Court observed, that public trust doctrine, as discussed in the judgment, is a part of the law of land. The Court gave various directions even cancelling the lease granted in favour of the Motel and directing the Motel to pay compensation by way of cost for restitution of the environment and ecology of the area. The judgment was cited to reaffirm the argument for preservation of ecology, which is an important factor in preserving the Jhandewala Park.

6. Section 114 of the Act provides for obligatory duties of the Mahapalika and one such obligatory functions is to maintain public places, parks and to plant trees. This cannot now be done as the park has been dug and construction made underground. By allowing underground construction Mahapalika has deprived itself to its obligatory duties which cannot be permitted. Irreversible changes have been made. Qualitatively it may still be a park but it is a park of different nature inasmuch as trees cannot be planted. Now it is like a terrace park. Though the Park Act came into operation w.e.f. February 1, 1995 and the construction of the underground shopping complex had started in January, 1995 after the interim order of this Court but since the construction was made subject to the final order of this Court the provisions of the Park Act will have to be considered while deciding the matter.

7. Contract of such a magnitude could not have been awarded to the builder without calling for tenders. There was no ground to depart from the settled norms. Decision of this Court in Sachidanand Pandey & Anr. vs. State of West Bengal and others (1987 (2) SCC 295), is no authority for the proposition that it was not necessary to invite tenders. That was a case relating to development of tourism industry in the State of West Bengal. The case did not lay any rule but was an exception thereto. In that case a lease was granted by the State Government to Taj Group of Hotels for construction of a Five Star Hotel. This was challenged on various grounds in a writ petition filed under the banner of PIL. The writ petition was dismissed by the learned single judge of the High Court. On appeal, the Division Bench confirmed the judgment of the learned single Judge. The matter then came to this Court under Article 136 of the Constitution and leave was granted. One of the questions raised was that lease which was granted by the State Government without inviting tenders or holding a public auction. This Court posed the question if in pursuing the socio-economic objective, the State is bound to invite tenders or hold a public auction. The Court referred to various

judgments of this Court in Rashbihari Panda vs. State of orissa [(1969) 1 SCC 414; R.D. Shetty vs. International Airport Authority of India & Ors. [(1979) 3 SCC 489]; Kasturi Lal Lakshmi Reddy vs. State of J. & K. [(1980) 4 SCC 1]; State of Haryana vs. Jage Ram [(1983) 4 SCC 556]; Ram and Shyam Co. vs. State of Haryana & Ors. [(1985) 3 SCC 267]; and Chenchu Rami Reddy & Anr. vs. Government of A.P. & Ors. [(1986) 3 SCC 391]. Then this Court observed as under :

"On a consideration of the relevant cases cited at the bar the following propositions may be taken as well established: State-owned or public- owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism.

Applying these tests, we find it is impossible to hold that the Government of West Bengal did not act with probity in not inviting tenders or in not holding a public auction but negotiating straightway at arms length with the Taj Group of Hotels."

This Court also found that on the commercial and financial aspect of the lease even on a prima facie view, there appears to be nothing wrong or objectionable in the 'net sales' method. The 'net sales' method is a fairly well known method adopted in similar situations. It is a profit- oriented and appears to be in the best interest of the Government of West Bengal.

8. There was collusion among certain members of the Mahapalika, its officers and the builder. Even the conduct of the lawyer of the Mahapalika was commented upon adversely. It was not necessary for the Mahapalika to file a separate appeal against the impugned judgment of the High Court. These members of the Mahapalika equated themselves with the builder. The lawyer of the Mahapalika drafted the agreement dated November 4, 1993 between the Mahapalika and the builder. He also filed special leave petitions on behalf of the Mahapalika which had since been withdrawn. All the fees of the lawyer of the Mahapalika for attending the meetings of the Mahapalika, drafting the agreement, preparing special leave petitions, etc. were paid by the builder though that was shown to be done at the instance of the Mahapalika. There is on the record of the Mahapalika a letter of the builder that there was a collusion among the Mahapalika, builder, the lawyers and the officers of the Mahapalika, the architect of the Mahapalika, who approved the lay out plan, was also the architect of the LDA. After the lay out plan was submitted to the LDA the architect of the Mahapalika himself okays the lay out plan as architect of the LDA, which is then approved by the Vice-Chairman of the LDA.

9. A body corporate cannot be made to remain bound by its earlier decision if that decision is found to be contrary to law. There could not be any estoppel against the statute particularly when the whole project is against public interest. The State Government was right in changing its stand. State

Government considered the whole matter and on the representations received from the public decided to accept the judgment of the High Court.

10. The agreement is a fraud on the power of the Mahapalika. Prime land has been given to the builder for a song. The fact that the scheme was so lucrative could be seen that all shops to be constructed less 5% were booked within six days of the advertisement appearing in December, 1993. Public interest and public exchequer have been sacrificed. Mahapalika divested itself of its control over the project. The agreement is wholly one sided favouring the builder. It is unjust, unreasonable and irrational.

11. Builder had already collected Rs.25,000/- from each of the prospective allottees at the time of registration when it was originally planned to construct 500 shops. There were no building plan in existence. Collecting of this amount by the builder is of no consequence in deciding the present appeals. It is now stated that 263 shops had been constructed though the builder collected earnest money for 500 shops. In spite of the judgment of the High Court the builder did not care to refund the earnest money so collected. Its conduct does not entitle it to any consideration. No proper study was undertaken before the Mahapalika granted its approval for construction of the underground shopping complex. There were no building plans when the agreement was entered into.

12. Narrow consideration that a few crores of rupees have been spent on the construction cannot come into consideration when the construction is in clear violation of the Act, the Development Act and Article 21 of the Constitution. That crores of rupees have been spent is an argument which is advanced in every other case of unauthorised construction.

13. There is no alternative to the construction which is unauthorised and illegal to be dismantled. The whole structure built is in contravention of the provisions of law as contained in the Development Act. The decision to award contract and the agreement itself was unreasonable. The construction of the underground shopping complex, if allowed to stand, would perpetuate an illegality. Mahapalika could not be allowed to benefit from the illegality. A decision of this Court in Seth Badri Prasad and others vs. Seth Nagarmal and others (1959 (1) Supp. SCR 769 at 774) was referred to, to contend that the court could not exclude from its consideration a public statute and since the construction of the underground shopping complex was wholly illegal it had to be dismantled. No question of moulding a relief can arise as the builder made construction on the basis of the interim order of this Court and at its own risk. Various decisions of this Court in support of these contentions where demolition of unauthorised construction was ordered, were referred to, these being (1) K. Ramdas Shenoy vs. The Chief Officers, Town Municipal Council, Udipi and others (1975 (1) SCR 680 at 685), (2) Virender Gaur and others vs. State of Haryana and others (1995 (2) SCC 577 at 582), (3) Pleasant Stay Hotel and another vs. Palani Hills Conservation Council and others (1995 (6) SCC 127 at 139), (4) Cantonment Board, Jabalpur and others vs. S.N. Awasthi and others (1995 Supp. (4) SCC 595 at 596), (5) Pratibha Cooperative Housing Society Ltd. And another vs. State of Maharashtra and others (1991 (3) SCC 341), (6) Dr. G.N. Khajuria and others vs. Delhi Development Authority and others (1995 (5) SCC 762), (7) Mrs. Manju Bhatia and another vs. New Delhi Municipal Council and another (JT 1997 (5) SC 574) and (8) an unreported decision of this Court in Ram Awatar Agarwal vs. Corporation of Calcutta (Civil Appeal 6416 of 1981) decided on

August 20, 1996.

In K. Ramadas Shenoy vs. The Chief Officers, Town Municipal Council, Udipi and others (1975 (1) SCR 680) respondent was granted by resolution of the Municipal Committee to construct a cinema theatre at a place where earlier respondent was granted licence for the construction of Kalyan Mantap-cum-Lecture Hall. In a petition under Article 226 of the Constitution the High Court held that the cinema theatre could not be constructed in a place other than specified localities without proper sanction but since the third respondent had spent a large sum of money it did not quash the impeached resolution of the Municipal Committee. The appellant contended before this Court that the Town Planning Scheme forbade in cinema building at the place asked for and, therefore, the resolution of the Municipal Committee was invalid. This Court observed as under: -

"An illegal construction of a cinema building materially affects the right to or enjoyment of the property by persons residing in the residential area. The Municipal Authorities owe a duty and obligation under the statute to see that the residential area is not spoilt by unauthorised construction. The scheme is for the benefit of the residents of the locality. The Municipality acts in aid of the schemed. The rights of the residents in the area are invaded by an illegal construction of a cinema building. It has to be remembered that a scheme in a residential area means planned orderliness in accordance with the requirements of the residents. If the scheme is nullified by arbitrary acts in excess and derogation of the powers of the Municipality the courts will quash orders passed by Municipalities in such cases.

The Court enforces the performance of statutory duty by public bodies as obligation to rate payers who have a legal right to demand compliance by a local authority with its duty to observe statutory rights alone. The scheme here is for the benefit of the public. There is special interest in the performance of the duty. All the residents in the area have their personal interest in the performance of the duty. The special and substantial interest of the residents in the area is injured by the illegal construction."

In Virender Gaur and others vs. State of Haryana and others (1995 (2) SCC 577), the Municipal Committee, Thanesar, District Kurukshetra in the State of Haryana framed Town Planning Scheme, which was sanctioned by the Government. In the Scheme certain land vested in the municipality. State Government sanctioned allotment of that land to Punjab Samaj Sabha on payment of a price at the rates specified therein. When the Punjab Samaj Sabha after getting sanction started construction the appellants filed writ petition in the Punjab and Haryana High Court, which was, however, dismissed. It was submitted before this Court that the purpose of the Scheme was to reserve the land in question for open spaces for the better sanitation, environment and the recreational purposes of the residents in the locality and that the Government had no power to lease out the land to Punjab Samaj Sabha. Reversing the judgment of the High Court this Court said that after the writ petition was filed by the appellants Punjab Samaj Sabha instead of awaiting the decision on merits proceeded with the construction in post-haste and expended the money on the construction. Therefore, the Court said, "we do not think that it would be a case to validate the actions deliberately chosen, as a premium, in not granting the necessary relief. It was open to the Punjab Samaj Sabha to await the decision and then proceed with the construction. Since the writ petition was pending, it

was not open to them to proceed with the construction and then to plead equity in their favour. Under these circumstances, we will not be justified in upholding the action of the State Government or the Municipality in allotting the land to Punjab Samaj Sabha to the detriment of the people in the locality and in gross violation of requirements of the Scheme. Any construction made by Punjab Samaj Sabha should be pulled down and it must be brought back to the condition in which it existed prior to allotment. The Municipality is directed to pull down the construction within four weeks from today. They should place the report on the file of the Registry of the action taken in the matter."

In Pleasant Stay Hotel and another etc. etc. vs. Palani Hills Conservation Council and others (1995 (6) SCC

127) the question was whether the impugned Government Orders were lawfully and validly made and, if so, whether they could regularise the unauthorized construction. High Court quashed the impugned Government orders and issued certain directions. This Court observed as under and then referred the matter to the High Court for certain clarifications: -

"In our considered opinion the most eloquent and patent fact that must tilt the scale in this dispute in favour of the Council is that the Hotel has admittedly made a residential construction of seven floors even though their sanctioned plan was only for two floors. That necessarily means that five floors of the building have been constructed illegally and unauthorisedly. It is not surprising therefore that the entire endeavour of the Hotel now is to protect the two floors constructed above the road level and to yield to any workable formula. It is in that context that the Hotel, without prejudice to its rights and contentions, had suggested that the entire structure of seven floors might be allowed to remain and, for that purpose it was prepared to give an undertaking that they would not use the five floors below the road level for any residential purpose but utilise it only the for keeping air- conditioning plant and other attendant purposes for running the Hotel on the two floors above the road level. The Council, however, vehemently opposed the above suggestion on the ground that acceptance thereof would mean giving judicial imprimatur to utter and flagrant breach of statutory provisions to which the Hotel resorted to in spite of repeated opportunities given and reminders issued to retrace their steps and any sympathy shown to the Hotel would be wholly misplaced. We need not, However, dilate on this aspect of the matter as it appears to us that there is some confusion as to the nature of the above-quoted direction, given by the High Court and it requires to be clarified."

In Cantonment Board, Jabalpur and others vs. S.N. Avasthi and others (1995 Supp. (4) SCC 595) this Court observed that construction made in contravention of law would not be a premium to extend equity so as to facilitate violation of the mandatory requirements of law. Here the Cantonment Board had granted permission for construction of a building which was later on cancelled as the resolution of the Board granting permission was suspended by the GOC-in-Chief.

In Pratibha Cooperative Housing Society Ltd. And another vs. State of Maharashtra and others (1991 (3) SCC

341) this Court came down heavily on the housing society which made construction in violation of Floor Space Index. This Court said that such unlawful construction was made by the Housing Board in clear and flagrant violation and disregard of FSI and upheld the order of demolition of eight floors as ordered by the Bombay Municipal Corporation. While dismissing the special leave petition this Court observed as under: -

"Before parting with the case we would like to observe that this case should be a pointer to all the builders that making of unauthorised constructions never pays and is against the interest of the society at large. The rules, regulations and by-laws are made by the Corporations or development authorities taking in view the larger public interest of the society and it is the bounden duty of the citizens to obey and follow such rules which are made for their own benefits."

In Dr. G.N. Khajuria and others vs. Delhi Development Authority and others (1995 (5) SCC 762), appellants were some of the residents of Sarita Vihar colony, developed by the Delhi Development Authority (DDA). It was contended that the DDA permitted a nursery school to be opened in a certain park in complete violation of the provisions of the Delhi Development Act, 1957. After considering the provisions of the Delhi Development Act Master and Zonal Development Plans this Court said that the site at which the school was allowed to be opened was a park. It further held that it was not open to the DDA to carve out any space meant for park for a nursery school. This Court said that the allotment for opening the nursery school was misuse of power and it cancelled the allotment. This Court observed that the construction put up by the allottee, even though permanent, was of no relevance as the same has been done on a plot of land allotted to it in contravention of law. As to the submission that dislocation from the present site would cause difficulty to the tiny tots, this Court said that the same has been advanced only to get sympathy from the court inasmuch as children, for whom the nursery school is meant, would travel to any other nearby place where such a school would be set up by the allottee or by any other person. Six months time was granted to the allottee to make alternative arrangements as it thinks fit to shift the school so that the children are not put to any disadvantageous position. Then, this Court observed as under:-

"Before parting, we have an observation to make. The same is that a feeling is gathering ground that where unauthorised constructions are demolished on the force of the order of courts, the illegality is not taken care of fully inasmuch as the officer 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."

In Mrs. Manju Bhatia and another vs. New Delhi Municipal Committee and another (JT 1997 (5) SC 574), the builder, after obtaining requisite sanction to build 8 floors, constructed more floors, sold the flats and gave possession to the respective buyers. Subsequently it was found that the builder constructed the building in violation of the building regulations and consequently flats on the top four floors were ordered to be demolished. The demolition was challenged in the High Court by way of a writ petition, which was dismissed. Special leave to appeal to this Court was also dismissed. The question before this Court was whether the appellants, who had purchased the flats without the builder informing them of the illegal construction, should be compensated for the loss suffered by them. High Court in the impugned judgment directed the return of the amount plus the escalation charges. All this was on a suit brought by the appellants. This Court noticed that the escalated price as on the date was around Rs.1.5 crores per flat. Taking into consideration the totality of the circumstances this Court directed the builder to pay Rs.60 lacs including the amount paid by the allottees.

In an unreported decision of this Court in Ram Awatar Agarwal & ors. Vs. The Corporation of Calcutta & ors. [C.A. No. 6416 of 1981] decided on August 20, 1996, an unauthorised construction in the city of Calcutta was allowed to be demolished by the Corporation of Calcutta. It was a multistory building. The Court observed as under:-

"We share the feeling of the Deputy City Architect when he states in paragraph 18 of his affidavit that this is a case in which an unscrupulous builder took advantage of the courts order upto a point of time and after he failed in the legal process upto this court the tenants were set up to delay the inevitable and thus in this matter the unauthorised structure hazardous and unsafe has stood all these years. We have, therefore, no manner of doubt that this is a case in which exemplary costs should be awarded."

At the conclusion of the arguments and in order to decide the matter fully and finally but without prejudice to the respective contentions of the parties, we wanted to know the nature of construction so far as carried out; the cost thereof; the area meant for shopping and parking separately; and if the plans were in accordance with the Development Act and Rules. This was particularly so when by an interim order of this Court construction was allowed though with certain clear stipulations.

Prof. T.S. Narayanaswami, Ex-Head of Department of Building Engineering and Management, School of Planning and Management, New Delhi was appointed as Local Commissioner for the purpose. He was asked to report on the following aspects of the construction :

"1. What is the extent of construction put up by the appellant under ground the aforesaid part?

2. What is the nature of said construction?

3. What cost can be said to have been incurred by the appellant in the construction uptil now?

4. What further costs, if any, are required to be incurred for completion of the project with parking provisions?

5. What will be the extent of the cost required to be incurred if the structures existing on spot are required to be demolished and the land is to be restored to its original position?

6. Whether the present structures are put up by the appellant in accordance with the building plans sanctioned by the Nagar Nigam?

7. Whether the present structures comply with the building requirements as per the provisions governing the Lucknow Development Authority?

8. Whether the structures existing on spot are safe and sound and not likely to create any health hazard, if they are allowed to be retained on spot?

9. Whether the existing structures with suitable alterations can be used for parking of vehicles and/or for putting up other amenities like public convenience etc?

10. If the land earmarked for parking in the building plans submitted to the Nagar Nigam by the appellant, and which land is dug up at present, if restored to its original position, is it feasible to use the existing structures for parking of vehicles and for putting up other amenities?

11. What are the existing general conditions of the locality and the area around the park?"

It is not necessary to examine the report of the Local Commissioner in detail except to note that :

1. extent of work carried out is approximately 80% of the civil and structural work, about 30% of the finishing work and 20% of the services support work;

2. it is a First Class permanent construction;

3. cost of construction of the work so far executed is approximately Rs.3.52 crore and the cost of work still to be done is approximately 2.97 crore;

4. dismantling of the construction so far made and restoration of the park would cost Rs.98,10,181/- less Rs.22,19,550/- salvage value;

5. though there is a letter of approval of confirmation having been given, there are no sanctioned drawings (Chief Architect of the Mahapalika said that sanctioned drawings were "missing" from his files).

6. Lucknow Development Authority (LDA) did not play any role in sanctioning the project except the Layout Plan. (Layout Plan was forwarded to the LDA by the Chief Architect of the Mahapalika who was also officiating as Chief Architect of LDA at that time. In other words, the approval of the Layout at the LDA level was recommended by the same person who forwarded it from the Mahapalika);

7. Master Plan could not have envisaged the park as a site available for commercial exploitation, given the density and congestion of the surrounding area;

8. structure as designed is safe from the structural engineering view point;

9. air pollution levels of the park and the surrounding areas would go up by substantial amount as a result of underground shopping complex-cum-parking; and

10. there is a lot of crowding during day hours (9.00 a.m to 6.00 p.m.) leading to generally slow movement of traffic and occasional traffic hold ups. A high decibel level thanks to vehicles and moving people and vendors. A lot of solid waste collection at the end of the day and generally high level of pollution as a result.

By and large the Report of Prof. Narayanaswamy has found acceptance by all the parties.

Mr. M.L. Verma, learned senior advocate, who appeared for M.I. Builders after the report of Prof. Narayanaswamy, submitted that the Report of the Local Commissioner insofar as it gives cost incurred on the constructions is not correct and so also the cost required to be incurred for completion of the project. His argument was that cost so far incurred was in fact more than what the Local Commissioner said and that cost required for completion of the project was less than that arrived at by the Local Commissioner. We, however, do not find merit in his submission as we find that the Local Commissioner has applied the same principles while arriving at the cost so far incurred and the cost to be incurred for completion of the project. We, therefore, accept the Report of the Local Commissioner in its entirety. But to what effect we shall presently see.

Jhandewala Park, the park in question, has been in existence for a great number of years. It is situated in the heart of Aminabad, a bustling commercial-cum- residential locality in the city of Lucknow. The park is of historical importance. Because of the construction of underground shopping complex and parking it may still have the appearance of a park with grass grown and path laid but it has lost the ingredients of a park inasmuch as no plantation now can be grown. Trees cannot be planted and rather while making underground construction many trees have been cut. Now it is more like a terrace park. Qualitatively it may still be a park but it is certainly a park of different nature. By construction of underground shopping complex irreversible changes have been made. It was submitted that the park was acquired by the State Government in the year 1913 and was given to the Mahapalika for its management. This has not been controverted. Under Section 114 of the Act it is the obligatory duty of the Mahapalika to maintain public places, parks and plant trees. By allowing underground construction Mahapalika has deprived itself of its obligatory duties to maintain the park which cannot be permitted. But then one of the obligatory functions of the Mahapalika under Section 114 is also to construct and maintain parking lots. To that extent some area of the park could be used for the purpose of constructing underground parking lot. But that can only be done after proper study has been made of the locality, including density of the population living in the area, the floating population and other certain relevant considerations. This study was never done. Mahapalika is the trustee for the proper management of the park. When true nature of the park, as it existed, is destroyed it would be violative of the doctrine of public trust as expounded

by this Court in Span Resort Case (1997 (1) SCC

388). Public Trust doctrine is part of Indian law. In that case the respondent who had constructed a motel located at the bank of river Beas interfered with the natural flow of the river. This Court said that the issue presented in that case illustrated "the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change".

In the treatise "Environmental Law and Policy : Nature, Law, and Society" by Plater Abrams Goldfarb (American Casebook series - 1992) under the Chapter on Fundamental Environmental Rights, in Section 1 (The Modern Rediscovery of the Public Trust Doctrine) it has been noticed that "long ago there developed in the law of the Roman Empire a legal theory known as the Doctrine of the public trust." In America Public Trust doctrine was applied to public properties, such as shore-lands and parks. As to how doctrine works it was stated: "The scattered evidence, taken together, suggests that the idea of a public trusteeship rests upon three related principles. First, that certain interests - like the air and the sea - have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership. Second, that they partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry without regard to economic status. And, finally, that it is a principle purpose of government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted private benefit... With reference to a decision in Illinois Central Railroad Company v. Illinois (146 U.S. 387 [1892]), it was stated that the court articulated in that case the principle that has become the central substantive thought in public trust litigation. When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate the resource to more restricted uses or to subject public uses to the self-interest of private parties. This public trust doctrine in our country, it would appear, has grown from Article 21 of the Constitution.

Thus by allowing construction of underground shopping complex in the park Mahapalika has violated not only Section 114 of the Act but also the public trust doctrine.

If we now refer to the provisions of law relating to notice of meetings and business of the Mahapalika and its committees it is apparent that these provisions were not adhered to. There is no authority with the Mahapalika to constitute High Power Committee and to delegate its functions to that High Power Committee. There was no agenda at any time in any of the meetings of the Mahapalika for consideration of the underground shopping complex. There were no proposals, no documents, no plan, no study, no project report or feasibility report on the basis of which Mahapalika could have given a green signal for construction of the underground shopping complex. There was no discussion and no informed decision. Mahapalika completely abdicated its functions. Mahapalika delegated its functions to the High Power Committee in contravention of the Act. Constitution of the High Power Committee itself was wholly illegal. High Power Committee took

decision to hand over the park to the builder for construction of the underground shopping complex and also approved the terms of the agreement dated November 4, 1993. Decision of the High Power Committee was put before the Executive Committee and the general body of the Mahapalika for the purpose of "information and both these bodies stamped their approval. As noted above there was no agenda for consideration of these resolutions of the Executive Committee of the Mahapalika. Corporators had no time to apply their minds. Such an important matter, where the cost of the project was likely to run in crores of rupees, could not have been considered under the topic "other subjects, subject to the permission of the Presiding Officer". Section 105 of the Act protects any act done or proceeding taken on account of any defect or irregularity in procedure not affecting the substance. In the present case it is not mere irregularity or defect in the procedure but the whole procedure is in clear breach of Sections 91 and 119 of the Act which are mandatory.

The law mandates that not only the notice of the date and the time of the meeting but the notice of the business to be transacted at such meeting should be given at least 4 clear days before the date of the meeting for the Mahapalika and 3 days for the Executive Committee. When the agenda did not include the subject of construction of underground shopping complex nor was there any material to support the discussion the subject of construction of underground shopping complex it could not have been considered in the meetings of the Mahapalika and the Executive Committee.

In Myurdhwaj Cooperative Group Housing Society Ltd. vs. Presiding Officer, Delhi Cooperative Tribunal and Ors. [(1998) 6 SCC 39), the appellant was a Housing Co-operative Society registered under the Delhi Co- operative Societies Act, 1972 and Delhi Co-operative Societies Rules, 1973. In the meeting of the general body of the society, it was decided that only those who have deposited minimum amount specified by the general meeting would be allotted flats and others would be accommodated on the flats to be constructed on the additional land in Phase-II construction. Respondent No.3 who was one of the original members of the society challenged the decision of the general meeting. One of the contention raised was that decision of the general body which relegated her and other such members to Phase-II was not on the agenda. This Court said a general body can always with the approval of the house in the meeting of its members take up any other matter not covered by the agenda on that account, no illegality could be held. This Court also observed that Section 28 of the Delhi Co-operative Societies Act, 1972 vests final authority in the general body of a cooperative society. It has wide powers including residuary power except those not delegated to any other authority under the Act, the rules and its bye-laws. In other words, its power, if any, is only restricted by the Act, the rules, the bye-laws and any order having force of law. This decision is of no help to the appellant as in the present case we are considering the statutory provisions for holding of the meetings of the Mahapalika and the Executive Committee which have been violated.

Agreement dated November 4, 1993 has not been executed as required under Section 133 of the Act. Resolution of the High Power Committee, which was placed before the Mahapalika and the Executive Committee for information, required that the prescribed project may be got executed by M.I. Builders Pvt. Ltd. and the Mukhya Nagar Adhikari should be authorised for conducting all the forthcoming actions and formalities". Now, Mahapalika has power to enter into contracts (Sec.131). Under sub-section (1) of Section 132 contract shall be expressed to be made, for and on behalf of Mahapalika and shall be so executed for and on behalf of the Mahapalika. Under sub-section (4), no

contract involving an expenditure exceeding five lakh rupees shall be made by Mukhya Nagar Adhikari (Chief Executive Officer) unless it has been sanctioned by the Mahapalika. Proviso (a) to Section 133(1) requires common seal of the Mahapalika to be affixed on every contract. The common seal shall be affixed only in the presence of a corporator (Sabhasad) who shall attach his signatures to the contract in token that the same was sealed in his presence. The signature of the corporator shall be distinct from the signature of any witness to the execution of such contract (sub-sections 2 and 3 of Section

133). Under sub-section 4 of Section 133 no contract executed otherwise than as provided in the section shall be binding on the Mahapalika. The impugned agreement is thus not executed in accordance with the requirements of law. Further, under sub- section (2) of Section 136 where the Mahapalika approves the project and the entire estimated cost exceeds rupees ten lakhs, the project report shall be submitted to the State Government and it is for the State Government to reject or sanction the project with or without modifications. Till that is done no work shall be commenced. No such sanction of the State Government was obtained in the present case. It was submitted that this provision would apply only if the project cost was to be incurred by the Mahapalika. We do not think it is so. It is the cost of the project that matters and not who incurs the cost in the first instance. Agreement dated November 4, 1993 is, therefore, not a valid contract and not binding on the Mahapalika. As held in H.S. Rikhys case (AIR 1962 SC

554) where a statute makes a specific provision that a body corporate has to act in a particular manner and in no other, that provision of law being mandatory and not directory has to be strictly followed. This principle will apply both as regards holding of meeting of the Mahapalika and execution of contract on its behalf. This judgment is also authority for the preposition that there is no estoppel against a statute.

We may now examine some of the terms of the agreement dated November 4, 1993. There are six recitals to the agreements which cannot be co-related to any discussion in any of the meetings of the Mahapalika, the Executive Committee or the High Power Committee. Under clause (2) of the agreement it is for the builder to make construction at its own cost and then to realise the cost with profit not exceeding more than 10% of the investment in respect of each shop. Nobody knows how much cost the builder is likely to incur and how long it will continue to be in possession of the shopping complex. Full freedom has been given to the builder to lease out the shops as per its own terms and conditions to persons of its choice on behalf of the Mahapalika and Mahapalika shall be bound by these terms and conditions. Builder has also been given the right to sign the agreement on behalf of the Mahapalika on the terms and conditions which the builder may deem fit and proper. Builder is only required to give a copy of the agreement to the Mahapalika after its execution and both the Mahapalika and the builder shall remain bound by the terms of that agreement. Since there is no project report nobody knows how many shops the builder would construct and of what sizes. Mahapalika is allowed to charge Rs.5,000/- per shop for every second and subsequent transfer of shops by the builder but what amount is to be charged for the first transfer or subsequent transfers is left to the sole discretion of the builder. A bare glance at the terms of agreement shows that not only that the clauses of the agreement are unreasonable for the Mahapalika but they are atrocious. No person of ordinary prudence shall ever enter into such an agreement. A trustee, which the

Mahapalika is, has to be more cautious in dealing with its properties. Valuable land in the heart of commercial area has been handed on a platter to the builder for it to exploit and to make run away profits. As a matter of fact on examining the terms of the agreement we find that Mahapalika has been completely ousted from the underground shopping complex for an indefinite period. It has completely abdicated its functions.

To repeat, the agreement is completely one sided favouring the builder. The land of immense value has been handed over to it to construct underground shopping complex in violation of the public trust doctrine and the Master Plan for the city of Lucknow. Mahapalika has no right to step in even if there is any violation by the builder of the terms of the agreement or otherwise. Mahapalika, though considered to be the owner of the land, is completely ousted and divested of the land for a period which is not definite and which depends wholly on the discretion of the builder. On the question of reasonableness reference may be made to Wade on Administrative Law, 7th Edition, page 399. The learned author observed that "The court must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended. Decisions which are extravagant or capricious cannot be legitimate". Quoting Lord Hailsham LC in Re W. (an infant) ([1971] AC 682) where he said, "two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable". The following passage from the treatise would be relevant:-

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

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

This has become the most frequently cited passage (though most commonly cited only by its nickname) in administrative law. It explains how unreasonableness, in its classic formulation, covers a multitude of sins. These various errors commonly result from paying too much attention to

the mere words of the Act and too little to its general scheme and purpose, and from the fallacy that unrestricted language naturally confers unfettered discretion.

Unreasonableness has thus become a generalised rubric covering not only sheer absurdity or caprice, but merging into illegitimate motives and purposes, a wide category or errors commonly described as irrelevant considerations, and mistakes and misunderstandings which can be classed as self-misdirection, or addressing oneself to the wrong question. But the language used in the cases shows that, while the abuse of discretion has this variety of differing legal facets, in practice the courts often treat them as distinct. When several of them will fit the case, the court is often inclined to invoke them all. The one principle that unites them is that powers must be confined within the true scope and policy of the Act.

Taken by itself, the standard of unreasonableness is nominally pitched very high: so absurd that no sensible person could ever dream that it lay within the powers of the authority (Lord Greene MR); so wrong that no reasonable person could sensibly take that view (Lord Denning MR); so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it (Lord Diplock). It might seem from such language that the deliberate decisions of ministers and other responsible public authorities could almost never be found wanting. But, as may be seen in the following pages, there are abundant instances of legally unreasonable decisions and actions at all levels. This is not because ministers and public authorities take leave of their senses, but because the courts in deciding cases tend to lower the threshold of unreasonableness to fit their more exacting ideas of administrative good behaviour."

When we keep in view the principles laid by this Court in its various judgments and which we have noticed above, it has to be held that the agreement dated November 4, 1993 is not a valid one. The agreement defies logic. It is outrageous. It crosses all limits of rationality. Mahapalika has certainly acted in fatuous manner in entering into such an agreement. It is a case where the High Court rightly interfered in exercise of its powers of judicial review keeping in view the principles laid by this Court in Tata Cellular vs. Union of India (1994 (6) SCC 651). Every decision of the authority except the judicial decision is amenable to judicial review and reviewability of such a decision cannot now be questioned. However, a judicial review is permissible if the impugned action is against law or in violation of the prescribed procedure or is unreasonable, irrational or mala fide. On the principle of good governance reference was made to a decision of Division Bench of Bombay High Court in State of Bombay vs. Laxmidas Ranchhoddas and another (AIR 1952 Bombay 468 at 475) (Para

12). It was submitted that bad governance sets a bad example. That is what exactly happened in the present case.

In State of Bombay vs. Laxmidas Ranchhoddas & Anr. [1952 AIR Bom. 468] a Division bench of the High Court was considering the argument that the writ of mandamus being discretionary, the Court should consider whether it should not put a limitation upon its own powers and jurisdiction. It was submitted that it was impossible for any State to function if there was a constant interference by the

High Court in the executive acts performed by the officers of the State. Chagla, CJ, speaking for the Court, said :

"It may be that interference by the High Court may result in inconvenience or difficulty in administration. But what we have to guard against is a much greater evil. When we find in the modern State wide powers entrusted to Government, powers which affect the property and person of the citizen, it is the duty of the Courts to see that those wide powers are exercised in conformity with what the Legislature has prescribed. We are not oblivious of the fact that in order that the modern State should function the Government must be armed with very large powers. But the High Court does not interfere with the exercise of those powers. The High Court only interferes when it finds that those powers are not exercised in accordance with the mandate of the Legislature. Therefore, far from interfering with the good governance of the State, the Court helps the good governance by constantly reminding Government and its officers that they should act within the four corners of the statute and not contravene any of the conditions laid down as a limitation upon their undoubtedly wide powers. Therefore, even from a practical point of view, even from the point of view of the good governance of the State, we think that the High Court should not be reluctant to issue its prerogative writ whenever it finds that the sovereign Legislature has not been obeyed and powers have been assumed which the Legislature never conferred upon the executive."

It cannot be said that the construction of the underground shopping complex is by the builder as an agent of the Mahapalika. Concept of agency is totally missing in the present case. Rather the deal is from principal to principal. Reference may be made to the decision of this Court in Akadasi Padhans case [1963 Supp.(2) SCR 691] quoted above. When the "development" is by the builder provisions of Section 14 of the Development Act would apply. There is no sanction of the building plan of the underground shopping complex by the LDA. Construction is, therefore, per se illegal. Even after the interim order of this Court allowing construction, plans were not got sanctioned from the LDA, which would be authority under the Development Act. Sanction of the building plan by the Mahapalika would, therefore, be meaningless. Even then, there were no sanctioned drawings. It has been pointed out that process of sanction appeared to be ad hoc and skeletal. When construction started LDA issued a show cause notice to the Mahapalika but then in view of the interim order made by this Court show cause notice was subsequently withdrawn. It was stated that against the order withdrawing the show cause a revision was filed by Mr. Amrit Puri, a writ petitioner to the State Government, which was stated to be still pending.

It is not disputed that there is a Master Plan applicable to city of Lucknow. This Master Plan is prepared under the Development Act. It was submitted by the builder that the park could be exploited for commercial purposes as Aminabad has been shown to be a commercial area. No doubt Aminabad is a commercial area but that does not mean that the park can be utilised for commercial purposes. Rather using the park for commercial purposes would be against the Master Plan. However, in letter dated October 16, 1993 by Vice-Chairman, LDA to the Mahapalika did say :

"I am to inform you in this regard that the land use of the Jhandewala park situated in Aminabad is commercial one as per the Master Plan. This department has no objection on the layout plan submitted accordingly."

How this letter came to be written one may notice the sequence. High Power Committee meets on October 13, 1993 and is adjourned to October 19, 1993. Mr. G.C. Goyal is the Architect of Mahapalika and he forwarded the layout plan to LDA. Mr. Goyal is also officiating as Architect of LDA. Approval of the layout plan by LDA is dated October 16, 1993, which is 3 days before the next meet of the High Power Committee. This approval of the layout at LDA was recommended by the same person who forwarded it from the Mahapalika and in a great hurry. In the Master Plan for the city of Lucknow, it is Aminabad area which is commercial and that would not mean that Park can be put to commercial use. By letter dated November 23, 1993, LDA objected to the construction being undertaken in the Park without obtaining permission/No objection from it and required the construction to stop. Mahapalika in turn by its letter sent on the following day to the builder informed it of the objection raised by LDA and that before starting any construction the permission/No objection of LDA as required under Sections 14 and 15 of the Development Act was necessary. It does appear to us that the Master Plan of the city of Lucknow could not have envisaged the Jhandewala Park as a site available for commercial exploitation considering the density and congestion in the area.

The reason for the construction of underground shopping complex given was that it would remove the congestion in the area. We have report of the Local Commissioner, which says that it would rather lead to more congestion. We think Mr. Dave is right in his submission that a decision to construct underground shopping complex by M.I. Builders had already been taken and that the whole process was gone into to confer undue benefit to M.I. Builders and the bogie of congestion was introduced to justify the action of the Mahapalika. It is wholly illegal and smacks of arbitrariness, unreasonableness and irrationality.

We may also note the argument of Mr. Adarsh Goel who said that Jhandewala Park was acquired by the State in the year 1913 and was given to Mahapalika for its management. He said under Section 41 of the Development Act read with Section 5 of the U.P. Regulation of Building Operations Act a Government order was issued on August 18, 1986 by the State Government whereby the use of park for any other use was prohibited. This direction of the State Government was incorporated in the Master Plan for the city of Lucknow and of course violated by allowing construction of underground shopping complex.

Action of the Mahapalika in agreeing to the construction of underground shopping complex in contravention of the provisions of the Act and then entering into an agreement with the builder against settled norms was wholly illegal and has been held to be so by the High Court. No doubt Mahapalika is a continuing body and it will be estopped from changing its stand in the given case. But when Mahapalika finds that its action was contrary to the provisions of law by which it was constituted there could certainly be no impediment in its way to change its stand. There cannot be any estoppel operating against the Mahapalika. Principles laid in Union of India vs. M/s. Indo-Afgan Agencies Ltd. (1968 (2) SCR 366) and of Calcutta High Court in The Ganges Manufacturing Co. vs. Sourujmull and others (1880 ILR Calcutta 669) cannot apply to the facts of the present case.

Section 128 of the Act confers powers on the Mahapalika to sell, let of, hire, lease, exchange, mortgage, grant otherwise dispose of any property or any interest therein acquired by or vested in the Mahapalika. Appellant and the intervenors said that there was no disposal of any property and no interest in the land had been transferred by the Mahapalika to the builder. Respondent, as noted above, contended to the contrary. Under Section 54 of the Transfer of Property Act, 1882 agreement to sell does not create any interest in land. We are not concerned with this provision. Reference may, however, be made to Sections 60(b) and 62(f) of the Easement Act, 1882. Though the licence under Section 60(b) is irrevocable but it can be revoked after the happening of certain event which is when the builder has recovered whole of his investment plus 10% of the profit. Reference may be made to a decisions of this Court in Chawalier I.I. Iyappan and another vs. The Dharmodayam Company [(1963) 1 SCR 85]. In this case an argument was raised by the appellant that he had been granted a licence and acting upon the licence he had executed a work of permanent character and incurred expenses in the execution thereof and, thereafter, under Section 60(b) of the Easement Act, 1882 the licence was irrevocable. This Court said:-

"In our opinion no case of licence really arises but if it does what is the license which the appellant obtained and what is the licence, which he is seeking to plead as a bar. The licence, if it was a licence, was to construct the building and hand it over to the respondent company as trust property. There was no licence to create another kind of trust which the appellant has sought to create. It cannot be said therefore that there was an irrevocable license which falls under s. 60(b) of the Act. Even such a license is deemed to be revoked under s. 62(f) of that Act where the licence is granted for a specific purpose and the purpose is attained or abandoned or becomes impracticable. In the present case the purpose for which the license was granted has either been abandoned or has become impracticable because of the action of the appellant."

[The Indian Easement Act, 1882: Sections 52, 53, 60(bo and 62(f) :-

52. Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.

53. A license may be granted by any one in the circumstances and to the extent in and to which he may transfer his interests in the property affected by the license.

60. A license may be revoked by the grantor, unless:-

(a).....

(b) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution.

62. A license is deemed to be revoked -

(a) to (e) .....

(f) where the license is granted for a specified purpose and the purpose is attained, or abandoned, or becomes impracticable;] We find force in the submissions of respondents that by granting licence to the builder to construct underground shopping complex of permanent nature and to hold on to the same for a period which is not definite and then under the impugned agreement builder having been authorised to lease out the shops on behalf of the Mahapalika, it is a dubious method adopted to subvert the provision of Section 128 which apply as well in the case of lease and thus the transaction will also be covered by the expression "otherwise dispose of any interest in the property". It is, therefore, difficult to accept the argument of the builder that transaction is outside Section 128 of the Act. Now, first licence has been granted to the builder to enter upon the park and to execute a work of permanent character and incur expenses in the execution of the work, thus making the licence irrevocable. However, the licence is deemed to be revoked after the licensee has recovered his full cost on the construction plus 10% of the profit on the investment made by him. When this purpose is achieved by the licensee is anybodys guess. Not only that licensee, i.e., the builder is then authorised to lease out the shops so constructed on behalf of the Mahapalika. The result would be that to the builder provisions of Section 129 of the Act, cannot be thus made applicable. In such a situation for the builder to contend that the transaction is not covered by Section 128 and, therefore, Section 129 will not apply is certainly incredulous. Provision of Section 129 of the Act has, therefore, been flouted. Impugned agreement dated November 4, 1993 is bad having been executed also in contravention of the requirement of Section 129 of the Act.

The facts and circumstances when examined point to only one conclusion that the purpose of constructing the underground shopping complex was a mere pretext and the dominant purpose was to favour the M.I. Builders to earn huge profits. In depriving the citizens of Lucknow of their amenity of an old historical park in the congested area on the spacious plea of decongesting the area Mahapalika and its officers forgot their duty towards the citizens and acted in a most brazen manner.

Proposition of construction of underground shopping complex was so lucrative and the land so valuable that Mahapalika itself could have done it by collecting earnest money from the prospective allottees. But then nobody cared to examine this aspect and a plea was also advanced that Mahapalika had no finance to undertake the project. If one refers to the agreement the builder itself devised a self- financing scheme and it had not to spend anything from its own pocket. On mere booking of the shops builder could collect rupees one crore twenty five lakhs and would have collected more money with the progress of the construction at various stages. A public body would not sequester away its property by devising new methods.

Thus there are two distinct areas of challenge in the present case - (1) the agreement is fraud on power, prime land has been given for a song by the Mahapalika. The fact that the scheme is so lucrative could be seen from the fact that all shops less 5% were booked within six days of the advertisement appearing in December, 1993. Public interest and public exchequer have been sacrificed. Mahapalika is divested of its control over the project though notionally not for ever but the builder, on the other hand, has control over the project for all times to come and (2)

construction is in contravention of the provisions of law as contained in Development Act. The project has been entrusted to the builder in violation of the provisions of the Act. The decision taken by the Mahapalika was not on proper consideration and was not an informed objective decision. Judicial review is permissible if the impugned action is against law or in violation of the prescribed procedure or is unreasonable, irrational or mala fide. As said earlier High Court rightly exercised its power of judicial review in the present case. It has examined the manner in which the decision was made by the Mahapalika. Second principle laid in Tata Cellular's case [(1994) 6 SCC 651] applies in all respects. High Court held that the maintenance of the park because of its historical importance and environmental necessity was in itself a public purpose and, therefore, the construction of an underground market in the garb of decongesting the area was wholly contrary and prejudicial to the public purpose. By allowing the construction Mahapalika had deprived its residents as also others of the quality of life to which they were entitled to under the Constitution and the Act. The agreement smacks of arbitrariness, unfairness and favourtism. The agreement was opposed to public policy. It was not in public interest. Whole process of law was subverted to benefit the builder. We agree with the findings and conclusions of the High Court.

High Court in its impugned judgment has not doubted the capacity of M.I. Builders to undertake the project but then that is not the issue. The question is why it was not necessary to invite tenders for the project of such a high cost. Why it was thought that it was only the M.I. Builders in the country who could undertake the job? Why project report was not obtained to know the cost of the project? Why could it not be thought that there could be any other person who could undertake the job at a lesser cost and in equally competent manner? Public interest has certainly been given a go bye. There was some undercurrent flowing to award the contract to M.I. Builders. High Court said "lest we are taken amiss we wish to make it clear that we do not doubt either the bona fides of the authorities or the competence of the respondents M/s. M.I. Builders to enter into the impugned agreement but we are of the view ..." The competence of M/s. M.I. Builders to undertake the project is not doubted when now it is seen that proper construction has been made but before taking decision to award the contract to it nobody knew its credentials. No attempt made whatsoever to consider if there was any other person more competent for the job or if of equal competence could offer better terms. In these circumstances, dictum contained in the case of Kasturi Lal Lakshmi Reddy vs. State of J & K [(1980) 4 SCC 1] becomes inapplicable. No advantage can be drawn by the builder from the decision of this Court in G.B. Mahajans case [(1991) 3 SCC 91] as here the whole process of awarding contract to M.I. Builders has been gone through in an unabashed manner and in flagrant violation of law with the sole purpose of conferring benefit on it. All said and done we fail to understand the certificate given by the High Court about the bona fides of the authorities in awarding the contract to M/s. M.I. Builders. The officers of the Mahapalika, who were impleaded as respondents by name, did not file any replies to contradict the allegations made against them. Rather it appears that it was a fit case where High Court should have directed an inquiry to be made as to how the project came to be awarded to M.I. Builders including the conduct of the lawyers.

High Court has directed dismantling of the whole project and for restoration of the park to its original condition. This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorised. This dicta is now almost bordering rule of law. Stress was laid by the appellant and the prospective allottees of the

shops to exercise judicial discretion in moulding the relief. Such discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles. As will be seen in moulding the relief in the present case and allowing one of the blocks meant for parking to stand we have been guided by the obligatory duties of the Mahapalika to construct and maintain parking lots.

In the present case we find that the builder got an interim order from this Court and on the strength of that order got sanction of the plan from the Mahapalika and no objection from the LDA. It has no doubt invested considerable amount on the construction which is 80% complete and by any standard is a first class construction. Why should the builder take such a risk when the interim order was specific that the builder will make construction at its own risk and will not claim any equity if the decision in the appeal goes against it? When the interim order was made by this Court Mahapalika and the State Government were favouring the builder. As a matter of fact Mahapalika itself filed appeals against the impugned judgment of the High Court. Perhaps that gave hope to the builder to go ahead with the construction and to take the risk of getting the construction demolished and restoring the park to its original condition at its own cost. The builder did not foresee the change in stand not only of the Mahapalika but also of the State Government. It also, as it would appear, over-rated its capacity to manage with the State Government to change the land use of the park. Builder is not an innocent player in this murky deal when it was able to get the resolutions of the Mahapalika in its favour and the impugned agreement executed. Now, construction of shops will bring in more congestion and with that the area will get more polluted. Any commercial activity now in this unauthorised construction will put additional burden on the locality. Primary concern of the Court is to eliminate the negative impact the underground shopping complex will have on environment conditions in the area and the congestion that will aggravate on account of increased traffic and people visiting the complex. There is no alternative to this except to dismantle the whole structure and restore the park to its original condition leaving a portion constructed for parking. We are aware that it may not be possible to restore the park fully to its original condition as many trees have been chopped off and it will take years for the trees now to be planted to grow. But beginning has to be made.

There are four blocks under construction. Services like air-conditioning, fire-fighting, water supply, sanitary installation, necessary pumps for drainage and sewerage, etc. are yet to be installed and completed.

In block No. 1 there are shops at the level minus 9'6". These shops are divided by partition walls. There is a big hall with pillars below these shops at level of minus 19'6".

In block 2 there are shops on the upper basement level 9'6". There is no lower basement level.

Third block is currently designed to have shops at the upper basement level and parking at the lower basement level. The upper basement level can be converted to have parking at that level too since the structural configuration will permit the same. Flooring on the lower basement is yet to be laid. There can thus be parking both on the upper basement and the lower basement. This parking place for vehicles would lead to decongestion of the roads surrounding the park which are otherwise choked with the parked vehicles in its entire periphery.

Fourth block is only partially developed with just a separate ramp going down to the first basement level and a few columns with their foundations standing from the lower basement level. This fourth block, is currently dug up. However, to facilitate the movement of the vehicles to the two levels of parking in the third block a new ramp shall be constructed adjacent to and contiguous to the third block.

We have noted above that under clause (ix-a) of Section 114 of the Act, it is incumbent on the Mahapalika to make reasonable and adequate provision by any means or measures which it is lawfully competent to it to use or to take for the construction and maintenance of parking lots, bus stops and public convenience.

Number of cases coming to this Court pointing to unauthorised constructions taking place at many places in the country by builders in connivance with the Corporation/Municipal officials. In the series of cases, this Court has directed demolition of unauthorised constructions. This does not appear to have any salutary effect in cases of unauthorised construction coming to this Court. While directing demolition of unauthorised construction, court should also direct inquiry as to how the unauthorised construction came about and to bring the offenders to book. It is not enough to direct demolition of unauthorised construction, where there is clear defiance of law. In the present case, but for the observation of the High Court, we would certainly have directed an inquiry to be made as to how the project was conceived and how the agreement dated November 4, 1993 came to be executed.

We direct as under :

1. Block 1, 2 and 4 of the underground shopping complex shall be dismantled and demolished and on these places park shall be restored to its original shape.

2. In Block 3 partition walls and if necessary columns in the upper basement shall be removed and this upper basement shall be converted into parking lot. Flooring should be laid at the lower basement level built to be used as parking lot. Ramp shall be constructed adjacent to Block 3 to go to upper and lower basement levels for the purpose of parking of vehicles. Further to make block 3 functional as a separate unit walls shall be constructed between block 2 and block 3 and also block 3 and block 4.

3 Dismantling and demolishing of these structures in Blocks 1, 2 and 4 and putting Block 3 into operation for parking shall be done by the Mahapalika at its own cost. Necessary services like sanitation, electricity etc. in Block 3 shall be provided by the Mahapalika.

4. Mahapalika shall be responsible for maintaining the park and the Block 3 for parking purposes in proper and efficient manner.

5. M.I. Builders Pvt. Ltd., the appellant, is divested of any right, title or interest in the structure built by it under or over the park. It shall have no claim whatsoever against Mahapalika or against any other person or authority

6. Block 3 shall vest in Mahapalika free from all encumbrances. Licence of M.I. Builders to enter into the park and the structure built therein is cancelled of which possession is restored to the Mahapalika with immediate effect. No obstruction or hindrance shall be caused to the Mahapalika by any one in discharge of its functions as directed by this order.

7. Restoration of the park and operation of Block 3 for parking purposes shall be completed by Mahapalika within a period of 12 months from today and report filed in the registry of this Court.

With the directions aforesaid, the appeals are dismissed with costs.