

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on : January 10, 2014*
Judgment Pronounced on : March 05, 2014

+ **LPA 775/2003**

GRAND VASANT RESIDENTS WEL.ASS. Appellant
Represented by: Mr.Arun Mohan Sr.Advocate
instructed by Mr.Arvind Bhatt and
Mr.Harshit Agarwal, Advocates.

versus

DDA & ORS. Respondents
Represented by: Mr.Rajiv Bansal, Advocate with
Ms.D.Ray Chaudhary and
Mr.Anchit Sharma, Advocates for
R-1.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR.JUSTICE V.KAMESWAR RAO

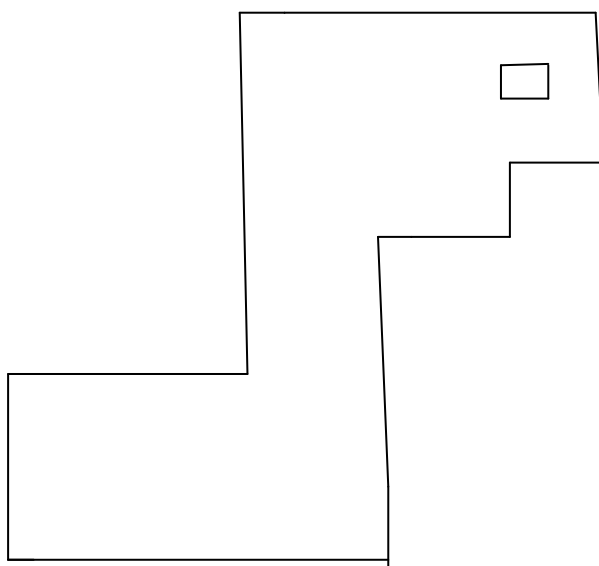
PRADEEP NANDRAJOG, J.

1. An authority known as the Delhi Development Authority was established under the Delhi Development Act, 1957. It was charged with the statutory duty of preparing a Master Plan for Delhi. It was also charged with the statutory duty of preparing the Zonal Development Plans, which included the lay-out of various colonies in Delhi. The colony of Vasant Kunj was one such colony conceived of under the Zonal Development Plans prepared by Delhi Development Authority and for which, after acquiring the lands the Central Government placed the same at the disposal of Delhi Development Authority for development;

residential plots to be sold and flats constructed on some land to be sold to the allottees by Delhi Development Authority.

2. The colony Vasant Kunj was divided into four sectors viz. A, B, C and D with each sector having pockets within.

3. We are concerned in the appeal with Pocket-5 in Sector-C, wholly envisaged as per the lay-out plan sanctioned by Delhi Development Authority as a residential colony. The pocket has 61 plots of various sizes. Spanning 25000 sq.mtrs. area the 61 plots, of various sizes have a spread over 13400 sq.mtrs. 6700 sq.mtrs are under roads and the remaining 4900 sq.mtrs has been shown for a park. The land shown for park is 'Z' shaped, and to illustrate it, it would as under:-



4. The small square within the 'Z' shaped plot has been shown in the lay-out plan for a Community Hall.

5. It needs to be highlighted at the outset that the 'Z' shaped plot having 6700 sq.mtrs. area shown for a park is as per a scale and though the dimensions of the Community Hall have not been indicated, in

comparison and with reference to the proportion of the size earmarked for a Community Hall viz-a-viz size of a park it is clear that the Community Hall site would be within the vicinity of around 200 sq.mtrs.

6. The appellant had to file a writ petition when Delhi Development Authority allotted land ad-measuring 618.42 sq.mtrs in Sector-C, Pocket-5 to Lala Baijnath Bhagaria Charitable Society for purpose of establishing a Community Hall-cum- Library and Reading Room. The contention of the appellant in the writ petition pleaded before the learned Single Judge was that the land earmarked as a park could not be used for a purpose other than the prescribed use. It was pleaded that as per the Delhi Development Act, 1957 the Master Plan was the conceptual document with reference whereto Zonal Development Plans had to be prepared. The Zonal Development Plans envisaged development in two parts : (i) carving out single entity plots for construction of buildings thereon; and (ii) flats to be constructed on some large plots and sold. District Centres and Shopping Complexes in residential colonies to be earmarked was another requirement of the Zonal Development Plans. It was pleaded that preparation of Zonal Development Plans required facilities to be identified and laid such as roads, drains, water supply, electrification etc. It was pleaded that the standard practice was that after colonies were developed for purposes of maintenance the same were handed over to the Municipal Corporation of Delhi. It was pleaded that with this concept Vasant Kunj, having four sectors, was conceived of. Further pleadings were as per paras 3 to 5 hereinabove.

7. In paragraph 26 of the writ petition it was pleaded as under:-

“The lay-out plan for C-5 may be examined. In one of the two parks (the one on the north) it provides for a small ‘community hall’. The community means the community living in the pocket while the community

hall' means what the word implies – a place where the local community can get together. The community hall in this case would be a small hall measuring, say, about a 90 sq.mtrs and would be available for the use of the bonafide residents of the area for purposes like:-

- i. An occasional party by a resident*
- ii. Condolence/prayer meeting*
- iii. A periodic get together of the residents*
- iv. For the persons having their daily walk to rest upon getting tired.*
- v. In the event of sudden rain, shelter for the children playing in the park to take refuge.*

A community Hall is used for purposes as aforesaid. It does not mean use for any other activity and while the residents may contribute towards the costs of its cleaning & maintenance there is no question of charging' for its use. It cannot be turned into a Banquet Hall, a Barat ghar, a Restaurant or a Club of sorts where the person who invested in its allotment and construction charges for food, drinks or other services so as to make a 'profit' therefrom. This is where a residential colony differs from a district centre or even a local shopping centre."

8. It was pleaded in the writ petition that the appellant had also learnt that some part of the park was proposed to be allotted to some organization for purposes of constructing a temple. An estoppel was pleaded in the writ petition by pleading that members of the appellant No.1 Association purchased flats in Pocket-5, Sector-C induced by the lay-out plan shown to them as per which a 'Z' shaped park existed in the middle of the pocket with a small area within the park to be used as a Community Centre. The pleadings in para 26 which we have noted above were expanded by pleading that a Community Hall meant a Hall for the community of the area, which would be the residents of Pocket-5, Sector-C.

9. In paragraph 36 of the writ petition it was pleaded that it was hoped by the appellant that in the counter affidavit to be filed by Delhi Development Authority it will disclose facts pertaining to the Zonal Development Plan and the lay-out plan in force at the time plots were sold in Pocket-5, Sector-C and in particular: -

- i. What was the total area of the Pocket C-5?
- ii. What was the total area under the 61 plots?
- iii. What was the total area under the colony roads?
- iv. What was the total area under the colony parks?
- v. What was the area earmarked for the community hall?
- vi. What was the total area earmarked for the ESS? And
- vii. What was the area earmarked for other support services such as water tanks, tube-well/pump houses, DALAO etc.?

10. In a counter affidavit filed Delhi Development Authority neither affirmed nor denied the pleadings in the writ petition pertaining to the lay-out sanctioned as pleaded in the writ petition, but we find that Delhi Development Authority filed as Annexure-R1 a lay-out plan, which we find is identical to the one filed by the appellant and annexed as Annexure-P1 to the writ petition, wherein the 'Z' shaped park has been shown, a small portion within shown as proposed to be used for a Community Hall. Relevant would it be to highlight that Delhi Development Authority did not traverse the pleadings in the writ petition concerning as to what would be the concept of a Community Hall. Delhi Development Authority pleaded that the lay-out was modified on October 21, 1999 and as per the modified lay-out plan area of the Community Hall was fixed 618.42 sq.mtrs, 400 sq.mtrs. was earmarked for used as a religious site. 18.04 sq.mtrs was earmarked for a pump house.

11. No particulars of the minutes of the meeting when the lay-out plan was modified were pleaded. None were annexed with the counter affidavit. Whether those who met and decided on October 21, 1999 to

change the lay-out plan were authorized to do so and whether the approval of the Vice-Chairperson, Delhi Development Authority was obtained was not pleaded.

12. Order dated May 31, 2002 passed in the writ petition by the learned Single Judge would evidence the appellant's grievance of counter affidavit filed by Delhi Development Authority being wishy washy. Counsel for Delhi Development Authority stated, as recorded in the order, that no additional affidavit in response was intended to be filed.

13. In the order dated July 10, 2002 a concession by the appellant to retain the plot in dispute allotted to Lala Baij Nath Bhageria Charitable Society was recorded upon appellant paying ₹45,00,000/- to Delhi Development Authority for the reason this was the price at which the plot earmarked for a community centre was allotted to Lala Baij Nath Bhageria Charitable Society.

14. Further orders would reveal that to show its bona-fides appellant deposited ₹15,00,000/- in this Court and offered to pay another ₹30,00,000/-, to make good ₹45,00,000/-. Record would reveal that the learned Single Judge was informed that Lala Baij Nath Bhageria Charitable Society had been returned the money by Delhi Development Authority and that the file had been placed before the Lt.Governor for sanction to change the lay-out plan relatable to the plot size earmarked for a community centre as per revised lay-out plan modified on October 21, 1999 and convert it into a park.

15. The Hon'ble Lt.Governor granted the approval, and since the threat of a 618.42 square meter plot being allotted to Lala Baij Nath Bhageria Charitable Society as also further 400 square meters being allotted to a third party for use for religious purpose which was looming large not only receded but vanished, the appellant took a stand that since the land use

was reconverted to be used as a park, that would be the end of the debate. Appellant wanted its money back i.e. ₹15,00,000/- deposited in this Court. The learned Single Judge opined that the appellant was trying to play smart. After eating its cake it wanted one more. The learned Single Judge disposed of the writ petition noting the decision of the Lt.Governor to approve the use as a green area, directing that the appellant would pay ₹30,00,000/- to Delhi Development Authority within a month and if not paid ₹15,00,000/- deposited by the appellant in this Court would be forfeited and paid over to Delhi Development Authority. It would be open in said circumstances for Delhi Development Authority to deal with the plot as per original user prescribed when the writ petition was filed. Though not expressly stated, the user would be as per the revised lay-out plan statedly modified on October 21, 1999.

16. At the outset we need to note that under the Delhi Development Act, 1957, the Master Plan and the Zonal Development Plan have a statutory character. Under Section 7 of the Act the Authority is charged with the duty to carry out a civic survey and prepare the Master Plan which as per sub-Section 2 of Section 7 which shall define the various zones into which Delhi may be divided for the purposes of development and to serve as a basic pattern of frame working within which the Zonal Development Plans have to be prepared.

17. As regards the Zonal Development Plans, the requirement as per the statute would be in terms of Section 8 of the Delhi Development Act, 1957 which reads as under:-

“8. Zonal development plans.-

(1) Simultaneously with the preparation of the master plan or as soon as may be thereafter, the Authority shall proceed

with the preparation of a zonal development plan for each of the zones into which Delhi may be divided.

(2) A zonal development plan may -

(a) contain a site plan and use-plan for the development of the zone and show the approximate locations and extents of land-uses proposed in the zone for such things as public buildings and other public works and utilities, roads, housing, recreation, industry, business, markets, schools, hospitals and public and private open spaces and other categories of public and private uses;

(b) specify the standards of population density and building density;

(c) show every area in the zone which may, in the opinion of the Authority be required or declared for development or redevelopment; and

(d) in particular, contain provisions regarding all or any of the following matters, namely:-

(i) the division of any site into plots for the erection of buildings;

(ii) the allotment or reservation of land for roads, open spaces, gardens, recreation grounds, schools, markets and other public purposes;

(iii) the development of any area into a township or colony and the restrictions and conditions subject to Which such development may be undertaken or carried out;

(iv) the erection of buildings on any site and the restriction and conditions in regard to the open spaces to be maintained in or around buildings and height and character of buildings;

- (v) *the alignment of buildings on any site;*
- (vi) *the architectural features of the elevation or frontage of any building to be erected on any site;*
- (vii) *the number of residential buildings which may be erected on any plot or site;*
- (viii) *the amenities to be provided in relation to any site or buildings on such site whether before or after the erection of buildings and the person or authority by whom or at whose expense such amenities are to be provided;*
- (ix) *the prohibitions or restrictions regarding erection of shops, workshops, warehouses or factories or buildings of a specified architectural feature or buildings designed for particular purposes in the locality;*
- (x) *the maintenance of walls, fences, hedges or any other structural or architectural construction and the height at which they shall be maintained;*
- (xi) *the restrictions regarding the use of any site for purposes other than erection of buildings; and*
- (xii) *any other matter which is necessary for the proper development of the zone or any area thereof according to plan and for preventing buildings being erected haphazardly in such zone or area.”*

18. Once the two plans are prepared the same have to be forwarded to the Central Government for approval and as per Section 11 the Master Plan and the Zonal Development Plans have to be notified by publication. As per Section 11A if the Master or the Zonal Development Plan has to be modified objections to the modifications have to be invited and after considering the objections and or suggestions the Authority has to take a decision and if the same is to modify either the Master Plan or the Zonal

Development Plan, approval has to be obtained from the Central Government.

19. It is no doubt true that lay-out plans may be altered or modified, but within the constraints of the Master Plan and the Zonal Development Plan. Thus a lay-out plan has to conform to, inter-alia, Section 8(2)(xi) i.e. the land use as per the Zonal Development Plan.

20. A perusal of Chapter 16 of the Master Plan in force would reveal that the Zonal Development Plans have to conform to the development code which vide clause-8 controls activities permitted in the various use zones, to wit : in a park - a play ground, a swimming pool or a sports complex alone would be permissible. As per Chapter 18 the land use patterns in the Zonal Development Plan as also lay-out plans must take into account the demographics and the environment impact. To put it pithily the population holding capacity in an areas with infrastructure available had to be adhered to. Thus, it would not be a case where a lay-out plan could be amended without any limitation upon the power to do so. The amendment to a lay-out plan has to be within the confines of the Zonal Development Plan and the Master Plan for Delhi.

21. Regretfully, in spite of copious pleadings of law and fact by the appellant, as noted hereinabove in para 9 above, the Delhi Development Authority filed a short and a cryptic counter affidavit not dealing with the basic question : What was the need to modify the lay-out plan in the year 1999? The decision to modify the same on October 21, 1999 was just referred to in the response without annexing the decision. It is trite that reasons in the decision would have evidenced whether the amendment to the lay-out plan was in conformity with the Zonal Development Plan of the area or was contrary thereto.

22. Unfortunately, the learned Single Judge has overlooked said relevant fact. A perusal of the impugned decision would reveal that the learned Single Judge was highly influenced by the fact that after offering to purchase the site in question for ₹45,00,000/- so that the appellant could maintain the same as a park, having led Delhi Development Authority to refund ₹45,00,000/- to respondent No.2; and approval obtained from the Lt.Governor of Delhi that the land use be reverted as a park, the appellant took a summersault.

23. Now, the act of the appellant to pay ₹45,00,000/- was an act of desperation and once realization dawned that it had a good case in law the appellant was justified in withdrawing its offer.

24. An issue of law has to be decided sans any concession made.

25. At this stage we would like to note various authorities frowning upon evasive pleadings and the presumptions required to be drawn when pleadings are elusive as also to the authorities on the subject of how the Courts should be vigilant against speculative pleadings.

26. On March 25, 2011 this Court while deciding W.P.(C) No.11896/2009 Rajender Pal Singh vs Union of India held as under:-

“7. We must highlight that the pleadings in the counter affidavit, as indeed we find in virtually 9 out of 10 counter affidavits filed on behalf of the Government, are inadequate and do not justify the standard of pleadings expected in a premier High Court. We do not expect muffed level pleading standards in the urbanized city of Delhi.”

27. In the decision reported as 2003 (5) AWC 3723 Keshav Kumar Gupta vs State of U.P. it was observed as under:-

“6. ...It is also indicated that this is one writ petition where the counter-affidavit filed by Dr. Suresh Chandra Tiwari, Deputy Director of Higher Education (Statistics),

U.P., Allahabad on behalf of the Respondents is admirable as the clear facts along with elaborate provisions of law relevant to the case have been submitted at the out set before giving parawise reply to the contents of each paragraphs of the writ petition. The Government authorities are expected to file the counter-affidavit in such a way that proper and adequate assistance could be derived in respect of the facts and law for prompt adjudication of the case.”

28. In the decision reported as 1998 III AD Delhi 487 Allora Electric & Cable Co. vs M/s. Shiv Charan & Bros it was held as under:-

“11. ...The defendants in corresponding para 7 of the written statement have admitted that plaintiff had been supplying goods to them from time to time and accounts used to be settled at the end of each year. The total purchases made and the total payments made by defendants as pleaded in paras 8 to 19 of the plaint have been denied but not specifically. Only vague denial has been made stating that the contents of such paras are either incorrect or wrong and denied. Learned counsel for the plaintiff has strongly contended that in the absence of specific denial the above said averments made in these paras of the plaint should be deemed to have been admitted as provided under Order 8 Rule 5 CPC. The object of this provision is to narrow the issues to be tried in the case and to enable either party to know what the real point is to be discussed and decided. The word “specifically” qualifies not only the word “deny” but also the words “stated to be not admitted” and therefore a refusal to admit must also be specifically stated. A defendant can admit or deny the several allegations made in the plaint and if he decides to deny any such allegations, he must do so clearly and explicitly. A vague or evasive reply by the defendant cannot be considered to be a denial of fact alleged by the plaintiff. A party is expected to expressly deny the fact which is within its knowledge and a general denial is not a specific denial.

12. ...Evasive or vague denial of fact in the written statement of such facts should be taken to be no denials and so deemed to be admitted. On that principle in the absence

of specific and unambiguous denial and the denial here being vague, the averments made in paras 8 to 19 should be deemed to have been admitted by the defendants.”

29. In the decision reported as (2004) 49 SCL 597 Official Liquidator of Amfort Agro Finance Ltd. vs Shishpal Singh it was held as under:-

“7. Reply to this application is filed by the respondent. It is not a parawise reply. Thus the averments made in Para No. 7 stand uncontroverted.”

30. In the decision reported as 2003 (96) FLR 722 Rajesh Singh vs M.P. Rajya Krishi Vipnan Board it was held as under:-

“4. ...The return filed by the respondent No. 4 is cryptic. There is no parawise reply. Therefore, the averments made in the petition which have not been specifically denied will be deemed to have been admitted.”

31. On November 21, 2011 this Court while deciding RFA (OS) 78/2011 P.K. Gupta vs Ess Aar Universal (P) Ltd. held as under:-

“11. We need to highlight that the fundamental principles, essential to the purpose of a pleading is to place before a Court the case of a party with a warranty of truth to bind the party and inform the other party of the case it has to meet. It means that the necessary facts to support a particular cause of action or a defence should be clearly delineated with a clear articulation of the relief sought. It is the duty of a party presenting a pleading to place all material facts and make reference to the material documents, relevant for purposes of fair adjudication, to enable the Court to conveniently adjudicate the matter. The duty of candour approximates uberrima fides when a pleading, duly verified, is presented to a Court. In this context it may be highlighted that deception may arise equally from silence as to a material fact, akin to a direct lies. Placing all relevant facts in a civil litigation cannot be reduced to a game of hide and seek. In the decision reported as 2011 (6) SCALE 677 Rameshwari Devi vs. Nirmala Devi the Supreme Court highlighted that pleadings are the foundation of a claim of the parties and where the civil litigation is largely based on documents, it is the bounden duty and obligation of the Trial

Judge to carefully scrutinize, check and verify the pleadings and the documents filed by the parties.

12. Highlighting that pleadings must be sufficient and consequence of laconic pleadings, which cannot be permitted, and the failure to plead sufficient details amounting to an insufficient plea, in the decision reported as AIR 1999 SC 1464 D.M. Deshpande vs Janardhan Kashinath Kadam, the Supreme Court observed qua a claim for tenancy that in the absence of a concise statement of material facts relating to the tenancy, the mere raising of a plea of tenancy is not enough for the purpose of raising an issue on the question. The Court cautioned against a pedantic approach to the problem and directed that the Courts must ascertain the substance of the pleading and not the form, in order to determine the same. It was observed that pertaining to a claim of tenancy, the exact nature of the right which is claimed has to be set-forth and no issue pertaining to existence of tenancy could be framed on a vague plea.”

32. In the decision reported as 2012 (5) SCC 370 Maria Margarida Sequeria Fernandes vs Erasmo Jack de Sequeria it was held as under:-

“72. The Court will examine the pleadings for specificity as also the supporting material for sufficiency and then pass appropriate orders.

x x x

74. If the pleadings do not give sufficient details, they will not raise an issue, and the Court can reject the claim or pass a decree on admission. On vague pleadings, no issue arises. Only when he so establishes, does the question of framing an issue arise. Framing of issues is an extremely important stage in a civil trial. Judges are expected to carefully examine the pleadings and documents before framing of issues in a given case.

x x x

78. *The Court must ensure that pleadings of a case must contain sufficient particulars. Insistence on details reduces the ability to put forward a non-existent or false claim or defence.*”

33. In the decision reported as 2012 (6) SCC 430 A. Shanmugam vs Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam it was held as under:-

“27. *The pleadings must set-forth sufficient factual details to the extent that it reduces the ability to put forward a false or exaggerated claim or defence. The pleadings must inspire confidence and credibility. If false averments, evasive denials or false denials are introduced, then the Court must carefully look into it while deciding a case and insist that those who approach the Court must approach it with clean hands.*”

34. In the decision reported as 2012 (10) SCALE 330 Kishore Samrite vs State of U.P. it was held as under:-

“32. *...The parties must state forthwith sufficient factual details to the extent that it reduces the ability to put forward false and exaggerated claims and a litigant must approach the Court with clean hands.*

33. *...While approaching the court, a litigant must state correct facts and come with clean hands. Where such statement of facts is based on some information, the source of such information must also be disclosed. A litigant is bound to make “full and true disclosure of facts”.*

35. On the question of principle as far back as 1816, in the decision reported as (1816) 5 M&S 2016 R. vs Turner it was held as under:-

“*...I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it, and not he who avers the*

negative I cannot help thinking, therefore that the onus must lie on the defendant, and that when the prosecutor has proved everything, which, but for the defendant's being qualified, would subject the defendant to the penalty, he has done enough; and the proof of qualification is to come in as a matter of defence."

36. In 1872, the statute, Section 106 of Evidence Act, provided:

"106. Burden of proving facts especially within knowledge. – When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations:

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

The 'railway ticket' in illustration (b) is, in our case, the equivalent of a 'pre-27.09.1974' partnership deed and supporting records."

37. Similar is the purport of Section 114 of the Evidence Act (which provides that the Court may presume existence of certain facts) where illustration (g) provides that the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person, who withholds it.

38. In 1903, the US Supreme Court in the decision reported as 191 U.S. 84 United States vs Denver & Rio Grande Railroad Company, said:

"Upon principle as well as upon authority, a party who has been shown to be prima facie guilty of a trespass, and relies upon a license, must exhibit his license, and prove that his acts were justified by it. The practical injustice of a different rule is manifest.

It is a general rule of evidence, noticed by the elementary writers upon that subject (1 Greenl. Ev. §79) that 'where the subject-matter of a negative averment lies peculiarly within the know-ledge of the other party, the averment is taken as true unless disproved by that party.' When a negative is averred in pleading, or plaintiff's case depends upon the establishment of a negative, and the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must pre-sume it does not exist, which of itself establishes a negative.

Familiar instances of this are where persons are prosecuted for doing a business, such, for instance, as selling liquor without a license. It might be extremely difficult for the prosecution in this class of cases to show that the defendant had not the license required, whereas the latter may prove it without the slightest difficulty. In such cases the law casts upon the defendant not only the burden of producing his license, but of showing that it was broad enough to authorize the acts complained of.

As the license (the statute in this case) authorized the timber to be cut only for a specific purpose, and the means of proof as to the purpose for which the timber was cut were peculiarly within the knowledge and control of the defendant, we think the burden of producing evidence to that effect devolved upon it."

39. In the decision reported as 1943 ALL ER 800 R. vs Oliver, it was observed that the accused was charged with having sold sugar as a wholesale seller without the necessary licence. Relying on 106 ER 1026

R. vs Turner, it was held that whether the accused had a licence was a fact peculiarly within his own knowledge and proof of the fact that he had a licence lay upon him. It was further held that in the circumstances of the case the prosecution was under no necessity to give prima facie evidence of non-existence of a licence.

40. In the decision reported as AIR 1917 PC 6 Murugesam Pillai vs Gnana Sambandha Pandara Sannadhi, it was held as under:-

“A practice has grown up in Indian Procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough – they have no responsibility for the conduct of the suit, but with regard to the parties to the suit it is, in their Lordships’ opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition.”

41. In the decision reported as (1974) 2 SCC 544 Collector of Customs, Madras vs D. Bhoormull, proceedings were initiated under Section 167(8)(c) of the Customs Act for confiscation of contraband or smuggled goods and it was observed:-

“31. Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the accused, it is not obliged to prove them as part of its primary burden.

On the principle underlying Section 106 Evidence Act, the burden to establish those facts is cast on the person concerned; and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty.”

42. In the decision reported as (2000) 8 SCC 382 State of W.B vs Meer Mohd. Umar, it was held that the legislature engrafted special rule in Section 106 of the Evidence Act to meet certain exceptional cases in which not only it would be impossible but disproportionately difficult for the prosecution to establish such facts which are specially and exceptionally within the exclusive knowledge of the accused and which he could prove without difficulty or inconvenience. This principle was reiterated in the decision reported as AIR 2001 SC 979 Sanjay vs State (NCT of Delhi) and AIR 2002 SC 2017 Ezhil vs State of Tamil Nadu.

43. In the decision reported as (2005) 5 SCC 665 Sarbananda Sonowal-1 vs Union of India, the Supreme Court held:

“26. There is good and sound reason for placing the burden of proof upon the person concerned who asserts to be a citizen of a particular country. In order to establish one's citizenship, normally he may be required to give evidence of (i) his date of birth (ii) place of birth (iii) name of his parents (iv) their place of birth and citizenship. Some times the place of birth of his grand parents may also be relevant like under Section 6-A(1)(d) of the Citizenship Act. All these facts would necessarily be within the personal knowledge of the person concerned and not of the authorities of the State. After he has given evidence on these points, the State authorities can verify the facts and can then lead evidence in rebuttal, if necessary. If the State authorities dispute the claim of citizenship by a person and assert that he is a foreigner, it will not only be difficult but almost impossible for them to first lead evidence on the aforesaid points. This is in accordance with the underlying policy of Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

27. Though in a criminal case the general rule is that the burden of proof is on the prosecution but if any fact is

especially within the knowledge of the accused, he has to lead evidence to prove the said fact.”

44. In the decision reported as (2007) 1 SCC 174 Sonowal-2, the Supreme Court held:

“28 This Court opined:

(i)Section 9 of the 1946 Act regarding burden of proof is basically on the same lines as the corresponding provision is in U.K. and some other Western nations and is based upon sound legal principle that the facts which are peculiarly within the knowledge of a person should prove it and not the party who avers the negative.”

45 In Sonowal-1, this Court clearly held that the burden of proof would be upon the proceedee as he would be possessing the necessary documents to show that he is a citizen not only within the meaning of the provisions of the Constitution of India but also within the provisions of the Citizenship Act.

46. In the decision reported as 2003 ACJ 1274 National Insurance Co. vs Brij Pal Singh, a DB of the Allahabad High Court noted:

“23. ...the burden of proof that the driver of the truck had a valid and effective driving licence would be entirely upon the owner of the truck. The said burden can never be shifted to the insurance company, as it cannot be asked to discharge a negative burden with regard to a fact which is especially within the knowledge of the driver, who is an employee of the owner of the vehicle.

22. In sum, a fundamental of justice delivery and adjudication is where the averment, and therefore the issue, is about the non-existence of a fact, and where factual details and documents must be within the knowledge of the other, it is a general rule that it is for that other to place the affirmative facts and produce documents.

47. To a plaint (or a writ petition) with positive averments of a negative fact, what is expected in a written statement (or counter affidavit) so as to constitute an answer, has been clarified by Supreme Court in the decision reported as (2003) 1 SCC 18 Vithal N. Shetti vs Prakash N. Rudrakar it was held as under:-

“8. The plaint makes a positive averment of a negative fact, that is, the absence of consent in writing of the landlord to raising of the permanent structure by the tenant over the tenancy premises. In the wake of such averment in the plaint, it was necessary for the tenant to have raised specific pleading in the written statement setting out the particulars of the consent in writing. Not only the particulars are not pleaded but even the factum of the landlord having given a consent in writing to the permanent construction is not stated. There is not even a whisper in the written statement of such consent, on which the tenant relies, having been ever given by the landlord and forming part of the record of the Municipal Corporation. Similarly, no effort for production of the alleged consent on writing of the landlord appears to have been made during the pendency of the proceedings before the appellant court. In this background, the High Court rightly declined to show its indulgence to a belated prayer for summoning the record from the custody of the Municipal Corporation.

Stated jurisprudentially, this decision only restated the principle behind Section 106 of Evidence Act in its application to pleadings.”

48. Independent of, and in addition to, sufficiency of details in the pleadings is the production of documents. Unlike as in the nineteenth century, today the documents and records hold the key. A party who can produce, but does not produce, the documents, makes no case.

49. In the decision reported as AIR 1964 SC 1714 Karamshi Jethabhai Somayya vs The State of Bombay it was held as under:-

“6. ...Apart from the fact that the appellant asked for the production of all the relevant documents, the Government, being the defendant in this case, should have produced the documents relevant to the question raised. While it is the duty of a private party to a litigation to place all the relevant matters before the Court, a higher responsibility rests upon the Government not to withhold such documents from the court.”

50. In the decision reported as AIR 1968 SC 1413 Gopal Krishnaji Ketkar vs Mahomed Haji Latif it was held as under:-

“5. ...We are unable to accept this argument as correct. Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof.”

51. The Court quoted with approval the Privy Council dictum in Murugesam Pillai vs Gnana Sambandha Pandara Sannadhi (supra).

52. In the decision reported as ILR 1980 HP 516 State of Himachal Pradesh vs Jiwan Singh it was held as under:-

“19 ...It is now well settled that where a party is in possession of material documents which are necessary to be produced for the determination of the controversy between the parties, it is the duty of that party to produce the same irrespective of the fact that the burden of proof may be on the opposite party.”

53. In the decision reported as 71 (1998) DLT 1 S.P.Chengalvaraya Naidu vs Jagannath it was held as under:-

“8. ...Non production and even non-mentioning of the release deed at the trial tantamounts to playing fraud on the Court. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side than he would be guilty of playing fraud on the Court as well as on the opposite party.”

54. In the decision reported as 71 (1998) DLT 1 Satish Khosla vs M/s. Eli Lilly Ranbaxy Ltd it was held as under:-

“16. ...In our view, the arguments are wholly fallacious. A party must come to the Court with clean hands and must disclose all the relevant facts which may result in appreciating the rival contentions of the parties. In our view, a litigant, who approaches the Court, must produce all the documents which are relevant to the litigation and he must also disclose to the court about the pendency of any earlier litigation between the parties and the result thereof.”

55. In the decision reported as 139 (2005) PLR 269 Krishan Lal Kacker vs Ram Chander it was held as under:-

“7. ...A litigant who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document or information in order to gain advantage on the other side then he would be guilty of playing fraud on the Court as well as on the other party.”

56. In the decision reported as AIR 1940 Calcutta 331 Gobinda Mohun Roy vs Magneram Bangur & Co. it was held as under:-

“In the case with which we are now dealing it must have been obvious not only to the parties concerned but also to the presiding Judge that the decision of the matter would depend to a very large extent upon documentary evidence and that, therefore, this was essentially a case in which recourse should have been taken to the provisions of O.11, Civil P.C. It is, therefore, difficult to understand why in the absence of any application to this effect by either of the

parties, the learned Munsif did not himself record the requisite orders for this purpose under S.30, Civil P.C., as enjoined by para 153 of the Court's Civil Rules and Orders, which have been quoted above."

57. In the decision reported as AIR 1986 Madhya Pradesh 19 Vinod Kumar vs Santi Devi it was held as under:-

"7. ...Where from the pleadings it is obvious that the decision of the matter would depend to a very large extent upon the documentary evidence, the case is essentially one in which recourse should be taken to the provisions of this Order and the Court should not refuse the application of the parties for discovery of all documents. In fact, in such cases even in the absence of an application to this effect by either of the parties, the trial Court should himself record the requisite orders."

58. In all judicial adjudication in our courts, it is: (1) fact; (2) law; and (3) application of law. The first (fact) has three sub-elements: (1.i) pleadings; (1.ii) documents; and (1.iii) evidence, for then follow: (2) law (selection & interpretation); and (2) application of law to the facts as established. Facts and documents are the very base while material facts (with requisite degree of detail) come through pleadings. Documents are produced where fortunately the cheap photocopier has made that simple.

59. To conclude - on failure to plead details and produce document and records, and more so in answer to positive averments of negative fact – the fundamental principle is clear, and admits of no exception. The case law too, is consistent.

60. In view of the cursory counter affidavit filed by Delhi Development Authority with simply disclosed that it had amended the lay-out plan without traversing the pleadings in the writ petition and without disclosing the Master Plan and the Zonal Development Plans norms, an adverse presumption has to be raised had Delhi Development

Authority disclosed facts personal to its knowledge, the Court would have held against Delhi Development Authority. Further, without disclosing the reasons why the Zonal Development Plan was changed, further adverse inference was required to be drawn against Delhi Development Authority. The Rules of pleadings aforementioned in various judicial pronouncements have been overlooked by the learned Single Judge.

61. Further, the learned Single Judge has overlooked various decisions highlighting the obligations of the statutory authorities to preserve streets, open spaces and parks etc. for the common good of the residents of the locality. We highlight the said decisions.

62. In the decision reported as AIR 1996 SC 253 Dr. G.N. Khajuria vs Delhi Development Authority the Supreme Court held as under:-

“8. We, therefore, hold that the land which was allotted to respondent No.2 was part of a Park. We further hold that it was not open to the DDA to carve out any space meant for park of a nursery school. We are of the considered view that the allotment in favour of respondent No. 2 was misuse of power, for reasons which need not be adverted. It is, therefore, a fit case, according to us, where the allotment in favour of respondent No.2 should be cancelled and we order accordingly. The fact that respondent No.2 has put up some structure stated to be permanent by his counsel is not relevant, as the same has been done of 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, we would observe 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 either by respondent No.2 or by any other body.”

63. In the decision reported as AIR 1995 SC 430 Pt. Chet Ram Vashist vs Municipal Corporation of Delhi the Supreme Court held as under:-

“6. Reserving any site for any street, open space, park, school etc. in a lay-out plan is normally a public purpose as it is inherent in such reservation that it shall be used by the public in general. The effect of such reservation is that the owner ceases to be a legal owner of the land in dispute and he holds the land for the benefit of the society or the public in general. It may result in creating an obligation in nature of trust and may preclude the owner from transferring or selling his interest in it. It may be true as held by the High Court that the interest which is left in the owner is a residuary interest which may be nothing more than a right to hold this land in trust for the specific purpose specified by the coloniser in the sanctioned lay-out plan. But the question is, does it entitle the Corporation to claim that the land so specified should be transferred to the authority free of cost. That is not made out from any provision in the Act or on any principle of law. The Corporation by virtue of the land specified as open space may get a right as a custodian of public interest to manage it in the interest of the society in general. But the right to manage as a local body is not the same thing as to claim transfer of the property to itself. The effect of transfer of the property is that the transferor ceases to be owner of it and the ownership stands transferred in the person in whose favour it is transferred. The resolution of the Committee to transfer land in the colony for parks and school was an order for transfer without there being any sanction for the same in law.”

64. In the decision reported as (2004) 5 SCC 182 Municipal Corporation, Ludhiana vs Balinder Bachan Singh the Supreme Court held as under:-

“17. For every locality green spaces and green belts have to be provided to provide lung space to the residents of the locality. A provision for green park was made by the Municipal Corporation keeping in view the minimum requirement to provide open/green space to the residents of the locality. Rajinder Kaur mother of the plaintiffs-respondents herself had submitted a lay-out plan which comprised the present suit land. She had herself agreed to leave 25 per cent of the area under the scheme to be used by the inhabitants of the locality for common purposes

including the open space area which is in dispute. The documentary evidence which has come on record in the form of the original scheme as well as the documents D1 to D38 and the report submitted by the Deputy Commissioner conclusively shows that the suit land measuring 3.16 kanals was left in the scheme to be used as open space for the use of the residents of the locality.

18. Map attached with the report of the Deputy Commissioner and the site plan attached with the scheme completely tally with each other. In the scheme 3.16 kanals of land was left as open space in the center surrounded by houses on three sides. The photographs produced also show that the land is lying vacant and is being used by the inhabitants for common purposes. It may be noted that the plots carved out in the scheme were sold by Rajinder Kaur as well as her sons including the plaintiffs-respondents. Rajinder Kaur and plaintiffs/respondents could not have sold the land without getting the scheme sanctioned as plots. It is well-known and judicial notice can be taken of the fact that residential plots sell at a much higher price than the agricultural land. To sell the land as plots, a part of the land has to be left to provide for common purposes such as roads, community center, schools and parks. Having taken advantage of selling the plots in a developed colony and charging a higher price, which were purchased by the inhabitants with the understanding that civic amenities including the park were well provided for, the plaintiffs/respondents cannot be permitted to turn around to claim the land left in the scheme for being used as a park as their personal property.”

65. In the decision reported as JT 2011 (7) SC 13 Tamil Nadu Housing Board vs The Service Society the Supreme Court held as under:-

“19. If a development authority or board acquires a large tract of land and develops it for residential purposes and forms plots in a portion thereof for construction of houses, utilises another portion for construction of multi-storeyed apartment buildings and uses the balance for development works like roads, drains, parks, open spaces apart from

earmarking some areas for site office/electrical substation/police station, etc., then what is chargeable to the allottee of a plot or a house, is not only the cost of the plot area, but also the cost of the proportionate share in the common areas, used for development and amenities and the cost of the development.

20. We may illustrate. If 5 Hectares (50000 sq.m.) of land is acquired for formation of residential plots each measuring 250 sq.m., it is not possible for the authority to carve out 200 plots (each measuring 250 sq.m). This is because, not less than 25% to 30% of the total sital area will be used up for forming roads, footpaths and drains. Another 10% to 20% may be used for common facilities and amenities like park, playground, community hall etc. The common/service areas are not saleable and the board will have to recover the cost thereof by loading the proportionate cost thereof, on the cost of the residential plots. Therefore if 40% is the area used for roads, drains, parks, playgrounds etc., the saleable area or area that can be used for forming plots would be only 60% and the cost of the total land 50000 sq.m. will have to be recovered from the sale of the said 60% area (30,000 sq.m.) which can be carved into 120 plots of 250 sq.m. If the total value of 5 hectares is ₹60 lakhs, the value of a plot of 250 sq.m. will not be ₹30000/- (that is ₹60 lakhs divided by 200) but ₹50,000/-(that is ₹60 lakhs divided by 120). An allottee of a plot measuring 250 sq.m. cannot therefore contend that he is liable to pay only the actual proportionate cost of 250 sq.m. of land out of 50000 sq.m. The proper method is to calculate the total common/service area (used for roads, drains and common amenities) and include the proportionate cost thereof in the price of the plot.”

66. In the decision reported as AIR 1993 Allahabad 57 D.D. Vyas vs Ghaziabad Development Authority the Court held as under:-

“9. It is a matter of great regret that the fond object for which the G.D.A. was constituted remained unaccomplished. The Raj Nagar scheme is meant for the reasonable accomplishment of the statutory object, which is to promote

the orderly development of the town Ghaziabad and to preserve open spaces by reserving public parks with a view to protecting the residents from the ill effect of urbanisation. The legislative intent has always been the promotion and enhancement of the quality of life by preservation of the character and desirable aesthetic features of the town. No town is known for skyscrapers, for myriad industries, for big commercial centres, for big monumental building, but for the attractive lay-out of the town, for good landscapes, for beautiful parks and lawns, for expansive verdant cover, and for perfect social ecology. Good parks expansively laid out are not only for aesthetic appreciation, but in the fast developing towns having conglomeration of buildings, they are a necessity. In crowded towns where a resident does not get anything but atmosphere polluted by smoke and fumes emitted by endless vehicular traffic and the factories, the efficacy of beautifully laid out parks is no less than that of lungs to human beings. It is the verdant cover provided by public parks and greenbelts in a town, which renders considerable relief to the restless public. Hence the importance of public parks cannot be under estimated. Private lawns or public parks are not a luxury, as they were considered in the past. A Public Park is a gift of modern civilisation, and is a significant factor for the improvement of the quality of life. Earlier it was a prerogative of the aristocracy and the affluent either as a result of royal grant or as a place reserved for private pleasure. Free and healthy air in beautiful surrounding was a privilege of few, but now in a democratic set up, it is gift from the people to themselves. Open space for a public park is an essential feature of modern planning and development, as it greatly contributes to the improvement of social ecology.

x x x

19. ...From Section 13(1), it is manifest that the authority may make only those amendments which do not affect material alterations in the character of the plan. It means the respondents do not have an absolute right of amending the master plan or the zonal development plan. The basic characteristic of such a plan cannot be altered by the authority. Only that amendment is permissible under

Section 13(1) which does not affect the basic character of the plan. An open space lying for park in the plan forms a basic feature of the plan and that cannot be amended. A plan cannot be amended so as to denude the plan of such a basic feature. Section 13(1) can in no circumstances be interpreted so as to clothe the G.D.A. to utilise the open space reserved for a park either to construct building or use it in any other manner, which is foreign to the concept of a park.”

67. In the decision reported as 2007 (2) CTLJ 179 (Delhi) Outdoors Communication vs PWD and Municipal Corporation of Delhi the Court held as under:-

“101. Parks, roundabouts, pavements, traffic islands, schools are not commercial areas or buildings and consequently, commercial use thereof may be prohibited even under the statutory master plan.”

68. On April 12, 2007 a Division Bench of the Madras High Court in W.A.No.156/2000 Sri Devi Nagar Residences Welfare Association vs Subbathal held as under:-

“5. It is a settled law that the object of approving the lay-out , before converting the land into house sites, is to regulate the development in the locality so as to secure the present and future inhabitants sanitary conditions, amenity and convenience, with the prior permission of the fifth respondent. The approval of the lay-out, is, therefore, intended to secure amenity and convenience to the present and future residents in connection with laying out and use of lands.

x x x

10. We, therefore, appreciate the interest of the residents of the area, who have purchased the plots as per the approved lay-out , that for the benefit of the ecology, certain areas should be earmarked for garden and park so as to provide fresh air to the residents of that locality. To that extent, we disagree with the learned Single Judge that

the residents of the locality are not necessary parties for the simple reason that respondents 1 to 3 have got the lay-out approved, as per the proceedings dated 17.7.1994, with the specific conditions, referred to above, which becomes the part and parcel of the terms of the sale deeds. Therefore, virtually, these conditions, agreed by the land owner become the terms of covenant. Therefore, it would be too harsh to say that the residents of the locality are not proper parties.

11. The open space in a residential area or in busy townships is treated as lung space of the area. It provides fresh air and refreshment to the persons in the neighbourhood. Its presence ameliorates the hazards of pollution and it has to be preserved and protected for the sustenance of the men around. It is for the health and well-being of the inhabitants of the residential area. The same cannot be bartered for any other purpose.

12. Where open space for construction of public park is preserved and earmarked in the Plan for Development of a planned town, the Authorities cannot ignore or neglect to develop that open space into a public park within reasonable time. Unless an open space reserved for a public park is developed as such, the execution of the plan will remain incomplete. Buildings, as proposed in the plan, may have come up, amenities and civic amenities may have been provided and the people may have started living in the colony, yet the plan cannot be said to have been fully executed, if an open space meant for a park is not developed as such. The duty of the authorities is to implement the plan in entirety making the area beautiful with attractive public parks. Their job is not over when the area becomes habitable.

13. Good parks expansively laid out are not only for aesthetic appreciation, but in the fast developing towns having conglomeration of buildings, they are a necessity. In crowded towns where a resident does not get anything but atmosphere polluted by smoke and fumes emitted by endless vehicular traffic and the factories, the efficacy of beautifully

laid out parks is no less than that of lungs to human beings. It is the verdant cover provided by public parks and greenbelts in a town, which renders considerable relief to the restless public. Hence the importance of public parks cannot be under-estimated. Private lawns or public parks are not a luxury, as they were considered in the past. A public park is a gift of modern civilization, and is a significant factor for the improvement of the quality of life. Open space for a public park is an essential feature of modern planning and development, as it greatly contributes to the improvement of social ecology.

14. We are therefore, of the firm opinion, that the statutes in force in India and abroad reserving open spaces for parks and play grounds are the legislative attempt to eliminate the misery of disreputably housing condition caused by urbanisation.”

69. On July 27, 2008 a Division Bench of the Madras High Court in W.P.No.3643/2002 Thai Nagar vs Special Commissioner held as under:-

“11. The open space in a residential area or in busy townships is treated as a lung space of the area. Where open space is preserved and earmarked in the plan for development of a planned town, the authorities cannot ignore the public interest and allot the same for construction of godowns, thereby causing environmental hazards to the residents of the colony. In other words, when an area is earmarked for a particular purpose in the approved lay-out, the said area cannot be converted or used for a different purpose. Open space is an essential feature of modern planning and development, as it greatly contributes to the improvement of social ecology. The interests of the residents of the area, who have purchased the plots as per the approved lay-out, have to be safeguarded and for the benefit of ecology, certain areas should be earmarked for garden and park, so as to provide fresh air to the residents of that locality, as ecological factors indisputably are very relevant considerations in construing a town planning statute.

12. *The members of the petitioner society purchased the plots by investing their hard earned money on the expectation that the colony will continue to retain for ever the common facilities and features as found in the lay-out plan, which is a legitimate expectation in them. But, in this case, such an expectation is overthrown and the place which is earmarked for common use is converted to the benefit of the self-interested persons.*

13. *When the fourth respondent had accepted the earlier lay-out sanction subject to the condition that the disputed rea should be kept as a public area and also acted upon such a condition not only in the formation of the lay-out but also in the sale of the approved plots, she is estopped from making any claim for the alteration of the lay-out plan.*

x x x

15. *As held by this Court in the case of R. Varadarajan (cited above), the minimum, which is required in public interest, is some open space in every colony which would not only act as the lungs of the colony, but also a must for young and old to spend their time and energy usefully. Such areas are necessary not only for reducing the congestion in the area, but also for the benefit of the physical and mental health of the residents especially the children and youth. That is the reason why there is statutory recognition for such a requirement to leave out a specified portion of the colony as open space as a pre-condition for sanctioning the lay-out plan.”*

70. On January 04, 2010 a Division Bench of the Madras High Court in W.P.Nos.23980/2005 A Alamu Nagar vs State of Tamil Nadu held as under:-

“47. I am also constrained to hold that once the land is reserved for public purpose, the Corporation gets a right as a custodian only to manage the same. The reservation however, does not, by itself, confer any right or title or

interest thereof in the Corporation. As pointed out in the decision reported in (1995) 1 SCC 47 (PT.Chet Ram Vashist Vs Municipal Corporation of Delhi), public interest cannot be stretched to create a right in the Corporation beyond the status of a trustee or a custodian to manage the property for the public purpose. In the above-said circumstances, the Government cannot change the character of the reservation and is, in fact, estopped from dereserving the same to the benefit of the individual/owner who sought for a sanction of the lay-out . The reservation of land being part of the lay-out sanctioned, the petitioners, who had gone for the purchase of the reserved plots under the sanctioned scheme, which assures open space, are entitled to the enjoyment of the lung space reserved as every other member of the public.

48. Being beneficiaries of the sanctioned lay-out scheme and the Association Members having fiduciary interest in the preservation and maintenance of the lay-out scheme, there are no compelling reasons of public nature indicated in the Government Order to go for de-reservation of the area reserved for public interest. As a custodian, the first respondent has the statutory obligation along with the owner of the lands who sought for sanction of the lay-out scheme and other purchasers of the lay-out to see that the reservation, in fact, serves the purpose and is not defeated at the cost of gain by a few.

x x x

59. As already pointed out in the preceding paragraphs, once while granting the lay-out a particular area is reserved for public purpose and the owners have acted so, it is obligatory on the part of the land owner to respect it so and it is not open to the land owner or his successors in interest in any manner to give a go bye to the conditions under which the lay-out was sanctioned. Hence, the land owners have no right to deal with it as he pleases and the land reserved as for public purpose would continue to remain so and no individual, including respondents- 4 to 6, can claim ownership over the property.

60. *The reservation under the sanctioned lay-out creates an obligation on the owner of the land and the Corporation in the nature of trustee to protect the interest of the public. So too, the purchasers of the plots in the sanctioned lay-out have the vested right for enjoying the common area fully. The Corporation and the owner have the legal necessity of respecting the expectation of the purchasers of the lay-out sanctioned plots that the earmarked portion continue to be available for public purpose; that neither the passage of time nor the whims and desires of the land owners affect the reservation of the land for public purpose.*

x x x

65. *Going by the sanction, the reservation of an extent of the land for public purpose continues to have its force. The Corporation and the owner of the property are bound to manage the same for the benefit of the public. The rights of the Corporation is limited to that of a custodian to manage the reserved site for public purpose. In the absence of any provision either under the Coimbatore City Municipal Corporation Act or under the Tamil Nadu Town and Country Planning Act that except in respect of cases reserved/designated in the plan as required for public purpose falling under Sections 36 to 39, reserving a site in a lay-out plan on an application under Section 49 for public purpose, does not, by a mere specifying of the land as open space, fall for consideration under Section 36 to 39. The reservation, thus, by itself, does not result in the transfer of the property to the Corporation. The effect of the reservation is that while losing his exclusive right as a legal owner, thereby, restricting the rights of the owner for selling or transferring his interest in it, the owner holds the land for the benefit of the society creating an obligation in the nature of trust. The Corporation becomes a custodian of the public interest to manage it in the interest of the society at large. In this, both the owner as well as the Corporation on one hand and all those purchasers share the equal responsibility of maintaining and preserving the reserved area, thereby,*

protecting the area on public purpose from abuse from any quarters. In the circumstances, the question of dereservation does not arise, or for that matter, transferring the reserved area to the name of the Corporation. The order made by the Government in the review petition is totally devoid of any merits and there are no grounds indicated in the order to consider how the private interest has been considered as outweighing the public interest to order dereservation.

66. While considering a situation of de-reservation, in the decision reported in 2007-3-L.W.259 (Sri Devi Nagar Residences Welfare Association V. Subbathal), this Court pointed “A public park is a gift of modern civilization, and is a significant factor for the improvement of the quality of life. Open space for a public park is an essential feature of modern planning and development, as it greatly contributes to the improvement of social ecology.” In the circumstances, this Court held that the area reserved for public purpose cannot be used for any other purpose and directed the owner of the land to maintain the park, failing which, the Corporation shall develop the area as a park with the cooperation of the owner with whom the title continued to remain and that the Corporation shall not collect property tax on the reserved site.”

71. In the decision reported as 2001 (5) ALD 663 Co-operative Housing Society, Saleemnagar Limited vs Municipal Corporation of Hyderabad it was held as under:-

“7. It is not in dispute that the area in question has been set apart as park. The owners of the land had handed over possession of the said property to the first respondent herein for construction and maintenance of the area as a park.

8. The short question, which arises for consideration, is as to whether the first respondent had any authority to execute the deed of lease in favour of the second respondent?

9. *The answer to the said question must be rendered in the negative. Right to clean environment is a part of the fundamental right under Article 21 of the Constitution of India. The land earmarked for park cannot be converted or changed into land for other purposes. If the Corporation had no jurisdiction to grant permission for construction of the building in a park, no amount of consent can validate the invalidity. The order of the Corporation was a nullity. The Corporation being a statutory authority must exercise its jurisdiction within the four corners of the statute. Any action taken beyond the power by Corporation shall be ultra vires.*

x x x

14. *In H.G.N. Samity v. Chief Secretary 2000 (1) CIIN 28, a question arose as to whether the Municipality could sanction for construction of a community hall within a park. In that case also the construction of the building was completed. One of us speaking for the Division Bench of the Calcutta High Court, relying on M.I. Builders Private Limited vs Radhey Shyam Sahu (supra) stated the law thus:*

How the State Government had allotted a portion of the Park in deviation of its policy decision in the name of building of Community Hall is a matter of great surprise that there are several statutes governing the field is not in dispute. ... Therefore, we fail to understand as to how the State could allot the lands in question within a park which is contrary to the representation made by it to the residents particularly in view of the fact that excess premiums had been charged for those who had opted for settlement of land near the park or green verges.

15. *Referring to clauses (a) and (1) of sub-section (3) of Section 63 West Bengal Municipal Act, 1993, it was held:*

The obligatory functions leave no manner of doubt that park being a property having vested in the Municipality, has the duty to maintain and develop the same. It, of course, has a

discretionary duty, inter alia, to construct and maintain a Community Hall but the same cannot be done at the cost of ecology and greenery. The Sate, as noticed hereinbefore, has a duty to look after the environment, safety and improvement. Such functions can only be transferred in terms of Section 65 of the Act but the same has not been done. It was in this situation the Municipality could not have sanction any building plan inside the Park. The respondents have constructed their buildings at their own risk during pendency of the writ petition. They therefore, cannot take any benefit thereof and, thus, there is no difficulty in directing demolition of those buildings and a further direction that the parks should be restored to their original position. It is directed accordingly.

x x x

18. In the instant case, admittedly, the deed of lease executed in favour of the second respondent herein is up to December, 9, 2001. Having regard to the facts and circumstances of this case, we direct that the said lease shall not be renewed any further. The first respondent herein shall also take appropriate steps for removal of the encroachments in accordance with law and restore the park to its original position. It is further directed to maintain the park.”

72. In the decision reported as 2003 (4) ALD 74 Bhagya Nagar Colony Welfare Association vs Government of A.P. it was held as under:-

“10. The only question that arises for consideration is whether the area admeasuring 2897 sq. yards in the approved lay-out of Bhagyanagar Colony can be permitted to be utilized for other purposes than for the purpose of park and open space?

11. It is not denied by all the Counsel that the area in question was earmarked for a park/open space. It is not denied that at least to an extent of 1250 sq. yards of land is available for development of the park. Therefore, there

cannot be any dispute or objection for developing an extent of 1250 sq. yards into a park for the benefit and use of the people of Bhagyanagar Colony as well as others. The controversy is whether the area admeasuring about 1,647 sq. yards has to be resumed and reclaimed by demolishing and removing the structures which are ex facie illegal having regard to the provisions of Andhra Pradesh Municipalities Act, 1965 and HUDA lay-out Rules, 1982.

12. It is now well settled that having regard to the provisions of Article 48-A of the Constitution of India, the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country. After Article 48-A was introduced by the Constitution (42nd Amendment) Act, 1976, there has been sudden spurt of litigation by well meaning social activists to protect quality of life in urban areas and a movement for protecting parks and ground areas is on increase. Indeed, it augurs well for the community at large.

x x x

16. Therefore, it is a settled law of the land, that, it is axiomatic that when once a lay-out is approved showing an open space meant for a park or for a recreational purpose, under no circumstance, no public authority, be it the Government, the District Collector or the Municipal body, is entitled to utilize the land for any other purpose. This is especially so, when the land is earmarked as a green space/park meant for the user of the people of the locality. It appears, Municipality allowed free hand to all and sundry to raise structures and the temple. As all the learned Counsel appearing for various contesting parties admit that an extent of only 300 sq. yards is occupied by Sri Shirdi Sai Temple and there is no objection among the colony people, the same can be allowed. Insofar as other temporary structures like reading room and other huts are concerned, they are unauthorized and they were constructed without the permission and they should be removed.

Appeal against this Judgment was dismissed by DB on 11.09.2003.”

73. In the decision reported as 2003 (5) ALD 771 Sri Ramakrishna Edu. Society vs Chairman, Nandyal Municipality it was held as under:-

“16. Therefore, it is a settled law of the land, that, it is axiomatic that when once a lay-out is approved showing an open space meant for a park or for a recreational purpose or playground, under no circumstance, a public authority, be it the Government, the District Collector or the Municipal body, can utilize the land for any other purpose. This is especially so, when the land is earmarked as a green space/park meant for the use of the people of the locality. I may hasten to add that even if the Municipality has permitted such constructions, all such permissions are contrary to law laid down by the Supreme Court. Rule of Law requires that they should be ignored, as they are void.

17. The area earmarked as playground in the lay-out can be used by the residents of the locality as well as Nandyal Town not only for the purpose of children’s games and sports but can be used for different purposes like walking track, for growing tree clusters or for common meeting place. When once the lay-out was approved considering the playground is part of the common area, the same cannot be converted into a business/commercial area by allowing a Rythu Bazar. Such conversion is impermissible in law.”

74. In the decision reported as 2006 (3) ALD 242 K. Rajamani vs Alamunagar Residents Welfare Association it was held as under:-

“17. ...In that view of the matter, we hold that once such permission is accorded and in that permission if a specified area is earmarked for public purpose, even the planning authority shall not have power to exempt that land for being put to use for any other purpose. In that context, the State Government also cannot have any jurisdiction to alter the

conditions imposed in the lay-out , whereby certain lands are earmarked as open space to be used for public purposes.

18. The contention of Mr. K.M. Vijayan, learned senior counsel for the Appellants is that the Government would have jurisdiction to de-reserve the open space in a lay-out . This argument is untenable, as the power of the Government to vary, revoke or modify a regional plan under Section 32 could be exercised before the lands are acquired under Section 36 and before the lands are placed at the disposal of the new town development authority and not otherwise. Hence, the power of the Government to alter the conditions imposed in the lay-out is not available and that too, when the entire portion of the land is plotted out and sold to various parties leaving only the open space for public use.

19. Point No. (ii): This takes us to the next question as to whether the lands specified for public purpose and left open in the lay-out could be used for any other public purpose. The question as to whether a land specified for public purpose and left open in a lay-out could be used for any other purpose came up for consideration before the Apex Court as well as this Court and we have enough authorities on the subject.

x x x

21. A survey of the above law shows that the land once earmarked for public purpose cannot be earmarked for any other purpose and, particularly, to de-reserve or put to use as housing plots.

22. The contention of Mr. K.M. Vijayan, learned senior counsel for the Appellants is that the law relating to open space would be available only in case of apartments, where the purchaser of an apartment would have right to seek for maintenance of public space as such, as he/she has an undivided share in the open land as well and that law is not applicable to a lay-out . In our opinion, the said contention is totally on a misconception. The purpose for leaving open

space is not only to meet the future developmental activity, but also to meet the recreational activity of the inhabitants. The provision of open space in a development plan is to provide green space as well which is an essential feature in the development of an area. In a lay-out leaving of certain area of land as open space for use of park is in conformity with the development control rules. Hence, there cannot be a different yardstick as to the de-reservation of land left for open space in the case of an apartment and lay-out . Hence, the learned Judge has rightly quashed the order of the Government in de-reserving the land earmarked for public purpose in the lay-out into housing plots and we are not inclined to interfere with the same.”

75. We highlight that in a public park, the original lay-out plan sanctioned without disclosing the dimensions, but with reference to the scale of the plan provided for a Community Centre in the park having a plot size of not more than 200 sq.mtrs. There is rationale in having a Community Centre of 200 sq.mtrs and no more a park for the reason a two storied building on a 200 sq.mtrs plot would be sufficient for a Community Centre. For a Community Centre would mean a place where the community could assemble for social purposes such as reading and recreation. The community would mean the people living in the area and not outsiders. We highlight that the original lay-out plan did not stipulate any plot reserved for a religious site. A presumption has to be drawn that when the lay-out plan was originally sanctioned it conformed to the Zonal Development Plan and Master Plan requirements of minimum green area to be maintained in Pocket-5, Sector-C, Vasant Kunj to act as the natural lungs for the community.

76. Besides, the wishes of the community i.e. residents of the area where a Community Centre has to come up also needs to be ascertained in a democratic set up. If the residents of an area want a small

Community Centre, we are of the opinion that to thrust against their wishes a large Community Centre would be undemocratic. After all, the beneficiaries would be entitled to say, that we do not want more. We are happy with less.

77. We allow the appeal and set aside the impugned order dated September 15, 2003 passed by the learned Single Judge and allow the writ petition filed issuing a mandamus to Delhi Development Authority to strictly abide by the lay-out plan of Pocket-5, Sector-C as originally drawn. Since as per the same around 200 sq.mtrs has been reserved as a Community Centre, and since a Community Centre is meant for the benefit of the residents of the colony and not outsiders, Delhi Development Authority would consider allotting the site ad-measuring 200 sq.mtrs to the appellant and if the appellant agrees to effect the allotment so that the appellant's Association can built and maintain a Community Centre at its own cost. If Delhi Development Authority decides that the entire park has to be free from any construction, that would be the end of the dispute and Delhi Development Authority did not take any further action.

78. ₹15,00,000/- deposited by the appellant in this Court shall be returned to the appellant with such interest which has accrued thereon.

79. Parties shall bear their own costs all throughout.

(PRADEEP NANDRAJOG)
JUDGE

(V.KAMESWAR RAO)
JUDGE

MARCH 05, 2014

Mamta/Skb