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IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.25 OF 2021

1. Mr. RAMAN MADHOK
aged 75 years,
residing at Plot No. 19,
Aldeia de Goa,
Bambolim – Goa.

2. Mr. NEVILLE CHICO,
aged 56 years,
residing at Plot No. 84,
Aldeia de Goa,
Bambolim – Goa.

3. Mr. AMIT PRADHAN,
aged 65 years,
residing at Plot No. 57,
Aldeia de Goa,
Bambolim – Goa.

4. Mr. JOSEPH NORONHA,
aged 65 years,
residing at Plot No. 11,
Aldeia de Goa,
Bambolim – Goa.

5. Mrs. MARIAM SANDHU,
aged 68 years,
residing at Plot No. 202,
Aldeia de Goa,
Bambolim – Goa. … Petitioners

Versus

1. STATE OF GOA,
through its Chief Secretary,
having its office at Secretariat,
Porvorim, Goa.

2. Dy. TOWN PLANNER,
Town & Country Planning Department,
Tiswadi Taluka Office,
05th Floor, Kamat Tower,
Patto, Panaji – Goa.

3. VILLAGE PANCHAYAT CURCA, BAMBOLIM
& TALAULIM,
through its Secretary,
Tiswadi – Goa.

4. GOAN REAL ESTATE & CONSTRUCTION
PVT. LTD.,
Aldeia de Goa,
P.O. Goa University,
Bambolim – Goa. ... Respondents

Mr. Yogesh V. Nadkarni with Mr. Sanket Kamat, Advocates *for the Petitioners*.

Mr. Devidas Pangam, Advocate General with Ms. Maria Correia, Additional Government Advocate *for the Respondent-State*.

Mr. J.P. Supekar with Mr. Roger D'Souza and Ms. Sufiyan Sayed, Advocate *for Respondent No.4*.

CORAM:	**G.S. KULKARNI & BHARAT P. DESHPANDE, JJ.**
RESERVED ON:	**23rd September, 2022**
PRONOUNCED ON:	**30th September, 2022**

JUDGMENT: ***(Per Bharat P. Deshpande, J.)***

1. The moot question which arises for consideration in the present proceedings is as to whether the originally sanctioned open spaces on the basis of which plots are sold, whether can be altered under the garb that some area above the required percentage of 15% under the regulations was available.

2. Vide order dated 11.02.2021, notices were served on all the parties and it was made clear that the matter will be taken up for final disposal at the admission stage itself.

3. Rule. Rule returnable forthwith. Heard the parties by consent.

4. The Petitioners are the residents/plot owners of the project "Aldeia de Goa" at Bambolim of which Respondent No.4 is the developer.

5. In the present petition, the Petitioners are aggrieved by the permission/NOC dated 11.12.2020 granted by the Dy. Town Planner/Respondent No.2 herein to Respondent No.4 for deviation/alteration in the final approved sub-division layout of the said project thereby allowing total area of 9,384 sq. mts of the open space to be deleted from the earlier approved plan and to be used for commercial and/or residential purpose.

6. Petitioners Nos.1 to 4 purchased plots in the first phase of the said project as per the final approved plan of the year 2004. Petitioner No.5 purchased plot in the second phase as per the approved plan 2007. All the Petitioners constructed their respective houses as per the approved plans.

7. In the year 2010, the developer applied for amalgamation of Phase I and II by submitting fresh plans. The open spaces shown in 2004 plan and 2007 plan were maintained as it is. The concerned authorities approved

amalgamation of Phase I and Phase II wherein open spaces in both the phases were shown as it is.

8. Suddenly in the year 2020, the developer applied for revision of plans. In the said revision, open spaces shown in the amalgamation plan of 2010 were reduced by an area of 9384 sq. mts. Specifically, the open space "A" admeasuring 1345 sq. mts. is deleted and included in a larger plot area for commercial activity. The entire open space "B" admeasuring 581 sq. mts. is deleted and converted into residential plot No.409. The open space "C" admeasuring 12710 sq. mts. has been reduced to 7052.5 sq. mts., as such, the area of 5657.5 sq. mts. has been included in the residential plots Nos.410, 411 and 412. The entire open space "D" of 1800 sq. mts. is deleted and included within a plot for commercial activities. The Petitioners along with 43 other plot owners objected by filing representations to the Planning and Development Authority and Town Planner for conversion of such open spaces in Phase I and Phase II of the project. Such representations were filed somewhere in the year 2018-19, apprehending the intention of Respondent No.4 to convert such open spaces for commercial use. On 05.10.2020, Respondent No.4 applied with the Town and Country Planning Department for deviation/alteration in the sub-division layout of project in Phase I and Phase II for approval. After calling Respondent No.4 to submit clarifications, the concerned authority i.e. Respondent No.2 granted permission/NOC to Respondent No.4 to deviate/alter in the final approved sub-division layout which is impugned in the present petition.

9. Subsequently, the Petitioners sent legal notice to the Panchayat asking them not to take further action. However, on 07.01.2021, the Panchayat granted necessary NOC to Respondent No.4 on the basis of NOC granted by the Planning Department.

10. It is a matter of record that after filing of the petition, this Court vide order dated 28.01.2021 directed the Respondents to maintain status quo with regard to the open spaces in both the phases.

11. Heard Mr. Yogesh V. Nadkarni who appears along with Mr. Sanket Kamat for the Petitioners, Mr. Devidas Pangam, Ld. Advocate General who appears with Ms. Maria Correia, Additional Government Advocate for the State and Mr. J.P. Supekar who appears with Mr. Roger D'Souza and Ms. Sufiyan Sayed for Respondent No.4.

12. With the assistance of the learned Counsels appearing for the respective parties, we perused the entire record, the relevant rules, regulations as well as the case laws cited across the bar.

13. The learned Counsel Shri Y.V. Nadkarni appearing for the Petitioners submitted that once the open spaces are shown in the approved plans, the plot owners in the said scheme become joint owners along with the developer and therefore, they have a right over the said land to be used for the purpose for which it is reserved as open space. In this regard, he placed reliance on the specific provisions of the 2000 PDA Regulations, Goa (Regulations of Land Development and Building Construction) Act, 2008 together with the Goa Land Development and Building Construction Regulations, 2010. He strongly contended that the open spaces kept in a sanctioned layout cannot be altered and used for

any other purpose than the one which is mentioned in the Regulations and the Act. He forcefully submitted that the Petitioners purchased the plots in the said Phase I and Phase II on the basis of approved plans wherein open spaces have been shown to be kept for the purpose of recreation. He invited attention to the sale deeds of Petitioners No.1 to 5 and claimed that there are specific clauses which show that the vendor i.e. developer agreed to maintain the open spaces as per the approved plans of 2004 and 2007 as it is till the project is handed over to society.

14. The learned Counsel Shri Nadkarni then submits that even though plan 2004 and plan 2007 show open spaces which are more than 15% of the total project land, the developer is duty bound to maintain such open spaces forever for the purpose of benefits of the plot owners. According to him, once the open space in an approved plan, always an open space. Thus, he would submit that a revision of the plans by the developer with the intention to reduce or alter open spaces cannot be permitted. He fairly conceded that the Petitioners are not against revision of the plans which could be altered as per the provisions. However, his main thrust is only against conversion of the open spaces to commercial use without consent of the Petitioners. According to him, if the developer wants to convert such open spaces, he ought to have obtained permission of all the plot owners in the said project. On this premise, he submitted that the prayers as amended be allowed.

15. The prayers in the petition reads thus:-

> "A. That this Hon'ble Court be pleased to quash and set aside the Impugned Permission / NOC bearing No. TIS/3801/BAM/TCP/2020/1749 dated 11th December,

2020 to the extent it permits alteration / conversion of 9,384 sq. mts. of OPEN SPACE A, OPEN SPACE B, OPEN SPACE C and OPEN SPACE D;

(A1) that this Hon'ble Court be pleased to quash and set aside the NOC bearing No. VP/CBT/2020-2021/1125 dated 07th January, 2021 of the Respondent No. 3 Panchayat to the extent it permits alteration / conversion of 9,384 sq. mts. of Open Space A, Open Space B, Open Space C and Open Space D.

B. That pending hearing and final disposal of the present Petition, this Hon'ble Court be pleased to stay the Impugned Permission / NOC bearing No. TIS/3801/BAM/TCP/2020/1749 dated 11th December, 2020 to the extent it permits alteration / conversion of 9,384 sq. mts. of OPEN SPACE A, OPEN SPACE B, OPEN SPACE C and OPEN SPACE D;

C. That pending hearing and final disposal of the Petition, this Hon'ble Court be pleased to restrain the Respondent No. 4 herein and / or his agents, servants or any person claiming through on behalf of the Respondent No. 4 from changing the nature of the subject OPEN SPACE A, OPEN SPACE B, OPEN SPACE C and OPEN SPACE D and from undertaking any development or construction in the said OPEN SPACE A, OPEN SPACE B, OPEN SPACE C and OPEN SPACE D;

D. That pending hearing and final disposal of the present Petition, this Hon'ble Court be pleased to restrain the Respondent No. 4 from creating any third party rights in respect of OPEN SPACE A, OPEN SPACE B, OPEN SPACE C and OPEN SPACE D;

E. For ad-interim, ex-parte reliefs in terms of prayer clauses (B), (C) and (D); and

F. For such other and further reliefs as this Hon'ble Court deems fit and proper in the facts and circumstances of this case."

16. Additional affidavit was filed by Respondent No.4. Whereas it has been claimed that the petition itself is not tenable as the Petitioners are having alternate efficacious remedy of filing of civil suit to claim their easementary rights of fresh air, light, etc. for the purpose of using such open spaces.

17. As far as merit of the petition is concerned, it is the case of Respondent No.4 that he has every right to apply for revised plans and he is only bound to keep open spaces of 15% as provided under the statute in the entire project. It is his case that under the revised plans of 2020, he has shown open spaces of 15% of the entire project which is necessary to be used by the plot owners. It is his contention that the Petitioners, though plot owners, cannot claim any right over the particular open spaces shown in plan 2004 or plan 2007 of Phase I and II as the project is not complete. According to Respondent No.4, the project is undergoing development and additional land is available for him to develop for commercial and residential purposes. Therefore, he applied for revised plans wherein he has shown open spaces of 15% in the entire project. Therefore, the Petitioners cannot claim any right as there is no infringement of any provision of law, rules or regulations of planning.

18. The learned Advocate General appearing for the State submitted that in the revised plans, Respondent No.4 has shown 15% of open spaces as per the 2010 Regulations and therefore, the revised plans have been approved. He submitted that while accepting such revised plans, the planning authorities did not commit any illegality as the open spaces of 15% is clearly maintained. According to him, there is no statutory

violation while granting such revised permission. Learned Advocate General also submitted that the civil rights, if any, of the Petitioners could be agitated before the Civil Court by filing appropriate proceedings and not before this Court.

19. The learned Advocates appearing for the other Respondents supported the above arguments of Respondent Nos.2 and 4.

20. In rejoinder, the learned Counsel Shri Nadkarni appearing for the Petitioners forcefully submitted that not only civil rights but the fundamental rights of the Petitioners are violated for the simple reason that the very object of keeping open spaces in the final project plan gives vested right to the plot owners and the right of the developer is restricted only to transfer such spaces to the society to be formed or to the local authorities for the purpose of maintenance. In this respect, he heavily relied upon 2000 PDA Regulations and more specifically Regulation 5.4 which speaks about open spaces. He then submitted that the open spaces are zoned in Zone R whereas the other property of Respondent No.4 was zoned in Zone S1 to S4. He then submitted that Regulation 4.A prohibits the use of Zone R specifically for any other purpose. He submitted a chart stating as to how Respondent No.4 has reduced the area in order to claim more area for the purpose of development. In this respect, he pointed out that amalgamated 2010 plan shows the net effective area as 2,96,642 sq. mts. in which the area under open spaces is shown as 44,175 sq. mts. (15.10%). In the said plan of 2010, although an area under commercial and utilities is shown as 11,550 sq. mts., an area falling within 100 sq. mts. of high tide line is shown as 46,411 sq. mts. These areas are

not deducted for calculating the net effective area and the 15% open space required to be reserved is calculated on the net effective area of 2,92,643 sq. mts. However, in the impugned permission/NOC dated 11.12.2020, the net effective area is purported to be reduced from 2,92,643 sq. mts. to 2,31,936 sq. mts. by excluding an area of 46,411 sq. mts. against purported area falling within 100 metres line from high tide and further an area of 11,599 sq. mts. against purported area under commercial/community/ public/utilities/amenities. This reduction of net effective area from 2,92,643 sq. mts. to 2,31,936 sq. mts. is illegal, unlawful and contrary to the provisions. He submits that exclusion of an area of 46,411 sq. mts. from the net effective area for the first time in the impugned permission/NOC dated 11.12.2020 is impermissible, unlawful and illegal. He then submitted that the purported excluded area of 46,411 sq. mts. includes two open spaces of 8,330 sq. mts. and 7,052.5 sq. mts. totalling to 15,382.5 sq. mts.

21. Learned Counsel Shri Nadkarni then claimed that on the basis of the sale deeds and on the basis of approved plan of 2004, approved plan of 2007 and amalgamated plan of 2010, the Petitioners have right of easements of light, ventilation and playground over the open spaces as approved in the sub-division plans. He would submit that positive representation made by Respondent No.4 to each Petitioner that the open spaces as approved in the plan of 2004, plan of 2007 and the amalgamated plan of 2010 would be maintained as open spaces forever and for the benefit of the plot owners. Believing such representation and the approved final plans showing the open spaces in the entire project, the Petitioners purchased the plots. Therefore, without consent and

approval of the Petitioners and other plot owners, the developer is precluded from converting such open spaces for commercial or residential use.

22. The learned Counsel Shri Nadkarni placed reliance on the following decisions:-

1. ***Down Mangor Valley, Residents Welfare Association & another vs. Mormugao Municipal Council through its Chief Officer & others***[1],
2. ***Anjuman E Shiate Ali and Anr. vs. Gulmohar Area Societies Welfare Group and Ors.***[2]**,**
3. ***Pt. Chet Ram Vashist (Dead) by Lrs. vs. Municipal Corporation of Delhi***[3]**,**
4. ***Shri Gurudatta Co-operative Housing Society Wadgaon Gupta and Ors. vs. State of Maharashtra and Ors.***[4]**,**
5. ***Vasantrao and Ors. vs. Aurangabad Municipal Corporation and Ors.***[5]**,**
6. ***Real Estate Agency vs. Model Co-operative Housing Society Ltd. and Ors.***[6]**, and**
7. ***Supertech Limited vs. Emerald Court Owner Resident Welfare Association and Ors.***[7]

23. The learned Advocate General placed reliance on the following decision:-

1. ***Industrial Association of Small Scale Industries v. State of Maharashtra***[8].

1 2002 (3) Bom. C.R.29
2 AIR 2020 SC 2011
3 (1995) 1 SCC 47
4 MANU/MH/2078/2016
5 MANU/MH/1620/2015
6 (1990) 3 Bom. C.R. 534
7 (2021) 10 SCC 1
8 2019 SCC OnLine Bom 778

24. Having heard the learned Counsels for the respective parties and after considering the relevant provisions, we propose to consider the relevant provisions of the 2000 PDA Regulations, the provisions of the Goa (Regulation of Land Development and Building Construction) Act, 2008, (hereinafter called "Act of 2008") and Goa Land Development and Building Construction Regulations, 2010, (hereinafter called as "2010 Regulations"). However, before considering such regulations, we would like to discuss the main purpose of keeping open spaces at the time of sub-division and development of a property. This concept is required to be kept in mind in order to decide the issue involved in the present petition.

25. Reservation of open spaces for parks and playgrounds is universally recognized as legitimate exercise of statutory powers rationally related to the protection of the residents of a locality from the ill effects of urbanization. In providing legislation for reserving spaces for parks and open spaces, the legislative intent has always been the promotion and enhancement of the quality of life by preservation of character and desirable aesthetic features and protection of environment. Open spaces for recreation and fresh air, playgrounds for children, promenade for residents and other amenities are matters of great public concern and vital interest to be taken care of in development schemes. Any act would be contrary to legislature intent and inconsistent with statutory requirement. It will be diversely in conflict with the constitutional mandate to ensure that State action is inspired by the basic values of individual freedom and dignity and addressed to the attainment

of a quality of life which makes guaranteed rights as related for all citizens. If the quality of life is directly affected due to reduction of open spaces approved under the final plans, the entire project of development would be curtailed.

26. Thus, we sincerely consider the grievances raised by the Petitioners in the present petition as affecting their fundamental rights to life and to enjoy free air and light. Therefore, we consider it appropriate to reject preliminary objection raised by the Respondents that a civil remedy is available to the Petitioners as the same is not effective for the redressal of fundamental rights of the Petitioners as raised in the present petition. The basic arguments advanced in the present petition is that once the open space is shown as approved in the final approval plan, the plot owners in the said project get a right to use such places as open spaces forever and for their benefit.

27. The contention raised by the learned Counsel Shri Nadkarni with regard to the rights of the Petitioners is fully justified on the basis of the sale deeds. First of all, the sale deeds by which the Petitioners purchased plots clearly show that the final approval of the development plan is issued by the Planning and Development Authority in the year 2004 itself, as far as Phase I is concerned. Similarly, the Planning and Development Authority granted final approval to the plans in the year 2007 as far as Phase II is concerned. Therefore, there is reference in the sale deeds of such finally approved plans. Similarly, sale deeds of the Petitioners show in clause (i) as under:-

> "As for the said common areas and open spaces, the Vendor initially and on completion of the development on

"the said Larger Property", an Apex Body or Company or Association of Persons as may be formed of all Plot Owners, Premise Owners or their Society, shall be entrusted with the management and control thereof."

28. Paragraph nos.5, 7 and 12 of the sale deeds read thus:-

"5. AND the Purchasers do hereby covenant with theVendor THAT THEY shall become members of the Apex body/Association to be Organized, formed and registered by the Vendor of various Sub Plot Owners/Society/ies in "the said Larger Property", to look after the maintenance, security and up-keep of the said common areas and common open spaces within "the said Larger Property" AND FURTHER the Purchasers agree and undertake to pay to the Vendor initially and ultimately to said APEX SOCIETY/Body their proportionate share in the taxes, expenses and outgoings effective from 15.06.2004, in respect of the maintenance, security and up-keep of the said common areas and said common spaces and the Vendor and/or the said Apex Society/Body, as the case may be, are entitled for defraying the same, out of interest earned from the said "Corpus Fund" AND THEY, the Purchasers hereby undertake to pay to the Vendor/Apex Society or Body, as the case may be, any deficit or additional charges proportionately for the maintenance, security and upkeep of the said common areas and the common open spaces as is determined by the Vendor or such Society/ Association as the case may be from time to time and for which if the interest earned from the said "Corpus Fund" is found to be insufficient in any financial year, regularly within 30 (Thirty) days of the end of such financial year, commencing from the end of current financial year in ensuing March, so as to enable the Vendor and/or the said Apex Society/Association (when formed), to manage and maintain the common areas and common open spaces uninterruptedly for the benefit of the members and

occupants of its member and member societies AND the Purchasers hereby further covenant with the Vendor that they the Purchasers shall accordingly as aforesaid contribute towards the expenditure for the maintenance, upkeep and security of the said common areas and the common open spaces and shall also contribute proportionately to all cost, charges and expenses of renovation, modernization and replacement of such common areas and the common open spaces and to observe and perform the rules and regulations framed by the Vendor and/or the said Apex Society/ Association to regulate the use and enjoyment of the said common areas and common open spaces, which on completion of the development of "the said Larger Property", the Vendor have agreed to convey in favour of the said Apex Society (excluding the areas to be conveyed to local authorities) and the Purchasers herein do hereby reaffirm their undertaking and consent for the same.

7. AND FURTHER THAT the Purchasers covenant with the Vendor to observe and perform and implement the Terms and Conditions of the said Sanctioned Sub Division Scheme dated 15/6/2004 while development and use of "the said Sub Plot" and as applicable to "the said Sub-Plot in relation to sanctions/permissions obtained/ to be obtained by Vendor with regards to development of "the said Larger Property" and the Building Plan/s as may be sanctioned by the authorities concerned in respect of the development to be carried out by the Purchasers at their own costs, risk and expenses on "the said Sub Plot" and the Purchasers hereby confirms the entitlement of the Vendor to carry on development on the remaining portions of "the said Property" and "the said Larger Property" in the manner as per the said Sub Division/Layout sanctioned/ to be sanctioned and/or permitted/ to be amended by the authorities concerned from time to time.

12. AND IT IS FINALLY AGREED BY AND BETWEEN THE PARTIES HERETO THAT all out of

> pocket expenses and costs, charged, expenses of and incidental to these presents including Stamp Duty and Registration Charges shall be borne and paid by the Purchasers alone and that the consideration herein mentioned is inclusive of the proportionate consideration of the common areas and common open spaces as may be provided by the Vendor in "the said Larger Property", that are to be ultimately conveyed to the said Apex Society or Body as herein mentioned upon completion of the development of "the said Larger Property"."

29. Thus, the sale deeds of the Petitioners clearly show that first of all the open spaces as shown in Plan 2004 and Plan 2007 are required to be maintained as it is by the developer/Respondent No.4 and finally the same has to be handed over to the society or association for the purpose of maintenance.

30. The 2000 Regulations were published by exercising powers conferred under Section 141 of Goa Town and Planning Act, 1974, which is clear from the notification produced at Exh. R attached to the petition. Therefore, the 2000 Regulations were prepared and published as per the powers under Section 141 of Goa Town and Country Planning Act, 1974 and thus are having statutory force. These regulations were in force till the 2010 Regulations came on the statute book. Admittedly, necessary permissions for development of the said project were granted to Respondent No.4 under the said 2000 Regulations. Regulation 3.4 of the 2000 Regulations specifically provided for grant of permission. Regulation No.3.4.2 (a),(b) reads thus:-

> "2.(a) In case of an application for sub-division of land, the authority shall grant provisional permission specifying

all conditions to be complied as per sub-division regulations provided in para (v) of these regulations. On compliance of all conditions of "provisional permission", applicant shall submit a fresh application in the manner prescribed above and the authority shall grant "final permission".

(b) In case the application is for sub-division of an already approved sub-divided plot, final permission shall be granted at the time of first application itself."

31. Regulation 4 in para (iv) deals with issuing zoning regulations and use provisions. Regulation 4A.1 deals with land use of zones wherein in Table (IV) the land shown as parks/playgrounds, recreational are shown in Zone R.

32. Regulation 4A.2 deals with provisions governing the uses wherein the uses are prohibited except those permitted with restrictions:-

"4A.2 – Provisions governing the uses

1. **USES PROHIBITED:** (Except those permitted with restrictions).

i) Zones S1, S2, S3 & S4:

Wholesale trade, warehousing, all kind of industries, railway yards, sidings, air ports and air stations, electric power plants, gas works, fabrication and assembly workshops, scrapyards, transport agencies, automobile workshops, hotels, motels, hostels and restaurants.

ii) Zones C1, C2, C3 and C4:

Extensive, heavy and noxious industries, airports and air stations, electric power plants and gas works.

iii) Zones I-1, I-2 & I-3:

a) I-1:

Extensive, heavy and noxious industries.

b) I-2:

Noxious and hazardous industries.

c) I-3:

All uses other than industries with exception of those permitted with restrictions.

iv) Zone P

All kinds of industries, wholesale trade, warehousing, storage, airports & air stations.

v) Zone T:

Theatres, Auditorium, Cultural and religious institutions, heavy, noxious & hazardous industries, sports stadia, crematoria, cemeteries, burial grounds and other uses permitted under other zones.

vi) **Zone R**

All uses permitted under other zones.

vii) Zone A1 & A2

All uses other than agriculture, horticulture, farming and allied operations.

viii) Zone F

All uses prohibited in the basis Zone, since this is a superimposed Zone.

33. Para (V) of the 2000 Regulations deals with sub-division regulations.

34. The learned Counsel Shri Nadkarni heavily placed reliance on Regulation 5.4 which deals with regulations regarding open spaces and reads thus:-

"5.4) Regulations regarding open spaces.

1) When the plot to be sub-divided has an effective area of more than 4000.00 m2, an area equal to 15% of the

effective area of such plot shall be set apart as usable open space/green area.

2) The open spaces shall be deemed to be zoned as Zone "R" and shall be jointly held, developed and maintained by the owners of the sub-divided plots, unless they are transferred to the local Authority.

3) The open space/spaces to be provided under sub-clause (1) may be kept in more than one parcel, each parcel having an area of not less than 500.00 m2 and least dimension of not less than 15.00 m.

4) All open spaces shall have a means of access as though it is an independent plot.

5) In commercial zones, if bye-lanes of width not less than 7.50 m. are provided adjoining public roads, to be used for parking, the area of such bye-lanes may be computed in the open space upto 50% of the total requirements of open space.

6) In case of partial development of a plot, 15% open space should be set apart of only that part of the plot undertaken for development provided that this part of the plot as well as the remaining part are not less than 4000.00 m2 in area.

The open spaces shall be used for recreational and community purposes of the occupants of the sub-divided plots and/or for installations of public utilities, provided such installations do not cover more than 5% of each of the open space, a minimum 3.00 m. setback from any edge of the plot is kept and the maximum height of any construction is restricted to 6.00 m. only. In case of water tower, the height restriction will not be applicable."

35. The learned Counsel Shri Nadkarni placed heavy reliance on Regulation 5.4.2 as quoted above claiming therein that open spaces shall be deemed to be zoned as Zone R and shall be jointly held, developed and maintained by the owners of the sub-divided plots unless they are

transferred to the local authority. He, therefore, would submit that once the final approved plan shows open spaces whether 15% of the total area or more, the plot owners get vested right in such open spaces and shall be jointly held by the owners of sub-divided plots, unless such spaces are transferred to the local authority. In other words, he contended that the developer/Respondent No.4 is also a joint owner along with the owners of sub-divided plots of such open spaces but his right is restricted to only transfer it either to the society or to the local authority as the case may be. The developer has no other right as provided in the said regulation.

36. The 2010 Regulations which came into force on the basis of Section 4 of Act of 2008, first time defines open spaces at Regulation 2(94) which reads thus:-

> "Regulation 2(94) – "Open Space" means an area forming part of a site left open to the sky and includes the areas reserved as such in a sub-division of land for the purpose of recreation or any other public use permitted under these Regulations;

37. The learned Counsel Shri Nadkarni appearing for the Petitioners submitted that the provisions of the 2000 Regulations with regard to open spaces are the same as found in the 2010 Regulations except minor changes. However, it is reiterated in the 2010 Regulations that open spaces shall be used for recreational and community purposes of the occupants of sub-divided plots and/or for installation of public utilities provided such installations do not cover more than 5% of each of the open space, a minimum 3 metres setback from any edge of the plot is kept.

Similarly, open spaces shall be deemed to be zoned as Zone "R" and shall be governed by the following regulations:-

38. Regulation 12.4 deals with open spaces and reads thus:-

"12.4 Regulations regarding open spaces:

(a) When a plot is to be sub-divided, certain areas shall be set apart as usable open space in the proportion given as detailed in TABLE-XI below. Further such open space provided in any sub-division of land shall not be further sub-divided under these regulations. Provided that the Goa Industrial Development Corporation may re-align, revise or reduce the open spaces maintained by it in any existing Industrial Estate or Industrial Area as per the standards specified in the Table below:

TABLE-XI

Zone	Area to be sub-divided	Open space to be provided
1	2	3
S1, S2, S3, S4	4000 m2 and above	15%
C1, C2, C3, C4	4000 m2 and above	15%, out of which 10% is to be developed as recreational open space and 5% as general pool parking which is open to sky and shall not be built upon.
P	4000 m2 and above	15%, out of which 10% is to be developed as recreational open space and 5% as general pool parking which is open to sky and shall not be built upon.
[I1, I2, I3,	10,000 m2 and above	15%, out of which 7.5% is to be developed as recreational open space and 7.50% as general pool parking which is open to sky and shall not be built upon. In GIDC developed industrial estates/industrial areas, 7.5% of the total area shall be reserved for open space, out of which 2.5% shall be kept for recreational landscaping such as park/garden/tree plantation and 5% can be used for general utility like OHR, pump house, sump and

		general parking open to sky.] The open space area that may be available to be released over and above the requirement of 7.5% of the total area shall be deemed to be zoned as industrial area.
T	20,000 m2 and above	

"(b) The open spaces can be provided in more than one parcel. However, the area of each such parcel shall not be less than 500 square meters and the minimum length of any side shall not be less than 15.00 meters.

Further, in case of triangular open space/any open space having irregular shape, the minimum dimension shall be that of a circle, having 15 meters diameter, inscribed within such an irregular shape (refer sketch No. 7).

(c) All open spaces shall have a means of access as though it is an independent plot.

(d) The open spaces shall be used for recreational and community purposes of the occupants of the sub-divided plots and/or for installations of public utilities, provided such installations do not cover more than 5% of each of the open space, a minimum 3.00 meter setback from any edge of the plot is kept and the maximum height of any construction is restricted to 6.00 m only. In case of water tower, the height restriction will not be applicable.

(e) The open spaces shall be deemed to be zoned as zone "R" and shall be governed by the following provisions:-

(i) The open spaces may be transferred to the local authority by a gift deed by the owner/developer before obtaining final approval. If the open spaces are transferred to the local authority the same shall be developed and maintained by such local authority for the purpose mentioned in subclause (d) above. However, purchasers of the plots shall be entitled to free access and use of the open spaces.

(ii) In case of Group Housing wherein open spaces are required to be kept, then, such open spaces shall be jointly held by the owners of the premises/Co-operative Housing Society. The owners of the premises or Co-operative Housing Society shall be deemed to have an undivided share in such open spaces proportionate to the area of their premises. Its use however shall remain unchanged as stipulated at sub-clause (d) above.

While enclosing the area by a compound [or boundary] wall, adequate provision shall be made to ensure that access is not obstructed to any adjoining [property thereby making it a land locked property.]

(f) In commercial zones, if bye-lanes of width not less than 7.50 m. are provided adjoining public roads, to be used for parking, the area of such bye-lanes may be computed in the open space up to 50% of the total requirements of open space.

(g) In case of partial development of a plot, 15% open space should be set apart of only that part of the plot undertaken for development provided that this part of the plot as well as the remaining part is not less than 4000 m^2 in area.

(h) General pool parking provided in the regulations at Table XI shall be only of open to sky type and shall not be built upon."

39. Conjoint reading of the above provisions of the Regulations uncontrovertedly prove that the Petitioners who are owners of the sub-divided plots are considered as joint owners of the open spaces, whereas the right of the developer over such open spaces is only restricted to handing it over to the society or to the local bodies.

40. The 2000 Regulations and 2010 Regulations provide that while developing a property, minimum area of 15% at different places shall be

kept as open spaces. However, if the developer is voluntarily keeping more than 15% of the area as open spaces, and such plans are approved finally by the appropriate authorities, whether he could under the garb of revision of plans, alter such condition of open spaces partially or fully for the purpose of development/commercial use or residential use is the moot question.

41. The basic arguments on behalf of the Respondents is that during the revision of the plans submitted by the developer in accordance with the 2010 Regulations, he has maintained minimum 15% of open spaces and therefore, there is no illegality committed by him. Similarly, by approving such revised plans, the authorities did not commit violation of statutory provisions and therefore, such revision of plans as submitted by Respondent No.4 cannot be questioned by the Petitioners.

42. However, it has to be kept in mind that once the developer gives a promise to sub-divided plot owners that he has kept more than 15% of the land as open spaces for their use, thereby allowing them to purchase the plots on such assurances, cannot claim revision of development without permission or no objection of such plot owners specifically for reduction of open space to minimum 15% as provided under the regulations. We say so on the ground that once the plans are approved finally by the concerned authorities, the plot owners become joint owners of the open spaces to be used by them for recreational, sports activities and thus, their permission or no objection for conversion of such areas is must.

43. In the case of ***Bangalore Medical Trust vs. B.S. Muddappa and Ors.***[9], the Apex Court was dealing with an attempt of the municipal

9 (1991) 4 SCC 54

authorities to convert the open spaces by constructing a hospital. While dealing with the statutory provisions and the very purpose of maintaining open spaces in a development plan or a sub-divided land, it has been observed in paragraphs 24 to 29 and 36 as under:-

> 24. Protection of the environment, open spaces for recreation and fresh air, play grounds for children promenade for the residents, and other conveniences or amenities are matters of great public concern and of vital interest to be taken care of in a development scheme. It is that public interest which is sought to be promoted by the Act by establishing the BDA. The public interest in the reservation and preservation of open spaces for parks and play grounds cannot be sacrificed by leasing or selling such sites to private persons for conversion to some other user. Any such act would be contrary to the legislative intent and inconsistent with the statutory requirements. Furthermore, it would be in direct conflict with the constitutional mandate to ensure that any State action is inspired by the basic values of individual freedom and dignity and addressed to the attainment of a quality of life which makes the guaranteed rights a reality for all the citizens.
>
> 25. Reservation of open spaces for parks and playgrounds is universally recognised as a legitimate exercise of statutory power rationally related to the protection of the residents of the locality from the ill-effects of urbanisation.
>
> 26. In *Agins v. City of Tiburon*, *447 US 255 (1980)*, the Supreme Court of the United States upheld a zoning ordinance which provided `... it is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant impacts, such as ..... pollution, ... destruction of scenic beauty, disturbance of the ecology and the environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl'. Upholding the ordinance, the Court said: (US pp. 261-62)

"…. The State of California has determined that the development of local open-space plans will discourage the "premature and unnecessary conversion of open-space land to urban uses" …. The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill-effects of urbanization. Such governmental purposes long have been recognized as legitimate ….

…. The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas.

27. The statutes in force in India and abroad reserving open spaces for parks and playgrounds are the legislative attempt to eliminate the misery of disreputable housing condition caused by urbanisation. Crowded urban areas tend to spread disease, crime and immorality. As stated by the U.S. Supreme Court in *Samuel Berman v. Andrew Parker*, 99 L Ed. pp. 37-38 : US pp. 32-33)

"…. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

…. The concept of the public welfare is broad and inclusive. …. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values…..". (Per Douglas, J.).

28. Any reasonable legislative attempt bearing a rational relationship to a permissible state objective in economic

and social planning will be respected by the courts. A duly approved scheme prepared in accordance with the provisions of the Act is a legitimate attempt on the part of the government and the statutory authorities to ensure a quiet place free of dust and din where children can run about and the aged and the infirm can rest, breath fresh air and enjoy the beauty of nature. These provisions are meant to guarantee a quiet and healthy atmosphere to suit family needs of persons of all stations. Any action which tends to defeat that object is invalid. As stated by the U.S. Supreme Court in *Village of Belle Terre v. Bruce Boraas*, 39 (L Ed p. 804 : US p. 9)

"…. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people".

See also *Village of Euclid v. Ambler Realty Company, 272 U.S. 365 1926*. See the decision of the Andhra Pradesh High Court in *T. Damodhar Rao & Ors. v. The Special Officer, Municipal Corporation of Hyderabad & Ors., AIR 1987 AP 171*.

29. The residents of the locality are the persons intimately, vitally and adversely affected by any action of the BDA and the Government which is destructive of the environment and which deprives them of facilities reserved for the enjoyment and protection of the health of the public at large. The residents of the locality, such as the writ petitioners, are naturally aggrieved by the impugned orders and they have, therefore, the necessary *locus standi*.

36. Public park as a place reserved for beauty and recreation was developed in 19th and 20th Century and is associated with growth of the concept of equality and recognition of importance of common man. Earlier it was a prerogative of the aristocracy and the affluent either as a result of royal grant or as a place reserved for private pleasure. Free and healthy air in beautiful surroundings

> was privilege of few. But now it is a, `gift from people to themselves'. Its importance has multiplied with emphasis on environment and pollution. In modern planning and development it occupies an important place in social ecology."

44. The effect of urbanization and more particularly converting undeveloped land or even changing the use of the land from any other category to urbanization/development are having its own effects on the ecology and also on human beings. Conversion of open land into a developed land is a serious change which takes place in respect of the status of the said land. It affects the forestation existing in such land together with other effects. Undeveloped land is having less value as compared to a developed land. Thus, after getting subjected to development into layouts, the price of the plots which are permitted to be used for residential or commercial purposes fetch more value. For this purpose, the procedure as per the Planning and Development Authority has to be followed. It is only after a layout is sanctioned, the same can be utilized for urban development. It is clear from the 2000 PDA Regulations and the 2010 Regulations which governs the conditions for the purpose of development, imposes certain conditions while granting permission for development of a land by making it into a layout. While doing so, specific care is taken to provide ameneties to the proposed residents of the said plot owners. Once such layout is finalized and development takes place, the layout virtually becomes unalterable as the public amenities such as roads, drainage, open spaces, common utility places are to be utilized by all the plot owners and also the public who are visiting the said place. Such public utilities such as roads, open spaces,

etc. are necessarily to be utilized for the purposes for which the same are reserved and none else. In an ideal case, plot owners would form a cooperative society and by using contributed funds, they would keep places for recreation clean and tidy and useful for recreation only. Such plot owners can develop such open places into gardens and playgrounds on such land. The building bye-laws provide that such plots/open spaces would be handed over to the local authorities so that they would not only protect them but would also develop them as playgrounds or gardens for the use of the people residing in the said locality. Thus, not only plot holders in the said locality, but even outsiders who would come in the said locality would be entitled to use such land for its specified purpose such as roads, open spaces for recreation, etc. In other words, right of users of these open spaces and roads accrued to public at large. No one can interfere with such right.

45. In the case of *Pt. Chet Ram* (supra), the Apex Court while dealing with the permission granted by the Corporation for construction of building in open space for parks and schools observed in para 6 as under:-

> "6. Reserving any site for any street, open space, park, school etc. in a layout 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 layout 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 to the person in whose favour it is transferred. The resolution of the Committee to transfer land in the colony for park and school was an order for transfer without there being any sanction for the same in law."

46. In the case of *Shri Gurudatta Co-operative Housing Society Wadgaon Gupta and Ors.* (supra), the Division Bench of this Court (Aurangabad Bench) relied upon the observations of the Apex Court in the case of *Pt. Chet Ram Vashist (Dead) by Lrs. vs. Municipal Corporation of Delhi* (supra) and observed in para 7 as under:-

> "As such, it would be abundantly clear that though original owner of the lay-out remains owner of the said open space, his ownership is residuary in nature and said space is meant for use of the plot holders and general public. Original owner retains said residuary rights as trustee of the other lay-out plot holders. However, as observed by the Apex Court local body or the Government do not have any right to transfer the open space in its name without any consideration or nominal charges. Even section 20 of Maharashtra Land Revenue Code, 1966 would not come to the aid of the respondents'

for claiming ownership of the open space. The original owner is never divested of his ownership."

47. In the case of *Down Mangor Valley, Residents Welfare Association & another* (supra), this Court while dealing with the unauthorized construction on an open space held in paragraphs 10 and 11 as under:-

> "10. We may now deal with the main issue of open spaces which are reserved as part of a development project. It is no doubt true that there is some material on record to indicate that respondents no. 4 to 15 have been occupying the structures on the said land. The question is whether because of long existence of constructions which admittedly are illegal, this Court would be precluded from exercising its extraordinary jurisdiction in the matter. The Goa, Daman and Diu Town & Country Planning Act, 1974 is an enactment which provides for development of land. There are regulations framed under the said Act whereby a mandatory duty is cast in the matter of development on the owner/owners of the sub-divided plots and if transferred to the local authority, by the local authority, to keep open spaces. Similarly, there are bye-laws in the matter of building constructions which require set backs to be maintained when building constructions are to be put up and further area to be left open, which cannot be built upon. It has now been judicially recognized that the need to keep set back areas/open spaces is a recognition by the State for maintaining environment and ecology of the area and to ensure for the people of the area a place for recreation, or leisure, whilst at the same time serving as green lungs for the area. If the objective therefore is to provide a better environment for the residents, can that objective be defeated on the specious plea that encroachers on the land are residing there for a long time? Neither the provisions of the Municipalities Act, nor the provisions of the Town and Country Planning Act provide for any regularization of

such encroachment on open spaces. Once an open space, it has always to be an open space to be used for the purpose for which it is kept. The issue of open spaces has come for consideration before Courts in various forms, whether it be in the form of regulations for land development of the area, or in the matter of building bye-laws of various Corporations and Municipalities, which require maintenance of such open spaces. As far back as 1991 the Apex Court in the case of Bangalore Medical Trust vs. B.S. Muddappa & Ors., 1991(4) S.C.C. 54, recognized the need for planned development of the area and the importance of the open areas and/or reservation for open areas. Reaching out to new frontiers in the development of law after the judgment in Udipi Municipalitys case, the Apex Court held that residents of an area would have a right in the event the land meant and reserved for public amenities was sought to be changed for some other purpose. While considering the law, the Apex Court noted the developments around the world and the necessity of the residents of the locality to enjoy and live in a healthy environment. In paras 24 and 25 of the judgment the Apex Court observed as under:-

> "Protection of the environment, open spaces for recreation and fresh air, playgrounds for children, promenade for the residents, and other conveniences or amenities are matters of great public concern and of vital interest to be taken care of in a development scheme.....
>
> .....
>
> The public interest in the reservation and preservation of open spaces for parks and playgrounds cannot be sacrificed by leasing or selling such sites to private persons for conversion to some other user.....….....
>
> ….....
>
> Any such act would be contrary to the legislative intent and inconsistent with the statutory

> requirements. Furthermore, it would in direct conflict with the constitutional mandate to ensure that any State action is inspired by the basic values of individual freedom and dignity and addressed to the attainment of a quality of life which makes the guaranteed rights a reality for all the citizens.
>
> 25. Reservation of open spaces for parks and playgrounds is universally recognised as a legitimate exercise of statutory power rationally related to the protection of the residents of the locality from the ill-effects of urbanisation."

In *(Virender Gaur & Ors. vs. State of Haryana & Ors.)* 1995(2) S.C.C. 577, the Apex Court noted that open lands vested in the municipalities are meant for public amenities of the residents of the locality to maintain ecology, sanitation, recreation, playground and ventilation purposes. The buildings directed to be constructed necessarily affect the health and the environment adversely, sanitation and other effects on the residents in the locality. It is in these circumstances that where land was acquired for a public purpose, the Municipality is required to use the land for protection and preservation of hygienic conditions of the local residents in particular and the people in general and not for any other purpose. The Apex Court further noted that in providing legislation for reserving places for parks and open spaces, the legislative intent has always been the promotion and enhancement of the quality of life by preservation of character and desirable aesthetic features. The reservation of open spaces for parks and playgrounds is universally recognised as a legitimate exercise of statutory power rationally related to the protection of the residents of the locality from the ill-effects of urbanisation.

In *(Pt. Chet Ram Vashist (dead) by L.Rs. vs. Municipal Corporation of Delhi*, 1995(1) S.C.C. 47, the issue before the Apex Court was whether a condition requiring for vesting of the open space reserved in the Municipality is legal. The Apex Court observed that reserving any site for

any street, open space, park, school, etc. in a lay out plan is normally a public purpose as it is inherent in such reservation that it shall be used by the public in general. The effect of such reservation is that the owner ceases to be a legal owner of the land in dispute and he holds the land for the benefit of the society or the public in general. It may result in creating an obligation in nature of trust and may preclude the owner from transferring or selling his interest in it. The Corporation by virtue of the land specified as open space may get a right as a custodian of public interest to manage it in the interest of the society in general.

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

11. The decision in *(Dr. G.N. Khajuria & others. v. Delhi Development Authority & others)*, 1995 (5) S.C.C. 762, again was in a matter of land reserved for one purpose being diverted to another. In that case, a part of a park was sought to be allotted for the purpose of setting up a school. The Apex Court held that a place reserved for a park could not be diverted for any other purpose. The observations in paragraph 10 of the said judgment are

relevant in the context of the Legislature conferring power on the Executive with the hope and object that they will discharge those statutory powers honestly, faithfully and in the spirit in which such powers have been conferred by the statute on public functionaries. It is increasingly coming to the notice of the courts that public functionaries, meaning thereby the Executive, which is an important arm in our constitutional set up, are failing to discharge their duties by the other constitutional wing, the Legislature. In this vacuum, increasingly Courts are being called upon to play the role which the constitutional fathers perhaps never expected the Courts to discharge. As there never should be a vacuum, Courts as protectors of constitutional values and upholders of law, are presently occupying this vacuum. It is only a strong Executive discharging its duties, that can help bring the constitutional scheme on rails. That is required so that both our democratic set up, as well as the spirit of the federal constitution is maintained. It is in that context that para 10 of the judgment needs to be reproduced:-

> "Before parting, we have an observation to make. The same is that a feeling is gathering ground that where unauthorized constructions are demolished on the force of the order of courts, the illegality is not taken care of fully inasmuch as the officers of the statutory body who had allowed the unauthorised construction to be made or make illegal allotments go scot free. This should not, however, have happened for two reasons. First, it is the illegal action/order of the officer which lies at the root of the unlawful act of the citizen concerned, because of which the officer is more to be blamed than the recipient of the illegal benefit. It is thus imperative, according to us, that while undoing the mischief which would require the demolition of the unauthorised construction, the delinquent officer has also to be punished in accordance with law. This, however, seldom happens. Secondly, to take

care of the injustice completely, the officer who had misused his power has also to be properly punished. Otherwise, what happens is that the officer, who made the hay when the sun shined, retains the hay, which tempts others to do the same. This really gives fillip to the commission of tainted acts, whereas the aim should be opposite."

A Division Bench of this Court in the case of (Sindhu Education Society v. Municipal Corporation of City of Ulhasnagar & others), 2001(2) Bom. C.R. 523 : 2001(1) Mh.L.J. 894, observed that the Municipal Corporation as the custodian of the rights of the people, has been given by law the right to enforce its bye-laws by refusing sanction, preventing constructions and by demolishing buildings that may violate any law and/or bye-law. That judgment has reiterated the right of an affected person, including neighbours, for whose benefit the open spaces were reserved, to approach the Court and exercise its extraordinary jurisdiction under Articles 226 and/or 227 of the Constitution."

48. Finally in paragraph 15, the conclusions drawn therein are very material which read thus:-

"15. From the above, the following conclusions emerge:-

(i) Open spaces maintained as part of a development project or pursuant to a building licence, have to be kept open as per the development permission or building licence as a condition for development or construction in terms of the relevant Act, Rules and Bye-laws or other executive directions;

(ii) These open spaces as referred to in conclusion (i) cannot be altered, converted or changed without hearing the beneficiaries or the parties for whose benefit they were maintained and that too only if there is specific provision under any enactment, Rules, Regulations or

other enactment having the force of law, including Bye-laws;

(iii) Those who have put up constructions or changed user on such open spaces as referred to in conclusion (i), can have no equitable consideration in their favour on the ground that the constructions are existing for a long time, whether the constructions are legal or illegal, as the open spaces have been kept for the benefit of the beneficiaries at the time the development permission or building licence was granted, in furtherance of their right to life. This consideration outweighs all other considerations.

(iv) The authorities who grant the development permission/licence and who have been conferred powers by any enactment, including Rules, Regulations, Bye-laws, etc. and who fail to discharge their duties by acting according to law on complaints being made of illegal constructions, or on change of user or the like, have to expeditiously take action in the matter, as otherwise in terms of law declared by the Apex Court, they are liable for action, including disciplinary action;

(v) a copy of this Judgment and Order be sent to the Chief Secretary of the State of Goa, for taking further steps in the matter of issuing instructions and/or guidelines to all officers entrusted with these duties, including all local bodies and Planning Authorities, so that they act upon the complaints within a specified time, failing which they ought to be made liable for disciplinary action;

(vi) A copy of the guidelines/instructions so issued by the Chief Secretary to be placed before this Court within six months from today; and

(vii) The Chief Secretary to send copies of this Judgment to all bodies referred to in conclusion (v) and seek their compliance within six months and thereafter to file a status report through any officer designated by him."

49. The Apex Court in the case of *Supertech Limited* (supra) observed that a breach by development/planning authority of its obligation to ensure compliance with building regulations is actionable at the instance of residents whose rights are infringed by violation of law since their quality of life is directly affected by failure of planning authority to enforce compliance. Hence, law must step in to protect their legitimate concerns. When the planning and building regulations are violated by developers more often than not with the connivance of regulatory authorities, it strikes at the very core of urban planning, thereby directly resulting in an increased harm to the environment and a dilution of safety standards. Though these observations are with regard to illegal construction of two high rise buildings, the aspect of infringement of the rights of the locality are clearly applicable to the matter in hand.

50. Thus, from the above decisions, what emerges is the fact that once an open space is shown in the final approved plan, it remains to be an open space forever and that the original owner of such land though having residuary ownership in nature, he holds it as trustee of layout plot holders.

51. The learned Advocate General placed reliance in the case of *Industrial Association of Small Scale Industries* (supra) to buttress his submissions that authorities are having the right to alter such open space under its powers to alter, modify or revise the plans. However, such decision would not help Respondents in this matter as it was a case of a leasehold right of the plots in the industrial area and not of the ownership rights.

52. We clearly observe that in the present matter, Respondent No.4 applied for sub-division of Phase I and the said plans were approved. This happened in the year 2004. Accordingly, the sub-divided plots were sold to different persons including Petitioners 1 to 4. Thereafter, the individual plot owners constructed residential houses and started utilising common facilities and amenities including the open spaces shown in approved plan 2004. Similar is the case with regard to development of Phase II in the year 2007. The plans for sub-division and development were approved in the year 2007. Thereafter, Petitioner No.5 along with others purchased sub-divided plot and accordingly constructed residential premises. The plot owners of the approved sub-division of 2007 plan started enjoying the facilities and amenities including open spaces as projected in the plans.

53. Thereafter, Respondent No.4 applied for amalgamation of Phases I and II, in the year 2010. It is interesting to note that at the time when such amalgamation of Phases I and II was applied, the 2000 Regulations were in force. It is also interesting to note that the open spaces approved in 2004 plan and 2007 plan were shown as it is in the amalgamation plan. Thus, while approving 2004 plan and 2007 plan, the concerned authorities approved finally the open spaces shown in both the said phases. This aspect was reiterated and confirmed by amalgamation and final approved plan 2010. Therefore, the plot owners of Phases I and II purchased their plots with the assurance from the developer that open spaces shown in such approved plans shall be maintained as it is for the benefit of the plot owners.

54. Subsequently, the 2010 Regulations came into force. Somewhere in 2020, Respondent No.4 applied with Respondent No.2 for deviation/alteration of sub-division layout of the amalgamated plan 2010. At this stage and as rightly pointed out by the learned Counsel Shri Nadkarni, the effective area of the plots was substantially altered and reduced by showing net effective area of 2,31,936 sq. mts. instead of the earlier net effective area of 2,92,642 sq. mts. This was done by excluding the area of 46411 sq. mts. which was purportedly falling within 100 metres of the high tide line.

55. In order to demonstrate, the learned Counsel for the Petitioners has submitted a chart which is as under:-

	AREA OF PLOT (SQ. MTS.)	EFFECTIVE PLOT AREA (SQ. MTS.)	15% OF EPA (SQ. MTS.)	OPEN SPACE APPROVED (SQ. MTS.)
2004 (Phase I)	1,06,950	1,01,492	15,223	15,495
2007 (Phase II)	1,92,050	1,60,350	24,052	26,680
2010 (Amalgamated Phase I & II)	2,99,000	2,92,642	43,896	44,175
2020 (Impugned Revised Approval).	2,99,000	2,31,936	34,790	34,791

56. It is clearly observed that such exercise was carried out on behalf of Respondent No.4 in order to reduce the open spaces shown in the earlier approved plans. It is surprising that Respondent No.2 being the authority failed to raise objection on these aspects. Be that as it may, the fact remains that under the garb of revised plans, Respondent No.4 is trying

to cull out an area of 9384 sq. mts. out of the open spaces for the purpose of development on the premise that the remaining area left out as open spaces in the revised plans is more than 15% of the total area of the land as approved under the regulations.

57. Since it is now observed by the Apex Court and also by this Court in the decisions cited above that when the open space is kept for the purpose of use of the plot owners and shown in the final approved plan, the same cannot be used for any other purpose except for recreation. Therefore, even if the developer is keeping more than 15% of the land as open space for the benefit of the plot owners and on that assurance, the proposed plot owners invest their hard-earned money to have better facilities and a healthy environment for their livelihood, the developer is precluded from asking unilaterally for the revised plans thereby reducing such open spaces to the detriment of the plot owners. We have already considered the 2000 Regulations under which plan 2004, plan 2007 and plan 2010 were finally approved. Thus, all the open spaces in Phase I and Phase II or amalgamated plan 2010 are necessary to be shown in Zone R and use of such Zone R is prohibited for any other purpose except for which the same are reserved, as provided in Regulation 4A(2) of the 2000 Regulations.

58. Regulation 5.4 as quoted above further fortifies the rights of the plot owners when it is provided that such open spaces shall be jointly held, developed and maintained by the owners of the sub-divided plots unless they are transferred to the local authorities. Thus, on showing such open spaces in the final approved plan, it shall be jointly held and

developed as well as maintained by the owners of such divided plots. Such right is therefore crystallized in favour of the owners of sub-divided plots.

59. Reliance placed on the provision of Regulation 6.2 of the 2000 Regulations by the learned Advocate General is misplaced. Such provision shows that development permission for sub-division of land or construction of buildings which were already approved by the competent authority and the development has been completed or part completed in pursuance of such approvals, final approval or completion certificate shall be granted based on regulations on which the approval was granted even though a subsequent change is brought about because of new regulations, upto a period of six years.

60. In fact, this provision is helping the Petitioners more than the Respondents as in the present matter, final approved plans of 2004, 2007 and amalgamated plan of 2010 were approved under the provisions of the 2000 Regulations. Even the Petitioners completed construction of their residential premises on their respective plots in accordance with the 2000 Regulations.

61. The learned Advocate General then invited attention to paragraph 7 of the sale deed and would submit that the purchasers/Petitioners agreed for the change of the layout/sub-division sanctioned/to be sanctioned and/or permitted/to be amended by the authorities concerned from time to time. He further relied upon paragraph 8 of the sale deed which reads thus:-

> "8. AND IT IS HEREBY AGREED AND DECLARED by the Purchasers for themselves their heirs, administrators, legal representatives and assigns that they shall neither object to nor interfere with the right of the Vendor to utilize the F.A.R. (Floor Area Ratio)/ further F.A.R. (Floor Area Ratio) and/or any other benefits etc., as permissible in respect of "the said Larger Property", as may be approved by the authorities concerned from time to time, on any part or portion of "the said Larger Property" excluding that of "the said Sub Plot" and shall extend their fullest co-operation to the Vendors for utilization of the same, during the course of the construction work which may be subsequently commenced and carried on by the Vendor and such NOC and consent herein is and shall be deemed always to be covenant running with the land i.e. "the said Sub Plot".

62. Such provision of paragraphs 7 and 8 of the sale deed, is specifically dealing with the utilization of the F.A.R/further F.A.R. of the larger property and not in connection with common amenities such as roads, open spaces as approved in the final approved plan. This clause in the sale deed will not help the developer or the planning authorities in any way while reducing the open spaces which were already approved under the plan of 2004, plan of 2007 and finally in the amalgamated plan of 2010.

63. Though it has been tried to be projected that the development of the larger property is not complete, it is clear from the record produced before this Court that the property was developed in phases. First phase started by the final approval plan of 2004 whereas the second phase started with the final approval plan of 2007. Both these phases were amalgamated in the year 2010.

64. Therefore, admittedly Phase I and Phase II were completed long back and no further development activity was going on as tried to be projected. Be that as it may, the main concern is with regard to the open spaces shown in the final approval plans and more specifically the amalgamated plan of 2010. The attempt on the part of Respondent No.4 is to convert some of the open spaces from the approved plan of 2010 for the purpose of commercial use, which in our considered opinion is certainly affecting the rights of the Petitioners and other sub-divided plot owners, and not only the civil rights. Such open spaces for recreation and leisure are serving as green lungs for the area as on the other portions, construction is already carried out. Thus, the sub-divided plot owners are having the right to be consulted before asking for conversion of such open spaces as they become joint holders of such open spaces along with their sub-divided plots.

65. The 2010 Regulations and more specifically quoted above as Regulation No.12.4 are not deviating with the 2000 Regulations more so with regard to open spaces except clarifying with adding other table in it. These regulations also provide that open spaces shall be deemed to be zoned as Zone R and shall be governed by the said provisions. Thus, even under the 2010 Regulations, the Petitioners as sub-divided plot holders and having undivided share in such open spaces proportionate to the area of their premises. Conversion of such open spaces fully or partly for any other purpose and more specifically for commercial purpose is therefore prohibited under the Regulations which are having statutory force. Thus, the Petitioners' right to life and to have better amenities is directly affected by the impugned permission granted by Respondent No.2.

66. Accordingly, we conclude that the impugned permission/NOC dated 11.12.2020 to the extent it permits alteration/conversion of 9,384 sq. mts. of open space "A", "B", "C" and "D" is illegal and needs to be quashed and set aside.

67. Accordingly, we allow the petition in terms of prayer clause (A) and (A1).

68. Rule is made absolute in the above terms.

69. There shall be no orders as to cost.

BHARAT P. DESHPANDE, J. **G.S. KULKARNI, J.**