

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 06.12.2017

JUDGMENT PRONOUNCED ON : 06.07.2018

CORAM

THE HONOURABLE Mr.JUSTICE M.SATHYANARAYANAN
and
THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

W.P.Nos.17236 of 2013 & 3622 of 2014
and MP.No.1 of 2013 in W.P.No.17236 of 2013
and M.P.No.1 of 2014 in W.P.No.3622 of 2014
and WMP.Nos.5074 & 5075 of 2017 in W.P.No.17236 of 2013

1.The Tamil Nadu Unaided Polytechnic
Management Association (Regd No.340/1997)
Rep. by its President Thiru.S.Selvamani,
S/o.E.Swamikannu
Residing at : No.4, Rajamanickam Street,
West Shanmugapuram Colony,
Villupuram - 605 602.

... Petitioner in W.P.No.17236 of 2013

2.Tamil Nadu Nursery, Primary
Matriculation and Higher Secondary School
(Reg. No.138/2003)
Rep. by its State General Secretary K.R.Nandakumar
No.14/260, II Floor, Peters Road
Royapettah,
Chennai - 600 014.

... Petitioner in W.P.No.3622 of 2014

सत्यमेव जयते
Vs

1.The State of Tamil Nadu
Represented by the Secretary to Government
Housing and Urban Development Department
Fort St.George, Chennai - 600 009.

.... 1st respondent in both WPs

2.The Director of Town and Country Planning
807, Anna Salai, Chennai - 600 002.

.... 2nd respondent in both WPs

3.All India Council for Technical Education
Rep. by its Member Secretary
7th Floor, Chanderlok Building
Janpath, New Delhi - 110 001.

4.The Commissioner of Technical Education
Directorate of Technical Education
Government of Tamil Nadu
Guindy, Chennai - 600 025.

5.The Secretary to Government
Department of Higher Education
Fort St.George, Chennai - 600 009.

.. Respondents 4 to 5 in W.P.No.17236 of 2013

Common Prayer : Writ Petitions filed under Article 226 of the Constitution of India, praying for a writ of declaration to declare that Sections 10 to 32 and Sections 47 to 63 of the Tamil Nadu Town and Country Planning Act, 1971 are void and inoperative.

In W.P.No.17236 of 2013:

For Petitioner : Mr.C.Prasanna Venkatesh
For Respondents : Mr.V.Ayyadurai
Additional Advocate General III,
assisted by Mr.A.N.Thambidurai
Special Government Pleader [RR1, 2 & 5]

In W.P.No.3622 of 2014:

For Petitioner : Mrs.N.Mala
for Mr.M.Venkadesh
For Respondents : Mr.V.Ayyadurai
Additional Advocate General III,
assisted by Mr.A.N.Thambidurai
Special Government Pleader [RR1 & 2]

COMMON JUDGMENT

[Judgment of the Court delivered by N.SESHASAYEE, J.]

1. In these petitions, the challenge is directed against the Constitutionality of certain provisions of the Tamil Nadu Town and Country Planning Act, 1971 (henceforth would be referred to as the TCP Act, for brevity), and consequently their legitimacy for functional existence post the Constitution 73rd Amendment.

A Facts:

2.1 W.P.No.17236 of 2013: The petitioner is a registered Society of Unaided Polytechnic Managements, with over 300 members who run and manage unaided Engineering Colleges consistent with the norms prescribed by the AICTE. As per the Rules of the AICTE, more precisely Rule 2.1 (b) & (c), one who proposes to establish an engineering college is required to produce building approvals obtained from the Competent Authorities, and this is a pre-condition for obtaining requisite approval from the AICTE. The members of the petitioner Society have established technical institutions and they had applied for the approval to the AICTE based on the building approvals granted by the Executive Authority of the Panchayat.

2.2 The petitioner in the connected matter in W.P.No.3622 of 2014 is an Association and registered under the Tamil Nadu Societies Registration Act, 1975. Its primary function is to work for the welfare of Nursery, Primary, Matriculation and Higher Secondary Schools situated in Tamil Nadu and its members run private schools in different parts of Tamil Nadu. For construction of school buildings in Panchayat area, they have obtained permission under Rule 25 of the Tamil Nadu Panchayat Rules.

3. While so, the Director of Town and Country Planning has caused issuance of notice under Sec. 56 of the Tamil Nadu Town and Country Planning Act, 1971, to the effect that the constructions have been made without obtaining any permission from Town Planning Authorities, and that an action would be initiated under Sections 56(2), 57 for locking, sealing and demolition of their respective buildings where they run their respective educational institutions, and for initiating punitive action under Section 88 of the Act.

4. That these notices lack legitimacy in law as their source, namely the Town and Country Planning Act itself run counter to the Constitution 73rd Amendment. In both the writ petitions, petitioners seek a declaration that Sections 10 to 32 and Section 47 to 63 of the Tamil Nadu Town and Country Planning Act 1971 (henceforth would be referred to as the TCP Act) are void and inoperative on grounds of Unconstitutionality.

B. Contentions against Constitutionality:

5. In the course of their arguments, however, the petitioners in both the cases confined their prayer on the constitutionality-issue to Sec.49 and Sec.111(3)(b) of the TCP Act and hence the narrative is restricted to them.

6. The petitioners contend that the notices issued by the Town Planning Authority threatening to invoke Secs.56(2), 57 and 88

of the TCP Act are incompetent since, consequent to the Constitution (Seventy-Third & Seventy-Fourth) Amendment Acts, they can have only a hollowed and inoperable statutory existence. This is their core idea. And, it must be underscored that nowhere, and at no time, did the petitioners contend that the Constitution 73rd Amendment has rendered the entire TCP Act irrelevant or invalid.

7.1 The constitutionality-issue that the petitioners raise has a legislative setting. Panchayats have been units of local government from time immemorial in India. As time glided through the pages of history, they gained statutory status, with statutes governing their constitution, existence and powers. Then descended on the Indian Constitutional panorama, the Constitution 73rd and 74th Amendments, commonly referred to as Panchayati Raj Amendments, creating tectonic shifts in the conceptualisation of the local bodies from a prevailing understanding as units of local governance to an empowered, self-governing Constitutional institutions. These amendments introduced Part IX and IX-A to the Constitution, the former concerning the Panchayats and the latter with the Municipalities. Through its 73rd Amendment, Constitution has made a declaration that the Panchayats be endowed with powers of self-governance and directed that it be accomplished through the legislative process of the State legislatures. Article 243-G in Part IX of the Constitution requires the State legislature to make law to endow the Panchayats with powers of self-governance which may provide for the devolution of powers and responsibilities upon the Panchayats subject to such conditions as the State Legislature may impose. Such powers so granted may include matters listed in the Eleventh Schedule. 243-W is worded in pari materia but deal with the Municipalities, and there the power which the State enactment may endow the Municipalities with, may include matters listed in the Twelfth Schedule. The ensuant consequence is that it has now become mandatory for the State legislatures to make laws to translate the Constitutional idea of endowing powers of self-governance into a functional reality.

7.2 Article 243-N of the Constitution provided that where any law relating to Panchayat which is in force before the commencement of Constitution 73rd Amendment and has since become inconsistent with Part IX thereof, will be in force till it is amended or repealed by the competent legislatures or competent authority, or until the expiry of one year from the commencement of Constitution 73rd Amendment, whichever is earlier. This would imply that any statute whose provisions run counter to the theme of Part IX of the Constitution can have an extended life of one year from the date of commencement of the Constitution 73rd Amendment Act, and not beyond it.

7.3 The Constitution 73rd Amendment came into effect on 24-04-1993. About couple of days short of the expiration of the one year period stipulated in Article 243-N, the State Legislature brought in the Tamil Nadu Panchayat Act, 1994 (hereinafter would be referred to as Panchayat Act), repealing the Panchayat Act, 1958. Under the powers granted to the Government in Sec.242 thereof, Panchayat Building Rules, 1997 (henceforth would be referred to as Building Rules) were framed. The Building Rules vested the Executive Authority of the Panchayat, who by definition is the President of the Panchayat, with powers to grant permission for construction of buildings.

7.4 Rule 25 of the Building Rules pertains to grant of permission for public buildings, which, for the present, may be broadly understood as buildings to which the public may have access. Educational institutions fall under this class of (public) buildings. Rule 25 stipulates that an applicant for construction of any public building is required to follow the Multi-Storeyed and Public Building Rules, 1973, framed under the provisions of Tamil Nadu District Municipalities Act, 1920. Then it turns to the Authority in whom it vests the powers to grant permission for construction of such buildings, and names the Executive Authority of the Panchayat as the Authority to grant permission for the construction of public buildings. It however, adds a rider to it and directed that the Executive Authority shall not grant approval without consulting the Joint Director or Deputy Director of Town and Country Planning before granting approval for construction of public buildings.

7.5 The Tamil Nadu Town and Country Planning Act, 1971, is a statute of pre-Constitution 73rd Amendment times. Sec.49 thereof requires that any person intending to construct any building should apply and obtain permission of the Authorities constituted under the said Act. Under Sec.111(3)(b) of the Act, any violation of the provision of the TCP Act is declared unlawful and consequently, a construction made violating, ignoring or avoiding Sec.49 of the TCP Act will invite the statutory wrath of the Act, and instantly expose these buildings to the peril of statutory consequences - locking, sealing and demolition, besides penalising the violators.

8. The petitioners peg their contention on Constitutionality-issue right here. They would contend that Sec.49 along with Sec.111(3)(b) have now come into direct conflict with the Panchayati Raj Amendments and they cease to have operational competence beyond one year period referred to earlier. Blending law with logic, they contend:

- Given the fact that the local bodies are vested with the powers of self governance, and in a setting where the Panchayat Building Rules have vested the power to grant permission for construction of Public buildings to the Executive Authority of the Panchayat, an applicant seeking permission for construction of public buildings only needs to apply to the Executive Authority for obtaining permission. There is no need for him to obtain the approval for the constructions from the Town Planning Authority under Sec.49 of the TCP Act additionally.
- All that the statute requires is that, the Executive Authority of the Panchayat should obtain prior concurrence from the Director of the Town Planning in the case of development of a land in non-planning area, or consult the Joint Director or Deputy Director of Town Planning for grant of permission for public buildings, as the case may be. This has to be done by the Panchayat/the Executive Authority internally, and it does not require an individual to apply separately to the Town Planning Authority.
- When it is not required of an individual to apply under sec.49 of the TCP Act, then the consequences spelt out under Sec.111(3)(b) can never be unleashed. Necessarily, the Town Planning Authorities can neither invoke Sections 56, nor 57 nor 88 of the TCP Act. When the provisions are specifically made by the State Legislature to endow the Panchayats with powers of self-governance, the provisions under Sec.49 and Sec.111(3)(b) cannot have a stealthy existence to interfere with powers of self-governance of the Panchayats.
- While granting permission as indicated above, if the Executive Authority of the Panchayat has failed to obtain the prior concurrence from, or consult, as the case may be, such Town Planning Authority as are specified in the statute, it may throw open legal implications, but still it should not be let to impact the rights of the applicants of the building-permission or lay-out approvals, for the failure to obtain concurrence under Rule 3 or consult in terms of the Proviso to Rule 25 of the Building Rules is internal to the office of the Executive Authority and not due to the default of the applicants.

9. The conflict between the two legislations is made apparent when notices were issued by the TCP Authorities threatening to initiate punitive actions for non-compliance of Sec.49 of the TCP Act. After the Constitution 73rd Amendment and the consequent legislative response in Panchayat Act, 1994, followed by framing of the Building Rules, there is a shift in the point

where applications have to be made and permissions are to be given and accordingly the window to present the applications are moved from the TCP Authorities to the office of the Executive Authority of the Panchayat. And, inasmuch as the Panchayat Act and the Rules framed thereunder owed their existence in the Constitution 73rd Amendment, they will prevail over the TCP Act. This would imply that Sec.49 of the TCP Act should yield to the Panchayat Act and the Building Rules framed thereunder, and it is no more permissible for the TCP Authorities to insist that an applicant for construction of buildings should approach them for obtaining permission. These authorities can no longer afford a walled existence, far removed from the reality that has edged them out, and should start submitting to the spirit of self-governance of Panchayats as manifested in the Panchayat Act, and in that context, the Building Rules too.

10. Stretching their contention, the counsel for the petitioners argued that Sec.112 of the TCP Act does not envisage that the TCP Act is enacted with the contemplation of a perpetual existence. It provides that the Planning Authority has been created for a particular and limited purpose and that it could be dissolved once the purpose is achieved. In effect the TCP Act is a transient legislation for achieving a specific object or purpose, and its relevance would die on achieving the intended object. Hence, the provisions of the TCP Act should not be let to cloud the powers of a self governing Panchayat.

11. To make it short, an applicant only needs to make one application and this should be made only to the Executive Authority of the Panchayat, and there is no need for him to approach the Town Planning Authority under Section 49 of the TCP Act any longer. Any insistence that permission must also be independently obtained under Sec.49 of the TCP Act is an invasion on the Constitutional theme of self governance as manifested in the Panchayat Act and the Building Rules, and hence, both Sec.49, the invading provision, and its allied back-up provision in Sec.111(3)(b) which spells the consequence of non-compliance of Sec.49, should be declared unconstitutional.

Contentions and Argument in defence of Constitutionality:

12. In the common counter filed in both the cases, it is contended:

- Under Sec.47 and 47-A of the TCP Act, an applicant seeking permission for the formation of a layout, should apply to the local body, yet the latter should also obtain concurrence of the Director of Town Planning. Any violation thereof would invite the consequences under Sec.111(3)(b) thereof necessarily, if not automatically.

- As per Appendix E, Table No:2, Item 7 of Rule 13 of Multi-storied and Public Building Rules, 1973, vehicle parking requirements for any institutional buildings has to be assessed by the local body in consultation with Director under the TCP Act.
- The Director of the Town and Country Planning, while granting permission for construction of public buildings is required to verify the due compliance of all the Rules and Regulations framed in relation to this class of buildings with particular focus, both on the structural safety and the safety of those who access these buildings. In addition, he assesses the Amenities Charges payable to the Government too.
- So far as Article 243-G goes, it only requires that the State 'may' make laws, and there is no direction that the State 'shall' make laws for endowing powers of self governance to the Panchayats. Again it has granted the State legislatures the power to provide such conditions as it may deem fit to such powers of self governance. In other words, even as per the Constitutional scheme of things, powers of self governance that the Panchayat may enjoy is not absolute.
- While Tamil Nadu Panchayat Act and the Rules framed thereunder have granted the power for granting permission to the local authority, it is still required to ensure that such buildings conform to the planning parameters and are consistent with the objectives of Master Plans made for a larger area. The powers available under Section 54 and 56 of the TCP Act are therefore, adjunct to the duty cast on the Authorities constituted under the TCP Act.
- So far as the application of Sec.111 of the TCP Act goes, in any event it will have a overriding effect on other statutes.

13. Expatiating his contentions, the Additional Advocate General painstakingly took this Court through the scheme of the entire TCP Act and argued:

- That the subjects pertaining to which the power of self-governance of the Panchayats is specified in the Eleventh Schedule, and those that concern the Municipalities (Refer: Part IX-A of the Constitution) in Twelfth Schedule. If these schedules are compared, Item 2 of the Eleventh Schedule is differently worded from the expressions used in Item 1 of the Twelfth Schedule. While in the case of Municipalities, 'Urban Planning including Town Planning' is

a specific subject, Item 2 of the Eleventh Schedule (pertains to Panchayats) there is no reference to Town planning and all it relates to is "land Development, implementation of land reforms, land consolidation and soil conservation". If Item 2 of the Eleventh Schedule is read as a whole, in the context of Article 243-G of the Constitution, it relates to those that pertain to the self-governance of Panchayats in relation to agriculture, economic development and social justice programmes. In other words, the Parliament is careful in not including matters relating to Town Planning when it structured the design of a self-governing Panchayat. While it laid thrust on agriculture-related subjects as concerning the Panchayats, in the case of Municipalities it made a conscious decision to include matters relating to Urban Planning including Town Planning in the Twelfth Schedule. Soil conservation and consolidation of fragmented land holdings are purely agriculture-related activities, and they cannot be equated with Town Planning.

- Secondly, even the Building Rules which the petitioners rely on, do not exclude the role of Town Planning Authorities since the Executive Authority of the Panchayat is still required to consult the Town Planning Authority before grant of permission for construction of public buildings, of which the educational institutions are a specified category of public buildings. Even Article 243-G of the Constitution requires the State to enact laws for endowing the Panchayats with power of self-governance but "subject to such conditions" as may be specified therein with regard to preparation of plans for economic development and social justice or implementation of schemes relating to them." This, in other words, would mean that the Constitution, even as it envisioned a self governing Panchayat, yet did not think of creating a Panchayat endowed with unlimited powers of self governance. This condition finds expressions in the Proviso to Rule 25 of the Panchayat Building Rules, and consequently the purpose or the necessity behind Sec.49 of TCP Act has not ended. Hence, if Sec.49 is violated, the consequences under Sec.111(3)(b) is bound to visit. It may, therefore, mean that no issue of constitutionality is involved if approval of the Town Planning Authority is required to be obtained under Sec.49 of the TCP Act.

DISCUSSION AND DECISION:

14. The controversy is set forth in the paragraphs above. Has then Sec.49 along with Sec.111(3)(b) of the TCP Act been stripped of their statutory significance and pushed to the precipice of Constitutional irrelevance and invalidity?

15. The fact that has set in motion the ongoing legal proceedings which now threatens the continued existence of Sec.49 and Sec.111(3)(b) of the TCP Act is traceable to the issuance of notices by the Town Planning Authority - the second respondent, to be precise. This fact is not disputed. If this notice is considered legally sustainable then it implies that the petitioners and those who are similarly placed should apply for construction of the public buildings to two Authorities: First, to the Executive Authority of the Panchayat under the Panchayat Building Rules, and the other to the Town Planning Authority under Sec.49 of the TCP Act.

16. The members of the petitioners' Associations claim that they have applied and obtained permission for the construction of their buildings where their educational institutions function (statutorily termed public buildings), only from the Executive Authority of the Panchayat, and not from the Town Planning Authority under Sec.49 of the TCP Act. If permission for the construction of their buildings were to be obtained separately from both the authorities, then the sword of Damocles in Sec.111 (3)(b) of the TCP Act will be hanging on them to destroy their plans to run their institutions.

17. This has landed them in a situation where they appear to consider that challenging Constitutionality of Sec.49 and 111(3)(b) of the TCP Act as strategically inevitable. It is now required to be stated:

(a) Whether one who proposes to construct, reconstruct or alter an existing public building should approach two different Authorities under two different enactment?

(b) Whether any insistence on dual permissions from twin authorities independent of each other creates internal imbalance in the working of two different statutes operating in the same area.

(c) After the Constitution 73rd Amendment, is it still permissible to insist on obtaining permission from the TCP authorities under Sec.49 of the Act, a requirement of pre-73rd Amendment era, and does it create a contradiction vis a vis the Constitutional mandate of granting the power of self governance to the Panchayats as envisaged in Article 243-G?

An overview of statutory setting:

18. As has been introduced in paragraph 7.1 above, a stroke of destiny in the annals of Constitutional history rewrote the

definition of Panchayats and the Municipalities from being creations of statutes to self-governing institutions, that the Constitution prides. The Constitutional design to achieve its theme of self governance is through its 73rd and 74th amendments and its introduction of parts IX and IX-A to the Constitution.

19.1 The TCP Act has its own reasons for its enactment and existence. The Tamil Nadu Town and Country Planning Act, 1971, has been in force for over two decades before the Constitution 73rd and 74th Amendments came into force on 24-04-1993. As would be seen later, the legislative power for enacting this law is traceable to Item 18 of List II and Item 20 of List III of the seventh Schedule. The preamble to the TCP Act reads:

"An Act to provide for planning the development and use of rural and urban land in the State of Tamil Nadu and for purposes connected therewith."

For working this objective, the statute has made a broad classification called Planning and Non-Planning area: While the former is defined in Sec.2(30), the latter is not, and it must be understood as one not falling within the planning area. In Sec.2(30) the definition of Planning area is:

"planning area" means any area declared to be a regional planning area, local planning area or a site for a new town [or the Chennai Metropolitan Planning Area] under this Act;

Categorising an area as a Regional Planning Area or a Local Planning Area is population-dependent, and it is formed by a declaration of the Government under Chapter III of the TCP Act. The idea behind such declaration chiefly concerns with the development of such area, be it Regional or Local Area, for industrial or commercial purposes, though there can be any other purposes which the Government may prescribe. The process commences with a notification of the Government under Sec.10(1). The notification, according to Sec.10(2) shall define the geographical area which is proposed to be designated as the Regional or Local Area. The final notification declaring an area as Regional or Local area would be made under Sec.10(4) of the TCP Act. Thereafter, the Planning authorities constituted under the Act would prepare necessary development plans, prepare a Master Plan (Sec.17) and Development Plans (Sec.19).

19.2 The next aspect is to ensure that any development intended by any person conforms to the development plans. The need for obtaining permission for construction of buildings, including public buildings falls within this. It brings in a restriction through regulation on the user of the land and this is provided in Sec.48 of the TCP Act :

"Section 48 : Restrictions on buildings and lands in the area of the planning authority :- On or after the date of the publication of the resolution under sub-section (2) of section 19 or of the notice in the Tamil Nadu Government Gazette under Section 26, no person other than any State Government or the Central government or any local authority, shall, erect, any building or make or extend any excavation or carry out any mining or other operation, in on, over or under any land or make any material change in the use of land or construct, form or layout any work except with the written permission of the appropriate planning authority and in accordance with the conditions, if any, specified therein."

This is followed by a requirement to obtain permission for developing the land, which includes the formation of lay-outs and construction of buildings from the Town Planning Authorities. This is provided in Sec.49, the very provision whose survival is under challenge in these proceedings. It reads:

49. Application for permission

(1) Except as otherwise provided by rules made in this behalf, any person not being any State Government or the Central Government or any local authority intending to carry out any development on any land or building on or after the date of the publication of the resolution under sub-section (2) of section 19 or of the notice in the Tamil Nadu Government Gazette under section 26, shall make an application in writing to the appropriate planning authority for permission in such form and containing such particulars and accompanied by such documents as may be prescribed.

(2) The appropriate planning authority shall, in deciding whether to grant or refuse such permission, have regard to the following matters, namely:-

(a) the purpose for which the permission is required;

(b) the suitability of the place for such purpose;

(c) the future development and maintenance of the planning area

(3) When the appropriate planning authority refuses to grant a permission to any person, it shall record in writing the reasons for such refusal and furnish to that

person, on demand, a brief statement of the same."

Sec.49 of the TCP Act insists that any person interested in developing any land or constructing any building should apply to the appropriate Town Planning Authority for permission. As per Sec.111(3)(b) any violation thereof would render anything done unlawful. It is dealt with towards the end of the order. Accordingly, if no permission for construction is obtained under Sec.49, or if the terms of the approval granted is violated during construction, it would amount to unlawful construction and consequently would invite the application of Sec.56, 57 and 88 of the Act - locking, sealing and demolition besides penal consequences.

20. The TCP Act is a general legislation on town planning. Till now it hardly faced a threat to its application, even though its performance may not be appreciable. Those who believe in the rule of law and choose not to blindfold themselves to the reality of the times, will agree that its working presents a disappointing score-card. This is partly due to the irresponsibility of the substantial number of the citizenry who do not believe in obtaining permission under sec.49 of the TCP Act, or violate the permission obtained with audacity and impunity and with no sense of shame, and partly due to the indifference and lack of vigilance on the part of the Authorities entrusted with the duty to arrest the growth of unlawful buildings.

21. Reverting to the topic, as long as the Panchayats existed as a statutory creation of the State legislature, the TCP Act had a free reign. But the Constitution 73rd Amendment, reined in all those laws, (to which the petitioners add Sec.49 and Sec.111(3)(b) of the TCP Act) to the extent it came into conflict with the powers of self-governance of the local bodies, and contextually that of the Panchayats. Articles 243-N and 243-ZF of the Constitution, the former concerning the Panchayats, and the latter with the Municipalities, provide that any provisions of any law relating to Panchayats or the Municipalities, as the case may be, that are in force immediately before the Commencement of the Constitution 73rd and 74th Amendments, and which are inconsistent with Part IX or IX-A, as the case may be, shall have force until amended or repealed by the Competent Legislature or until the expiration of one year, whichever is earlier. Article 243-N, (and Article 243 ZF which is worded in pari materia, and deals with Municipalities) reads:

243-N. Continuance of existing laws and Panchayats - Notwithstanding anything in this Part, any provision of any law relating to Panchayats in force in a State immediately before the commencement of the Constitution (Seventy-third Amendment) Act, 1992, which is inconsistent with the provisions of this Part, shall

continue to be in force until amended or repealed by a competent Legislature or other competent authority or until the expiration of one year from such commencement, whichever is earlier:

Provided that all the Panchayats existing immediately before such commencement shall continue till the expiration of their duration, unless sooner dissolved by a resolution passed to that effect by the Legislative Assembly of that State or, in the case of State having a Legislative Council, by each House of the Legislature of that State."

To state it slightly differently and with a degree of emphasis, any law that is inconsistent with Part IX of the Constitution can have an extended operational life for one year from 24-04-1993, the date on which these Constitutional Amendments came into force. The State legislatures are therefore under a Constitutional compulsion to trim its laws to meet the necessities of the Panchayat Raj Amendments to the Constitution, either by amendment or by repeal. The Legislature of Tamil Nadu opted for the repeal option, repealed the Panchayat Act, 1958, and replaced it with the Panchayat Act, 1994. This Act came into force on 22-04-1994, exactly one day before the expiry of the one year period stipulated.

22. Sec.242 of the Panchayat Act vested the Government with the powers to make Rules on several subjects, and Sec.242(xxxiii) in particular has vested the Government with the power to make Rules "as to regulation or restriction of building and the use of sites for building." On 18-12-1997, The Tamil Nadu Panchayats Building Rules, 1997 (being referred to as "Building Rules" in this order) were brought into force. Rule 2(e) defines an Executive Authority to mean the President of the Village Panchayat. The other salient features of these Rules that contextually bear relevance are:

- Under Rule 3, the power of approving an application for lay-out of sites is vested in the Executive Authority, who by definition is the President of the Panchayat, but also enjoins a restriction when it insists that the Executive Authority of the Panchayat should obtain the prior concurrence of the Director/Joint Director/Deputy Director of Town and Country Planning.
- For construction, reconstruction or alteration of buildings other than Multi-storeyed and Public Buildings in the Panchayats, as per Rule 4 of the Building Rules, permission must be obtained from the Executive Authority / the President of the Panchayat.

- Multi-storeyed and Public buildings form a class by itself and are treated differently. Rule 2(g) of the Panchayat Building Rules, defines the 'Public Buildings' to mean "any building to which the public or any class or section of the public are granted access or any building which is open to the public or any class or section of the public", and inter alia included 'Educational Institutions including Schools or colleges, hostel' etc., Inasmuch as the petitioners are running Educational Institutions, they instantly fall under the category of public buildings.
- Rule 25 deals with Multi-storeyed and public buildings. This by reference, makes applicable the Multi-storeyed and Public Buildings Rules, 1973, framed under the Tamil Nadu District Municipalities Act, 1920, to the multi-storeyed and public buildings proposed to be constructed in the Panchayats. Accordingly, every person intending to apply for the construction, reconstruction, add to or alter any buildings falling in this class are required to follow the Multi-Storeyed and Public Building Rules, 1973. In Rule 25, the power to grant approval for the construction of public buildings is vested in the Executive Authority but is made subject to a rider introduced in the Proviso which insists that the Executive Authority shall not grant permission without consulting the concerned Joint director or Deputy Director of Town and Country Planning."

23. According to the Petitioners, the window to be approached for obtaining approval for the formation of lay-outs or construction of buildings, from the stand point of one who either proposes to form a lay-out or construct or reconstruct a building, is that of the President of the Panchayat since the Building Rules have vested the power only in him to grant permission, be it Rule 3 (dealing with approval of lay-outs) or Rule 4 for grant of permission for construction of buildings other than public buildings, or Rule 25 pertaining to Multi-storeyed and Public Buildings, the exclusive power for granting permission continues to rest with the President of the Panchayat. Rule 25 may now be reproduced:

25. Multi-storeyed and public buildings:- Every person intending to construct, reconstruct, add to or alter any public building other than Government building shall follow the provisions of the Multi-storeyed and Public Building Rules, 1973 issued under the Tamil Nadu District Municipalities Act, 1920 (Tamil Nadu Act V of 1920):

Provided that the Executive Authority shall not grant approval for construction, reconstruction, addition

or alteration of any such building without consulting the concerned Joint Director or Deputy Directory of Town and Country Planning."

The Constitutionality-issue:

24. Has then Sec.49 alongside Sec.111(3)(b) of the TCP Act come into conflict with the Constitution that they should be declared unconstitutional? Petitioners' accusation of unconstitutionality is derived as a consequence when Sec.49 and Sec.111(3)(b) TCP Act are pitted against Rule 25 of the Building Rules and tested for their compatible co-existence on the plane of Articles 243-G and 243-N in Part IX of the Constitution.

25. Article 243-N in Part IX of the Constitution (for the text of the provision paragraph 21 above may be referred to), unlike Article 13(1) or (2) of Part III, does not declare that any law inconsistent with Part IX is void. In a language vastly different from Article 13, it spells the consequence which a law inconsistent with Part IX may face: It will be valid, despite the inconsistency it bears to Part IX for one year, or till it is amended or repealed by a competent legislature or competent authority, and guides this Court in the process to an inference that a law inconsistent with Part IX does not become void ab initio but merely becomes non-operational. See Keshava Madhava Menon Vs State of Bombay [1951 SCR 228 : AIR 1951 SC 128] and Mahendra Lal Jaini Vs State of Uttar Pradesh [AIR 1963 SC 1019].

26.1 Where then, does the inconsistency sprout from? Article 243-N, may not be the fountain head of the alleged inconsistency since it provides only the consequence, an inconsistency that it deals with invites. Article 243-G is significantly relevant here. It reads:

243-G. Powers, authority and responsibilities of Panchayats:- Subject to the provisions of the Constitution, the Legislature of a State may, by law, endow the Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, at the appropriate level, subject to such conditions as may be specified therein, with respect to

(a) the preparation of plans for economic development and social justice;

(b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in

relation to the matters listed in the Eleventh Schedule."

Article 243-G in essence provides: (a) The State legislature may make law for endowing the Panchayats with power of Self-governance; and (b) that a law legislated in terms of Article 243-G, may contain provision for devolution of powers and responsibilities upon Panchayats.

26.2 The Oxford Dictionary defines "devolution" as: "Transfer or delegation of power to a lower level, especially by central government to a local or regional administration". Is then the power granted to the Executive Authority/ the Panchayat President under Rule 25 of the Building Rules, a power endowed on it by devolution, and if so, where does the TCP Act figure in, post such devolution?

27. This necessitates a short detour on interpretation of the legislative power under the Seventh Schedule. The earliest authority, that may well have set the tone for later judicial thinking is that of the Privy Council in *British Coal Corporation v. The King* [(1935) A.C. 500 (518)]. There, in the context of the Constitution Act of Canada of 1867, the Judicial Committee was called upon to interpret whether a provision which abolished the right of appeal to the Privy Council from any judgment or order of any court in any criminal case was *intra vires* the legislative powers. Dealing with the entries, Lord Viscount Sankey held,

"Indeed, in interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted."

This interpretation in aid of granting expansive meaning to the words denoting the legislative power found acceptance by the Federal Court in *United Provinces V. Mt. Atiqa Begum and Others*, [AIR 1941 FC 16] when it was called upon to interpret Government of India Act, 1935. Speaking through Gwyer C.J , the Court declared: (at page 25)

"...The subjects dealt with in the three legislative lists are not always set out with scientific definition. It would be practically impossible for example to define each item in the Provincial List in such a way as to make it exclusive of every other item in that list, and Parliament seems to have been content to take a number of comprehensive categories and to describe each of them by a word of broad and general import. In the case of some of these categories, such as "Local Government," "Education,"

"Water" "Agriculture" and "Land," the general word is amplified and explained by a number of examples or illustrations, some of which would probably on any construction have been held to fall under the more general word, while the inclusion of others might not be so obvious. Thus "Courts of Wards" and "treasure-trove" might not ordinarily have been regarded as included under "Land," if they had not been specifically mentioned in item 21. I think however that none of the items in the lists is to be read in a narrow or restricted sense, and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. I deprecate any attempt to enumerate in advance all the matters which are to be included under any of the more general descriptions; it will be sufficient and much wiser to determine each case as and when it comes before this Court..." (emphasis by us)

In *Shamsher Singh & Another Vs State of Punjab*, [1975] 1 S.C.R. 814] Justice V.R Krishna Iyer wrote:

"Not the Potomac, but the Thames fertilizes the flow of the Yamuna, if we may adopt a riverine imagery."

The Thames did fertilize the banks of Yamuna, as this principle was willingly adopted by the Supreme Court in *Sri Ram Ram Narain Medhi Vs State of Bombay*, [AIR 1959 SC 459]. Bhagwati J. held,

"...It is well settled that these heads of legislation should not be construed in a narrow and pedantic sense but should be given a large and liberal interpretation..."

This is not a principle of the mundane variety, but a beacon light leading the way. While interpreting Item 18 of List II of the Seventh Schedule, which bears substantial similarity to Item 21 of List II in the Government of India Act, 1935, in *Atma Ram Vs State of Punjab*, [AIR 1959 SC 519 : 1959 SCR Suppl (1) 748], another Constitutional Bench of the Supreme Court relied on the interpretation placed on this entry by the Privy Council in *Megh Raj Vs Allah Rakhi*, [AIR 1947 PC 79 : 74 I.A. 12]. where the Privy council held:

"As to item 21, " land ", the governing word, is followed by the rest of the item, which goes on to say, 'that is to say'. These words introduce the most general concept-' rights in or over land'. Rights in land' must include general rights like full ownership or leasehold or all such rights.

Rights over land' would include easements or other collateral rights, whatever form they might take. Then follow words which are not words of limitation but of explanation or illustration, giving instances which may furnish a clue for particular matters: thus there are the words relation of landlord and tenant, and collection' of rents ".

A decade later, in *Maneklal Chhotalal and Others Vs M.G. Makwana and Others*, [AIR 1967 SC 1373], the Supreme Court was required to decide the Constitutional validity of the Bombay Town Planning Act, 1954, (Bombay Act XXVII of 1955) and the amendments carried thereto by the Bombay Town Planning (Gujarat Amendment and Validating Provisions) Act, 1963. Relying on the *Sri Ram Ram Narain* case [AIR 1959 SC 459] and the *Atma Ram* case [AIR 1959 SC 519], the Supreme Court upheld their Constitutional validity, in the course of which it held:

"41. The various aspects dealt with in the Act, in question, can be considered to deal with 'land', and, accordingly, the competency of the State Legislature to enact the measure, in question, can be found in Entry No. 18.

42. We are further satisfied that the competency of the State Legislature can also be rested under Entry No. 20, of List III, which is as follows:

"20. Economic and social planning".

In *Principles of Town & Country Planning* by Lewis Keopl the scope of planning has been stated thus:

"Planning has both social and economic aims. Socially, successful Planning tends to make people's lives happier because it results in a physical environment which conduces to health, which allows convenient and safe passage from place to place, which facilitates social intercourse and which has visual attractiveness. The economic results of good Planning also, of course, conduce to increased happiness, but not quite so directly. A proper spatial relationship between the communities in a region and the constituent parts of a town, compactness of development, and an efficient arrangement of communication routes all result in human activities being carried on more efficiently and less wastefully, and thus increase wealth;"

In *Corpus Juris Secundum*, Vol. 70, the word "planning" is stated to mean:

"In connection with Municipalities, the term connotes a systematic development contrived

to promote the common interest in matters embraced within the police power, with particular reference to the location, character, and extent of streets, squares, parks, and to kindred mapping and charting."

In Encyclopedia Britannica, Vol. 5, p. 815 "City Planning" is stated to mean :

"the guidance of the growth and change of urban areas. As such, it is aimed at fulfilling social and economic objectives which go beyond the physical form and arrangement of buildings, streets, parks, utilities and other parts of the urban environment. City planning takes effect largely through the operations of government and requires the application of specialized techniques of survey, analysis, forecasting and design. Thus city planning may be described as a social movement, as a governmental function, or as a technical profession. Each aspect has its own concepts, history and theories. Together they fuse into the effort of modern society to shape and improve the environment within which increasing proportions of humanity spend their lives : the city."

28. Therefore, it is beyond cavil that the State legislature's source of legislative power to make a law on Town Planning is to be traced to Item 18 List II and Item 20 List III of the Seventh Schedule. It is here, Item 2 of Eleventh Schedule signifies its relevance. It reads:

"Land Improvement, implementation of land reforms, land consolidation and soil conservation."

As seen earlier, the power to legislate on town planning is held to be traceable to Item 18 List II of the Seventh Schedule, and necessarily, the expression "land improvement" in Item 2 Eleventh Schedule cannot have a meaning different from the one discernible from item 18 List II of the Seventh Schedule, for, what is enacted under items 18 of List II is now transferred to the Panchayats under Item 2 of the Eleventh Schedule. In other words item 2 of Eleventh Schedule must be understood as accommodating the widest meaning - from agriculture to town planning, within it.

29. Guided by an understanding of this judicial interpretation, an integrated reading of Sec.49 of the TCP Act, the Panchayat Act, 1994 with its Rules, and Article 243-G of the Constitution

may now be attempted. It then would leave an inference that Rule 25 of the Building Rules is a statutory contrivance devised for the limited devolution of State's authority on the subject of Town Planning upon the Panchayat, as an inevitable derivative. It is a legislatorial statement that resonates to the rhythm of the Constitution. This devolution of powers may not be absolute, still it is not a symbolism; nor are they pretensions. This transfer of power is real and functional, as it is driven by the Constitutional quest for constituting self-governing Panchayats.

30. If both Rule 25 of the Building Rules and Sec.49 of the TCP Act are now read, it is evident that both cannot operate in the manner the provisions are worded. If the contention of the learned Additional Advocate General that sec.49 of the TCP Act continues to have the same force as it was before the framing of Rule 25 of the Building Rules is weighed for its merits, then there is absolutely no need to append a Proviso to Rule 25. Secondly, if both Rule 25 of the Building Rules and Sec.49 of the TCP Act are let to operate simultaneously, it then presents a seeming possibility of the power of the Executive Authority of the Panchayat losing its sheen under the shadow of the TCP Act. And in this process, the primacy of the Executive Authority of the Panchayat as the voice of self-governance in the Constitutional sense of his authority is reduced to a shell, with its core robbed by the TCP Act.

31. It is apparent that any interpretative attempt to draw Rule 25 of the Building Rules and Sec.49 of the TCP Act to a point of convergence for their harmonious co-existence will have only a recoiling effect. Now, to retain this conflict in the face of their apparent incompatibility will be a contraindicated consequence that may not be in consonance with the Constitution 73rd Amendment. Apparently it is only a battle for compatible-coexistence that Sec.49 of the TCP Act strives for vis a vis Rule 25 of the Building Rules, and that it does not involve any crisis of constitutionality as has been projected by the petitioners.

In search of statutory harmony

32. Is there therefore, a way to harmonise two different provisions of two statutes for a compatible co-existence? It is the duty of the courts to give effect to every legislative Act and Rules made thereunder, and in a situation where two State legislation operate in the same sphere, Courts should endeavour to harmonise them rationally and objectively.

33. As this Court steps into the sphere of harmonious interpretation, it is required to address a key aspect on it immediately. As a general rule, a legislation cannot be placed at par with a subordinate legislation as they do not share the

same legislative status. Therefore, where there is a conflict between the two, the former will prevail over the latter. If this principle is telescoped into the controversy at hand, it may appear that Sec.49 of the TCP Act is in a zone of safety. But, the contextual setting of Rule 25 of the Building Rules saves it from its supposed vulnerability in an interpretative exercise. This is approached as below:

- Article 243-G of the Constitution, when it declared its intent to endow the powers of self-governance to the Panchayats, it entrusted this responsibility upon the State legislature to achieve it through 'law'. In prescribing this legislative mode, the Constitution has chosen not to distinguish between a principal legislation or a subordinate legislation/delegated legislation, but opted for a generic word in 'law'. This would imply that, the Constitution has concerned itself chiefly with the end, and hence it has not specified the nature and character of such law that it required the State legislature to make. The reason for this course might be that, the power to make law for the Panchayat and the Municipalities emanates only from List II of the Seventh Schedule. Any subordinate legislation, therefore, made to achieve this supreme Constitutional objective, must necessarily be considered as forming part of a wholesome strategy that the State legislature has chosen to adopt. Rule 25 of the Building Rules, given its context and significance, belongs to this category. It is a legislative engine, specially designed to endow the Panchayats with powers of self governance that the Constitution has consciously planted in the conscience of the legislature. If it is to be construed otherwise, it would instantly reduce the Constitutional conceptualisation of Panchayats as empowered units of local self government, illusory and unobtainable.
- Any statutory interpretation which fails to promote the aspirations of the Constitution is an anathema to its supremacy, and is liable to be eschewed. The word 'law' in Article 243-G must therefore, be granted its widest meaning, and must be stretched to the limits of its elasticity, as in the phrase 'existing law' as defined in Article 366 (10) of the Constitution, which finds usefulness in the context of the interpretation of Article 13(2) of the Constitution. This would result in the word 'law' in Article 243-G receiving substantially the same meaning as in Article 366 (10), which reads: "existing law means any law, Ordinance, order, bye law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance order, bye law, rule

or regulation". A narrower meaning of the word 'law' may limit the legislative freedom of the State legislature in making 'law' for the purposes of Article 243-G of the Constitution.

The basic premise that may now be formulated is that Rule 25 of the Building Rules should not be construed as a mere piece subordinate legislation of a common variety, but as part of a substantial legislative strategy for achieving the objective under Article 243-G of the Constitution. This would mean that when compared with the TCP Act, Rule 25 is a special legislation intended for Panchayats.

34. While framing the Panchayat Building Rules, the State legislature/the Government cannot be said have been oblivious to the TCP Act. This is reflected in the fact that it still required the Executive Authority of the Panchayat to obtain the concurrence of the Director of Town Planning Authority under Rule 3 of the Building Rules, and to engage in a consultation with the Joint/Deputy Directors of Town Planning. This now brings into focus the Proviso to Rule 25 of the Building Rules. It is reproduced for a contextual emphasis :

Provided that the Executive Authority shall not grant approval for construction, reconstruction, addition or alteration of any such building without consulting the concerned Joint Director or Deputy Directory of Town and Country Planning."

As argued by the learned Additional Advocate General, the Proviso operates as an in-built limitation on the power of the Executive Authority of the Panchayat to grant permission for public and multi-storeyed buildings as it makes it mandatory for the Executive authority of the Panchayat to make a pre-decisional or a pre-approval consultation with the designated authorities under the TCP Act before granting permission for construction.

35.1 Town planning, and construction according to planning, and compliance of specific Rules and Regulations framed in connection with such constructions are in the realm of specialised domain of administrative activity. They do not operate to stall the construction activities but to regulate them. Therefore, irrespective of who has the authority to grant permission for an intended construction-activity, it is still imperative that Rules regulating the same are complied with. It is here, the legislature in its wisdom introduces a subtle dichotomy between the Sanctioning Authority and the Regulatory Authority, and respect to this wisdom compels that this dichotomy is maintained. This is precisely captured in Rule 25 of the Building Rules where it specifies (i) who shall sanction

the construction of a public or a multi-storeyed building in a Panchayat, and (ii) the need for such sanctioning Authority (the Executive Authority of the Panchayat) to consult the Regulatory Authority. The latter is a specialised job which, besides other aspects, includes guaranteeing the safety to the public who access such buildings. It is brought to the notice of this court that besides Rule 25 of the Building Rules, Rule 13 of the Multi-storeyed and Public Building Rules, 1973, also insists that the local body consults the Director of Town Planning in assessing the vehicle-parking requirements for the institutional buildings. This Court, therefore, is in agreement with the contention of the learned Additional Advocate General that Article 243-G of the Constitution does not visualise a Panchayat with unrestricted powers of self governance, as it grants the State legislature the power to make laws with such conditions as the legislature deems fit but without destroying the soul of self governance.

35.2 It may also be viewed from another angle. The Executive Authority of the Panchayat, who in terms of the Rules would mean the President of the Panchayat, is an elected representative for the time being. He is not required to be qualified, or informed on the technical requirements, or familiar with the Rules and Regulations and their working. And given our political structure, he is also not expected to be informed on this. But, an uninformed exercise of any administrative power is an affront to the Constitution. Infected by arbitrariness, it destroys the fairness in the action, which the Constitution abhors and Courts despise. It is to eliminate the probability of uninformed and arbitrary decision-making by the Executive Authority of the Panchayat, the State legislature has directed that before granting permission for construction, the Executive Authority of the Panchayat should consult those statutory authorities who, by virtue of their office, have acquired special knowledge in the regulatory-field of constructions. Given the context, the Proviso to Rule 25 can not be a statutory formality, but is an indispensable and an inviolable statutory requirement. This is evident from the very choice of expressions through which the statute speaks its mind: "...the Executive Authority shall not grant approval.... without consulting the concerned Joint Director or Deputy Directory of Town and Country Planning." It indeed, opens with a negative phrase.

35.3 To sum it up, if Rule 25 of the Building Rules is viewed intensively, it can be seen that Sec.49 of the TCP Act floats in it like a hologram, and is operating: First, the power of granting permission for construction - the sanctioning power, that the TCP authorities have been exercising stands transferred to the Panchayat under Rule 25. Second, the underlying

regulatory duty that the Town Planning Authority have been performing in the process of granting permission, is pushed to the Proviso to Rule 25 of the Building Rules.

36. The actual harmonisation and negotiating the consequences that may flow from the process is still at a distance. This now takes this court to understand the nature, content and extent of consultation required under the Proviso to Rule 25. According to Oxford English dictionary meaning of consultation is "the action or process of formally consulting or discussing". The broad dictionary meaning of the word "Consultation" is that it is a process of discussing something with someone in order to get their advice or opinion.

37. The word 'Consultation' has visited the Courts for an understanding on what it means in law. A provision for consultation existed in the United Kingdom under the New Towns Act, 1946. Under the said provision, the Local Authorities had to be consulted by the Minister for Town and County planning prior to designating an area as a site in a proposed new town. Challenging the decision of the Minister in identifying an area as a new town on the grounds of non consultation, in Fletcher Vs Minister of Town Planning [(1947) All ER 496] proceedings were initiated before the English Courts. The court while upholding the order, delineated the contours of the words "consultation". It held:

"The word "consultation" is one that is in general use and that is well understood. No useful purpose would, in my view, be served by formulating words of definition. Nor would it be appropriate to seek to lay down the manner in which the consultation must take place. The Act does not prescribe any particular form of consultation. If a complaint is made of failure to consult, it will be for the Court to examine the facts and circumstances of the particular case and to decide whether consultation was, in fact, held. Consultations may often be a somewhat continuous process and the happenings at one meeting may form the background of a later one".

Following this verdict, our High Court in R. Pushpam And Anr. vs The State Of Madras [(1953) 1 MLJ 88,], a locus classicus on the topic, has held:

"The word "consult" implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at least, a satisfactory solution. Such a consultation may take place at a conference table or through correspondence. The form is not material but the substance is

important. It is necessary that the consultation shall be directed to the essential points and to use core of the subject involved in the discussions. The consultation must enable the consultor to consider the pros and cons of the question before coming to a decision. A person consults another to be elucidated on the subject-matter of the consultation. A consultation may be between an uninformed person and an expert or between two experts. A patient consults a doctor; a client consults his lawyer; two lawyers or two doctors may hold consultations between themselves. In either case the final decision is with the consultor, but he will not generally ignore the advice except for good reasons. So too in the case of a public authority. Many instances may be found in statutes when an authority entrusted with a duty is directed to perform the same in consultation with another authority which is qualified to give advice in respect of that duty. It is true that the final order is made and the ultimate responsibility rests with the former authority. But it will not, and cannot be, a performance of duty if no consultation is made, and even if made, is only in formal compliance with the provisions. In either case the order is not made in compliance with the provisions of the Act" (emphasis supplied).

In *R v Brent London Borough Council, ex p Gunning*, [(1985) 84 LGR 168], Hodgson J had to decide whether the decision of the Brent London Borough Council in ordering the closure of two schools was valid. It rested primarily on the lack of full consultation between the parents and the council. The learned judge gave a four pronged test. He held : -

"...First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third,... that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."

In *R v North and East Devon Health Authority, ex parte Coughlan* [(2001) QB 213], the four pronged test was examined again. This was a case concerning the closure of a home for the disabled. Lord Woolf MR, accepting the tests of Hodgson J elaborated and held:

"It has to be remembered that consultation is not

litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

The object behind the consultation, and the roles that a consultor and a consultee should perform have been stated as above. After all, where the statute stipulates how a thing should be done, then it shall be done in that manner and no other, and hence, there cannot be any breach of the Proviso to Rule 25 of the Building Rules.

38. Turning to the Town Planning Authority, its role while offering its advice or opinion during the process of consultation is no ordinary job, as the discussion above would have indicated. In *Madan Mohan Choudhary Vs state of Bihar and Others* [(1999) 3 SCC 396], where the facts are set to an entirely different situation and the ratio declared itself operates on a different point, the Supreme Court has underscored the role of a consultee during the consultation when it emphasised that a consultee "cannot act arbitrarily in giving its opinion ... or else it will be a betrayal of the trust." This would apply to every case of statutory consultation. Neither the consultor nor the consultee are at liberty to reduce the process of consultation to whimsical and farcical ends, lest they become carrier of arbitrariness. Our Constitutional jurisprudence, as in other civilised democracies, understands an action tainted in arbitrariness as a stain on the fairness required of it. This, then would be, a betrayal, not just of the public trust, but also of the Constitutional values and the Rule of Law involved in it. The consultee, therefore, will neither betray the statute, nor the society.

39. When consulted, what may be the aspects on which the Town Planning Authority will offer his inputs to the Executive Authority of the Panchayat? They, in the considered view of this Court, cannot be any different from the parameters that they have hitherto adopted for granting permission under Sec.49 of the TCP Act or such other responsibilities assigned to them on the subject. Their advice or opinion will be found on that material which guided their decisions earlier under Sec.49. This is to mean that the core-responsibility of the Town Planning Authority under Sec.49 of the TCP Act is retained, but

at the functional level, it is shifted from Sec.49 of the TCP Act to the Proviso to Rule 25 of the Building Rules. In essence, the role of operation of the Town Planning Authority is moved from Sec.49 of the TCP Act to Rule 25 of the Building Rules.

40. Once the window is legislatively opened in the Panchayat under the Building Rules for granting permission for construction of public and multi-storeyed buildings, shutters must be dropped on the window through which the Town Planning Authorities have been operating. This legislatively engineered shift, inasmuch as it is part of the process of devolution of powers upon the Panchayats, leaves Sec.49 of the TCP Act without a current need for independent existence for granting permission for construction. Consequently, an individual who proposes to construct a public or a multi - storeyed building in a Panchayat need not apply to the Town Planning Authority under Sec.49 of the TCP Act, and it is sufficient for him to apply to the Executive Authority of the Panchayat. And, once it is applied the Executive Authority should commence the consultative process within the meaning of proviso to Rule 25.

41. Since the Town Planning Authorities assume a role in advisory capacity, has the Executive Authority of the Panchayat any power to veto or supersede it? Technically, a sanctioning authority can override the opinions and advices of an advisory authority. However, the opinion and advice that the Town Planning Authorities would be offering to the Executive Authority of the Panchayat will be on serious issues which may include legal compliances involved in granting permission for construction. Ram Tawakya Singh Vs State of Bihar & Others [(2013)16 SCC 206], is a case where the appointment of Vice-Chancellor and Pro-Vice Chancellor under Bihar State University Act and Patna University Act was challenged inter alia on the ground that the Chancellor did not consult the Government in making appointments in terms of the relevant provisions of both the Acts. The Hon'ble Supreme court then had an occasion to state:

"29.the final decision is with the consultor, but he will not be generally ignoring the advice of the consultee except for good reasons." (emphasis supplied)

In State of Kerala V A. Lakshmikutty [(1986) 4 SCC 632], on an issue involving the duty of the Governor to consult the High Court in the appointment of District Judges on the recommendations of the High court, the Supreme Court held that the State Government cannot reject the views of the High Court except for "good and weighty reasons". Therefore, even though the Executive Authority of the Panchayat may have the power to supersede the views and opinion of the Town Planning Authority

offered to him during the process of consultation, yet he cannot override them except on weighty reasons of demonstrable variety.

42. What this court has now declared is not without its ramifications. There could be instances where buildings might have been constructed without the Executive Authority of the Panchayat following the compulsory consultative process and granted permission. A lay citizen might not be aware about absence of pre-approval consultation under the Proviso to Rule 25 of the Building Rules. Still, Rule of law cannot be compromised.

43. It is felt that the State legislature, in its anxiety to enact a law in terms of Article 243-G of the Constitution, and in its endeavour to integrate the inputs of the Town Planning authority in the process of decision making by the sanctioning authority under Rule 25 of the Building Rules, appeared to have lost sight of the need to ensure that TCP Act and the Panchayat Building Rules, 1997, compliment each other and support their harmonious mutual co-existence. A quarter of a century after the Constitution 73rd amendment, this Court is now required to address one such conflict in this case, but there could be more. The legislature, or the Government, should now step in to resolve the areas of conflict in the operation of both the legislations, and to address the consequences that they may throw open. However, till this is done, the vacant space left by the absence of a legislation, including a subordinate or a delegated legislation, should not let to be exploited, leaving Rule of law and the substantial justice involved stranded in helplessness. The Courts have a duty here. In B. C. Chaturvedi Vs Union of India & Another [(1995)6 SCC 750], the Hon'ble Supreme Court declared:

"23. It deserves to be pointed out that the mere fact that there is no provision parallel to Article 142 relating to the High Courts, can be no ground to think that they have not to do complete justice, and if moulding of relief would do complete justice between the parties, the same cannot be ordered. Absence of provision like Article 142 is not material, according to me. This may be illustrated by pointing out that despite there being no provision in the Constitution parallel to Article 137 conferring power of review on the High Court, this Court held as early as 1961 in Shivdeo Singh case that the High Court too can exercise power of review, which inheres in every court of plenary jurisdiction. I would say that power to do complete justice also inheres in every court, not to speak of a court of plenary jurisdiction like a High Court. Of course, this power is not as wide as which this

Court has under Article 142.”

44. To sum up the decision of this Court on this aspect:

- a) There shall be only one window where applications for constructions, alteration of all public buildings in the Panchayat must be made, and this will be the Executive Authority of the Panchayat. There is no need for a person to apply for permission for a construction within the Panchayat to the Town Planning Authority under Sec.49 of the TCP Act.
- b) The Executive Authority shall engage in a consultative process with the Joint Director or Deputy Director, Town and Country Planning providing the latter with all necessary materials and particulars for the latter to form his opinion and advice.
- c) The Joint Director or Deputy director of Town Planning shall then proceed to offer their meaningful opinions and advice by employing the same parameters that they would have adopted if the applications were made under Sec.49 of the TCP Act.
- d) To ensure fairness and transparency in the consultation process between the Executive Authority and the Town Planning Authority, the same shall take place only in writing. Oral consultation is not permitted as it has the potential to hijack the object of self-governance for purposes that may not have been in the contemplation of the Parliament.
- e) If the Executive Authority of the Panchayat decides to override or supersede the opinions/advices of the Joint Director or the Deputy director of Town and Country Planning, then it can be done only on grounds of weighty and justifiable reasons of greater quality.
- f) If the Executive Authority finds any arbitrariness or lack of inadequate application of mind by the consultee, namely the Joint Director or the Deputy Director of Town and Country Planning, it is no reason for the Executive Authority of the Panchayat to supersede such opinions of the consultee Authorities of the TCP Act. In all such instances, the Executive Authority of the Panchayat shall return the opinion received to the consultee Authorities, drawing their attention to the specific aspect/aspects where the former considers the opinion/advice as incomplete or inadequate, with a copy addressed to the Director of Town and Country Planning.

45.1 Here, Sec.111(3)(b) however, stands on a slightly different footing. This court has already held that no application for construction need be made by the applicants to whom Rule 25 of the Building Rules apply, under Sec.49 of the TCP Act. Sec.111 (3) (b) reads:

111. Effect of other laws :

(1) and (2)
.....

(3) [Subject to the provisions of sub-section (1)
but
notwithstanding] anything contained in any other
law

(a)
.....

(b) when permission for such development
has not been obtained under this Act, such
development shall not be deemed to be
lawfully undertaken or carried out by
reason only of the fact that permission,
approval or sanction required under such
other law for such development has been
obtained.

45.2 When this Court has already held that no application need
be made for construction, alteration etc., of a building in the
Panchayat area under Sec.49 of the TCP Act, its non-compliance
should not invite any punitive or penal consequences.
Therefore, Sec.111(3)(b) of the TCP Act, to the extent it holds
constructions made without application made under Sec.49 of the
TCP Act after the commencement of Tamil Nadu Panchayat Building
Rules, 1997, unlawful, is liable to be declared as inoperable.

46. In cases, which may include the petitioners herein, where
the Executive Authority of the Panchayat might not have
consulted either the Joint Director or the Deputy Director of
Town and Country Planning before granting permission for
construction of public buildings, this Court declares:

(a) In all such cases, the Executive Authority is directed to
forward the papers to the Town Planning Authority, who may
now consider them, and if required visit the premises in
question, and offer his advice if the constructions have
complied with all necessary statutory Rules and
Regulations, and the latter shall forward his views or
opinions to the Executive Authority. If opinions offered
are positive, in that if the constructions are found to
have complied with the Rules and Regulations and such other
legal requirements, then the Executive Authority shall
issue an order ratifying his earlier order granting his
permission. This will apply only to those public buildings
in the Panchayat area constructed after the coming into
force of the Tamil Nadu Panchayat Building Rules, 1997 till
today, the date of this Order, and not to any future
application for constructions.

(b) Where any permission has been granted by the Executive

Authority of the Panchayat without consulting the joint or Deputy Director of Panchayat in terms of Proviso to Rule 25, but no construction has yet commenced, it shall not be commenced, till opinion of the Town Planning Authority is obtained. If the opinion is not negative, then the earlier permission granted shall, subject to other provisions of law, remain in force. If the opinion of the Town Planning Authority is negative, the Executive Authority of the Panchayat shall forthwith cancel the permission earlier granted after following the due process of law.

(c) In cases of partially constructed buildings, no completion certificate or other amenities be provided unless a favourable opinion is given by the Town Planning Authority.

(d) In all cases falling under (a) and (c), if the opinion of the Town Planning Authority is negative, then such authorities as are empowered to initiate action for illegal constructions shall initiate appropriate actions as per law. The power to grant sanction for construction by the Panchayat is no answer to a builder or a developer violating Rules and Regulations pertaining to construction activities.

47. In conclusion, this Court holds that (a) neither Section 49 nor Section 111(3)(b) of the Tamil Nadu Town and Country Planning Act is unconstitutional; (b) Sec.111(3)(b) of the TCP Act, to the extent it relates to constructions made without permission under Sec.49 of the TCP Act after the commencement of Tamil Nadu Panchayat Building Rules, 1997, is declared inoperable, and accordingly, subject to the declaration/directions given in paragraphs 44 and 46, the writ petitions are disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

सत्यमेव जयते Assistant Registrar (CS-VI)

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Sub Assistant Registrar

ds
To:

1. The Secretary to Government
The State of Tamil Nadu
Housing and Urban Development Department
Fort St. George, Chennai - 600 009.

2.The Director of Town and Country Planning
807, Anna Salai, Chennai - 600 002.

3.The Member Secretary
All India Council for Technical Education
7th Floor, Chanderlok Building
Janpath, New Delhi - 110 001.

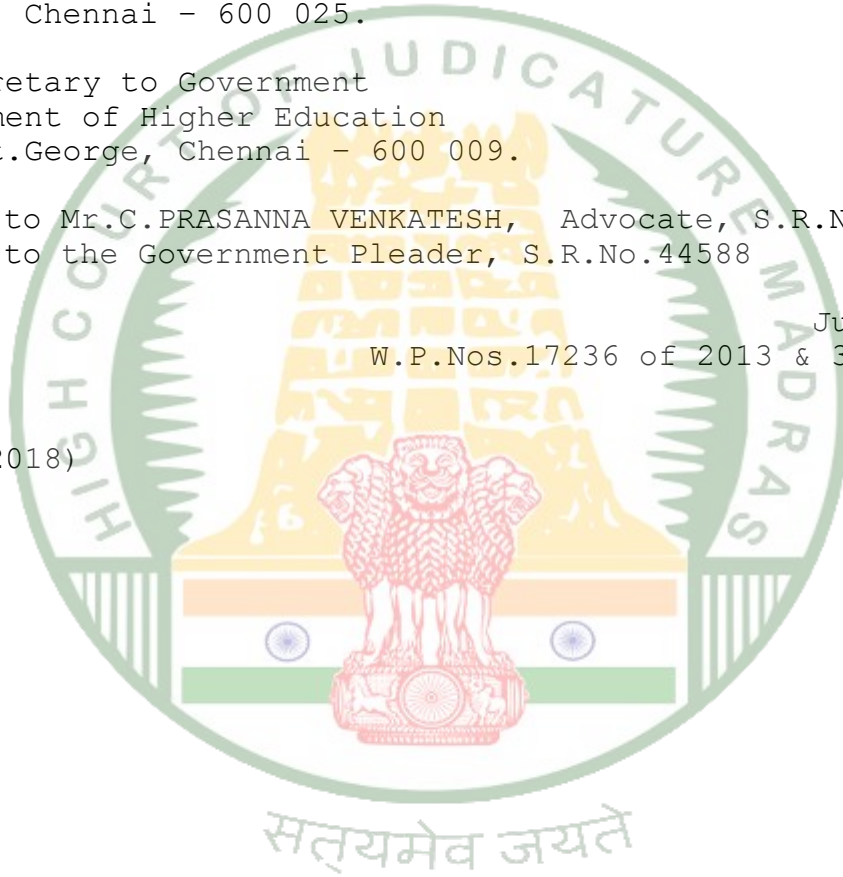
4.The Commissioner of Technical Education
Directorate of Technical Education
Government of Tamil Nadu
Guindy, Chennai - 600 025.

5.The Secretary to Government
Department of Higher Education
Fort St.George, Chennai - 600 009.

+1cc to Mr.C.PRASANNA VENKATESH, Advocate, S.R.No.43992
+1cc to the Government Pleader, S.R.No.44588

Judgement in
W.P.Nos.17236 of 2013 & 3622 of 2014

BR(CO)
TR(18/07/2018)



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