IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No. 897 of 2004-E
Reserved on: 10.9.2012
Decided on:31.10.2012

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1. Vijay Kumar Aggarwal son of late Sh. Inder Sam Rio Gulmarg Hotel, Shimla-171003, H.P.
2. Vinor Kumar Aggarwal son of late Sh. Inder Sam Rio Gulmarg Hotel, Shimla-171003, H.P.

.....Petitioners.

Versus

1. State of Himachal Pradesh through Commissioner-cum-Secretary (Urban Development) Government of Himachal Pradesh, H.P. Civil Secretariat, Shimla-2.
2. The Municipal Corporation, Shimla, The Mall, Shimla through its Commissioner, Shimla-171 001 H.P.
3. The Director, Town and Country Planning, Government of Himachal Pradesh, SDA Complex, Kasumpati, Shimla-171 009.

....Respondents.

Civil writ petition under Article 226 of the Constitution of India.

Coram:

Hon'ble Mr. Justice Rajiv Sharma, Judge.

Whether approved for reporting?[1] yes

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[1] Whether reporters of the local papers may be allowed to see the judgment? yes

For the Petitioners : Mr. R.L. Sood, Sr. Advocate with Mr. Arjun Lal, Advocate.

For the Respondents: Mr. Vikas Rathore, Dy. A.G. for respondents No.1 and 3.

Mr. Shrawan Dogra, Advocate for respondent No.2.

Per Rajiv Sharma, Judge.

Petitioners submitted building plans for construction on Khasra Nos. 912/2, 916/2, 917/2 and 920/2 in the month of November, 2003 to the respondent-corporation. Respondent-corporation raised certain objections and the same were removed and the building plans were re-submitted on 27.2.2004. Respondent No.2 forwarded the case of the petitioners to respondent No.3 on 17.3.2004. Text of letter dated 17.3.2004 reads thus:

> **"Sh. Mool Krishan Aggarwal and Sh. Gopal Mohan Aggarwal have applied for planning permission for the construction of building on Kh. Nos. 947/912, 951/917, 953/920, 949/916, 909, 946/912, 950/917, 918, 919, 952/920 and 959/496 at Tashkent Hotel, Sher Wood Estate Near A.G. Office, Shimla. The case of the applicants has been examined and found that it fulfills all the requirements of I.D.P. Shimla H.P.M.C. Act, 1994 and M.C. Building Bye Laws except the fact that the area falls in the 'Restricted Area' modified by the Government where no development can take place without the specific permission of the Government. It is, therefore, requested that the case of the applicants may be considered for giving relaxation in 'Restricted Area'. The copy of plan, revenue papers i.e. tatima & jamabandi and proforma duly filled in are enclosed please."**

2. Thereafter, respondent No.3 forwarded the case of the petitioners to the Chairman Conservation Advisory Committee-cum-Secretary (TCP) to the Government of H.P. on 30.6.2004. According to the contents of letter dated 30.6.2004, case was examined and it was observed that the proposed site falls within 'Restricted Area' as well as 'Heritage Zone' and as per notification dated 22.8.2002, the only competent authority to decide the normal planning permission cases in 'Restricted Area', was 'Restricted Area Committee' and as per Heritage Regulations notified vide notification dated 5.6.2003, no construction could be allowed in the strip of 25 meters on either side of the Mall Road. Since the site in question fell within the strip, the approval of the Heritage Conservation Sub-Committee was required. Thereafter, the Heritage Conservation Advisory Committee visited the spot on 8.9.2004. The Sub-Committee informed the Heritage Advisory Committee that further addition of four storyes + parking floor with an additional plinth area of 172.68 sqm. may not be allowed. The relevant portion of the recommendations is reproduced as under:

> **"Now the proposal has been submitted by the applicant for additional block four storyes + parking floor with existing main hotel building by including Kh. No. 947/912/1, 947/912/2,**

951/917, 953/920 and 949/916 measuring 508.08 sqm. Out of additional plot area of 508.80 sqm., the plinth area of existing structures is 232.35 sqm. The proposed additional plinth area is 172.68 sqm. The total existing plinth area of old structures within a plot area of 2162.27 sqm. Works out to 476.25 sqm. Against 476.25 sqm. permissible plinth area, sanction has already been accorded for a total plinth area of 563.94 sqm. and with the addition of proposed 172.68 sqm. plinth area, the total plinth area will be 736.62 sqm. The total floor area will be 2757.32 sqm. against existing total floor area of 1905.00 sqm and thereby excess floor area of 852.32 sqm.

The site was inspected and found that 6 storey framed structure + parking floor of hotel building have been constructed by the applicant. Terrace of the top storey is yet to be laid which will come on the Mall road level. The total floor area of hotel building constructed at site is 1805.90 sqm. including the area of parking floor.

As these structures are in the vicinity of main heritage buildings namely Gorton Castle (A.G. Office) and Railway Board building and fall within 'Heritage Zone' the same were required to be approved on old existing building line after proper application of Heritage Regulations on one hand and directions of the Hon'ble High Court, on the other. In view of the excessive coverage number of storeys and total floor area the Sub-Committee is of the opinion that the further addition of 4 storey + parking floor hotel building with plinth area of 172.68 squm. as proposed by the applicant may not be allowed."

3. Thereafter, writ petition was filed and a detailed order was passed on 9.12.2004. Order dated 9.12.2004 reads thus:

"Replies have been filed by respondent No. 2 as well as respondent Nos. 1 and 3. The replies reveal that the matter has already been examined by the sub-Committee constituted by the Heritage Advisory Committee and this sub-Committee has submitted its report but the Heritage Advisory Committee and the State Government have not taken any final decision in the matter uptil now. The replies however are unfortunately and conspicuously silent about the actual date or the time

period when the sub-Committee had submitted its report and also about the reasons as to why, despite the fact that on 17th March, 2004, the State Government had received the request from the Municipal Corporation, the matter has not been decided so far.

In para-11 of the writ petition, the petitioners have clearly averred and stated that in November, 2003, the petitioners submitted the building plan to Municipal Corporation Shimla but some objections were raised by the Municipal Corporation and after removing the objections, fresh building plan was submitted on 27th February, 2004. In para 12, it has been averred by the petitioners that on 17th March, 2004, the Municipal Corporation forwarded the Building plans to the Town and Country Planning Department of the Government of H.P.. For ready reference paras 11 and 12 of the Writ petition are reproduced hereunder. These read thus:-

"11. That, in the meanwhile, the petitioners had also submitted building plans to the Municipal Corporation, Shimla in November, 2003 for extension of their aforementioned Commercial-cum- Hotel Complex. This extension is to be carried out by the petitioners on Khasra Nos. 912/2, 917/2, 916/2 and 920/2. Some objections were raised by the Municipal Corporation, which objections were removed and the plans were re-submitted by the petitioners to the respondent Municipal Corporation on the 27th February, 2004 as per covering letter of the same date copy of which is annexed hereto as Annexure P-11. The plans were re-submitted after making the necessary amendments as required therein. The copies of the re-submitted plans are annexed to this petition as Annexure P-12 (colly). A perusal of the said plans will show that the respondents have applied for sanction for construction by way of extension of four storeyed building in addition to a parking floor. At this spot, a four storeyed Hotel building was already existing which had collapsed earlier.

12. That the respondent Municipal Corporation Shimla duly consider the aforementioned building plans of the petitioners and found the same to be in order. It may be submitted that the proposed construction in question falls within the restricted area. Thereafter, the Municipal Corporation Authorities forwarded the plans to the Town and Country Planning Department on 17.3.2004, copy of which letter was also endorsed to the petitioners and is annexed

hereto as Annexure P-13. Perusal thereof will show that the Municipal Corporation Authorities had no objection whatsoever for according sanction to the building plans of the petitioners and had as such, recommended the same to the Town and Country Planning Authorities. As per the requirement of law, the plan has to be recommended to the Town and Country Planning Authorities by the Municipal Corporation since the proposed construction fell within the restricted area. It may be submitted that the Director, Town and Country Planning Department, is the authority to sanction such building plans which fall within the restricted area and there is no requirement of law of seeking any approval of the government qua the same."

Neither para 11 nor para 12 has been denied either by respondent No. 2 or by respondent Nos. 1 and 3. To be more precise and specific, none of the respondents has denied the specific averments about the building plans originally having been submitted in November, 2003 and thereafter after removal of objections, these having been re-submitted on 27th February, 2004 and these thus consequently having been forwarded by the Municipal Corporation to the State Government on 17th March, 2004.

What therefore, clearly emerges is that at least as on 17th March, 2004, the State Government received the proposal from the Municipal Corporation with respect to the request of the petitioners for the sanction of the building plan in question.

Section 247 of the H.P. Municipal Corporation Act, 1994 clearly lays down that where within a period of 60 days after the date of receipt of the request for sanction of a building plan, the Commissioner does not refuse to sanction the building plan, he shall be deemed to have accorded the sanction to the building and the person by whom the request was made shall be free to commence and proceed with the building in accordance with his intention as expressed in his request and on the basis of the documents/plans accompanying the same. For ready reference, relevant extracts of Section 247 are reproduced hereunder, which read thus:-

> **"247(1) Where within a period of sixty days after the receipt of any notice under Section 243 or Section 244 or of the further information, if any, required under section 245 the Commissioner does not refuse to sanction the building or work or upon refusal does not communicate the**

refusal to the person who has given the notice, the Commissioner shall be deemed to have accorded sanction to the building or work and person by whom the notice has been given shall be free to commence and proceed with the building or work in accordance with his intention as expressed in the notice and the documents and plans accompanying the same:

.....

(2) Where a building or work is sanctioned or deemed to have been sanctioned by the Commissioner under sub-section (1), the person who has given the notice shall be bound to erect the building or execute the work in accordance with such sanction but not so as to contravene any of the provisions of this Act or any other law or of any bye-law made thereunder.

.....

Since in the present case apparently the provisions of H.P. Town and Country Planning Act, 1977 may also be attracted, our attention was drawn to sub-Section (5) of Section 31 of this Act which clearly lays down that if the Director, Town and Country Planning does not communicate his decision whether to grant or refuse permission to the applicant within two months from the date of receipt of the application, such permission shall be deemed to have been granted to the applicant on the date immediately following the date of expiry of two months from the date of receipt of the request. Proviso to sub-Section (5) lays down that in computing this period of two months, the period in between the date of requisitioning any further information or documents from the applicant and the date of receipt of such information or documents shall be excluded. Sub Section (5) and its proviso are reproduced hereunder and these read thus:

"(5) If the Director does not communicate the decision whether to grant or refuse permission to the applicant within two months from the date of receipt of his application, such permission shall be deemed to have been granted to the applicant on the date immediately following the date of expiry of two months:

Provided that in computing the period of two months the period in between the date of requisitioning any further information of documents from the applicant

and date of receipt of such information or documents from the applicant shall be excluded."

It is nobody's contention in this case, not the least of the respondents that they ever asked from the petitioners any information or documents, after 17th March, 2004.

In this petition, the subject matter of controversy relates to a piece of land comprising of khasra Nos. 912/2, 917/2, 916/2 and 920/2. It is the undisputed case of the parties that apart from the aforesaid piece of land comprising of the aforesaid four Khasra Numbers, the petitioners are joint owners of another piece of land comprising of eight khasra numbers., being khasra Nos. 916/1, 917/1, 912/1, 918, 919/920/1, 909 and 469/2, and that admittedly and indisputably, both the pieces of land are adjacent and adjoining to each other. It is also the undisputed case of the parties that on the land in question and/or the adjoining land there once stood a four storeyed hotel building which some time in the past had collapsed. It is also the undisputed and admitted case of the parties that in the adjoining and adjacent piece of land comprising of the aforesaid eight Khasra Numbers, the petitioners have already applied for and obtained sanction/permission for construction of a Hotel building and based on this sanction/permission, the construction work is almost nearing completion.

In para-12 of the writ petition, as has been noticed above petitioners have specifically submitted that the Municiapl Corporation after due consideration of the building plan submitted by the petitioner found it to be in order and accordingly forwarded the same to the Town and Country Planning Department of the State Government on 17th March, 2004 for sanction of the State Government. It has not been disputed by respondent No. 2 in reply to this averment of Para 12 that it did not find building plan to be in order, even though it has been averred by respondent No. 2 in reply that the forwarding of the plan by the Corporation State Government did not mean that the Corporation by itself approved the plan or that it had no objection for according of sanction to the same for ready reference. Para 12 is reproduced hereinbelow, which reads thus:

"12. That in reply to this para of the petition it is submitted that the plans of the petitioners were forwarded to respondent No. 3 on 17.3.2004 by the replying respondent. The remaining averments made in this para are not admitted. The forwarding of the plans by the Corporation does not mean that the Municipal Corporation has approved the plans of the petitioners or have no objection for according sanction to the building plans. As the plans pertain to area which is restricted area as far as construction activity is concerned, as declared by the State of H.P., hence the permission to carry out construction has to be granted by respondent No. 3"

Para-3 of "preliminary submission" in the Reply filed by respondent Nos. 1 and 3 clearly reflects that so far respondents have neither taken any decision, nor communicated the same to the petitioner. This Para is reproduced hereunder for ready reference which reads thus:-

"That the building plan for the grant of permission for extension of the present commercial-cum-hotel complex was forwarded by respondent No. 2 to the replying respondent No. 3 vide letter dated 17.3.2004. The said proposal was examined by the replying respondent and found that since the area in question falls within the Heritage Zone of Shimla Planning Area and therefore same was required to be thoroughly examined in the light of regulations as notified vide notification dated 22.8.2002 and 5.6.2003. The matter was examined in depth where after the same was sent to the Heritage Advisory Committee. Keeping in view the Heritage Zone involved, the said committee constituted a Sub Committee to examine the matter in detail. After spot inspection of the area, the said sub-Committee found that as the area falls in the vicinity of main heritage buildings i.e. Gorton Castle (A.G. Office) and Railway Board Building, therefore, the reconstruction if any, can be only in accordance with requirement of Heritage Zone regulations. Sub-Committee has submitted its reports to the Heritage Advisory Committee/ State Government for final opinion. Hence, the writ petition filed by the petitioners is premature and as such deserve to be rejected."

Based on the aforesaid facts and the legal position which has emerged with reference to the provisions of the H.P. Municipal Corporation Act, 1994 and the H.P. Town and Country Planning Act, 1977, we are convinced that by their non-action, the respondents have created a situation whereby the petitioners, under law, have become entitled to be given benefit of "Deemed Sanction" in terms of Section 247 of 1994 Act read with Sec. 31 (5) of the 1977 Act. This is a right which has accrued in favour of the petitioners are, therefore, entitled, based on such accrual of right, to start construction of the building.

We accordingly direct that the petitioners shall be considered to have been granted the aforesaid " Deemed Sanction" and accordingly they shall be at liberty to proceed with the construction work. The construction work, however, shall be strictly in accordance with and on the basis of the building plan as had been submitted by them to the Municipal Corporation and which had been forwarded by the Municipal Corporation to the State Government. In terms of sub-Section (2) of Section 247 of 1994 Act (supra) the petitioners shall be bound to execute the construction work not only in accordance with the plan which they had submitted but also they shall not contravene any provisions of 1994 Act or 1977 Act (supra) or any other law or bye-law made under any law.

Since in the peculiar facts and circumstances of this case, we have held the petitioners entitled to the benefit of "Deemed Sanction" we grant liberty to the respondents to approach this Court at any time within a period of four weeks from today with a request for vacation or modification of this order if the respondents think or consider that such vacation or modification of the order is warranted or called for, based on such facts as they might bring to the notice of this Court. For a period of four weeks therefore from today, any construction work that the petitioners may execute, shall be at their own risk and responsibility because if we are convinced that based upon such facts as the respondents might bring to our notice within this period of four weeks, the petitioners have become disentitled to the grant of relief, we may have to modify or vacate this order with all the consequences against the petitioners. Actually we shall be

expecting that within the aforesaid period of four weeks, the respondents do approach us if they feel that situation or facts or circumstances exists which require or warrant that the petitioners' deemed sanctioned be cancelled, or that the petitioners do not deserve this or any other relief. We also wish to observe that if for totally unavoidable or compelling reasons, respondents think that they need more time within four weeks, they would be at liberty to apply to us for extension of time but application for extension must be filed within four weeks from today. We are adopting this course of action because we cannot keep the petitioners in a guessing situation indefinitely because that would be prejudicial to their interests."

4. The Heritage Advisory Committee rejected the case of the petitioner in its meeting held on 1.1.2005. The proceedings of the meeting dated 1.1.2005, qua the petitioners, read as under:

"3.2: Planning permission case for construction of four storeys + 1 parking floor hotel (Tashkant) Sher Wood Estate near A.G. Office, Shimla in favour of Sh. Mool Krishan Aggarwal and Sh. Mohan Aggarwal.

The proposal submitted by the applicant for additional block having 4 storyes + 1 parking floor with existing main hotel building on Khasra No. 947/912/1, 947/912/2, 951/917, 953/920 and 949/916 measuring 508.08 sqm. was deliberated by the Committee. The Committee considered the report of Sub-Committee. The Committee was in agreement with the observations of the Sub-Committee that additional of 4 storeys+ parking floor with an additional plinth area of 172.68 sq. metre cannot be allowed due to following reasons:-

I. **The proposed building plan is not on old lines as stipulated by Heritage Regulations notified vide notification No. TCP-F (5)-3/2001 dated 5.6.2003 which are applicable in Heritage Zone.**

II. **The proposed building is in the vicinity of main heritage buildings namely Gorton Castle (A.G. Office) and Railway Board building which are one of the few**

> **master pieces of British Architecture and any construction which is not on old lines can not therefore be allowed without disturbing the over all symmetry of the place."**

5. Respondent No.2 filed CMP No. 238/2005 seeking modification of order dated 9.12.2004. According to respondent No.2, petitioners have failed to issue notice as envisaged in Building Bye-Law 9.1. Petitioner filed reply to CMP No. 238/2005. Respondent No.2 also moved CMP No. 239/2005 for staying the operation of order dated 9.12.2004. Respondent No.3 also filed application bearing CMP No. 240/2005 for modification and vacation of order dated 9.12.2004. Reply was filed by the petitioners to the same and rejoinder was also filed by respondent No.3. Respondent No.2 has also filed rejoinder to the reply filed to CMP No. 238/2005 by the petitioners. In the rejoinder, stand of the respondent-corporation was that the proposed building plans fall within the 'Heritage Zone' and the plans submitted by the petitioners were not conforming to the notifications dated 22.8.2002 and 5.6.2003. Hence, the same could not be deemed to have been sanctioned contrary to the Regulations. Respondent No.3 in CMP No. 240 of 2005 has taken a categorical stand that the Municipal Corporation without taking into

consideration notification dated 22.8.2002 and 5.6.2003 has recommended the case for building permission under the Regulations applicable to restricted area. According to respondent No.3, separate norms have been fixed seeking building permission in the 'Heritage Zone', the same could not be considered to be legally and validly submitted for the purpose of attracting the provision of section 247 (2) of the Municipal Corporation Act, 1994 and under section 31 (5) of the Town and Country Planning Act, 1977. There is also a reference to Building Bye-Law 9.1. In the rejoinder filed to the reply by the petitioner to CMP No. 240/2005, it is averred that forwarding of building plan by respondent No.2 to respondent No.3 was not sustainable in the eyes of law as the same was in contravention of Heritage Zone Regulations. It was reiterated that it was not a case of deemed sanction. The applications bearing CMPs No. 238 of 2005 and 240 of 2005 were rejected on 4.8.2005. Respondent-corporation filed a Special Leave Petition before the Hon'ble Supreme Court assailing order dated 4.8.2005. In the grounds of Special Leave Petition, special reference was made to the notification issued on 22.8.2002. The copy of the same was placed with the Special Leave Petition vide Annexure P-1. There is also

reference to notification dated 5.6.2003. According to the grounds taken in the Special Leave Petition, as per notification dated 22.8.2002, the construction raised by the petitioners falls in the Heritage Zone. The Hon'ble Supreme Court allowed the Special Leave Petition and the operative portion of the judgment dated 28.3.2008 reads as under:

> **"One of the questions which arise for consideration is as to whether 'deemed sanction' of building plans as contemplated under Section 247 of Himachal Pradesh Municipal Corporation Act would be applicable in respect of the constructions within the heritage zone.**
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> **This question has been gone into by this Court in Commissioner of Municipal Corporation, Shimla Vs. Prem Lata Sood and Ors. - 2007(7) SCALE 737.**
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> **We are, therefore, of the opinion that the interest of justice would be subserved if the impugned order is set aside and the High Court is requested to take up the hearing of the writ petition itself as expeditiously as possible.**
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> **Before us a counter affidavit has been filed on behalf of respondent Nos. 1 and 2 affirmed by Shri Gopal Mohan Aggarwal stating that the High Court has deleted the names of respondent Nos.1 and 2 and in their place names of Vijay Kumar Aggarwal and Vinod Kumar Aggarwal have been substituted.**
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> **An application has also been filed by the appellant herein to the said effect. Keeping in view the limited order that we are passing, we are of the opinion that as the aforementioned Vijay Kumar Aggarwal and Vinod Kumar Aggarwal being also party before the High Court, they would indisputably be entitled to raise all contentions before the High Court."**

6. In the meantime, writ petition was also amended and respondents No.2 and 3 have also filed the

replies to the same. In para 12 of the reply, respondent-corporation has stated that the area falls in the 'restricted area', but in para 18, it is stated that the construction has been raised in violation of the Heritage Norms of Shimla Planning Area where no new construction is permitted/allowed. Case of the respondent-corporation was that it has only recommended the case of the petitioners to respondent No.3. Stand of respondent No.3, in the reply, is that the area in question falls within the Heritage Zone of Shimla Planning Area, therefore, the same was required to be dealt/examined in accordance with the Heritage Zone Regulations of Shimla Planning Area. The Heritage Advisory Committee constituted a Heritage Sub-Committee for site inspection. The Heritage Sub-Committee has examined the matter of the Petitioners. Petitioners came to know about the decision of the Sub Committee and preferred the petition in this Court. It was also stated in the reply that the plea of deemed sanction was highly misplaced. It was specifically denied that the building in question falls in restricted area and it was reiterated that the same falls in Heritage Zone of Shimla Planning Area.

7. Mr. R.L. Sood, learned Senior Advocate has prayed for the strict compliance of order dated 9.12.2004. According to him, since respondents have not taken any action within the stipulated period as per the provisions of the Municipal Corporation Act, 1994 and the Himachal Pradesh Town and Country Planning Act, 1977, there was deemed sanction in favour of the petitioner. He has also argued that the building falls within the restricted area and not in the heritage zone. He has also argued that the amendments carried out in the Interim Development Plan on 22.8.2002 and 5.6.2003 are not in conformity with the Act. He has also contended that the respondents have wrongly placed reliance on Building Bye-Law 9.1 framed by the respondent-corporation. Mr. R.L. Sood has also argued that the proceedings dated 23.10.2009 are not in conformity of law.

8. Mr. Vikas Rathore, learned Deputy Advocate General and Mr. Shrawan Dorga have vehemently argued that the area falls within heritage zone and there could not be any deemed sanction. They have also argued that the Heritage Advisory Committee has rejected the case of the petitioner on the basis of report of the Sub-Committee. They have further argued that as per order

passed by this Court, the meeting of the Advisory Heritage Committee was held on 23.10.2009, but the same has rejected the case of the petitioners.

9. I have heard the learned counsel for the parties and have perused the pleadings as well as records produced by the respondents carefully.

10. The Court on 9.12.2004 has held that since the respondents have not taken any steps under section 247 of Municipal Corporation Act, 1994 read with section 31 (5) of the H.P. Town and Country Planning Act, it was a case of deemed sanction. According to the order dated 9.12.2004, respondents were permitted to move an application for vacation or modification of this order within four weeks. Respondents had filed CMPs, as noticed above, bearing CMP No. 238, 239 and 240 of 2005. The main ground taken in the applications for vacation and modification of order was that the area in question falls in Heritage Zone and thus there could not be deemed sanction in favour of the petitioners. These applications were rejected on 4.8.2005, which led to filing of the Special Leave Petition before the Hon'ble Supreme Court by respondent No.2. Respondent-corporation had also filed CMP No. 239/2005 for restraining the petitioners from raising construction.

11. State Assembly has enacted the Act called "The Himachal Pradesh Town and Country Planning Act", 1977. Chapter IV of the Himachal Pradesh Town and Country Planning Act, 1977 provides for planning area and development plans. According to section 13, the State Government may, by notification, constitute planning areas for the purposes of the Act and define the limits. Section 14 empowers the Director to prepare an existing land use map, an interim development plan, development plan and sectoral plan. Section 15 empowers the Director to carry out the survey and prepare an existing land use map and forthwith publish the same in such manner as may be prescribed together with public notice of the preparation of the map and of the place or places where the copies may be inspected, inviting objections and suggestions in writing from any person with respect thereto within thirty days from the date of publication of such notice. After the expiry of 30 days, the Director may, after allowing a reasonable opportunity of being heard to all such persons who have filed the objections or suggestions, make such modifications therein as may be considered desirable and as soon as may be after the map is adopted with or without modifications the Director is required to publish

a public notice of the adoption of the map and the place or places where the copies of the same may be inspected. Section 15-A provides for preparation and of existing land use map under section 15 (1). Section 16 provides that on the publication of the existing land use map under section 14, no person shall institute or change the use of any land or carry out any development of land for any purpose other than indicated in the existing land use map without the permission in writing of the Director. Section 17, provides for the preparation of interim development plans. According to sub-section (3) of section 17, subject to provisions of the rules made under the Act for regulating the form and contents of the interim development plan any such plan shall include such maps and such descriptive matters as may be necessary to explain and illustrate the proposals in the interim development plan. Sub-section (4) of section 17 provides that as soon as may be, after the submission of the interim development plan, under sub-section (1) the State Government may either approve the interim development plan or may approve it with such modification as it may consider necessary. The State Government is required to publish the interim development plan as approved under sub-section (4) in

the official gazette. Section 18 provides for preparation of development plan and publication of draft development plan is provided under section 19. Sub-section (5) of section 20 provides that development plan shall come into operation from the date of publication thereof and as from such date shall be binding on all Development Authorities constituted under the Act and all local authorities functioning within the development area. As per sub-section (6) of section 21 after coming into operation of the development plan the interim development plan shall stand modified or altered to the extent the proposals in the development plan are at variance with development plan. Sub-section (h) of section 2 provides that 'development plan' means interim development plan or development plan prepared under the Act. Under section 17, interim development plan was prepared and notified in the year 1979. The State Government vide notification dated 22.8.2002 has carried out amendment in Chapter-X of the Interim Development Plan. According to notification dated 22.8.2002, core area, restricted area and heritage zone were notified. According to Regulation 10.4.2 (x) (a) The core area comprises the following:

(a) Central Shimla bounded by the circular Cart Road starting from Victory Tunnel and ending at Victory

Tunnel via Chhota Shimla and Sanjauli and the area bounded by Mall Road starting from Railway Board Building to Ambedkar Chowk, covering Museum Hill by road starting from Ambedkar Chowk, on the north side, joining the Chowk of Indian Institute of Advanced Studies and following the road joining Summer Hill post office and via upper road to Boileauganj Chowk and then joining the Cart Road, along Cart Road to Victory Tunnel.

(b) From junction of Tribunal road and cart road near Secretariat then along the Tribunal road/path joining Boundary/Dhobi Ghat Path and then following Dhobi-Ghat path and then following Dhobi-Ghat, boundary path upto the Shimla Junga road near Boundary. Then following Chhota Shimla Himalya Bhawan path upto house of Sh. Amin Chauhan, then alongwith house of Sh. Amin Chauhan, Sh. Mansa Ram, Block No.4,6,8,9,7,5,2, (all the blocks of H.P. Housing Board) and house of Sh. Ramesh Negi, Sh. Diwan Chand Gupta, Sh. N.S. Pal, Sh. Indervir Singh Pal, Sh. Ashwani Kumar, Sh. Y.K. Gautam and then along the path joining to the Chotta Shimla-Kasumpati path near AIRA HOLME's Public School. Following Chhota Shimla Kasumpati path towards Kaumpati upto junction of Shimla-Junga road and SDA Complex Road. Then following cart road upto junction of Tribunal road and cart road near Himachal Pradesh Secretariat building."

12. Development permission in core area is to be granted by the State Government. According to Regulation 10.4.1.2. (x), restricted area comprises of the following:

"Area outside the core area defined vide para 10.4.1.2(x) (a) above and bounded by bye-pass road starting from barrier to Tutikandi-Khalini-Vikas Nagar, Pantha Ghati, Malyana, Bhattakufar to Dhalli Tunnel. The restricted area shall also include a belt of 50 meter on valley side of National Highway-22 starting from Barrier to Dhalli Tunnel. Sanjauli area starting from Dhalli Tunnel to old house of Smt. Shanti Devi

along Tibetan Hospital (excluding Tibetan Hospital) to Dhingu Temple via Municipal Corporation path to electricity transformer all along defence boundary and then following the Nalla cremation ground. From cremation ground to Sanjauli along existing Forest and Government land boundary and 50 meter on valley side of the cart road from Sanjauli chowk to victory tunnel, long wood Shankli, Ruldubhatta area bounded by upper Bharari road on East upto Harvington to Power House along road on sewerage line path on West to Cart road from above point to Tara Hall School to Tapovan to lower Kaithu along road on East to Cart road along External Municipal road on North and West meeting cart road near Hotel Hans."

13. The development permission in the restricted area is to be granted by the Director, Town and Country Planning in cases where no relaxation is required. The Heritage Zone, as per Regulation 10.7, comprises of the following:

(i) "Viceragal lodge complex complete.

(ii) One building depth on either side of the road surrounding viceregal lodge complex.

(iii) One building depth on either side of the Mall road starting from the gate of Indian Institute of Advance Studies upto Chhota Shimla Chowk via State Bank of India, Scandal Point, Shimla Club and Oak Over.

(iv) One building depth on either side of the path/road starting from Prakash Niwas (Housing Shimla Type writer) near State Bank of India via Kalibari to the Scandal Point.

(v) The area bounded by Scandal Point, Ridge, Regal, Takka Bench, Church, Ritz, U.S. Club Gate, Public works Department Officers, Chalet Day School and the Mall Road.

(vi) One building depth on either side of the road from Oak Over to Barnes Court (Governors residence) via Woodvilla, and

(vii) Any building/buildings falling outside the above zone but declared as heritage building/buildings by the State Government."

14. One of the functions of the Advisory Committee constituted under Regulation 10.7 of the Regulations is to examine and make recommendations on the proposals/cases falling within the Heritage Zone and submit its report on each proposal to the Director, Town and Country Planning Department and the Director has to submit the case to the State Government for consideration.

15. Mr. R.L. Sood, learned Senior Advocate has also argued that this area does not fall in 'heritage zone'. He has brought to the notice of the Court, the photographs placed on record to suggest that the area is below one building depth. These photographs cannot be taken into consideration without the same being proved in accordance with law. Whether the area falls below one building depth or not is required to be seen by the experts under the Himachal Pradesh Town and Country Planning Act, 1977 and the Rules and Regulations framed therein. Categorical stand of respondent No.3 is that the area falls in 'heritage zone' and this Court will not substitute its own judgment for the wisdom of the department. According to Regulation 10.1.4.2 (x) (a), the

area in question falls in 'heritage zone' as well as 'core area' and not 'restricted area'. This area would fall within Railway Board Building and Ambedkar Chowk.

16. Mr. R.L. Sood has also argued that in the vicinity of the building the construction has been permitted. This will not advance the case of the petitioners. Petitioners cannot claim parity that the construction has been permitted in the vicinity. Even hypothetically the construction has been permitted, Article 14 of the Constitution of India is positive concept and not negative concept. No benefit can be derived from illegality.

17. The respondent-corporation has not taken into consideration while recommending the case of the petitioner Regulation 10.7. Respondent No.3 has taken into consideration the fact that the area falls in Heritage Zone, thus, the permission was to be accorded on the basis of the recommendations made by the Heritage Advisory Committee. In fact, the Heritage Advisory Sub-Committee has visited the spot on 8.9.2004 and has not recommended the case of the petitioners. Thereafter, the matter has to go to Heritage Advisory Committee, but before the final decision could be taken and conveyed to the petitioners by the Heritage Advisory Committee,

petitioners have approached this Court taking plea of deemed sanction. The fact of the matter is that the Heritage Advisory Sub-Committee has rejected the case of the petitioners vide Annexure P-31 on 1.1.2005.

18. According to section 243 of the Himachal Pradesh Municipal Corporation Act, 1994, every person who intends to erect a building has to apply for sanction by giving notice in writing of his intention to the Commissioner in such form and containing such information as may be prescribed by bye-laws made in this behalf and every such notice is to be accompanied by such documents and plans alongwith specification as may be provided. Section 246 lays down that the Commissioner shall sanction the erection of a building or the execution of a work unless such building or work would contravene any of the provisions of sub-section (2) of this section or the provisions of section 250. Section 247 provides that where within a period of sixty days after the receipt of any notice under section 243 or section 244 or of the further information, if any, required under section 245 the Commissioner does not refuse to sanction the building or work or upon refusal does not communicate the refusal to the person who has given the notice, the Commissioner shall be deemed to have

accorded sanction to the building or work and person by whom the notice has been given shall be free to commence and proceed with the building or work in accordance with his intention as expressed in the notice and the documents and plans accompanying the same. According to sub-section (2) of section 247, where a building or work is sanctioned or deemed to have been sanctioned by the Commissioner under sub-section (1), the person who has given the notice shall be bound to erect the building or execute the work in accordance with such sanction but not so as to contravene any of the provisions of this Act or any other law or of any bye-law made there under. Section 395 empowers the corporation to make bye-laws, including building bye-laws. Sub-clause (D) of section 395 deals with Bye-laws relating to "building". According to sub clause (D) 1 to 3, the Municipal Corporation may frame bye-laws for regulation or restriction of the use of sites for buildings for different areas, regulation or restriction of buildings in different areas and the form of notice of erection of any building or execution of any work and the fee in respect of the same, the plans and documents to be submitted together with such notice and the information and further information to be furnished. The Municipal

Corporation has framed the building bye-laws strictly as per clause (D) of section 395 of the Himachal Pradesh Municipal Corporation Act, 1994. These have been approved by the State Government and have been published on 17.3.1998. According to bye-law 7.1, every person who intends to erect, re-erect a building or execute any of the works specified in sections 243 and 244 of the Himachal Pradesh Municipal Corporation Act, 1994 shall give a notice in writing to the Commissioner in Form-I and such notices shall accompany with building plans in six copies. Bye-law 9.1 provides that the Commissioner may either sanction or refuse the plans and specifications or may sanction them with such modifications or directions as it may deem necessary and thereupon shall communicate his decision to the person giving the notice. However, within 60 days of the receipt of notice under 7.1 of bye-laws, the Commissioner fails to intimate in writing to the person, who has given the notice, of its refusal or sanction or any intimation, the notice with its plans and statements shall be deemed to have been sanctioned provided the fact is immediately brought to the notice of the Commissioner in writing by the person, who has given the notice and have not

received any intimation from the Commissioner within 15 days of giving such notice. Bye-law 9.1 reads as under:

> **"The Commissioner may either sanction or refuse the plans and specifications or may sanction them with such modifications or directions as it may deem necessary and there upon shall communicate his decision to the person giving the notice.**
>
> **If within 60 days of the receipt of notice under 7.1 of bye-laws, the Commissioner fails to intimate in writing to the person, who has given the notice, of its refusal or sanction or any intimation, the notice with its plans and statements shall be deemed to have been sanctioned provided the fact is immediately brought to the notice of the Commissioner in writing by the person who has given notice and having not received any intimation from the Commissioner within fifteen days of giving such written notice. Subject to the conditions mentioned in these bye-laws, nothing shall be construed to authorize any person to do any thing in contravention or against the terms of lease or titles of the land or against any other regulations, bye-laws or ordinance operating on the site of the work."**

19. In the instant case, petitioner has not given 15 days notice as per bye-law 9.1 to the Commissioner. The Municipal Corporation was competent to frame building bye-laws, including dealing with the sanction as per clause (D) of section 395 of the Himachal Pradesh Municipal Corporation Act, 1994. The observation in the interim order dated 4.8.2005 to the effect that bye-law 9.1 was ultra vires the Act was per incurium since the

provisions of law, in detail, were not brought to the notice of the Court. Moreover, this order has been set aside by the Hon'ble Supreme Court in Special Leave Petition preferred by the Municipal Corporation.

20. Now, the Court will advert to section 31 of the Himachal Pradesh Town and Country Planning Act, 1977. Sub-section (5) of section 31 provides that if the Director does not communicate his decision whether to grant or refuse permission to the applicant within two months from the date of receipt of his application, such permission shall be deemed to have been granted to the applicant on the date immediately following the date of expiry of two months. This Court vide order dated 9.12.2004 has made the observation that deemed sanction would also apply to Heritage Zone.

21. Their Lordships of the Hon'ble Supreme Court in ***Commissioner of Municipal Corporation, Shimla*** versus **Prem Lata Sood and others**, (2007) 11 SCC 40 have held that Himachal Pradesh Town and Country Planning Act, 1977 and Himachal Pradesh Municipal Corporation Act, 1994 operate in different fields and they are complementary and supplementary to each other. Their Lordships have also considered sections 243, 245 and 247 of the Himachal Pradesh Municipal Corporation

Act, 1994. Their Lordships have also taken into consideration Regulation 10.4.2 (x) (a) and 10.7. Their Lordships have further held that the regulations in the 'core area' and 'heritage area' within which only the respondents had filed their application for grant of sanction of the building plans, no order could be passed by the respondent-corporation. Their Lordships have further held that section 243 of the H.P. Municipal Corporation Act, 1994 clearly mandates that erection of a building must precede grant of express sanction of a building plan and how and in what manner the same is required to be dealt with is provided in Sections 244 and 245 of the 1994 Act. Clause (a) of sub-section (2) of Section 246 in no uncertain terms restrict the power of the Municipal Corporation to grant sanction for erection, inter alia, for development of an area by way of erection of a building or otherwise, not only if the same is not in conformity with the building bye-laws, but also if it contravenes any other law or rules operating in the field. The Himachal Pradesh Town and Country Planning Act, 1977 is one of such Act of which provisions thereof are binding upon the local authority. Their Lordships have further held that once the provisions thereof are held to be binding, the law made by the State by way of

subordinate legislation in the form of the regulations and/or notifications issued under sub-sections (4) and (5) of Section 17 of the 1977 Act would also be binding. Indisputably, the Municipal Corporation would not have any authority to grant any sanction in violation thereof. Their Lordships have further held that it is now well settled that where a statute provides for a right, but enforcement thereof is in several stages, unless and until the conditions precedent laid down therein are satisfied, no right can be said to have been vested in the person concerned. Their Lordships have held as under:

> **23. Yet again a notification was issued by the State of Himachal Pradesh on or about 22.08.2000 whereby and whereunder, for the existing Regulation 10.4.2(x)(a), the following was substituted :**
>
> **"10.4.2 (x)(a), CORE AREA : (i) New construction in core area shall be allowed in respect of residential buildings upto maximum two storeys and ancillary used thereto with the prior permission of the State Government.**
>
> **Provided that in case of reconstruction of old structured or building shall be permitted by the State Government subject to the condition that the plinth area and number of storeys on old lines shall remain the same as were existing earlier."**
>
> **Regulation 10.7 provided for a 'Heritage Zone', relevant clauses whereof read as under:**
>
> **"10.7 HERITAZE ZONE :**
>
> **(A) No development for reconstruction unless specifically recommended by the Heritage Advisory Committee and permitted by the State Government shall take place in the Heritage Zone, which shall be comprised of the following areas, namely :**
>
> **(i) Viceregal lodge complex Complete;**

(ii) One building depth on either side of the road surrounding Viceregal lodge complex;

(iii) One building depth on either side of the Mall road starting from the gate of Indian Institute of Advance Studies upto Chhota Shimla Chowk via State Bank of India, Scandal Point, Shimla Club and Oak Over."

24. In view of the aforementioned amendments in the regulation declaring 'core area' and 'heritage zone' within which only the respondents had filed their application for grant of sanction of the building plans, no order could be passed by the appellant.

29. In our opinion, the 1977Act and the 1994 Act operate in different fields and they are complementary and supplementary to each other. The provisions of both the Acts can be worked out. There is no conflict between the two Acts. The 1977 Act deals with laying down the broad policy. It provides for preparation of development plans including the internal development plans. Indisputably, such development plans when made would be binding upon the local authority. It may, however, be not correct to contend that despite the fact that the operation of the Acts cover two different fields, namely, the 1977 Act deals with laying down the overall policy matter and the 1994 Act deals with the grant of building plans in terms of the provisions thereof by the Commissioner of the Municipal Corporation; only because sanction for development in the Mall area of the town of Shimla was granted by the State in terms of the 1977 Act, the same would mean that the same was binding upon the Municipal Corporation or that the provisions of the 1994 Act or the building bye-laws were not required to be complied with at all.

31. Section 243 of the 1994 Act clearly mandates that erection of a building must precede grant of express sanction of a building plan. How and in what manner the same is required to be dealt with is provided in Sections 244 and 245 of the 1994 Act. Clause (a) of sub-section (2) of Section 246 in no uncertain terms restrict the power of the Appellant-Corporation to grant sanction for erection, inter alia, for development of an area by way of erection of a building or otherwise, not only if the same is not in conformity with the building bye-laws, but also if it contravenes any other law or rules operating in the field.

32. The 1977 Act is one of such Act. As noticed hereinbefore, the provisions thereof are binding upon the local authority. Once the provisions thereof are held to be binding, the law made by the State by way of subordinate legislation in the form of the regulations and/or notifications issued under sub-sections (4) and (5) of Section 17 of the 1977 Act would also be binding. Indisputably, the Municipal Corporation would not have any authority to grant any sanction in violation thereof.

33. Section 247 no doubt provides for a legal fiction specifying a period of sixty days, within which the application for grant of sanction of a building plan should be granted, but the said period evidently has been considered to be providing for a reasonable period during which such application should be disposed of. However, only because the period of sixty days has elapsed from the date of filing of application, the same by itself would not attract the legal fiction contained in Section 247 of the 1994 Act. When such an application is attended to and the defects in the said building plans are pointed out, there cannot be any doubt whatsoever that the applicant must satisfactorily answer the queries and/or remedy the defects in the building plans pointed out by the competent authority.

35. In any event, as in the meanwhile, the period for which the building plan was sanctioned by the State had expired, the question as to whether in the aforementioned fact situation obtaining, the respondents acquired any vested right despite the amendments in the regulation by defining 'core area' and providing for the heritage zone is the issue, in our opinion, is misconceived.

36. It is now well-settled that where a statute provides for a right, but enforcement thereof is in several stages, unless and until the conditions precedent laid down therein are satisfied, no right can be said to have been vested in the person concerned. The law operating in this behalf, in our opinion is no longer res integra.

44. There cannot be any doubt whatsoever that an owner of a property is entitled to enjoy his property and all the rights pertaining thereto. The provisions contained in a statute like the 1994 Act and the building bye-laws framed thereunder, however, provide for regulation in relation to the exercise and use of such right of an owner of a property. Such a regulatory statute must be held to be reasonable as the same

is enacted in public interest. Although a deeming provision has been provided in sub-section (1) of Section 247 of the 1994 Act, the same will have restricted operation. In terms of the said provision, the period of sixty days cannot be counted from the date of the original application, when the building plans had been returned to the applicant necessary clarification and/or compliance of the objections raised therein. If no sanction can be granted, when the building plan is not in conformity with the building bye-laws or has been made in contravention of the provisions of the Act or the laws, in our opinion, the restriction would not apply despite the deeming provision.

50. Furthermore, since special regulations have been framed in the town of Shimla, the core area as provided for in the regulation is required to be protected. The area in question has been declared to be a heritage zone, and hence no permission to raise any construction can be issued, which would violate the ecology. Such regulations have been framed in public interest. Public interest, as is well-known, must override the private interest. [See Friends Colony Development Committee v. State of Orissa and Others AIR 2005 SC 1 \026 para 22].

22. The notification dated 22.8.2002 has been issued under sub-sections (4) and (5) of section 17 of the Himachal Pradesh Town and Country Planning Act, 1977. The notification on 5.6.2003 has also been issued under sub-sections (4) and (5) of section 17 of the Himachal Pradesh Town and Country Planning Act, 1977. These notifications dated 22.8.2002 and 5.6.2003 have been issued in accordance with law.

23. Their Lordships of the Hon'ble Supreme Court while disposing of Civil Appeal Nos. 2243-44 of 2008 have observed that one of the questions which arose for

consideration was as to whether deemed sanction of building plans as contemplated under section 247 of Himachal Pradesh Municipal Corporation Act would be applicable in respect of the constructions within the heritage zone. According to their Lordships of the Hon'ble Supreme Court, this question has already been gone into in ***Commissioner of Municipal Corporation, Shimla*** versus ***Prem Lta Sood and others***, 2007 (11) SCC 40. Thus, it is evident that the area in question falls in Heritage Zone and there could not be any deemed sanction as per the dicta of the Hon'ble Supreme Court in (2007) 11 SCC 40 (supra) and the matter was required to be considered by the Heritage Advisory Committee and the recommendations made by the Heritage Advisory Committee were required to be sent to the State Government by the Director.

24. The matter was discussed by the Heritage Advisory Committee on 14.9.2009. The proceedings qua the petitioner are as under:

> **"Planning permission case for construction of 4 storeys + parking floor Hotel (Tashkent) Sherwood Estate, near AG Office, Shimla in favour of Sh. Mool Krishan Aggarwal and Sh. Gopal Mohan Aggarwal.**
>
> **(i) The proposal was submitted for construction of 4 storyes+ 1 parking floor on Kh. No. 947/912/1, 947/912/2, 951/917, 953/920 and 949/916 with plinth area of 172.68 sqm. Besides, the said Kh. Nos., the applicants have ownership over Kh. No. 909,**

946/912, 950/917, 918, 919, 952/920, 948/916 and 959/496. The total area of land in ownership of the applicants measures 2162.27 sqm. The built up area of 1903.44 sqm. was sanctioned by the Municipal Corporation, Shimla for 4 storeys + 1 parking floor hotel building and an area of 163.21 sqm. for 2 storeyed residential cottage, vide sanction letter dated 23.2.2004, on Kh. No. 909, 946/912, 950/917, 918, 919, 952/920, 948/916 and 959/496. An additional built up area of 951.72 sqm. for 2 storeys was sanctioned by the M.C. Shimla, in view of Hon'ble High Court court, whereby 6 storeys + 1 parking floor were accorded permission for hotel building. Thus total built up area of already existing blocks was 3018.37 sqm.

(ii) The builkt up area of proposed additional 4 storeys + 1 parking floor Hotel building is 690.72 sqm.

(iii) The total built up area of existing and proposed construction was 3709.09 sqm. However, the permissible built up area is 2162.27 sqm. Thus there is an excess built up area of 1546.82 sqm. The overall F.A.R. works out 1.72 against the permissible F.A.R. of 1.00.

The status of the case was thoroughly deliberated by the Committee. The Commissioner, Municipal Corporation pointed out that in order to apprise the Committee regarding present status of the case, fresh inspection of the site is required to be conducted by the M.C. The Chairperson directed that the Commissioner should submit the status of the case by 19.10.2009, so that the same is considered in the meeting proposed to be held on 20.10.2009."

25. Thereafter, as per the record produced by the Municipal Corporation, Shimla, inspection was carried and the report was forwarded on 22.10.2009 to the Additional Chief Secretary (Urban Development) to the Government of Himachal Pradesh by the Commissioner. The matter was deliberated in the meeting held on

23.10.2009 vide Annexure P-37. The Heritage Advisory Committee has rejected the case of the petitioners. The Commissioner, Municipal Corporation was directed to confirm the details regarding latest status of the case presented by him before the Committee in writing for reference and record as soon as possible. The Commissioner, Municipal Corporation, Shimla again visited the spot as per resolution dated 23.10.2009 and has submitted the report to the Additional Chief Secretary (Urban Development) to the Government of Himachal Pradesh. According to him unauthorized construction was not permissible in view of the prevailing Regulations. He has also given reference to notification dated 5.6.2003 in his report. There is no illegality or arbitrariness in the final decision taken by the Heritage Advisory Committee in its meeting held on 23.10.2009 whereby the case of the petitioner has been rejected. Order dated 9.12.2004 being interim order will merge in the final judgment. The order dated 4.8.2005, has already been vacated by the Hon'ble Supreme Court. The present matter was not a case of deemed sanction since the area falls in 'heritage zone' as per notification dated 22.8.2002 read with notification dated 5.6.2003. There is a detailed procedure the manner in which the

application is to be processed as per notifications dated 22.8.2002 and 5.6.2003. Case of the petitioners already stood rejected by the Heritage Conservation-Committee on 1.1.2005 and again by the Heritage Advisory Committee on 23.10.2009. Initially, the stand of the respondent-corporation was that the area falls in restricted area, but in the Special Leave Petition preferred before the Hon'ble Supreme Court against the order dated 4.8.2005 and in the reply filed to the amended writ petition, it has been stated that the area falls in 'heritage zone'. The stand of the respondent-State throughout was that the area falls in 'heritage zone'. The Commissioner, Municipal Corporation was remiss in recommending the case of the petitioners on 17.3.2004 to the State Government that the area falls in 'restricted area'. The recommendations made by the respondent-corporation were not binding upon the State Government and the State Government has rightly come to the conclusion that the area falls in the 'heritage zone' and the regulations notified on 22.8.2002 and 5.6.2003 are applicable.

26. The amendment carried out to the Regulations by inserting 10.4.1.2 (x) (a), 10.4.1.2 (x) (b), 10.7, 10.7.2 and 10.7.3 are validly issued vide

notifications dated 22.8.2002 and 5.6.2003. The building bye-laws have been framed strictly as per section 395 Clause (D) of the Himachal Pradesh Municipal Corporation Act, 1994, including building bye-law 9.1. In the interim development plan, there is no provision of deemed sanction as far as area falling within the 'heritage zone' is concerned. Accordingly, order dated 23.10.2009 is legal and valid. This Court has passed various orders the manner in which the Heritage Advisory Committee was to be constituted and the same has been finally constituted as per notification dated 20.9.2011.

27. The observation made by the Division Bench in order dated 4.8.2005 that so far as the benefit of deemed sanction is concerned, section 247 does not draw any distinction between a heritage zone or any other zone, including section 31 of the Himachal Pradesh Town and Country Planning Act, 1977 has been set aside by the Hon'ble Supreme Court in Special Leave Petition preferred against this order.

28. Their Lordships of the Hon'ble Supreme Court in ***V.M. Kurian*** versus ***State of Kerala and others***, (2001) 4 SCC 215 have held that Kerala Building Rules, 1984 provided for regulation and construction of a

building in an urban area and the object behind the rules is maintenance of public safety and convenience. Their Lordships have further held that the State Government could not grant exemption from operation of the rules without the recommendations of the GCDA and the Chief Town Planner. Their Lordships have held as under:

> **"7. Learned counsel appearing for the appellant urged, that the application submitted by the 5th respondent having not processed in conformity with Rule 5 of the Rules and, therefore, the said application could not have been entertained by the State Government. It was also argued that in absence of any recommendation by the GCDA and the Chief Town Planner, the State Government could not have granted exemptions from operation of the Rules for construction of an eight storied building by the 5th respondent. Whereas, learned counsel for the 5th respondent contended that the meaning of the word recommendation necessarily does not mean a no objection certificate by the GCDA and the Chief Town Planner, but it contemplates only their view point. He further argued that even if the GCDA and the Chief Town Planner had objected to grant of the application, the State Government, in exercise of its overriding power can permit dispensation of Rules for construction of high rise building. In order to appreciate the argument of the parties, it is necessary to quote the relevant portion of Rule 5, which runs thus:**
>
> **5. Power of Government to exempt building: The Government may in consultation with the Chief Town Planner exempt (any building) from the operation of all or any of the provisions of these rules subject to conditions if may, to be stipulated in the order, granting such exemptions;**
>
> **Provided that such exemption shall be considered on individual application forwarded to the government through the authority and the Chief Town Planner with their specific recommendations;**
>
> **Provided further that such exemption shall be considered only if the individual application for exemption from building Rules is forwarded to Government along with a**

challan receipt remitting the application fee in the Government Treasury as detailed below.

A perusal of Rule 5 shows that an application for exemption from the provisions of Rules is required to be processed through the GCDA and the Chief Town Planner. The Rule further requires that the application is to be forwarded to the State Government along with the specific recommendations of the GCDA and the Chief Town Planner. The question, therefore, that arises for consideration is whether in absence of any recommendation by the GCDA and the Chief Town Planner the State Government was competent to grant exemption from the operation of the Rules for construction of a high rise building. The dictionary meaning of the word recommend is to advise, to praise or commend. In Law Lexicon, the meaning of the word recommendation is a statement expressing commendation or a message of this nature or suggests fit. It is true that the word recommendation is not defined in the Rules. If we do not go by the meaning of the word recommendation, as suggested by learned counsel for the 5th respondent, and found that there is no conclusive meaning of the word recommendation we are of the view that in such a situation the meaning of the word has to be understood in the context of the provisions of the Rules and the object behind such Rules. The Rules with which we are concerned here provide for regulation and construction of building in an urban area. The object behind the Rule is maintenance of public safety and convenience. The Municipal Corporation, GCDA, and the Chief Town Planner are entrusted with the functions and duties for carrying out development and regulation of building in the urban area. These are the authorities on the spot who have special and technical knowledge to advise the Government whether public safety and convenience requires dispensing with the provisions of Rules while permitting construction of an eight storied building. Thus, the meaning of the word recommend, when read in the context of Rules show that it means giving of a favourable report opposed to an unfavourable one. We, therefore, find that recommendations by the GCDA and the Chief Town Planner is sine qua non for granting exemption from operation of the Rules by the State Government. In the absence of such recommendations, the State Government was not legally justified in granting exemption from operation of

the Rules for construction of high rise building. However, the position would be different where the GCDA and the Chief Town Planner give an unfavourable report on irrelevant or extraneous ground and in that case, the Government can call for a fresh report for meeting the viewpoint of the GCDA and the Chief Town Planner. Here, what we find is that there were neither recommendations by the GCDA and the Chief Town Planner, nor the State Government obtained any fresh report to contradict the view point of the GCDA and the Chief town Planner while granting exemption from operation of the Rules for constructing high rise building. We are, therefore, of the view that the impugned orders suffer from serious legal infirmity.

8. It was then urged on behalf of learned counsel for the respondent that in the present case, the Chief Town Planner was present in the meeting held on 16.8.1990 and he consented to the grant of exemption from operation of Rules for according permission to construct an eight storied building and, therefore, in pith and substance, there was a recommendation of the Chief Town Planner. On the said argument we adjourned the case and directed the State Government to produce the minutes of the meeting held on 16.8.1990. Shri Harish N Salve, learned Solicitor General, appearing for the State of Kerala placed before us the entire record of the case. We have perused the minutes of the meeting held on 16.8.1990 but do not find any consent or recommendation having made by the Chief Town Planner recommending the State Government to grant exemption from operation of the Rules for construction of an eight storied building. Where the Rules require specific recommendation of the Chief Town Planner in writing, his mere presence in the meeting would not constitute recommendation for grant of exemption from the Rules. Therefore, in the absence of any such recommendation, we find that the order passed by the State Government permitting the 5th respondent to construct an eight storied building after granting exemption from operation of the Rules was erroneous.

10. As stated above, the area of land owned by the 5th respondent was only 9.5 cents (384.4 sq. mtrs.). As per the impugned order, the 5th respondent was allowed to construct an eight storied building with floor area of 27306.55 sq. ft. and 83.15 ft. height to accommodate 28 residential apartments,

office and godowns etc. etc. The exemption granted by the State Government has enabled the 5th respondent to construct the building in violation of Rules regarding - (1) minimum open spaces required to be kept in the front, rear and sides, (2) front, rear and side yards, (3) projections into and constructions on open spaces, (4) floor area ratio, (5) maximum prescribed height, (6) aerodrome vicinity height restrictions, (7) parking spaces, (8) minimum width of stair cases and (9) fire protection.

11. Under the Rules, there is restriction with regard to the maximum height of the building. The building should not be constructed exceeding 1.5 times width of the street abutting plus 1.5 times the front yard. Before the High Court, the 5th respondent gave an affidavit that he would convert the ground floor of the building for purposes of car parking. The said affidavit could not have been entertained as the ground floor had already been constructed and let out. Most surprising is that the requirement of having provision towards protection from fire hazards was also dispensed with. The minimum width of the staircase as required under Rule 21(11)(b), also got dispensed with. This shows that the Rules, which are mandatory in nature and are required to be complied with for construction of a high rise building, were allowed to be dispensed with. Observance and compliance of Rules is for public safety and convenience. There cannot be relaxation of Rules, which are mandatory in nature and cannot be dispensed with especially in the case of high rise building. The position may be different in the case of one or two storied building where there are minor deviations from the Rules, which do not effect the public safety and convenience. In the present case, we find that the deviations are of high magnitude, which are contrary to the public safety and convenience. We are, therefore, of the view that the order passed by the State Government exempting the provisions of the Rules for constructing an eight storied building was contrary to the mandatory provisions of the Rules and therefore, is not sustainable in law."

29. Their Lordships of the Hon'ble Supreme Court in ***State of A.P. and others*** versus ***N. Audikesava***

Reddy and others, (2002) 1 SCC 227 have held that the development and town planning are ongoing processes, subject to change from time to time, depending on local needs.

30. Their Lordships of the Hon'ble Supreme Court in ***Hotel Sea Gull*** versus ***State of W.B. and others***, (2002) 4 SCC 1 have held that the permission for development obtained under an earlier law which ran contrary to the interim provisions of the development plan could not continue after the application of the Act to the place concerned. Their Lordships have further held that section 56 of the West Bengal Town and Country (Planning and Development) Act, 1979 provides for interim development plan. Their Lordships have further held that such provisions imply that the powers and functions therein are to be exercised by the authority concerned under the Act pending preparation of development plan. Their Lordships have held as under:

> **"22. It is clear from the aforesaid section that the concerned authority while dealing with an application for permission is to have regard to the provisions of the development plan, if it has come into force, if not, then any other material consideration, obviously implying that Section 46(1) would be applicable even when development plan has not come into operation.**
>
> **23. Apart from this, Section 56 of the Act provides for interim provisions pending preparation of development plan. In terms of the aforesaid provisions the authority concerned while exercising the powers under the Act is**

required to have regard to the provisions of development plan before such development plan has become operative or which in its opinion would be required to be included for securing the proper planning of the concerned area implying thereby that the powers and functions therein are to be exercised by the concerned authority under the Act pending preparation of development plan in terms of the aforesaid provisions. Section 51(1) also indicates that power of revocation and modification of permission is with regard to "development plan" already prepared or "under preparation" or to be prepared and to any other material consideration implying thereby that the permission to develop under the Act would be required even when the development plan is under preparation or to be prepared. It does not indicate that the permission under section 46 would not be required in the absence of a development plan in a particular area.

24. Para 8(1) of the interim provisions says that no development shall be permitted within five hundred meters from the high tide line of sea and all along the boundary line of the planning area provided that the existing buildings including buildings under construction with the approval of the authority may be allowed to continue. Construction of the second floor over the existing first floor of the hotel building clearly amounts to building operations and is thus development in, on, and over the land in question. Section 46 makes it clear that the authority while dealing with an application for permission is required to have regard to the development plan if it has come into operation or any other material consideration. Section 56 provides for interim provisions. If that be so, then if any building operation is to be carried out which is against the interim provisions of the development plan and then the building operations or development is being carried out which falls within five hundred meters from the high tide line could be permitted only with the approval of the authority and not otherwise. For this reason the appellant was required to take permission before carrying out building operations/development of the second floor over the existing first floor of the hotel building.

25. Under Section 51 the planning or the development authority has been clothed with the power to revoke or modify a development plan prepared or under preparation, to the extent it is necessary, if it appears and is

expedient to do so. The circumstances and the reasons under which the plan can be revoked or modified have not been spelt out. It is left to the discretion of the authority. The expression 'Expedient' employed is the key word in this Section. The word 'expedient' has not been defined under the Act. According to Webster's Encyclopedic Unabridged Dictionary of the English Language 'expedient' means 'tending to promote some proposed or desired object'; 'fit' or 'suitable for the purpose'; 'proper under the circumstances'. In the Words and Phrases (Permanent Edition) Volume 15A Evidence-Eyewitness, the word 'expedient' has been described as when used as an adjective as 'apt' and 'suitable to the end in view'; 'furthering, or adapted to further, what is purposed'; practical and efficient; as, an expedient change of policy; an expedient solution of a difficulty; hence, advantageous. The word 'expedient' occurring in the statute authorising modification, revocation under the circumstances would comprehend whatever is suitable and appropriate for any reason for the accomplishment of the specified object."

31. In the instant case also, the powers and functions are to be exercised under the Himachal Pradesh Town and Country Planning Act, 1972 pending preparation of development plan.

32. Their Lordship of the Hon'ble Supreme Court in ***Ganga Retreat and Towers Limited and another*** versus ***State of Rajasthan and others***, (2003) 12 SCC 91 have held that bye-law is a law in enforce in India. Their Lordships have held as under:

"31. Under Section 20 of the Contract Act, a mistake of fact avoids the agreement when both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement. It is necessary that both the parties should be under a mistake. On the appellants' own showing, the respondents were not under mistake; according to the

appellants, the respondents knew the correct facts and yet misrepresented. The appellants pleadings of misrepresentation and mistake in the alternative, in the facts and circumstances of the case, are mutually destructive. Under Section 21 a contract is not voidable because it was caused by a mistake as to any law in force in India. The appellants cannot rely on the pleading of mistake of their part or misrepresentation on the part of the respondents as to the applicability of Urban Ceiling Law and FAR as provided by the bye-laws, both being the laws in force in India. Here again, the vitiating effect of alleged mistake shall stand obliterated no sooner it is found that the appellants have, in spite of the so-called mistake being discovered, yet, chosen to stand by the contract, ratifying the same by their conduct and went ahead to exercise the rights which accrued to them under the same contract which they are pleading to be vitiated by the mistake."

33. Their Lordships of the Hon'ble Supreme Court in ***Howrah Municipal Corporation and others*** versus ***Ganges Rope Co. Limited and others***, (2004) 1 SCC 663 have held that the building plans are governed by statutory provisions which are intended to ensure proper administration and to provide proper civic amenities and no vested right divorced from public interest or public convenience can be claimed by any person seeking such sanction. Their Lordships have further held that the building rules or regulations existing on the date of sanction would govern the matter and not those existing on the date of application. Their Lordships have held as under:

"17. The subject of sanction of construction is governed by the provisions of the Act, Rules and Regulations as also the

Resolution of the Corporation which was taken with approval of Mayor-in-Council. The statutory provisions regulating sanction for construction within the municipal area are intended to ensure proper administration of the area and provide proper civic amenities to it. The paramount considerations of regulatory provisions for construction activities are public interest and convenience. On the subject of seeking sanction for construction, no vested right can be claimed by any citizen divorced from public interest or public convenience.

28. In our considered opinion, by the order of the Court dated 23.12.1993 observing that the petitioner is 'not prevented from applying' for further sanction of additional floors above fourth floor and the 'expectation' expressed in the subsequent order of the Court dated 24.6.1994 , from the Corporation to decide the pending application for sanction within four weeks, no vested right in favour of the respondent \026 company can be said to have been created to obtain sanction on the unamended rules, as they existed on the date of their second application.

36. The above stated legal position is not disputed on behalf of the respondent \026 company. What is being contended is that the order of the High Court fixing a period for the Corporation to decide its pending application for sanction creates a vested right in favour of the applicant company to seek sanction for its additional proposed construction on the basis of Building Rules, as they stood prior to the amendment introduced to the Building Rules and the consequent Resolution of the Corporation restricting the height of buildings on G.T. Road. It is undeniable that after the amendment of the Building Rules and the Resolution passed by the Corporation thereunder restrictions imposed on heights of buildings on specified wards, roads and localities would apply to all pending applications for sanction. The question is whether any exception can be made to the case of the applicant seeking sanction who had approached the court and obtained consideration of its applications for sanction within a specified period. We have extracted above, the various orders passed by the High Court in writ petitions successively filed by the company in an effort to obtain early sanction for its additional construction of three floors on the buildings in its multi-storeyed complex already completed up to 4th floor. In

none of the orders of the High Court, there is a mandate issued to the Corporation to grant a sanction. What was directed by the High Court in the first order was merely a 'liberty' or option to the company to seek sanction for additional three floors. In the subsequent order, an 'expectation' was expressed for decision of the pending applications within a period of four weeks. There was, thus, in favour of the company an order of the High Court directing the Corporation to decide its pending applications for sanction within the allotted period but non-compliance thereof by the Corporation can not result in creation of any vested right in favour of the company to obtain sanction on the basis of the Building Rules as they stood on the date of making application for sanction and regardless of the amendment introduced to the Building Rules. Neither the provisions of the Act nor general law creates any vested right, as claimed by the applicant \026 company for grant of sanction or for consideration of its application for grant of sanction on the then existing Building Rules as were applicable on the date of application. Conceding or accepting such a so-called vested right of seeking sanction on the basis of unamended Building Rules, as in force on the date of application for sanction, would militate against the very scheme of the Act contained in Chapter XII and the Building Rules which intend to regulate the building activities in a local area for general public interest and convenience. It may be that the Corporation did not adhere to the time limit fixed by the court for deciding the pending applications of the company but we have no manner of doubt that the Building Rules with prohibition or restrictions on construction activities as applicable on the date of grant or refusal of sanction would govern the subject matter and not the Building Rules as they existed on the date of application for sanction. No discrimination can be made between a party which had approached the court for consideration of its application for sanction and obtained orders for decision of its application within a specified time and other applicants whose applications are pending without any intervention or order of the court."

34. Their Lordships of the Hon'ble Supreme Court in ***Friends Colony Development Committee*** versus

State of Orissa and others, (2004) 8 SCC 733 have held that the regulations of building activities although restricts the freedom of individual property owners to use their property but it cannot be termed as arbitrary or unreasonable. Their Lordships have further held that power to plan development of cities and to regulate building activity flows from the police power of the State. Their Lordships have held as under:

> **"20. The pleadings, documents and other material brought on record disclose a very sorry and sordid state of affairs prevailing in the matter of illegal and unauthorized constructions in the city of Cuttack. Builders violate with impunity the sanctioned building plans and indulge deviations much to the prejudice of the planned development of the city and at the peril of the occupants of the premises constructed or of the inhabitants of the city at large. Serious threat is posed to ecology and environment and, at the same time, the infrastructure consisting of water supply, sewerage and traffic movement facilities suffer unbearable burden and are often thrown out of gear. Unwary purchasers in search of roof over their heads and purchasing flats/apartments from builders find themselves having fallen prey and become victims to the design of unscrupulous builders. The builder conveniently walks away having pocketed the money leaving behind the unfortunate occupants to face the music in the event of unauthorized constructions being detected or exposed and threatened with demolition. Though the local authorities have the staff consisting of engineers and inspectors whose duty is to keep a watch on building activities and to promptly stop the illegal constructions or deviations coming up, they often fail in discharging their duty. Either they don't act or do not act promptly or do connive at such activities apparently for illegitimate considerations. If such activities are to stop, some stringent actions are required to be taken by ruthlessly demolishing the illegal constructions and non-compoundable deviations. The unwary purchasers who shall be the sufferers**

> **must be adequately compensated by the builder. The arms of the law must stretch to catch hold of such unscrupulous builders. At the same time, in order to secure vigilant performance of duties, responsibility should be fixed on the officials whose duty it was to prevent unauthorized constructions, but who failed in doing so either by negligence or by connivance."**

35. Their Lordships of the Hon'ble Supreme Court in ***New Delhi Municipal Council and others*** versus ***Tanvi Trading and Credit Private Limited and others,*** (2008) 8 SCC 765 have again reiterated that the law of approval of building plan would be the date on which approval is granted and not the date on which plans were submitted. Their Lordships have further held that town planning and development are covered under executive powers of Central Government under Article 73 of the Constitution of India, therefore, executive instructions can be issued in the absence of legislation (State of Central) in this field, but they should not be ultra vires the Act.

36. Their Lordships of the Hon'ble Supreme Court in ***Haryana State Industrial Development Corporation*** versus ***Shakuntla and others***, (2010) 12 SCC 448 have held that the court cannot sit in appeal over exercise of satisfaction by administrative authority vested with task of implementing development plan. Their Lordships have held as under:

> **"12. The appellant corporation has sought to justify the decision of the High Powered Committee to release that particular land by referring to a judgment of this Court in the case of Anand Buttons v. State of Haryana and others [(2005) 9 SCC 164] wherein this court observed:**
>
> **"...reasoning of the High Court cannot be faulted for the simple reason that the authority, who has to carry out the planned development of the industrial estate, is in the best position to judge as to which land can be exempted from the acquisition without jeopardizing the development scheme. It is not possible for the court to sit in appeal over the exercise of such satisfaction by the authority vested with the task of implementing the development plan."**
>
> **Thus the validity of the decision of the concerned authority was upheld on the ground that it has to carry out the planned development of the industrial estate and so it is in the best position to judge as to which land can be exempted from acquisition without jeopardising the development scheme. As such, it was rightly held by this court in Anand Buttons's Case (supra) that it is not possible for the court to sit in appeal over the exercise of such satisfaction by the authority vested with the task of implementing the development plan."**

37. Their Lordships of the Hon'ble Supreme Court in ***MIG Cricket Club*** versus ***Abhinav Sahakar Education Society and others***, (2011) 9 SCC 97 have held that user of the land is to be decided by the authority empowered to take such a decision and the court would not interfere unless change in user is found to be arbitrary.

38. Their Lordships of the Hon'ble Supreme Court in ***Manohar Joshi*** versus ***State of Maharashtra and others***, (2012) 3 SCC 619 have upheld the judgment for demolition of the building fully legally and justified.

39. The interim development plan has to be treated for all intents and purposes development plan and after the publication of this interim development plan, the control of development and use of land is covered under Chapter-VI of the Act. Thus, there is no merit in the contention of Mr. R.L. Sood, learned Senior Advocate that the interim development plan could not be implemented and taken into consideration for granting building permission.

40. Their Lordships of the Hon'ble Supreme Court in ***Raipur Development Authority*** versus ***Anupam Sahkari Griha Nirman Samiti and others***, (2000) 4 SCC 357 have held that when a draft scheme is published a sanction could only be in terms of the said scheme and no independent development plan in contradiction of the same could be sanctioned. Their Lordships have held as under:

> **"21. So far the 1st application dated 2.6.1986, we have already recorded that there is no deemed permission under sub-section (5) of Section 30. In fact, proceeding in pursuance to the same was closed for the lack of response from the respondent in respect of information sought. The second application is dated 1.1.1987 in which the respondent-society states about purchasing certain lands in villages and this society itself seeks issuance of no objection certificate from the appellant. However, the Chief Executive Officer rejected this through an order dated 16.11.1987 as the land in question which is situate in, the village Shankar Nagar, in which a draft scheme, as aforesaid, has already been published. Admittedly**

when a draft scheme is published a sanction could only be in terms of the said scheme and no independent development plan in contradiction of the same could be sanctioned. Similarly, through letter/order dated 20.11.1987 the Joint Director, Town and Country Planning also did not approve the application of respondent no.1 as applied area comes under the residential scheme of Raipur Development Authority which has already been published in the gazette. We do not find any illegality in the said two orders. This apart, respondent no.1, if aggrieved, had a remedy either by preferring an appeal or revision against it under Section 31 or 32 of the Act. Even otherwise, we feel if any development scheme is published either by the Union Government, State Government or local authority any application by any person under Section 29 for development cannot have its way in contradiction to such scheme. The scheme was framed in the year 1985, because of this long litigation delay is being caused in implementing the same with full force. The courts should normally refrain from interfering with the same, unless it is violative of the Act, rule or any constitutional provisions."

41. Their Lordships of the Hon'ble Supreme Court in ***Chairman, Indore Vikas Pradhikaran*** versus ***Pure Industrial Coke and Chemicals Limited and others***, (2007) 8 SCC 705 have observed that it is possible to enforce a draft development plan in a given case, but the statute must specifically provide for the same. There is reference to the Himachal Pradesh Town and Country Planning Act, 1977 where the provision has been made for preparation of interim development plan. Their Lordships have held as under:

"66. The draft development plan was published on 27.06.2003 although it was sent for consideration of the State in terms of Section 19 of the Act on 9.10.2003. The same was returned to the appellant \026 authority stating that plan to be prepared

for the projected population in the year 2021 on or about 4.01.2005. A draft development plan 2021 was published only on 13.07.2007 whereas the declaration by the appellant \026 authority was notified on 20.08.2004. Submission of Mr. Venugopal that a development plan would include a draft development plan is sought to be made as the statute has interchangeably used draft development plan, sanctioned development plan as development plan and, secondly, on the strength of clause (iv) of Sub-section (1) of Section 18 of the Act laying down that a notice shall be issued thereunder containing inter alia the particulars, viz., the provisions for enforcing the draft development plan and stating the manner in which permission for development may be obtained.

67. We do not see any force in the said argument. It is possible to enforce a draft development plan in a given case, but the statute must specifically provide for the same. But, a draft development plan which has not attained finality cannot be held to be determinative of the rights and obligations of the parties and, thus, it can never be implemented. Section 50 of the Act explicitly states that the authority may declare its intention to prepare a town development scheme which having regard to Section 2(u) of the Act must be read to mean declaration of its implementation to prepare a scheme for the implementation of the provisions of a development plan.

68. We have come across some legislations, as for example, The Himachal Pradesh Town and Country Planning Act, 1977 where a provision has been made for preparation of an interim development plan. It is not in dispute that legislations relating to town and country planning are somewhat similar. Had the legislature thought of implementation of a draft development plan, they could have also provided for an interim development plan which ipso facto would have been enforceable."

42. It is, thus, evident that the construction raised by the petitioners is unauthorized being in violation of the Himachal Pradesh Town and Country Planning Act, 1977 and the Rules framed there under read with interim development plan. The construction is

also in violation of the provisions of the Himachal Pradesh Municipal Corporation Act, 1994 and the Bye-Laws framed there under.

43. Now, the question, which needs consideration is: what action is required to be taken against the petitioners for raising construction unauthorizedly. Under the Himachal Pradesh Municipal Corporation Act, 1994, there is detailed procedure the manner in which the person who has raised unauthorized construction is to be dealt with. Section 253 deals with the order of demolition and stoppage of building and works in certain cases and appeal. Similarly, section 38 of the Himachal Pradesh Town and Country Planning Act, 1977 provides for penalty for unauthorized development. Section 39 empowers the Director to remove the unauthorized development.

44. Their Lordships of the Hon'ble Supreme Court in ***Muni Suvrat Swami Jain S.M.P. Sangh*** versus ***Arun Nathuram Gaikwad and others***, (2006) 8 SCC 590 have held that necessary orders are required to be passed by the statutory authorities provided under the Act. Their Lordships have held as under:

> **"53. It is seen that no notice under the provisions of Section 351 has been issued by the Municipal Commissioner in this matter against the appellant. In the special leave petition, it is**

clearly mentioned by the appellant that the Corporation had issued a notice to stop the work under Section 354A of the BMC Act. No reference is made to any notice under Section 351A of the Act. It is specifically mentioned that the affidavit which was filed on behalf of the Corporation had categorically stated that after the service of stop work notice under Section 354A no work was carried out. Respondent No.1 is fully aware that the provisions of Section 354A of the Act deals with stop work notice whereas the provisions of Section 351 of the Act deals with show cause notice for demolition of unauthorized structure. The grievance of the appellant herein has been that without issuing a notice under Section 351 of the Act and without giving an opportunity to the appellant of being heard the structure of the temple could not be ordered to be demolished by the High Court. The power under Section 351 of the Act, in our opinion, has to be exercised only by the Municipal Commissioner and it is left to the Municipal Commissioner under the provisions of Section 351(2) either to order or not to order the demolition of the alleged unauthorized temple. In fact, respondent No.1 by himself through his advocate's letter dated 16.04.2005 (annexed to his counter affidavit) requested the Municipal Authorities to take action under Section 351 of the Act. At the time of admission of this special leave petition, the provision of Section 351 of the Act was pointed out by the learned senior counsel to show that the Municipal Commissioner had only been conferred the power under the said provisions to demolish or not to demolish unauthorized structure and, therefore, the High Court ought not to have issued a mandamus for demolition of the temple before any order was passed by the Commissioner on the question of demolition. The provisions of Section 354A have nothing to do with the question of demolition. It is specifically averred and contended at the time of hearing that respondent No.1 is an agent set up by the developer who is developing the adjoining land and who is interested in dividing the right of way claimed by the appellant through the said adjoining plot bearing CTS No. 206."

45. In the instant case, the competent authority is the Municipal Corporation under the Himachal

Pradesh Municipal Corporation Act, 1994 to initiate action against the petitioners and under the Himachal Pradesh Town and Country Planning Act, 1977; the Director is empowered to take action against the petitioners.

46. Accordingly, in view of the observations and analysis made hereinabove, there is no merit in the petition and the same is dismissed. Respondents No.2 and 3 are directed to initiate action against the petitioners strictly as per the provisions of the Himachal Pradesh Municipal Corporation Act, 1994 and the Bye-Laws framed there under and under the Himachal Pradesh Town and Country Planning Act, 1977 and the Rules framed there under, including demolition of unauthorized construction within a period of four weeks from today. Pending application(s), if any, also stands disposed of. No costs.

(Justice Rajiv Sharma),
Judge.

31.10. 2012
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