
(2011) 02 KL CK 0037

In the High Court Of Kerala

Case No : Writ Petition (C) No's. 24526 of 2009 and 22857 of 2010

Shivaprasad

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 09-02-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 17, 19, 21, 243
Kerala Municipalities Act, 1960 — Section 4
Kerala Municipalities Act, 1994 — Section 2(4), 2(9), 20, 22, 22(1)
Kerala Municipality Building Rules, 1999 — Rule 2, 2(1), 21, 3A, 4
Kerala Panchayat Raj Act, 1994 — Section 175
Town Planning Act, 1939 — Section 10, 11, 12, 12(1), 13

Citation : (2011) 1 ILR (Ker) 697 : (2011) 2 KLJ 1 : (2011) 1 KLT 690

Hon'ble Judges : T.R. Ramachandran Nair, J

Bench : Single Bench

Advocate : Anil Thomas and K.V. Rashmi, for the Appellant; CM. Suresh Babu, Spl. Government Pleader, N. Nandakumara Menon P.K. Manoj Kumar and K.B. Mohandas, for the Respondent

Final Decision : Allowed

Judgement

T.R. Ramachandran Nair, J.—Important questions concerning the interpretation of Part IX-A of the Constitution of India, the Kerala Municipality Act, 1994 and the Town Planning Act, 1939 arise in these two Writ Petitions. Since common questions arise, they have been heard together and are disposed of accordingly.

W.P. (C) No. 24526/2009

2. The issue raised herein pertains to the Town Planning Schemes for Thiruvananthapuram Corporation, especially the Plamoodu area. The Petitioner is the owner of properties in Sy. Nos. 2101/2.1.1, 2079/1, 2079/1.1.1 of Kawdiar Village, Thiruvananthapuram Taluk. Ext.P1 series are the true copies of the applications for building permit, location plan, site plan, etc. which relate to the construction of a shopping mall comprising of 2 lakhs sq. ft. The Corporation rejected the application as per Ext.P2 order stating that the proposed site comes

under the residential zone of the Government sanctioned General Town Planning Scheme (Master plan) for Thiruvananthapuram and also the property comes under the residential zone of the Government sanctioned Detailed Town Planning Scheme (hereinafter referred to as the D.T.P. Scheme). The Petitioner mainly contends that the Master plan for Thiruvananthapuram was notified and published in 1960 under Sections 7, 8 and 9 of the Town Planning Act 1939. The Scheme was sanctioned by the Government vide G.O.(Rt) No. 921/71/LAD dated 21.6.1971 under Sections 10 to 12 of the said Act. Ext.P3 is the proposed land use map of the sanctioned master plan which was subsequently varied as per a notification of the year 1975 and sanction was accorded by the Government as per G.O.(Ms) No. 99/76/LA SWD dated 27.4.1976. It was further varied in the year 2006 as per G.O.(MS) No. 293/06/LSGD dated 23.12.2006. The said variation was sanctioned as per G.O.(MS) No. 144/07/LSGD dated 31.5.2007, which is produced as Ext.P4. In these schemes, the Petitioner's property remain as "residential", whereas the area next to his property remain as "industrial zone". Ext.P4 Zoning Regulations contains a restriction clause under para 14.3(iv) to the effect that "the provisions of Detailed Town Planning Schemes or Area Development Plans if any will prevail over these regulations." Thus, the relaxation granted in the residential area for mixed use on a land at a depth of 50 meters prescribed in the varied scheme is not available to Plamood area. It is pointed out that the Respondents have published a more liberalised scheme as far as Kochi city is concerned, as per Ext.P5 in the year 2007.

3. The D.T.P. Scheme of Plamoodu came into existence as notified u/s 12 of the Town Planning Act, 1939 by G.O.(MS) No. 174/92/LAD dated 29.6.1992 (Ext.P6). In an attempt to enlighten the Respondents of the necessity to amend the zoning regulations in respect of the area and to provide it as a mixed use area, the Petitioner has been moving the third Respondent as per Exts.P7 to P9 objections and letters. He moved the Government also by Exts.P10, P11 and P12 and Exts.P13 and P14 are the replies given to the effect that these objections will be considered at the time of revision of the D.T.P. Scheme. The Petitioner thereafter undertook the task of preparing an existing scenario map for a D.T.P. Scheme in the area and Exts.P16 to P18 series are the relevant documents. Ext.P19 is a comparative table prepared. This was followed by Exts.P20 and P22 and the Petitioner moved the Government under Sections 7, 13 and 35 of the Town Planning Act for considering them, but without any result. It is in these circumstances the Writ Petition has been filed.

W.P. (C) No. 22857/2010

4. The first Petitioner is a builder and second Petitioner is the owner of property wherein a hospital was functioning. The hospital was shifted to a more convenient area in the year 2007 and according to the Petitioners, for the philanthropic activities of the hospital, so as to raise funds they thought of constructing a commercial building in the property measuring 67.38 cents which is situated on the western side of Shornur road where the hospital was

functioning. Going by the zoning regulations, the area is known as "public and semi public zone". Ext.P 1 is the application for building permit which was accompanied by Exts.P1(a) to P1(h) documents. The Corporation rejected it by Ext.P2 communication by stating that the area is coming under the "public and semi public zone" as per the Detailed Town Planning Scheme for existing Shornur Road. The General Town Planning Scheme for Thrissur Town was prepared in 1960 and was got sanctioned on 21.6.1971 as per Ext.P3, wherein also the zone is classified as "public and semi public". It was revised as per Ext.P3(a), viz. G.O. (Ms.) No. 123/08/LSGD dated 28.4.2008. The said revised Scheme provided for mixed land use in "residential" as well as "public and semi public" and "industrial zones", which enables the second Petitioner to have commercial construction up to a depth of 100 meters. The Detailed Town Planning Scheme for existing Shornur road is produced as Ext.P4 which was notified in the year 1990 as per Ext.P4(a) notification. The mixed use permitted therein is except for the categories falling under "public and semi public" and "industrial". This was relied upon to reject the application of the second Petitioner as per Ext.P2. Thus, they could not get the benefit of the relaxed provisions under the General Town Planning Scheme. Representations were filed before Respondents 2 to 4 as Exts.P5 to P5(b), followed by reminders Exts.P5(c) to P5(e). The Petitioners have produced various documents as Exts.P6 to P9(a) to show the present non residential developments on the eastern side of existing Shornur Road DTP Scheme. According to them, they had requested for a revision of the DTP Scheme as per Exts.P10 and P11 contending that the existing DTP Scheme has become obsolete. Failing to get any action in the matter, this Writ Petition has been filed. The Petitioners have also produced Ext.P12 which is a copy of the Urban Policy and Action Plan for Kerala published in the year 2002 in tune with the policy of the National Commission on Urbanisation and the 74th Constitutional Amendment Act.

5. The reliefs claimed in these Writ Petitions are mainly to quash the General Town Planning Scheme and the D.T.P. Schemes produced in the respective Writ Petitions, to declare that the provisions of Sections 3 and 11 of the Town Planning Act, 1939 are inconsistent with Part IX-A of the Constitution of India and Chapter IV of the Kerala Municipality Act, 1994. Section 51(4) of the Municipality Act, 1994 and the orders refusing sanction are also under challenge. Consequential reliefs have also been sought for.

6. Heard Shri Anil Thomas and Smt. Rashmi K. V., learned Counsel for the Petitioners, Shri C.M. Suresh Babu, learned Govt. Pleader, Shri N. Nandakumara Menon, learned Senior Counsel and Shri P.K. Manoj kumar, learned Counsel appearing for Thiruvananthapuram Corporation and Shri K.B. Mohandas, learned Counsel appearing for Thrissur Corporation.

7. Learned Counsel for the Petitioners Shri Anil Thomas exhaustively covered the background of the Constitution Seventy Fourth Amendment Act, which introduced Part IX-A dealing with Municipalities, the provisions of the Municipality

Act, 1994 and the Town Planning Act, 1108 ME (1939). It is pointed out that the whole concept with regard to Urban Planning and Town Planning is laid down in the Constitution itself and Article 243ZF allows continuance of existing laws which is inconsistent with it until amended or repealed by a competent Legislature or until the expiration of one year from the commencement of the Constitution 74th Amendment Act, 1992, whichever is earlier. It is pointed out that that the Twelfth Schedule of the Constitution contains 18 subjects, of which the first three items relate to comprehensive urban and town planning as well as planning for economic and social development. It is further pointed out by the learned Counsel for the Petitioner that going by the provisions of the Constitution, it can be seen that spatial planning will have to be dealt with by the ward level committees of Municipalities, respective Standing Committees and the District Planning Committees upto the State Level Development Council for finalisation. Effective participation of the representatives of the people from the elected bodies and members from State legislature and the Parliament are also envisaged. Learned Counsel for the Petitioners submitted that this is in contra distinction to the top-down approach made in the Town Planning Act, 1939. It is pointed out that in tune with the Constitutional scheme, the legislature herein has enacted the Kerala Municipality Act, 1994 to replace the earlier enactments which were in conflict with Part IX-A of the Constitution. It is pointed out that even a reading of the preamble will show that it was brought to entrust such Municipalities with the functions of the preparation of plans and implementation of schemes for economic development and social justice including the implementation of schemes in relation to the matters listed in the Twelfth Schedule to the Constitution which is in tune with the decentralisation of powers and for participation of people in a great measure. The objects and reasons of the Constitutional Amendment Act 1992 and the statement of objects and reasons of the Municipality Act, 1994 emphasise the fact that Local Self Government Institutions like the Municipalities and Municipal Corporations will be involved in scientific spatial planning and different committees are involved in the matter. By referring to various provisions of the Municipality Act with regard to the formation of Ward Committees, its functions, Standing Committees, etc. in Local Self Government Institutions, it is pointed out that the framers of the Act brought into effect XI Ith Schedule of the Constitution by providing the First Schedule, in the Municipality Act, and Item 30 which specifically deals with preparation of detailed Town Planning Scheme and its implementation in a phased manner.

8. It is pointed out that Town Planning Act is obsolete, that it goes against the philosophy of the Constitution and thus cannot survive in the light of Article 243-ZF. It is also pointed out that the provisions of the Town Planning Act with regard to the General Town Planning Scheme and Detailed Town Planning Scheme are inconsistent with Part IX-A of the Constitution of India. They are inconsistent with the provisions of the Kerala Municipality Act, 1994 and therefore the later law, viz. the Municipality Act alone will prevail. The provisions of the Municipality

Act should be interpreted in a wide manner as it draws inspiration from the provisions of the Constitution itself. It is pointed out that the subject matter dealt with in the Town Planning Act has got only a limited scope as compared to the provisions of Part IX-A of the Constitution and the Municipality Act, 1994. It is also contended that the impugned orders affects the fundamental rights of the Petitioners guaranteed under Articles, 14, 19 and 21 of the Constitution. It is further pointed out that the town planning envisaged under the Municipality Act will involve schemes for development plans for the entire District and the Government has initiated steps in that line. As per the Govt. Order dated 1.8.2003 the Government has entrusted the District Planning Committee of Kollam District to prepare the Integrated District Development Plan for Kollam. This will fortify the argument of the Petitioners that the Town Planning Act has become obsolete. It is further pointed out that as far as preparation and finalisation of the Scheme under it are concerned, participation of the people's representative is minimal and it gives a major role for the Government and since the Constitution as well as the Municipalities Act provides the contrary scheme, the provisions under the Town Planning Act cannot survive.

9. Referring to the specific definitions of "development plan" contained in the Explanation to Section 51(2) of the Act, 1994 and that is contained in Rule 2(1) (w) of the Kerala Municipality Building Rules, it is contended that the definition under the Rules run contrary to the provisions of the Act and therefore it cannot survive. It is also submitted that the variation of the General Town Planning Scheme brought into effect within the two Corporation limits in the years 2007-2008 also can not survive as they are prepared under the Town Planning Act, 1939. It was alternatively pointed out that the maximum land use permitted under the revised General Town Planning scheme should get precedence over the detailed town planning schemes which have not been revised for decades by taking into consideration the development in the locality concerned.

10. By referring to various documents and the schemes prepared with regard to Plamoodu in Thiruvananthapuram and Shornur Road in Thrissur Corporation it is submitted that there had not been any proper adherence to the scheme at any point of time, mixed use has been permitted extensively and plans prepared by the Petitioner will show the same. It is therefore submitted that the view taken by the respective Corporations with regard to the applications submitted by the Petitioners for building permit is without referring to the various schemes extensively.

11. First I will consider the impact of Part IX-A of the Constitution, itself.

Constitutional Scheme:

Part IX-A of the Constitution was introduced as "Constitution (Seventy Fourth Amendment) Act, 1992. It was brought into effect since it was felt that the urban local bodies are not able to perform effectively as vibrant democratic units of self Government. In the light of the inadequacies it was considered necessary that

provisions relating to urban local bodies are incorporated in the Constitution itself to have an effective functioning. Para 3 of the statement of objects and reasons covers various matters on which the provisions were sought to be introduced in the Constitution itself. Clause (g) is important for our purpose which is reproduced below:

(g) devolution by the State Legislature of powers and responsibilities upon the Municipalities with respect to preparation of plans for economic development and social justice, and for the implementation of development schemes as may be required to enable them to function as institutions of self-government.

12. A reading of Part IX-A will show that a specific definition for Municipality has been introduced in Article 243-P(e). Article 243 provides that there shall be constituted in every State: (a) a Nagar Panchayat for a transitional area, that is to say, an area in transition from a rural area to an urban area; (b) a Municipal Council for a smaller urban area; and (c) a Municipal Corporation for a larger urban area, in accordance with the provisions of the said part. They have to be notified by the Governor under Article 243-Q(2) by which they will become Constitutional Institutions. Article 243-R provides for composition of Municipalities. Article 243-S provides for constitution and composition of Ward Committees. The next important article is Article 243-W which confers "powers, authority and responsibilities of Municipalities, etc." and it reads as follows:

243-W. Powers, authority and responsibilities of Municipalities, etc.- Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow,-

(a) the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to.-

(i) the preparation of plans for economic development and social justice; (ii) the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule;

(b) the Committees with such powers and authority as may be necessary to enable them to carry out the responsibilities conferred upon them including those in relation to the matters listed in the Twelfth Schedule.

Going by Clauses (i) and (ii) it can be seen that the Municipalities can be entrusted by law with the responsibilities for the preparation of plans for economic development and social justice and the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule. Items (1) and (2) in Twelfth Schedule are "Urban Planning including town planning" and "Regulation of land use and construction of buildings". Article 243-ZD provides for

constitution of Committee for district planning and Clause (1) provides as follows:

(1) There shall be constituted in every State at the district level a District Planning Committee to consolidate the plans prepared by the Panchayats and the Municipalities in the district and to prepare a draft development plan for the district as a whole.

It is specified in Clause (2) of Article 243-ZD that "the Legislature of a State may, by law, make provision with respect to the composition of the District Planning Committees and other matters specified. Clause (3) is important for our purpose which reads as follows:

(3) Every District Planning Committee shall, in preparing the draft development plan.-

(a) have regard to-

(i) matters of common interest between the Panchayats and the Municipalities including spatial planning, sharing of water and other physical and natural resources, the integrated development of infrastructure and environmental conservations;

(ii) the extent and type of available resources whether financial or otherwise;

(b) consult such institutions and organisations as the Government may, by order, specify.

The important item "spatial planning" is therefore emphasised therein to be included in the draft development plan. Article 243ZE provides for Committee for Metropolitan planning and the preparation of draft development plan for the Metropolitan area as a whole. Clause (3) therein reads as follows:

(3) Every Metropolitan Planning Committee shall, in preparing the draft development plan:

(a) have regard to.-

(i) the plans prepared by the Municipalities and the Panchayats in the Metropolitan area;

(ii) matters of common interest between the Municipalities and the Panchayats, including co-ordinated spatial planning of the area, sharing of water and other physical and natural resources, the integrated development of infrastructure and environmental conservation;

(iii) the overall objectives and priorities set by the Government of India and the Government of the State;

(iv) the extent and nature of investment likely to be made in the Metropolitan area by agencies of the Government of India and of the Government of the State

and other available resources whether financial or otherwise.

(b) consult such institutions and organisations as the Governor may, by order, specify."

Therein also it can be noticed that matters include co-ordinated spatial planning of the area. Article 243ZF relates to Continuation of existing laws and Municipalities. It reads as follows:

243ZF. Continuance of existing laws and Municipalities.- Notwithstanding anything in this Part, any provisions of any law relating to Municipalities in force, in a State immediately before the commencement of the Constitution (Seventy-fourth Amendment) Act, 1992, which is inconsistent with the provisions of this Part, shall continue to be in force until amended or repealed by competent Legislature or other competent authority or until the expiration of one year from such commencement, whichever is earlier:

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

13. In the light of the above, any law relating to Municipalities in a State prior to the coming into force of the Constitution (Seventy fourth Amendment) Act 1992 and which is inconsistent with the provisions of Part IX-A of the Constitution, can continue to be in force until amended or repealed or until the expiration of one year from such commencement, whichever is earlier. The Constitution (Seventy Fourth Amendment) Act, 1992 was published with effect from 1.6.1993 and therefore the period will expire by 31.5.1994.

The Kerala Municipality Act. 1994 - Background and scope of the relevant provisions:

14. As regards the introduction of the Municipality Act, it can be seen that the Legislature was alive to the responsibilities under Chapter IX-A of the Constitution and going by the preamble itself it can be seen that the Kerala Municipalities Act, 1960 and the Kerala Municipal Corporations Act, 1961 were found to be not in conformity with the provisions of Part IX-A of the Constitution and accordingly a new Act was brought for replacing them. The statement of objects and reasons show that apart from the Kerala Municipalities Act, 1960 and the Kerala Municipal Corporations Act, 1961, the Guruvayur Township Act, 1960 and the provisions of the Kerala Local Authorities (Constitution and Preparation of Electoral Rolls) Act, 1994 have also been repealed. The statement of objects and reasons contains in detail the background of the legislation.

15. Section 4 of the Kerala Municipalities Act, 1994 provides for Constitution, alteration and conversion of Municipalities; viz. (a) a "Town Panchayat" for a transitional area; (b) a "Municipal Council" for a smaller urban area; and (c) "a

Municipal Corporation" for a larger urban area. Evidently, the term "Municipality" will cover these three entities which are brought into effect under Article 243-Q of the Constitution.

16. To get an idea into the functions of various Standing Committees, it is profitable to refer to the relevant provisions of the Act. Section 20 of the Act provides for "Standing Committees" in a Town Panchayat, Municipal Council and Municipal Corporation. Herein, it is worthwhile to notice that as far as a Municipal Corporation is concerned, there should be a Standing Committee for Town Planning. As far as a Standing Committee for a Municipal Corporation is concerned, it is clear from Section 22(n) that it will have to deal with matters of town planning including regulation of building constructions, environment, urban beautification, etc. As far as the Standing Committee for Works of the Municipal Council is concerned, Section 22(h) provides that they will have to deal with matters of public works, housing, town planning including regulation of building constructions, environment, electricity, water supply, drainage and sewerage. In a Town Panchayat, these functions are entrusted to the Standing Committee for Development of the Town Panchayat u/s 22(1)(b). It is evident from Section 21 that Standing Committees are constituted by election from among the elected members of the Council. Section 30 is having the heading "powers, functions and responsibilities of Municipality". Sub-sections (1) to (3) are extracted hereunder:

30. Powers, functions and responsibilities of Municipality.- (1) The administration of a Municipal area in respect of the matters enumerated in the First Schedule shall, subject to the provisions of this Act and such other provisions as may be prescribed in this behalf and the provisions of other Acts and the rules made thereunder vest in the Municipality and it shall have the power and responsibility to prepare and implement schemes for economic development and social justice in relation to the matters enumerated in the First Schedule:

Provided that, it shall be the duty of the Municipality to render necessary service to the inhabitants of the Municipal area in respect of the matters enumerated as mandatory functions in the First Schedule;

(2) Municipality shall have such powers, authority and responsibilities of the Government as prescribed to enable it to function as an institution of self government in respect of the matters entrusted to it.

(3) The Government shall, as soon as may be after the coming into force of this Act, transfer all institutions, schemes, buildings, other properties, assets and liabilities connected with the matters mentioned in the First Schedule, to the Municipalities concerned.

It will show that it will have to prepare and implement schemes for economic development and social justice in relation to the matters enumerated in the First Schedule. For the effective functioning, the powers and responsibilities of the Government as prescribed have been conferred on, to enable it to function as an institution of self government. This is quite important. The Government will have

to transfer various institutions, schemes, buildings, other properties, assets and liabilities connected with the matters mentioned in the First Schedule to the Municipalities concerned. The proviso to Sub-section (1) is important as it emphasises the duty of the Municipality to render necessary service to the inhabitants in respect of enumerated mandatory functions under First Schedule wherein item 30 is "Preparation of detailed town planning and Action plan for implementation in a phased manner." Section 42 onwards relates to the Constitution of Ward Committees and Ward Sabhas, the functions and duties of these entities, etc. Going by Section 45(1)(a), the Ward Committees or Ward Sabhas will have to assist the collection and consolidation of details necessary for the formulation of development schemes for the Municipality apart from various other functions.

17. Chapter IV is important, which relates to preparation and execution of development plans. Going by Section 51, the Ward Committee or Ward Sabha as the case may be, will have to prepare every year a development plan for the ward along with an estimate of the expenditure therefore and Sub-section (2) enables the Municipality to prepare every year a development plan for the succeeding year considering the development plans submitted by the Ward Committee or Ward Sabhas, and submit it to the District Planning Committee. Explanation to the said section provides for a definition to the "development plan" which reads as follows:

Explanation.- For the purpose of this section "development plan" means a development plan for economic development, social justice, improvement of living conditions, creation of employment opportunities and increase of production capacity in relation to matters enumerated in the Twelfth Schedule to the Constitution including the matters to which the administrative power vests in the Municipality under the provisions of this Act or any other law.

Sub-section (3) is also important which is extracted below:

(3) Every Municipality shall prepare a master plan for its development in the prescribed manner with focus on scientific spatial planning taking into account its resources and as per the fiscal investment and submit the same to the District Planning Committee.

It thus concerns the preparation of a master plan on scientific spatial planning. Sub-section (4) is important for our purpose which reads as follows:

(4) Municipality shall have the power to prepare and implement detailed town planning schemes as per the laws relating to Town Planning for the time being in force subject to the master plan approved by the Government.

Sub-sections (3) and (4) in its present form, have been introduced substituting the earlier provisions, in 1999.

18. Thus it confers power to prepare and implement the detailed town planning scheme with reference to the provisions of the Town Planning Act and the Master

Plan approved by the Government. Section 52 gives power to the Government to entrust various Schemes to the Municipalities for implementation. Section 53 concerns constitution of District Planning Committee at the district level to consolidate the plans prepared by the Panchayats and the Municipalities in a District and to prepare a draft development plan for the district as a whole. The Government can nominate one person who has experience in administration and planning and the District Collector shall be the ex officio member. The District Collector shall be the Secretary of the Committee and the Committee includes the President of the District Panchayat, the Members of Lok Sabha and the Members of the Legislative Assembly representing any area comprised in a district shall be permanent invitees. If the constituency of a member of the Lok Sabha partly lies in one district and partly in another, he shall be a permanent invitee of the District Planning Committee of both districts. A member of the Rajya Sabha will be a permanent invitee of the district in which he is registered as an elector. Sub-section (9) also provides that the Committee shall consolidate the plans prepared by the Panchayats and the Municipalities in the District and prepare a draft development plan to the district as a whole and perform such other functions relating to district planning as may be assigned to it by the Government from time to time by notification in the Gazette. Sub-Sections 10 and 11 also are important which are extracted below:

(10). The Committee shall, in preparing the draft development plan.-

(a) have regard to (i) matters of common interest between the Panchayats and the Municipalities including spatial planning, sharing of water and other physical and natural resources, the integrated development of the infrastructure and environmental conservation; and

(ii) the extend and the type of available resources, whether financial or otherwise;

(b) consult such institutions and organisations as the Governor may, by order specify.

(11) The Chairman shall forward the development plan, as recommended by the Committee, to the Government for approval.

19. Sub-section (11) will show that the plan is to be forwarded to the Government by the Chairman for approval and the Government will have to consider it while preparing the State plan. Similar provisions are made in Section 54 with regard to the Metropolitan Planning Committee.

20. Section 55 relates to the State Development Council which will be chaired by the Chief Minister. It will include members of the Council of Ministers as well as the Leader of Opposition of the State Legislative Assembly who shall be the Vice Chairman, the Chairman of the District Planning Committees, the Mayors of the Municipal Corporations, two Chairpersons of the Municipal Council, two Chairpersons of the Town Panchayat, two Presidents of the Block Panchayat and

two Presidents of the Grama Panchayat, nominated by the Government, the Vice-chairman of the State Planning Board and the Chief Secretary who shall be its Member Secretary. The Council is entrusted with the task to co-ordinate the District plans and State plans.

21. The Kerala Municipality Act, 1994 came into force on 29.3.1994. The Kerala Municipality Act, 1960 and the Kerala Municipal Act, 1961 have been repealed. In fact, the concept of a Municipality itself has undergone a sea change, especially in the light of Part IX-A of the Constitution and the definition of Municipality under the Kerala Municipalities Act.

22. When we refer to the Kerala Municipality Act, 1960, Section 4 therein provided for creation of a Municipality, whereby the Government was given power to issue a notification in the Gazette declaring their intention "to constitute as a municipality any specified area within defined limits." As far as Municipal Corporations Act is concerned, "Corporation" was defined u/s 3(9) as follows: "Corporation means the Municipal Corporation of the City" and "City" has been defined u/s 3(7) as: "the City means the City of Trivandrum, the City of Calicut or any other local area constituted to be a City u/s 3 A." In Article 243P(e) the term "Municipality" has been defined as: "Municipality means an institution of self-government constituted under Article 243Q. Article 243Q relates to constitution of Municipalities and Clause (1) states as follows:

243Q. Constitution of Municipalities.- (1) There shall be constituted in every State.-

(a) a Nagar Panchayat (by whatever name called) for a area, that is to say, an area in transition from a rural area to an urban area.

(b) a Municipal Council for a smaller urban area; and

(c) a Municipal Corporation for a larger urban area, in accordance with the provisions of this Part:

Provided that a Municipality under this clause may not be constituted in such urban area or part thereof as the Government may, having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township.

Clause (2) concerns the manner and methods by which the notifications are issued. The same is extracted below:

2. In this article, "a transitional area", "a smaller urban area" or a "larger urban area" means such area as the Governor may, having regard to the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities, the economic importance or such other factors as he may deem fit, specify by public notification for the purposes of this Part.

23. Going by Section 4 of the Kerala Municipalities Act, 1994 the Government is given power to constitute: (a) a "Town Panchayat" for a transitional area; (b) a "Municipal Council" for a smaller urban area; and (c) a "Municipal Corporation" for a larger urban area. Therefore, the provisions of the new Act concerning vesting of powers on Municipalities, will have to be understood in the light of the above concepts itself. The concept evolved under the Constitution is to confer such powers on the Municipalities for enabling them to function as institutions of self government and going by Article 243-W an important thing to be noticed is that such powers which have to be provided are also with respect to preparation of plans for economic development and social justice, and the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule. Therefore, essentially it is a case where the provisions of the Municipalities Act, 1994 and the Town Planning Act, 1939 will have to be tested in the light of the above Constitutional scheme.

Town Planning Act. 1939 - An analysis:

24. In the light of the arguments raised by the learned Counsel for the Petitioners, the next question to be considered is whether the Town Planning Act 1939 satisfies the requirements of Part IX-A of the Constitution and the Municipalities Act, 1994. Learned Counsel for the Petitioners submitted that in the light of the prescriptions made in the Constitution as well as in the Municipalities Act, 1994 it can be seen that the concept of urban planning and town planning provided under the Town Planning Act is not in tune with the above and to that extent there is total inconsistency and therefore in the light of Article 243ZF it could have continued in force only for a period of one year. Learned Counsel invited my attention to me Town Planning Act 1939 and various provisions therein to contend that major role to be played therein is by the Government, but after coming into force of the Constitution (Seventh Fourth Amendment) Act, 1992 and the Kerala Municipalities Act, 1994, it can be seen that the tasks of preparation and for implementing development plans are entrusted with the local bodies with the participation of the representatives of the people and therefore the whole concept has been changed.

25. An analysis of the Town Planning Act, 1939 will show the following: The preamble of the Act states that the development of towns should be regulated to secure their present and future inhabitants, sanitary conditions, amenity and convenience. Section 2(4) defines Municipality as: "Municipality" means any city as defined in the Kerala Municipal Corporations Act, 1961 and any local area in which the Kerala Municipalities Act, 1960 is in force.

26. Chapter II of the Town Planning Act is under the heading "Town Planning Schemes". Section 3 therein relates to "matters that may be dealt with in the scheme." Section 5 provides for appointment of a person as Director of Town Planning and Sub-section (3) provides that "Municipal councils shall consult the Director on such matters relating to town planning, and in such manner as may

be prescribed. If any difference arises between the Director and a council on any matter so prescribed, it shall be referred to Our Government whose decisions shall be final". Section 7 gives power to the Municipal Council to adopt a resolution incorporating the decision to prepare a scheme in respect of any within the municipal area, or in its vicinity outside such area, as draft scheme, with or without modification. The Chairman will have to prepare a plan showing the land proposed to be included in the Scheme, the surrounding lands and any existing streets. For including any land outside its limits, the Municipal Council will have to get the sanction of the Government, going by Sections 7(2) and 7(3) shows that the decision of the Government in such matter shall be final. Section 8 confers power on the Chairman to publish the resolution adopted u/s 7 along with the plan and Section 9 provides for publication of the draft scheme. Therein also, it is based on a resolution of the Municipal Council and it will have to be published within 12 months from the date of the notification u/s 8 or within such further period, not exceeding twelve months allowed by the Government. Section 10 confers power on the Government to require the Council to make schemes which is notwithstanding anything contained in Sections 7 to 9. Section 11 provides for the contents of a draft scheme. Section 12 is important. Sub-section (1) of Section 12 allows an opportunity for any person to furnish objection or suggestion with regard to the scheme and if so, the Council will have to consider such objection or suggestion or even modify the scheme if it thinks fit. Thereafter, the Scheme adopted by the Council along with all written objections and suggestions will have to be submitted to the Government for sanction and the Government is given power under Sub-section (3) to sanction the scheme with or without modification after considering the objections and suggestions and after making such enquiry. The Government can also refuse to sanction the scheme or to return the same for reconsideration by the Council. In fact, the first proviso to Sub-section (3) obliges the Government not to sanction the scheme with such modification without the consent of the council. The second proviso states that the council shall resubmit the scheme which is sent for reconsideration, within a period of six months from the date of its receipt and the third proviso shows that if the council fails to resubmit the scheme within the prescribed time limit, the Government can pass appropriate orders as they may deem fit. Sub-section (5) obliges the Government to publish the notification sanctioning the scheme in the Gazette and Sub-section (6) shows that the notification published under Sub-section (5) shall be conclusive evidence that the scheme has been duly made and sanctioned and the scheme shall take effect from the date of publication of such notification. Section 13 confers power on the Government to effect variation or revocation of the scheme.

27. It is therefore clear from the above provisions that the entire scheme of the Town Planning Act gives importance to the Town Planning Department and the power is conferred on the Government at different stages even though the initial resolution will have to be passed by the Municipal Council. Section 10 confers wide powers for the Government. The question therefore is whether the said Act

is inconsistent with any of the provisions of Part IX-A of the Constitution.

28. While analysing the provisions of the Act along with the provisions of the Constitution, it can be seen that the matters coming under the Act of 1939 are specifically included in Schedule XII of Part IX-A of the Constitution. It is evident that the contents of Article 243W and Schedule XII pertaining to town planning are similar to that of the provisions of the Town Planning Act.

29. But it has to be noticed is that the procedures for preparation of the schemes and plans are totally different under the Town Planning Act and under the Constitutional scheme. Part IX-A deals with Article 243 which includes composition of ward committees, etc. and it provides for a committee for district planning under Article 243-ZD. Clause (3) of Article 243-ZD is important, since it provides that every District Planning Committee, in preparing the draft development plan, will have to go by the items covered by Sub-clauses (a) and (b) therein. Similar is the case with the committee for Metropolitan Planning under Article 243-ZE. Thus, the idea conveyed under Article 243-ZD is to confer powers, authority and responsibility to the Municipalities since Municipalities have to function as institutions of self government in respect of preparation of plans and implementation of schemes for economic development and social justice including the implementation of schemes in relation to the matters listed in the Twelfth Schedule to the Constitution.

30. In fact, the definition for "Municipality" and "Municipal Corporation" in the respective enactments for which the Town Planning Act is envisaged, are no longer there in the light of the wider definition provided under Part IX-A of the Constitution as well as under the Municipalities Act, 1994. Urban area include transitional area, smaller urban area and larger urban area which will have to be managed by the Nagar Panchayat, Municipal Council or Municipal Corporation, as the case may be.

31. The other similar enactment in force is the Madras Town Planning Act, wherein also similar provisions are available. Section 4 deals with matters that may be dealt with in scheme; Section 7 deals with appointment of Director of Town Planning; Section 9 deals with declaration of function to make or adopt scheme; Section 10 deals with resolution to make or adopt scheme; Section 11 deals with publication of draft scheme;

Section 12 deals with the power of State Government to require the council to make scheme; Section 13 deals with contents of draft scheme; Section 14 deals with sanctioning of scheme by State Government and Section 15 deals with variation or revocation of schemes. The above provisions are similar to the provisions contained in the Town Planning Act, 1939.

Municipalities Act. 1994 and the Town Planning Act 1939:

A comparison of the provisions:

32. Under the Kerala Municipalities Act, 1994 the First Schedule contains various

items with regard to the mandatory functions of the Municipality. This Schedule has been introduced as per Section 30 and item 30 therein is important. It provides for "preparation of detailed town planning and Action plan for implementation in a phased manner." When we consider the various provisions of the Municipality Act, 1994, it can be seen that the Municipalities are having various Standing Committees envisaged u/s 20. Those will have to be formed in respect of Town Panchayats, Municipal Councils and Municipal Corporations. The functions of the Standing Committee are provided u/s 22. I have already discussed the scheme under different provisions. In Town Panchayat, Municipal Council and in Municipal Corporation town planning is a subject which is entrusted to Standing Committees for Development, Standing Committees for Works and Standing Committees for Town Planning respectively as evident from Sections 22(1)(b), 22(1)(h) and 22(1)(n). In fact, u/s 23 of the Act, every Municipality will have a steering committee consisting of the Chairperson, Deputy Chairperson and Chairmen of Standing Committees and Chairperson shall be the Chairman of the said Committee. It will have to co-ordinate and monitor the functioning of the Standing Committees and it can discharge the powers and functions entrusted to it by the Council also. Going by Section 30, the administration of a municipal area is vested in a Municipality in respect of the matters enumerated in the First Schedule, "subject to the provisions of this Act" and such other provisions as may be prescribed in this behalf and the provisions of other acts and rules made thereunder. Sub-section (2) therein states that "Municipality shall have such powers, authority and responsibilities of the Government as prescribed to enable it to function as an institution of self government in respect of the matters entrusted to it." Thus, they have to exercise Government's powers, functions and responsibilities as prescribed. This is in conformity with Article 243-W(a) of the Constitution which envisages bringing a law containing provisions for devolution of powers and responsibilities on Municipalities. This is quite important. By Sub-section (3) the Government is obliged to "transfer all institutions, schemes, buildings, other properties, assets and liabilities connected with the matters mentioned in the First Schedule, to the Municipalities concerned." The constitution of ward committees and ward sabhas are included in Sections 42 and 42 A and their functions are clearly stipulated in Section 45. In fact, various powers and functions have been delineated in Section 45 for Ward Committees and Ward Sabhas and Section 45(1)(p) is important for the purpose of town planning which provides for "identification of the lacunae and lapses in following the building rules and in implementing spatial planning." Section 46 is concerned with the duties and rights of Ward Committees and Ward Sabhas. Sub-section (2) deals with the rights of Ward Committees and Ward Sabhas and Clause (v) of Sub-section (2) therein is important which reads as follows:

(v) to get information regarding detailed town planning schemes building construction permits etc. in the ward.

33. The next important Chapter is Chapter IV. Section 51 concerned with

preparation of development plans by Municipalities and going by Sub-section (1) development plans for each ward will have to be prepared by the Ward Committee or Ward Sabha and as per Sub-section (2), the Municipality will have to prepare a development plan every year for the succeeding year considering the development plan submitted by the Ward Committees or Ward Sabhas and it will have to be submitted to the District Planning Committee. The explanation deals with the scope of development plan. Sub-section (3) is important as per which, every municipality will have to prepare a "master plan for its development in the prescribed manner which focus on scientific spatial planning taking into account its resources and as per the fiscal investment and submit the same to the District Planning Committee.

34. Much attack has been made by the learned Counsel for the Petitioners on the scope of Section 51(4), whereby power is given to the Municipality to prepare and implement detailed town planning schemes as per laws relating to Town Planning for the time being in force subject to the master plan approved by the Government. It is submitted that this goes against the Constitutional scheme as well as the specific scheme of the provisions under the Municipalities Act.

35. When the provisions of the Municipality Act are thus analysed, it can be seen that the scheme is in total variation of the provisions of the Town Planning Act, wherein the Municipal Council itself is the entity under various provisions like Sections 7, 8, 9, 12 & 13. The various Standing Committees provided under the Municipalities Act, 1994 being saddled with the implementation of town planning scheme which is specifically provided for under Twelfth Schedule of Part IX-A of the Constitution and item 30 of First Schedule to the Municipalities Act, it can be seen that the same is totally different from the provisions contained in the Town Planning Act. Apart from that, under the Town Planning Act it is the Director of Town Planning u/s 5, who will have to be consulted by the Municipal Council in matters relating to town planning, whereas under the Act 1994, no such provision is there. Town Planning Department is therefore having a greater say under the Town Planning Act and the Government will have to sanction the scheme u/s 12, publish it under Sub-section (5) of Section 12 and the variation or revocation of the scheme u/s 13 is to be done by the Government. This directly goes against the concept of local self government as envisaged under Part IX-A of the Constitution as well as under Sections 30(2) and 30(3) the Municipalities Act, 1994. It is in that context the effect of Sections 20, 22 and 42 to 46 of the Municipalities Act will have to be considered. The concept of scientific spatial planning and the preparation of master plan based on that is conferred with the Municipalities u/s 51(3) itself. This will have to be given to the District Planning Committee which is an entity under Part IX-A of the Constitution and Section 53 of the Municipality Act, 1994. The constitution of District Planning Committee and State Development Council under the Act and its functioning will also show that they will have to adhere to the various stipulations under the Act. It is evident from Section 53 that the District Planning committee will have various elected members and specifically they are given powers under Sub-

sections (9) and (10) to consolidate the plans prepared by the Panchayats and the Municipalities and to prepare a draft development plan for the whole district. It is of importance to notice that it is up to the District Planning Committee to forward the development plan to the Government for approval. There is a provision for a Metropolitan Planning Committee u/s 54 of the Act in a metropolitan area and the section provides for various components for the functioning of the said Committee also. Ultimately, the State Development Council constituted u/s 55 will have to do various matters under the State level.

36. Therefore, the above scheme under the Municipalities Act is completely in variance with the provisions of the Town Planning Act, evidently. Under the Town Planning Act it is the Municipal Council to prepare the scheme, whereas under the Municipality Act it is the Ward Committee or Ward Sabha and the Standing-Committees, as the case may be. Therefore, Section 51(4) practically compels these bodies to have resort to Town Planning Act and to confine themselves with the schemes notified under the Town Planning Act. The idea therefore u/s 51(4), without having the Town Planning Act amended in terms of the Municipality Act, 1994, cannot be harmoniously read along with the provisions of the Constitution under Part IX-A and other provisions already discussed in the Municipality Act, 1994.

Urban Planning envisaged under Part IX-A of the Constitution and the Municipality Act, 1994 - Recent developments;

37. Before going into the other remaining aspects, it may be worthwhile to consider the documents produced as Exts.P23 and P26 in W.P. (C) No. 24526/2009. Ext.P23 is a letter sent by the Secretary of Urban Development to various State Governments including the State of Kerala which is dated 31.3.2009. In the said letter, the attention of the States are invited to the Constitution Seventy Fourth Amendment Act, 1992 and the importance of the mandatory provision for the constitution of Metropolitan Planning Committee in all the metropolitan areas by the State Governments. It is pointed out therein that in Andhra Pradesh and Gujarat the enactments have come into force which more or less reproduced the Constitution Seventy Fourth Amendment Act, 1992. In para 9 it is mentioned that the Metropolitan Planning Committee is required to prepare a development plan for the entire metropolitan area as notified by the State Government. Development Plan will have to incorporate the plans of Municipalities and Panchayats falling in the metropolitan area. To bring into effect the same, two options have been suggested: either a separate enabling legislation, as has been enacted in West Bengal, Maharashtra and Andhra Pradesh may be enacted or with some amendments in the existing Town and Country Planning Acts, provision for constitution of Metropolitan Planning Committees may be made in the existing Act. Various other suggestions have been made and finally the States are directed to take immediate action to facilitate enactment of enabling legislation and constitution of Metropolitan Planning Committees for all the metropolitan areas by the State Government.

Under Kerala Municipality Act, 1994 Section 54 provides for formation of a Metropolitan Planning Committee.

38. Ext.P26 is one brought out by the State Government as "Urban Policy and Action Plan for Kerala", in July 2002. Learned Counsel for the Petitioners submitted that the same really supports the pleas raised by the Petitioners as it brings out the idea of the Government to have a uniform legislation of Town and Country Planning with wider provisions for preparation of State Spatial Development Plans, Regional Development Plans, District Development Plans, Urban Development Plans and Special Area Development Plans. My attention was invited to various paragraphs of the policy document itself. Para 1.0 under the heading "Background", places much reliance on the objectives formed by the National Commission on Urbanisation. The relevant paragraphs are extracted below as they give an insight to the thinking of the Government:

2.0 PROBLEM AREAS:

2.1 Certain minimum requirements which need to be fulfilled include - (i) Creation of right atmosphere for large scale investment in housing sector (ii) Physical planning of the use of land and the preparation of master plans; (iii) Defining tolerable minimum standards for housing and other services to be provided; and (iv) Strengthening of municipal administration for undertaking new development responsibilities. It was concluded by the National Commission that the lowest grade municipal body must provide the following minimum facilities: (a) potable water supply; (b) street lighting, preferably electric; (c) drainage, at least pucca surface drains; (d) surfaced roads and streets; and (e) sanitation conservancy and arrangements for the disposal of town wastes and prevention of epidemics.

2.2 Cities themselves are undergoing noticeable changes. The sky line of Indian city is fast changing with a string of high-rise buildings multiplying at a rapid speed. This is changing the traditional urban culture. Houses are getting replaced by flats. There is a rush for every square foot of land. The result is that the aesthetic sense of space is altogether ignored; multistorey culture is now infecting Indian cities. In such a process of creating multi-storied structure, electricity, water and other infrastructure requirements are inadvertently ignored. The growth is unchecked, and unauthorised constructions go unabated. The over all situation is really chaotic, even grim. Everywhere, cities contain more people than their infrastructure can really take. Rents are soaring up everywhere and the common experience is that these are beyond the paying capacity of even the middle class.

3.0 URBAN SECTOR-NATIONAL SCENARIO 3.4. Our urban areas are in severe crisis. Planning process have proved to be intrinsically defective, the cities are over crowded, urban land has become extremely scare. Services are breaking down and city management is often ineffectual and human misery has increased beyond imagination. The urban infrastructure has become outdated. The roads,

water supply, drainage and sewerage have collapsed. Providing ample parking space and open space have been totally neglected. Enforcement of municipal laws has miserably failed.

5.0 IMPACT OF 73 RD AND 74 TH CONSTITUTION AMENDMENT ACTS ON THE PLANNING SET UP OF THE STATE

5.1 With the enactment of the Constitution amendment Acts, the Kerala Panchayat Raj Act, 1994 and the Kerala Municipalities Act, 1994 came into being incorporating the provisions of the respective Constitution Amendment Acts; the significant feature was the provision that the Government shall, after the commencement of the Act, transfer to the Local Bodies, all institutions; schemes, buildings, and other properties connected with the subjects listed in the respective schedules dealing with these functions.

5.5.5. A state level Council under the chairmanship of the Chief Minister has been formed to formulate policies for Local/Regional Development and to co-ordinate District and State Plans.

5.5.6. The Urban Local Bodies were given the authority to formulate spatial plan and consequently Development Authority lost relevance. Authorities based in 5 Small Towns have been abolished.

6.0 PLANNING WITH FUTURE VISION

6.1.1. The poor picture depicted in the development scenario of our urban areas is mainly due to the lack of proper vision and master schemes, which envisage long term and short term effects of urban infrastructure improvements. Proper development strategy should cater to the development needs of urban society ensuring modern comfort levels and standard of living while preserving natural cultural and historical entity of the city.

6.1.4. The present practice of annual planning based on the budgetary provision envisioning only short period implementation is inadequate and will hamper the comprehensive mass scale development of the town. Therefore an integrated and co-ordinate planning strategy based on comprehensive master scheme which effectively reflects the social, cultural and heritage factors of every city is required.

6.3.4: para 1 xxxxxxxx

Para 2: The Government will direct preparation of development strategies for each of these towns, considered under the above classifications. Short term and long term development packages will be prepared for all these towns and the timely implementation of these development proposals will be coordinated with all the sectors involved in development. Projects under statutory town planning schemes shall get priority while preparing such development packages.

6.3.6: At present there is no unified Town and Country Planning legislation for the State. The present Town Planning Acts have only very limited scope and

provide for preparation of only General Town Planning Schemes for towns and Detailed Town Planning Schemes for priority areas. The Government proposes to bring out a unified legislation on town and Country Planning with wider provisions for preparation of State Spatial Development plans, Regional Development Plans, District Development Plans, Urban Development Plans and Special Area Development Plans.

Under the heading "Major Recommendations" it is mentioned that "the Government proposes to bring out a unified legislation on Town and Country Planning with wider provisions for preparation of State Spatial Development plans, Regional Development Plans, District Development Plans, Urban Development Plans and Special Area Development Plans." Thus, it is pointed out that the State itself has felt the necessity for having a new enactment as early as in 2002, but no positive steps have been taken in the matter so far.

39. My attention was also invited to para 36 of Writ Petition No. 22857/2010 wherein it is mentioned that Respondents 1 and 2 had directed the District Planning Committee of Kollam District vide G.O.(MS) No. 62/03/Planning, Thiruvananthapuram dated 1.8.2003 to prepare integrated District Development Plan for Kollam (both long term prospective plan and short term executive plan) and that the work in that regard is almost over. The report has already been finalised and it is expected to be published shortly. In addition to the preparation of the District Development Plan for Kollam, one of the Panchayats, viz. Pooyappally and one of the Municipalities, viz. Paravoor were asked to prepare the Local Development Plans taking into consideration the spatial development component such as proposed land use pattern, zoning regulations, proposed circulation pattern, location and spatial allocation of various development projects, etc. in accordance with the Constitution as well as the Municipality Act and Panchayat Raj Act. Learned Counsel for the Petitioners by referring to a copy of the report, explained the various aspects of District Planning envisaged therein and thus it is contended that the said model has to be brought into force in the entire State. It is pointed out that some measures have been taken in the light of the fact that the Respondents themselves have felt that the Town Planning Act, 1939 is inadequate to meet the necessities and requirements of Part IX-A of the Constitution and the Municipality Act, 1994. My attention was invited to Ext.P13, viz. copy of G.O.(Rt) No. 354/07/LSGD dated 1.2.2007 which is a hand book for preparation of integrated District Development Plan and Local Development Plan for all the districts under the Municipalities. The hand book contains exhaustive schemes for preparation of Local Development Plans in ten chapters.

40. In this context, the stand taken by the Respondents in the counter affidavit is one of total rejection of the contentions of the Petitioners. In the counter affidavit filed in W.P. (C) No. 24526/2009, it is mentioned in para 4 that the Government has undertaken the variation of the D.T.P. Scheme of Plamoodu prepared in the year 1992. It is explained that the Town Planning Schemes for different cities/town/area were prepared and its subsequent variations are made

in accordance with the Town Planning Act. It is further pointed out that the Town Planning Schemes have been varied in terms of the provisions of Section 13 of the Town Planning Act 1108. The process of preparation of a new enactment for Town Planning is also in progress. The proposals of the sanctioned DTP Scheme is applicable till the scheme is varied or replaced by a new scheme. The DTP Scheme for Plamoodu area is not an invalid scheme. The developments within the scheme area has to be controlled as per the provisions of the Scheme itself. The scheme suggested by the Petitioners cannot be accepted as it may lead to more congestion in the locality.

41. With regard to the legal contentions, it is pointed out that the main provisions of the Town Planning Act are consistent with the Constitution Seventy Fourth Amendment Act. It is further pointed out that the definition of development plan contained under Rule 2(1)(w) of the Kerala Municipality Building Rules, 1999 is not against the definition contained u/s 51(2) of the Municipality Act, 1994. Development plan is a scheme for the local area as a whole like the Master Plan, Structure Plan, etc. The detailed town planning scheme is for a specified small area. The development plans mentioned in Section 51 is apian for economic development, social justice (improvement of living conditions, creation of employment opportunities and increase of production capacity) in relation to matters enumerated in the Twelfth Schedule to the Constitution. The relevant provisions which deal with the Town Planning Schemes in the Municipality Act is Section 51(3) and 51(4). Various provisions of the Town Planning Act have been explained to contend for the position that the schemes have been framed by the local self government municipalities and they are not obsolete. It is pointed out that Article 243-W provides only for an enabling clause which does not mean that the State is obliged to provide such a statute. The Constitution Seventy Fourth Amendment Act does not envisage that the existing laws would become non operative. Finally, it is mentioned that the Town and Country Planning Department has prepared a draft of the Kerala Town and Country Planning Bill, 2009 and submitted to the Government for further action.

42. Much argument was raised by the learned Counsel for the Petitioners on the scope of the definition of "development plans" u/s 51 of the Municipality Act. Evidently, the explanation to Section 51(2) of the Act states that "development plan" means a development plan for economic development, social justice (improvement of living conditions, etc.) in relation to matters enumerated in the Twelfth Schedule to the Constitution including the matters to which the administrative power vests in the Municipality under the provisions of this Act or any other law. In the Twelfth Schedule to the Constitution, 18 items have been shown. Item 1 is urban planning including town planning; item 2 is regulation of land use and construction of building; and item 3 is planning for economic and social development. Learned Counsel for the Petitioners laid great emphasis to the fact that in the light of the above specific items provided in the Twelfth Schedule, the development plan envisaged u/s 51(2) will have to naturally

contain urban planning including town planning.

43. Evidently, the Twelfth Schedule contains 18 items, including items 1 and 2 concerning urban planning including town planning and regulation of land-use and construction of building, etc. As pointed out by the learned Govt. Pleader, economic and social development is a different concept as far as development in a locality coming within the jurisdiction of a local self government is concerned. Normally it will have to be prepared annually. It is evident from Section 51(1) that the ward committee or ward sabha will have to prepare every year "development plan" for the ward along with an estimate of the expenditure therefore for the next year. Under Sub-section (2), the Municipality will have to prepare a development plan for succeeding year which will have to be submitted to the District Planning Committee. In fact, in Rule 2(1)(w) of the Municipality Building Rules, 1999 "development plan" has been defined as "any general planning scheme for the local area as a whole or any detailed town planning scheme for any specified area prepared under the Town and Country Planning Act in force." The question is whether this is in conflict with the definition of "development plan" under the Explanation to Section 51(2) of the Municipality Act, 1994. Sections 51(3) and 51(4) are exclusively concerned with spatial planning and town planning. It is clear that the definition of development plan in Section 51 is of a wider nature. The use of the term "development plan" in Article 243-ZD and in various provisions of the Municipality Act, 1994 is important. It encompasses various aspects. The Building Rule uses the term evidently in a restricted sense. The two operates in different fields, evidently.

44. It is true that Article 243W(a)(ii) deals with all subjects listed in the Twelfth Schedule and therefore the Municipality will have to be conferred with such powers for the performance of functions and the implementation of schemes in respect of such matters. When we come to Article 243ZD, the Committee for District Planning has to be constituted. It will have to prepare the draft development plan which will include matters including spatial planning. This is so in the case of a Committee for Metropolitan Planning under Article 243ZE also. The said aspects are therefore important to consider whether the Town Planning Act, 1939 contains any provision for spatial planning, etc.

45. Learned Counsel for the Petitioners contended that the emphasis given under Part IX-A of the Constitution and under the Municipality Act, 1994, Section 51(3) is on spatial planning which cannot be found in Section 3 of the Town Planning Act. Of course, in Section 3 of the Town Planning Act which provides for matters which may have to be dealt with in the scheme, the subject "spatial planning" is not mentioned. What is mentioned under item "k" is the following:

(k) the allotment or reservation of land for streets, road-squares houses, buildings for religious and charitable purpose, open spaces, gardens, recreation grounds, schools, markets, shops, factories, hospitals, dispensaries, Government and municipal buildings and public purposes of all kinds.

Section 11 provides for contents of draft scheme which also does not specifically deal with spatial planning. Therefore, in that regard, the contention raised by the learned Counsel for the Petitioners that the provisions of Part IX-A of the Constitution and Municipalities Act, 1994, will prevail over the Town Planning Act, is of much force.

46. Learned Govt. Pleader by referring to the various provisions of the Town Planning Act, submitted that the Town Planning Act also contains involvement of public and elected members of Municipalities and hence there is no inconsistency with the Constitution Seventy Fourth Amendment Act. It is pointed out that 7 confers power on a municipal council, by resolution, to decide to prepare a scheme which will have to be notified u/s 8 and the draft scheme will have to be published u/s 9 after consulting, in the prescribed manner, the owners of lands and buildings also. Section 12(1) also allows persons affected by such scheme, to raise objections and suggestions which will have to be considered by the council and again the Government will have to consider the scheme along with the objections and suggestions. It is therefore pointed out that the democratic principles are well preserved under the Town Planning Act also. Accordingly, it is contended that there is nothing therein which goes against Part IX-A of the Constitution.

47. Herein, one thing to be noticed is that under the Town Planning Act, the objections will have to be placed before the Municipal Council, whereas under Part IX-A of the Constitution, the ward committees, ward sabhas, district development committees and Committee for Metropolitan Planning, etc. have been envisaged. This is so in respect of Municipalities Act, 1994 also. We have already seen that the Town Panchayat, Municipality and Municipal Council will have to provide separate Standing Committees which will have to deal with the concept of town planning. There is a steering committee and the plans prepared and adopted by the Municipality will have to be forwarded to the District Development Planning Committee. Therefore, the concepts under the Town Planning Act, 1939 and under the Municipality Act, 1994 with regard to the preparation of plans are different. The devolution of powers to various bodies is evident from the scheme of the Act 1994 also. Therefore, after having brought out the general scheme under Part IX-A of the Constitution into effect by bringing a new law on Municipalities in 1994, it cannot be said that there is no real conflict with provisions under the Town Planning Act and the Municipalities Act. In fact, Section 51(3) enjoins a duty on every municipality to prepare a master plan for its development in the prescribed manner with focus on scientific spatial planning. When we come to Section 51(4) of the Act, it can be seen that the Municipality shall have the power to prepare and implement detailed town planning schemes under the Town Planning Act subject to the master plans approved by the Government. This provision really goes against the other provisions of the Municipality Act, 1994, since the power of the Municipality is confined to the implementation of the schemes under the Town Planning Act. It is in that context the contents of Ext.P26 produced in W.P. (C) No. 24526/2009 and

Ext.P13 produced in W.P. (C) No. 22857/2010 comes into the central stage. Apart from that, in Ext.P23, the Central Government has also advised to constitute a Metropolitan Planning Committee in the light of the Seventy Fourth Constitution Amendment Act. Therefore, the idea to have such a streamlined spatial planning under the new provisions of the Constitution has struck the Central Government as well as the State Government. But what is lacking is a proper enactment, in the place of the Town Planning Acts which are pre-constitutional enactments.

48. As evident from Ext.P26, it relates to Urban Policy and Action Plan for Kerala. There is a deep and detailed analysis of the whole problem under the national scenario in respect of urban centres. Para 2.1 clearly indicates the requirements which need to be fulfilled of which the important aspect is "Physical planning of the use of land and the preparation of master plans." Para 3.4, as already noted, lays down the crisis in the urban area of the State and it is mentioned that planning process have proved to be intrinsically defective. The glaring inadequacies are evident from the details noted in the said para itself and it is submitted that human misery has increased beyond imagination. The growth of urban population has been addressed in para 4.3. The idea under the Municipality Act, 1994 whereby urban local bodies have been given the power to provide spatial planning, is mentioned in para 5.6. In fact, the development authorities in the State have been dismantled in the light of this new development. Defective planning is covered under para 6.1.1 and the absence of master schemes which envisage long term and short term effects of urban infrastructure improvement is mentioned therein. Para 6.3.6 support the contention of the Petitioners with regard to lack of unified town and country planning legislation. The necessity to bring into effect a uniform legislation on town and country planning with the different development plans have been emphasised therein. It is evident from the said para itself that the government proposes to have a new legislation on Town and Country Planning for empowering various committees in regard to the preparation of Development Plans. This is repeated in the recommendations also.

49. Shri Nandakumara Menon, learned Senior Counsel appearing for the Corporation submitted that the detailed town planning schemes have been published in terms of the provisions of the Town Planning Act which provides a clause for submitting objections and suggestions and the Petitioners came into picture only in 2006. It is pointed out that going by Rule 3A of the Municipality Building Rules, 1999 the provisions of the Town Planning Scheme will prevail over the provisions of the Kerala Municipality Building Rules. It is pointed out that the amendment of the scheme is on the anvil and the Corporation has no other role in the matter as the Government will have to bring out the scheme.

Integrated District Development Plan - Steps envisaged for preparation on the basis of Spatial Planning approach;

50. It is evident from Ext.P13 produced in W.P. (C) No. 22857/2010 that it is for the relevant Five Year Plan period 2007-2012. The subject is preparation of the

Integrated District Development Plan in all the Municipalities. It is published by the Department of Town and Country Planning of the local self government department. Actually, the importance of decentralised planning is mentioned in the preface to the same. It is stated in Chapter I under the heading "Role of Spatial Planning in Decentralised Planning Process" as follows:

The most important event in the history of decentralised planning process in India was the promulgation of 73rd and 74th Constitutional Amendment Acts on December 22nd 1992 conferring constitutional status to Local Self Government Institutions..... This became a landmark in democratic decentralisation in the country, giving Local Self-Government Institutions the required constitutional legitimacy....

Para 1.3 is under the heading "Need of Spatial Planning." Reference is made to the National Commission for Urbanisation, 1988 which has identified the need of spatial planning. Para 1.5 is under the heading "Spatial Planning Efforts in Kerala" which mentions the preparation of economic planning by the State Planning Board and Spatial Planning by the Department of Town and Country Planning. It mentions that these plans were seldom integrated with the Five Year Plans and lacked people's participation. Reference is made in para 1.6 about the Kollam Model of Development Plans Preparation. In fact para 1.7 clearly supports the argument raised by the learned Counsel for the Petitioners that in spite of the amendment of the Constitution integrated development plans have not been brought out. Therein, after referring to Article 243ZD, it is mentioned thus:

This is in contrary to the present activities of District Planning Committees in the State, which are more or less limited to vetting of projects submitted by the local bodies in the district. Even after 10 years of promulgation of the 73rd and 74th Constitutional Amendment Acts, the District Planning Committees have not initiated to prepare such an integrated District Development Plan in the spatial planning approach.

After referring to Section 175 of the Panchayat Raj Act and Section 51(3) of the Municipality Act, 1994 it is stated that the said provisions compel local self governments to have a long range master plan and to submit it to the District Planning Committee. It is mentioned further that "all the above statutory provisions clearly indicate why spatial planning is essential in any planning process." Overall it can be seen how important a role spatial planning aspect has to play in the decentralised system. Therefore, it is high time that some steps are taken to introduce spatial plans into the system so that a District Development Plan is prepared for each district in the State and a Development Plan is prepared for each LSG in the State in order to strengthen the process through a comprehensive rather than a piece-meal approach as envisaged in the Constitution." Under various chapters different components have been explained. It is an extensive report prepared taking into consideration various aspects concerning different walks of life. It is clear that the scheme therein has been envisaged for a number of years.

51. Learned Govt. Pleader also submitted that the said process has been completed and the final notification is expected to be issued without delay.

52. A reading of various paragraphs therein shows that an integrated district development plan has been envisaged in tune with the amendment of the Constitution. Reference has been made to the National Commission on Urbanisation (NCU) August, 1988 and Urban Development Plans Formulation and Implementation (UDPF) Guidelines, Ministry of Urban Affairs and Employment, Government of India, August 1996. In fact, the said guidelines have given specific recommendations on the process of preparation of development plans. Thus, the concept of town planning and urban planning has been given a greater part in the integrated local development plan and the district development plan. This is in consonance with the relevant provisions of Part IX-A of the Constitution. Decentralisation is the hall mark of the entire approach.

53. Learned Government Pleader placed reliance on the Town Planning Rules framed u/s 41 of the Town Planning Act, 1939. As far as the provisions of Town Planning Act itself are concerned, it is contended that the said Act also involves Council of the Municipal Corporation, Municipal Council, etc. and therefore they are not variance with the provisions of the Municipality Act as well as Part IX-A of the Constitution.

54. I have already referred to certain provisions of the Town Planning Act, 1939. Section 36 of the said Act empowers the Municipal Council to appoint a special town planning committee. The said section is extracted below:

36. Subject to such rules as Our Government may make in this behalf a municipal council may appoint a special town planning committee composed either wholly of members of the municipal council, or partly of such members and partly of others, and may delegate to such committee power to dispose of, in relation to a particular scheme or to town planning in general, matters of a specified nature which under the provisions of this Act, are reserved for the decision of the council.

Section 37 provides for Joint Town Planning Committee. Sub-sections (1), (2), (3), (5), (7) and (8) are relevant for the purpose of this case which are extracted below:

37. Joint town planning committee.- (1) Subject to such rules as Our Government may make in this behalf a municipal council may, and if so required by Our Government, shall join with one or more than one other local authority in constituting a joint town planning committee for the making of a joint town planning scheme or for any purpose connected with town planning in which they are jointly interested or for which they are jointly responsible.

(2) A joint town planning committee may include persons who are not members of the local authorities concerned but who possess in their opinion special qualifications or represent institutions or corporations interested in the work of

the committee.

Provided that the number of such persons shall not exceed one-third of the total number of members of the joint committee.

(3) (i) Our Government may make rules to carry out the purposes of Sub-section (1)

(ii) In particular and without prejudice to the generality of the foregoing power Our Government may make rules to provide for-

(a) the total number of members of the joint committee;

(b) the number of such members who shall be members of the local authorities concerned and number of such members who may be outsiders;

(c) the qualifications of persons who shall be members of the joint committee or the manner in which they shall be appointed or elected;

(d) the qualifications of the person who shall be the chairman of the joint committee or the manner in which he shall be elected or appointed;

(e) the term of office of members and chairman;

(f) the manner in which the committee shall be put in funds and shall account therefore; and

(g) the procedure of the committee.

Sub-section (5) provides that "if any difference of opinion arises between local authorities under any of the foregoing provisions of this section, it shall be referred to Our Government whose decision shall be final." Sub-section (7) confers power on the joint town planning committee, to exercise the powers and perform the duties of the municipal council and its chairman the powers and duties of a chairman under the Act. Sub-section (8) is also important which is extracted below:

Any joint town planning scheme made by a joint committee may provide for the execution of the scheme or any part thereof jointly by all or two or more of the local authorities concerned or specify the parts of the scheme to be executed at the expense of the several local authorities in their respective areas and the said specified parts of the scheme shall after the publication of the notification u/s 12 have effect in the areas to which they relate as separate schemes.

By the exercise of power u/s 37A, the Government can extend any provisions of the Act to any Panchayat area. Sections 37B and 38 are also relevant which are extracted below:

37B. Relation of Municipal authorities to those of Panchayats in areas included in a scheme.- When any particular Panchayat area in which the Travancore-Cochin Panchayats Act, 1950, is in force is comprised in a town planning scheme made

or intended to be made by a Municipal Council then, notwithstanding anything in the said Act, the municipal authorities shall exercise therein all the powers given to them by this Act or the scheme, and the authorities of the panchayat concerned shall be bound to give all information that may be required by the municipal authorities for the purpose of this Act or the scheme, and to do nothing that will obstruct the lawful exercise of the powers of the municipal authorities thereunder;

38. Power of Government to arbitrate in disputes between local authorities.- Any dispute between any two local authorities in regard to any matters arising under any of the provisions of this Act shall, in case of their failure to settle it amicably between themselves be referred for adjudication to Our Government whose decision shall be final.

Section 37B empowers Municipal authorities to exercise powers conferred under the Act or the Scheme in the area of a Panchayat, if the said area is also included in the town Planning Scheme. Section 38 shows that the Government will be the Arbiter of the disputes between local authorities, and its decision will be final.

55. Section 41 of the Town Planning Act, 1939 confers power on the Government to frame rules which have been framed. In the definition clause of the Rules, the word "Committee" is defined in Clause (a). It means the "special town planning committee concerned, appointed by a municipal council u/s 36." The rules envisage two sets of schemes, viz. General Town Planning Schemes and Detailed Town Planning Schemes. There may be many detailed schemes under one general scheme. Rule 2 relates to the strength of the committee under which, not more than four members of the municipal council of whom the Chairman shall be ex-officio member and not more than two from outside shall be appointed as members of the Committee. Rule 4 provides for the term of office of members and Rule 5 relates to filling up of vacancies. Rule 7 says that the Chairman shall be the President of the Committee. Separate rules have been framed for the functioning of the Committee and its deliberations. Rule 21 is under the heading

Delegation of Powers to the Committee". The Council can delegate certain powers to the Committee. This includes: (i) preparation of reports on the general town planning scheme; (ii) the preparation of draft town planning schemes and investigation of all matters incidental to such preparation, the consultation with owners and the convening of meetings of such owners including the taking of written agreements from the owners; etc. etc. Part II is Under the heading "Preparation and sanction of General and detailed Town Planning Schemes." Various procedures have been provided therein.

56. When we compare the above provisions under the Town Planning Act and the Rules with the provisions of the Kerala Municipality Act, 1994 it can be seen that they differ in material particulars and are at variance with the substantive provisions of the said Act. As already noticed, Sections 20 and 22 of the

Municipality Act, 1994 refer to formation of various committees by the Town Panchayat, Municipality and Municipal Corporation for entrusting various functions including town planning. Thus, such committees which have got statutory powers, -will have to exercise such powers conferred on them, especially in the light of the provisions of the Municipality Act, 1994. The provisions of Section 53 conferring powers on the District Planning Committee are also important. In fact, under Sub-section (10), the said Committee will have to prepare development plan having regard to matters of common interest between the Panchayats and the Municipalities including spatial planning, etc. Therefore, the integrated district development plan in the district will have to be finalised by the District Planning Committee. Therefore, the provisions of the Town Planning Act permitting formation of town planning committee u/s 36, joint town planning committee u/s 37 and the provisions of Section 37(b) really run counter to the provisions of the Municipality Act, 1994. In the light of the provisions of the Municipality Act, the subject "town planning" can be considered only by the various committees formed under the Municipality Act, 1994 alone.

57. Under the Madras Town Planning Act also, similar provisions have been made. Section 37 deals with Town Planning Committee; Section 38 deals with Joint Town Planning Committee; Section 39 deals with extension of provisions to other areas; Section 41 deals with the power of State Government to arbitrate in disputes between local authorities and Section 42 deals with the power of Control of State Government.

58. One of the enactments on the subject is the Travancore Town and Country Planning Act, 1120 which envisages making of schemes with respect to the development and planning of land whether urban or rural and to provide for the protection of public health and of rural amenities. Therein, Section 3 enables the Government to declare any area in any part of Travancore to be controlled area for the purposes of the Act. Section 4 confers power on the Government itself to bring in planning schemes with the general object of controlling the development of the land comprised in the area to which the scheme applies, of securing proper sanitary conditions, amenity and convenience, of protected public health, of preventing undue congestion, etc. Section 8 provides that a scheme may specify an officer of the Government as the responsible authority for all purposes of the scheme or two or more such officers as the responsible authorities for different purposes of the scheme or as respects different parts of the area to which the scheme applies. Going by the definition of "responsible authority" u/s 2(9), he will be responsible for carrying out or enforcing the observance of all or any of the provisions of the scheme or for enforcing the execution of any works which under the scheme are to be executed by any authority, owner or other person. It is evident that the scheme of said Act is totally in variance with the provisions of the Municipality Act, 1994 and the Panchayat Raj Act.

59. Learned Counsel for the Petitioners relied upon various decisions of the Apex Court to contend for the position that the scheme under Part IX-A of the

Constitution as well as under the Municipality Act, 1994 should get precedence. Learned Govt. Pleader also relied on various decisions of the Apex Court in support of the plea raised by the Government. The following are among the decisions cited by both sides, which discusses certain general principles.

60. The Apex Court in Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, held in para 33 that "there is no substantial difference between a rule and a regulation inasmuch as both are subordinate legislation under powers conferred by the statute." The decision of the Apex Court in AIR 1997 3127 (SC) discussed the principles relating to the use of external aids for interpreting a statute. Para. 74 contains the following:

Preamble is the key to open the kind of the maker of the law; if the Act read with its preamble would indicate the object which the legislature seeks to achieve in enacting the Act, its intention becomes plain and manifest. It is settled law that if the language in the Act/section/clause is clear and unambiguous it is not necessary to fall back upon the Statement of Objects and Reasons of the Act to cull out the intention. Therefore, we need not burden the judgment by citing copious precedents in this behalf.

Reliance is placed next by the learned Counsel for the Petitioners on the decision of the Apex Court in Chairman, Indore Vikas Pradhikaran Vs. Pure Industrial Cock and Chem. Ltd. and Others, wherein it was held as follows:

The right of property is now considered to be not only a constitutional right but also a human right. The (French) Declaration of Human and Civic Rights of 1789 enunciates the scope of the right under Article 17 and so does Article 17 of the Universal Declaration of Human Rights, 1948 adopted in the United Nations General Assembly. Earlier human rights were restricted to the claim of individual's right to health, right to livelihood, right to shelter and employment, etc. but now human rights have started gaining a multifaceted approach. Now property rights are also incorporated within the definition of human rights. Even claim of adverse possession has to be read in consonance with human rights. Right to property, while ceasing to be a fundamental right would, however, be given express recognition as a legal right, provisions being made that no person shall be deprived of his property save in accordance with law.

Hence, it is contended that the right to property of an owner cannot be inter-meddled without a valid legislation.

61. The decision of the Apex Court in S.N. Chandrashekar and Another Vs. State of Karnataka and Others, was concerned with the limitations with regard to the grant of permission for change of user under the Zoning Regulations. Therein, permission was sought for running a hotel in a residential zone. It was held in para. 22 that "the definition of "land use" has to be read with the Zoning Regulations, running of a hotel in a residential zone is not permissible under the

Zoning Regulations." The same is not relevant for the purpose of this case.

62. Raju S. Jethmalani and Others Vs. State of Maharashtra and Others, is concerned with a question whether without acquiring land, the owner can be deprived of the use of his land, reserved in the development plan. It was held that the same cannot be done. In K.K. Bhalla Vs. State of M.P. and Others, the question was considered in the light of the scheme wherein the land was reserved for public purposes, but it was allotted for an industry. It was held that the same cannot be justified and hence illegal.

63. Friends Colony Development Committee Vs. State of Orissa and Others, considered the effect of the regulations on the individual rights of property owners and it was held thus:

Zoning and planning do result in hardship to individual property owners as their freedom to use their property in the way they like, is subjected to regulation and control. But for that reason alone the controlling regulations cannot be termed as arbitrary or unreasonable. The private interest stands subordinate to the public good. The power to plan development of city and to regulate the building activity therein flows from the police power of the State. The exercise of such governmental power is justified on account of it being reasonably necessary for public health, safety, morals or general welfare and ecological consideration.

64. In Teri Oat Estates (P) Ltd. Vs. U.T., Chandigarh and Others, paras.46 and 49 laid down the application of principles of "proportionality" in matters wherein the fundamental rights of citizens are affected by exercise of statutory power or discretion by administrative authority. Learned Counsel for the Petitioners relied upon the above principle to contend that the orders passed are really unreasonable in nature.

65. D.L.F. Qutab Enclave Complex Educational Charitable Trust Vs. State of Haryana and Others, reiterates the principle that the right under Article 300A cannot be taken away without any authority of law. The said principle was relied upon by the learned Counsel for the Petitioners in support of the plea that the Petitioners' right to carry on business cannot be deprived in the light of an obsolete law. By relying upon the decision of the Apex Court in Shri Sarwan Singh and Another Vs. Shri Kasturi Lal, , learned Counsel for the Petitioners that the later Act will have to prevail over the former.

66. Learned Counsel for the Petitioners invited my attention to the principles stated in Maxwell on "The Interpretation of Statutes", 12th Edn. with regard to repeal by implication. Therein at page 193 it is stated as follows:

If, however, "the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together," (Kutner v. Philips (1891) 2 Q.B. 267) the earlier is abrogated by the later.

The Apex Court in Ayay Kumar Banerjee and Ors. v. Union of India and Ors. AIR

1984 SC 1130 had occasion to consider these principles and after referring to certain other decisions, in para.39 the various tests have been laid down thus:

39. From the text and the decisions, four tests are deducible and these are: (i) The legislature has the undoubted rights to alter a law already promulgated through subsequent legislation, (ii) A special law may be altered, abrogated or repealed by a later general law by an express provision, (iii) A later general law will override a prior special law if the two are so repugnant to each other that they cannot co-exist even though no express provision in that behalf is found in the general law. and (iv) It is only in the absence of a provision to the contrary and of a clear inconsistency that a special law will remain wholly unaffected by a later general law. (See in this connection Maxwell on "The Interpretation of Statutes", Twelfth Edition, pages 196-198).

These principles will therefore, have to be considered in appreciating the argument that the later Act will prevail over the former. It can be seen that the Municipality Act under the various provisions deal specifically with the details for preparing development plans including matters specified in Twelfth Schedule of the Constitution which includes urban planning and town planning. The scope of Town Planning Acts is with respect to schemes which are framed within the then Municipalities and Municipal Corporations under the repealed Municipalities Act, 1960 and Municipal Corporations Act, 1961. When the later Act, viz. The Kerala Municipality Act, 1994 deals with the same subject under various provisions, as already noted, and when it is found that the provisions of the Town Planning Acts and the Municipality Act with respect to preparation and execution of spatial planning schemes are different, it can be safely concluded that the Municipality Act, 1994 being the later Act, will prevail over the Town Planning Acts. Even though learned Govt. Pleader contended that the General Town Planning Act is a special law dealing with town planning and Municipality Act, 1994 deals with various other aspects also, in the light of the scheme under the Act, 1994 which draws an inspiration from Part IX-A of the Constitution and since it specifically deals with urban planning, the said argument cannot be accepted.

67. In Sayeesh Kumar Vs. State of Kerala, , while referring to Section 13 of the Town Planning Act, a Division Bench of this Court held that the Act does not confer power on the Government to tamper with the approved development scheme and the Government has no power to grant individual exemption. This was relied upon by the learned Government Pleader to submit that the hands of the Government are tied and the request of the Petitioners in the representations filed before the Government cannot therefore be allowed.

68. Shanti G. Patel and Others Vs. State of Maharashtra and Others, explained the import of Article 243-W of the Constitution of India. This was relied upon by the learned Government Pleader to contend that it is not a mandatory provision at all.

69. In the above decision the Maharashtra Regional and Town Planning Act, 1966

and its scope was under challenge in the light of Article 243-W of the Constitution. The Apex Court took the view that the same is only an enabling provision and that it does not oblige the State to provide such a statute. It was further held that the existing provisions of the State which govern the field, unless a statute is enacted by the State Legislature in terms of Article 243-W of the Constitution would continue to operate in the field. The relevant findings are contained in paragraphs 9 and 10 which are extracted below:

9. Article 243-W whereupon great emphasis has been laid by the Petitioners herein provides for an enabling clause so as to enable the State to endow by law the municipality with such powers and authority, as may be necessary, to enable the State to make, by law, by endowing the municipalities to function as institutions of self-government which may contain provisions for the devolution of powers and responsibilities subject to the conditions which may be specified in the Twelfth Schedule. The Twelfth Schedule of the Constitution referable to Article 243-W, inter alia, provides for urban planning including town planning, regulation of land-use and construction of buildings. Thus, Article 243-W contains merely an enabling provision, and it does not mean that the State is obliged to provide for such a statute. The Constitution (Seventy-fourth) Amendment Act, in any event, does not envisage that the existing laws would become non-operative or a vacuum would be created in the matter of enforcement of existing laws relating to urban planning and/or regulation of land-use and construction of buildings, etc.

10. The existing provisions of the statutes which govern the field, in our opinion, unless a statute is enacted by the State Legislature in terms of Article 243-W of the Constitution would continue to operate in the field. In view of the fact that the validity and/or interpretation of the MRTP Act and/or the regulation framed by the State are otherwise pending consideration before this Court, entertaining this SLP at this stage, in our opinion, would not serve any fruitful purpose.

Going by the facts of the case, the validity of Section 37AA of the Maharashtra Regional and Town Planning Act, 1966 was challenged as violative of the Constitution and items 1 and 2 of the Twelfth Schedule thereof. It is in that context the above view was taken. Herein, even though learned Government Pleader submitted that Article 243-W is only an enabling clause, it can be seen that it is in the light of the above Constitutional Scheme that the Municipality Act, 1994 was enacted repealing the earlier Act. The Municipality Act, as already seen, has enacted various provisions dealing with items 1 and 2 of Twelfth Schedule also. Therefore, already the State has brought into force a new Statute as envisaged under Article 243-W of the Constitution. Hence, the argument of the learned Govt. Pleader that the said Article only enables anew legislation to be brought in, cannot be accepted in the light of the factual scenario available in this case.

70. Whether the conflict between Town Planning Act, 1939 and Madras Town Planning Act, 1920 with Part IX-A of the Constitution and the Municipality Act,

1994 can be resolved in the light of the above dictum, is the next aspect. Evidently, Section 51(3) of the Municipality Act, 1994 confers power on the Municipality to prepare a master plan for its development in the prescribed manner with focus on scientific spatial planning, taking to account its resources and as per the fiscal investment and submit the same to the District Planning Committee. Thus, scientific spatial planning is a matter of great concern for the Municipality and the submission of a master plan to the District Planning committee is important. As already noticed, the District Planning Committee will have to act u/s 53(10) and other provisions for formulating an integrated development plan including matters of spatial planning. When we come to Sub-section (4) of Section 51, for preparing and implementing detailed town planning schemes, the Municipality will have to go by the laws relating to town planning as well as subject to the master plan approved by the Government. These two provisions were introduced by the amendment in the year 1999, as already noticed and the unamended provisions read as follows:

(3) Each Municipality shall, anticipating a stipulated period, prepare a master plan for its development and furnish the same to the district planning committee.

(4) Notwithstanding anything contained in the Town Planning Act, for the time being in force, the respective Municipalities shall have power to prepare and implement their detailed Town Planning Schemes under the said Acts subject to the master plan prepared by the development authorities.

Actually, the unamended Sub-section (4) was wider in scope. It envisaged power to prepare and implement detailed town planning schemes by the Municipalities notwithstanding anything contained in the Town Planning Act and subject to the master plan prepared by the development authorities. Actually, if we analyse the provisions of Sections 20, 22, 51(3) and (4) and 53 concerning District Planning Committee, Section 54 concerning Metropolitan Planning Committee and Section 55 concerning State Development Council, the said Sub-sections (3) and (4) of Section 51 before amendment were in tune with the scheme under the Municipality Act, 1994. As evident from the provisions of the Town Planning Act, 1939 there are no detailed provisions for preparing a development plan with focus on scientific spatial planning. The said aspect was evidently noticed by the Government also as evident from Ext.P26 produced in W.P. (C) No. 24526/2009 and Ext.P13 produced in W.P. (C) No. 22857/2010 and the detailed provisions of the same have already been discussed.

71. Therefore, the said documents will go in a long way, to understand the inadequacies of the Town Planning Act with regard to spatial planning. That the Government itself has felt the necessity, is evident from these two documents.

72. In fact, the powers, functions and responsibilities conferred under the Municipality Act, viz. Section 30 with regard to matters enumerated in the First Schedule are also important for understanding the said legal position. One of the mandatory functions under the First Schedule is in relation to preparation of

detailed town planning scheme in a phased manner. The idea behind the introduction of Part IX-A of the Constitution under the Municipality Act, 1994 being decentralisation of powers to make the local authorities, the local self government institutions, etc. and which are reflected under the various provisions already discussed the same will have to be given due impetus. The former enactments like the Kerala Municipalities Act, 1960 and the Municipal Corporations Act, 1961 and Guruvayur Township Act were repealed specifically for this purpose. The District Planning Committee, as evident from Article 243-ZE(3), alone is entrusted with the task to prepare a draft development plan having regard to matters of common interest between the Panchayats and the Municipalities including spatial planning.

73. But one thing to be noticed is that even though provisions have been made in the Municipality Act, 1994 for forming various committees in tune with the constitutional scheme, the manner and method by which they can proceed for preparing a master plan, for town planning including spatial planning, are not detailed therein. Therefore, such procedures will have to be prescribed with more details providing for preparation of detailed schemes by way of town planning or urban planning, as the case may be, as well as integrated district development plan. Evidently, now in the light of Section 51(4) of the Municipality Act, the Municipalities will have to go by the provisions of the Town Planning Act itself. But as found already, various provisions of the said Act varies with the scheme of the Municipality Act. Section 51(4) of the Municipality Act as now amended is therefore unworkable in the light of the conflicting provisions of the Town Planning Acts and the Municipality Act, 1994 and as Municipality Act, 1994 will prevail over them.

74. While examining the provisions of the Town Planning Act and the Municipality Act, 1994, the urgent necessity to bring in a comprehensive legislation for enabling the Municipalities to effectively bring in spatial planning schemes is evident. The glaring difference in the approach under the two enactments should get the attention of the Government and the Legislature. As evident from the counter affidavit filed by the Government, a Bill to bring in a comprehensive legislation has already been prepared. In para 15 of the counter affidavit filed in W.P. (C) No. 24526/2010, it has been averred that the Town and Country Planning Development Department has prepared a draft of the Kerala Town and Country Planning Bill, 2009 and submitted to the Government for further action. Evidently, the action in that regard has to be expedited and that too in a time bound manner and considering the emergency, so that the various provisions under the Municipality Act, 1994 can effectively be brought into operation.

75. Now I shall deal with the individual grievances projected in the two Writ Petitions. The Petitioners in both the Writ Petitions seek to quash the communications issued by the respective Corporations rejecting the applications to grant permits. In both cases the zonal restrictions under the town planning scheme are relied upon by the respective Corporations to reject the applications.

The Petitioner in W.P. (C) No. 24526/2009 has pointed out that the town planning scheme was notified initially as per Ext.P3 in the year 1971 which was varied in the year 1975 and finally by Ext.P4, u/s 13(2) of the Town Planning Act a varied scheme has been brought in. It is pointed out that the Petitioner's property which is near to an industrial zone, is remaining as residential itself in the said scheme. With regard to the detailed town planning scheme, it is stated that the same was brought as per Ext.P6 dated 29.6.1992 and continues to be in force without any variation at all in spite of the introduction of Part IX-A of the Constitution and coming into force of the Municipality Act, 1994. It is pointed out that there is no proper scientific spatial planning as regards these two schemes are concerned. By referring to Ext.P5, the amended scheme for the Central city of Kochi, it is pointed out that therein a liberalised policy has been introduced by the Government to have a proper land use.

76. Evidently, under the Town Planning Act, 1939 general town planning schemes and detailed town planning schemes are envisaged separately. The detailed town planning scheme is with respect to a particular area. Therefore, the same will definitely exclude the general town planning scheme. What is lacking in the two schemes is, according to the Petitioners, the non participation of people's representative, as envisaged under the Municipality Act. It is also pointed out that even mixed use permitted under the general town planning scheme is not available under the detailed town planning scheme. The area is a fully developed commercial area. The Petitioner has produced Ext.P16, an existing scenario map detailing the variations and the developments in the locality. It is explained that the same goes against the contentions of the Respondents. Ext.P19 is a comparative analysis table with respect to different properties situated in different survey numbers. The Petitioner has given in detail the deviations envisaged under the 1992 scheme. Finally, the Petitioner contends that he has caused to prepare a land use map by experts in town planning as per Ext.P20 and a revised zoning regulations has been framed as per Ext.P21. It is prayed that the same may be considered as empowered under Sections 7, 13 and 35 of the Town Planning Act, 1939, by the Corporation for executing a special agreement with the owner of the property.

77. The Respondents stoutly object the contentions of the Petitioners by stating that the detailed town planning scheme is now proposed to be varied and therefore at this stage the permit sought for, cannot be granted. It is pointed out that unless and until the varied detailed town planning scheme is brought into force, the pleas raised by the Petitioners cannot be considered. Learned Standing Counsel appearing for the Corporation also submitted that the Corporation is not willing to accede to the request made by the Petitioners to have an alternative scheme.

78. Evidently, as contended by the learned Counsel for the Petitioners, a proper spatial planning scheme will have to be prepared by the Corporation. It is only proper that the Respondents consider the points raised by the Petitioner with

regard to mixed use in the locality itself and the contention that the detailed town planning scheme which was remaining static, has not taken into consideration the construction of commercial buildings and the mixed use of the land in the area. It is pointed out that from time to time the scheme has been breached and violated, may be by different orders and permits granted by the Corporation. Thus it is a matter for the Respondents to consider while preparing a proper spatial planning scheme, as this Court will not be justified in straight away directing the Respondents to accept the scheme framed by the Petitioners.

79. In W.P. (C) No. 22857/2010, Ext.P3 is the general town planning scheme notified in the year 1971, wherein the area of the Petitioner is classified as public and semi public. The zoning regulations were revised by Ext.P3(a) in the year 2008 after considering the present development scenario. Therein, mixed use has been provided under the general guidelines. Accordingly, the land to a depth of 75 meters in residential zone and 100 meters in commercial, public and semi public and industrial zones along the road sides having an existing or proposed width of 12 meters or more uses permitted in residential, commercial and public and semi public zones are permitted by the Secretary of the Local Self Government if such uses are not allowable otherwise in the zoning regulations. Detailed town planning scheme is produced as Ext.P4 which is of the year 1986 and was sanctioned in the year 1994 by Ext.P4(a). It is stated that Exts.P4(a) and P4(b) have not been revised for the last 24 years and remain to be a static document without noticing any of the developments in the area. By Exts.P5 to P5(b) the Petitioners sought for permits in the light of the mixed use permitted under Ext.P3(a). It is pointed out that lot of deviations have occurred in the locality, going by the D.T.P. Scheme, for the last 20 years and the existing scenario map and the comparative table prepared by the Petitioners will show that the developmental activities of the area were not guided or controlled according to the D.T.P. Scheme. The said scheme has not been periodically modified with emphasis for spatial planning. The existing scenario map is produced as Ext.P6. Exts.P6(a) and P6(b) are the photographs. Ext.P7 is the comparative analysis of the sanctioned D.T.P. Scheme and the proposed D.T.P. Scheme on a comparison between Exts.P4(a) and P4(b) as well as Exts.P6, P6(a) and P6(b). Therein also, the Petitioners moved the Respondents under Sections 7, 13(1) and 35 of the Town Planning Act. Herein also, the proposal have not been considered for variation of the detailed town planning scheme also. It is pointed out that the scheme framed by the Petitioners cannot be accepted straight away.

80. Evidently, the Petitioners are unable to get the benefit of Exts.P3 (a) and P4 in the light of the existence of the detailed town planning scheme. Evidently, this is a matter which should get the attention of the Respondents herein. The detailed town planning scheme has not been varied for the last 24 years in spite of the provision for introduction of a spatial planning scheme. The development activities which have occurred in the area will have to be assessed while considering the variation of the scheme. All these are matters which will have to

be considered at the appropriate level, as a proper spatial planning scheme will have to be prepared.

81. In fact, the Petitioners have succeeded in establishing that the Town Planning Act, 1939 and the Madras Town Planning Act, 1920 as now in force are beset with inadequacies compared with the concepts under Part IX-A of the Constitution and the Municipalities Act, 1994. Since the Government is already seized of the matter, as evident from Exts.P13 and P13(a) produced in W.P. (C) No. 22857/2010 and Ext.P26 produced in W.P. (C) No. 24526/2009 and by preparing a new Bill, effective measures will have to be taken for its logical conclusion. Now, only in Kollam District alone a detailed integrated development plan is proposed to be brought into force. Learned Counsel for the Petitioners also made available the development plan for Paravoor Municipality in Kollam District which was prepared in terms of Section 51(3) of the Municipality Act for a spatial planning approach. Thus, as of now efforts have already been made in respect of Paravoor Municipality alone. It is clear from Ext.P13(a) produced in W.P. (C) No. 22857/2010 that based on the success of the pilot project in Kollam, the Government has decided to extend the project to other districts in the State as well and vide G.O.(Rt) No. 354/07/LSGD dated 1.2.2007 accorded sanction for the programme of Preparation of Local Development Plans and Integrated District Development Plans for all Districts and Preparation of State Perspective Plan. It is also stated therein that as per the order, a hand book has to be prepared detailing the methodology of these plans. Therefore, it is evident that steps have already been taken in the matter. The importance of the District Planning Committee in preparing draft integrated development plan for the district cannot be minimised by taking recourse to the provisions of the Town Planning Act. Spatial planning approach will have to be given due importance and the development plan should be prepared fully in tune with the said approach. The involvement of all the local self government institutions in the district is important. Therefore, steps in this regard will have to be finalised without any delay. Since it is mentioned that a new enactment itself is being introduced, all the various aspects pointed out above will be taken into consideration.

82. The upshot of the discussion as above, is the following: The provisions of Town Planning Act, 1939 and the Madras Town Planning Act, 1920 with regard to the preparation of general town planning schemes and detailed town planning schemes cannot survive in the light of Part IX-A of the Constitution and the Municipality Act, 1994. The provisions of the Town Planning Acts are really inconsistent with the provisions of Part IX-A of the Constitution as well as the Municipality Act, 1994. Section 51(4) of the Municipality Act, 1994 is therefore unworkable.

83. But the next question is whether such inconsistency will lead to invalidation of the entire existing town planning schemes as prayed for by the Petitioners. Herein, if the existing Town Planning Schemes are held invalid and inoperative, the only conclusion possible is that the steps taken by the Municipality for

implementing the said schemes cannot be continued at all. The detailed development plans with respect to the spatial planning envisaged under the Municipality Act, 1994 have not been prepared as on today in any of the districts except Kollam and in Kollam also the same is yet to be finalised. Therefore, the declaration that the schemes will be in operative, will really create a vacuum as held by the Apex Court in Shanti G. Patel's case (supra). Of course, this situation is created purely because the new system with respect to the preparation of spatial planning schemes has not been brought into force. In the Municipality Act, 1994 also the required provisions for guidance of municipalities for preparation of spatial planning scheme are yet to be made also. Therefore, as held by the Apex Court in para 9 of the judgment in Shanti G. Patel's case (supra) the eventuality of a vacuum being created, has to be sorted out. Even though it is clear from the averments in the counter affidavit that the Government is already seized of the matter and a new legislation itself is in the anvil, what should be the method in the interregnum is a matter which has to be considered.

84. The question whether the courts exercising writ jurisdiction has power to remedy such situation, was considered by the Apex Court in State of Kerala Vs. Kumari T.P. Roshana and Another, . Justice V.R. Krishna Iyer, in the above decision, laid down the principle in paragraphs 3 and 34 thus:

3. Any incisive study of the exercise of the writ power in India may reveal that it limits its action to quashing or nullifying orders proceeding on a violation of law, but stops short of a reconstruction whereby a valid scheme may replace a void project. This is no reflection on the High Court's ruling but is symptomatic of an obsolescent aspect of the judicial process, its remedial shortcomings in practice and the need to innovate the means, to widen the base and to organise the reliefs so that the court actualises social justice even as it inhibits injustice.

34. The Court cannot adopt a rigid attitude of negativity and sit back after striking down the scheme of Government, leaving it to the helpless Government caught in a crisis to make-do as best as it may, or throwing the situation open to agitational chaos to find a solution by demonstrations in the streets and worse.

These principles will have to be therefore considered to deliberate as to how the situation can be remedied during the interim period till the new enactment is brought into force by the Government or till new Integrated Development Plans and Local Development Plans are brought out under the spatial planning approach.

85. Evidently, the general town planning schemes and detailed town planning schemes have been framed by the then Municipalities in terms of the provisions of the statute. Still, the need is to bring out a uniform legislation on town and country planning for wider preparation of special development plans, regional development plans and district development plans, urban development plans, etc. etc. Sufficient time will have to be spent for working out the details after

such a legislation is brought into force. Therefore, even though the provisions of the Town Planning Acts and Section 51(4) of the Municipality Act cannot survive and are really unworkable, the Municipalities including Municipal Corporations can have recourse to the existing town planning schemes and the detailed town planning schemes to avoid a vacuum. They can take appropriate decisions in the matter with regard to the adoption and continuance of the schemes, till new arrangements are made. They can also resort to the principles of spatial planning and introduce them in the meanwhile, after a comprehensive integrated district development plan is prepared and implemented. This alone will avoid a vacuum and will pave way for an orderly development of the spatial planning schemes.

Therefore, the Writ Petitions are allowed as follows:

(a) It is declared that the provisions of Town Planning Act, 1939 and Madras Town Planning Act, 1920 cannot survive in the light of Part IX-A of the Constitution and the Municipality Act, 1994;

(b) Ext.P2 orders produced in the two Writ Petitions are quashed;

(c) There will be a direction to the Government to address all aspects with regard to spatial planning as envisaged u/s 51(3) of the Municipality Act, 1994 and other provisions of the Act and to bring in the new legislation proposed as per the Kerala Town and Country Planning Act within a reasonable time. The Government can also, in the meanwhile, take steps to bring the integrated development plans and local development plans like the one in Kollam District, in the other parts of the State also, if the process of bringing the new legislation will get delayed for any reason whatsoever.

(d) The applications submitted by the Petitioners will be considered afresh, in the light of the findings rendered above, by the respective Corporations.

The Writ Petitions are allowed to the above extent. No costs.