

K.H.V. Prasad and ors. Vs. Govt. of Andhra Pradesh Rep. by Its Principal Secretary, Municipal Administration and Urban Development and ors.

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Court : Andhra Pradesh

Decided On : Jun-08-2009

Reported in : 2009(4)ALT71

Judge : V. Eswaraiah and ;Vilas V. Afzulpurkar, JJ.

Acts : Hyderabad Municipal Corporations Act, 1955 - Sections 452A, 455A, 455AA, 461, 461A and 461(4); Hyderabad Municipal Corporations (Amendment) Act, 2008; Andhra Pradesh Municipalities Act, 1965 - Sections 340 and 340A; Vijayawada Municipal Corporation Act; Visakhapatnam Municipal Corporation Act; Andhra Pradesh Urban Areas (Development) Act, 1975 - Sections 2, 3, 4, 32, 41, 43, 43A, 46, 46A and 218A; Andhra Pradesh Municipal Corporations Act; Andhra Pradesh Urban Areas (Development) (Amendment) Act, 2008; Andhra Pradesh Apartments (Promotion of Construction and Ownership) Act, 1987; Tamil Nadu Town and Country Planning Act, 1971 - Sections 113 and 113A; Easements Act; Andhra Pradesh Fire Service Act, 1999 - Sections 13; National Building Code; [Delhi Rent Control Act, 1958](#) - Sections

Appeal No. : Writ Petition No. 1069 of 2008

Appellant : K.H.V. Prasad and ors.

Respondent : Govt. of Andhra Pradesh Rep. by Its Principal Secretary, Municipal Administration and Urban Developm

Advocate for Def. : Adv. General, ;J.V. Suryanarayana, Sr. Counsel, ;V. Venkataramana, G.P., ;G. Rama Gopal, ;G. Jhansi, ;Venkata Rangadas Kanuri, ;P. Kamlakar, Advs., ;N. Ranga Reddy, G.P. for Home, ;M. Narender Reddy,

Advocate for Pet/Ap. : Srinivas Dammalapati, ;S. Niranjan Reddy, ;S. Sainatha, ;S. Ramachandra Rao, ;S.V. Ratnam, ;G. Chandraiah, ;Y. Rama Rao, ;K.S. Murthy, ;G. Dharma Rao, ;Rama Rao Ghanta, ;M.V. Suresh Kumar, ;D.V. Sitar

Judgement :

ORDER

Vilas V. Afzulpurkar, J.

1. In this batch of cases the question posed for consideration is regarding the validity of AP Act 9 of 2008, which amended the Hyderabad Municipal Corporations Act, 1955 (for short 'HMC Act'), Andhra Pradesh Municipalities Act, 1965, Vijayawada Municipal Corporation Act, Visakhapatnam Municipal Corporation Act, Andhra Pradesh Municipal Corporations Act, 1955 and the Andhra Pradesh Urban Areas (Development) Act, 1975 and G.O.Ms. No. 901 dated 31.12.2007 issued thereunder.

2. By the aforesaid amendment Act the HMC Act was amended by inserting Sections 452-A, 455-A and 455-AA apart from substituting Schedule U and V of the HMC Act. Similarly, with respect to the other allied Acts, in the Andhra Pradesh Municipalities Act, 1965, Section 218-A was inserted and in the Andhra Pradesh Urban Areas (Development) Act, 1975 under Section 2h(h) high rise buildings was defined and Sections 41 and 43 were amended by inserting sub-sections. Further, Section 46 was substituted by conferring power of regularization on the Vice-Chairman and Section 46-A was inserted in the said Act. The said Act came into force on 15.12.2007 having received assent of the Governor on 16.04.2008 and published in Andhra Pradesh Gazette Part IV - B (Extraordinary) dated 19.04.2008. In pursuance of the powers conferred under Section 455-AA of the HMC Act as well as Section 218-A of the Andhra Pradesh Municipalities Act and Section 46 of the Andhra Pradesh Urban (Development) Act, the Government issued G.O.Ms. No. 901 Municipal Administration and Urban Development (M1)

Department dated 31.12.2007 titled 'The Andhra Pradesh Regulation and Penalization of Unauthorizedly Constructed Buildings and Buildings Constructed in Deviation of the Sanctioned Plan Rules, 2007'. The aforesaid GO is applicable to the existing buildings in the jurisdiction of the Municipal Corporations, the Urban Development Authorities and the Municipalities in the State of Andhra Pradesh constructed after 01.01.1985 and before 15.12.2007. The said GO was published in Andhra Pradesh Gazette Part -1 (Extraordinary) dated 31.12.2007 and came into force from the date of said publication.

3. In this batch of cases the aforesaid provisions of AP Act 9 of 2008 as well as G.O.Ms. No. 901 are questioned by the petitioners primarily on the ground that they are ultravires the power of the Government in amending the HMC Act and the allied Corporation Acts as well as the AP Municipalities Act and the AP Urban Areas (Development) Act. In some of the writ petitions only Section 455-AA is questioned and in some writ petitions only the Rules under G.O.Ms. No. 901 are questioned, while in some other writ petitions the Ordinance No. 15 of 2007, preceding AP Act 9 of 2008 is questioned whereas in some of the writ petitions only the method of penalization in the aforesaid GO is questioned.

4. We have heard all the writ petitions together and in this judgment, though we have separately dealt with each writ petition, the area of challenge broadly as appearing in the batch of cases is indicated as above.

5. Before we deal with the issue involved it may be necessary to set out the previous history and the events leading up to the enactment of impugned GO. For the sake of convenience those events are categorized under the following head and broadly referred to as preamble.

PREAMBLE:

6. The HMC Act was enacted and enforced in the year 1955 whereas AP Municipalities Act was enacted in 1965 and the AP Urban Areas (Development) Act was enacted in the year 1975. The aforesaid Acts seek to regulate, inter alia, the constructions of buildings under the Building Rules, which are framed by keeping in view the requisite Floor Area Ratio (FAR), the open space norms on all

sides of the building etc. Spurt in population explosion in the Hyderabad and other cities in Andhra Pradesh over the decades, has also resulted in massive increase in demand for built-up area in the cities including conversion of agricultural land into commercial, industrial and institutional use within and around the cities leading to overall demand for land and built-up areas. An Expert Committee, appointed by the Government prior to taking up these impugned amendments, has found that massive unauthorized constructions have been made and some of the reasons enumerated by the said committee are as follows:

1. Eagerness of applicant for maximum utilization of site to get maximum returns.
2. High land cost and smaller plot sizes.
3. Building regulations not being accepted by applicants.
4. Non-regulation of unauthorized layouts both by owners and authorities.
5. Land use controls.
6. Ineffective and inadequate development control machinery.
7. Dependence on lower staff for detection, issue of notices and demolition and lack of interdepartmental co-ordination etc.

7. These and such other reasons resulted in massive unauthorized constructions in and around the city and in municipal and urban areas in the State, which ultimately resulted in the Government coming up with a scheme for regularization of these unauthorized constructions under G.O.Ms. No. 419 dated 30.07.1998. The aforesaid GO was preceded by similar schemes of regularization issued from time to time between 1992 to 1998 and such schemes were extended to other municipal and urban development areas in the State and under these various schemes the regularization of constructions made before a particular cut off date mentioned therein were sought to be regularized.

8. We have not been informed of any challenge to any of the said regularization schemes taken out by the Government from 1992 to 1998 under various GOs commencing from G.O.Ms. No. 87 dated 12.02.1992 and ending with G.O.Ms. No.

373 dated 01.07.1998. However, the last of the GOs being G.O.Ms. No. 419 dated 30.07.1998 was challenged by way of public interest litigation (PIL) before this Court in WP. No. 25011 of 1998. The Division Bench of this Court in C. Kulsum Reddy and Ors. v. State of A.P. : 2002 (3) ALT 536 : 2002 (4) ALD 2008 (D.B.) examined the said aspect of validity of G.O.Ms. No. 419 dated 30.07.1998 and found that the said scheme of regularization had no legislative sanction under the Act. This Court, therefore, found that there was no power under any of the laws i.e. HMC Act, AP Urban Areas (Development) Act, AP Town Planning Act etc. whereby illegal constructions could be regularized and it was held that '...there is nothing in these provisions which gives power to any authority including the Government to allow any person to make any unauthorized construction and if such construction is made to regularize it...'

This Court, further, held in Para 4 of the said judgment as under:..If the State is empowered under definite entry to legislate and there is no legislation it may exercise the power but once there is legislation the Government cannot use its executive power to defeat the legislation. The only way in such a situation is amendment in the legislation....

9. In view of the above, this Court had quashed G.O.Ms. No. 419 dated 30.07.1998 as being ultra vires the provisions of HMC Act. This resulted in the State Government enacting AP Act 6 of 2003. The title of the said Act was 'An Act to provide for the regularization of the unauthorized constructions in the areas of municipal corporations, municipalities and urban development authorities and the matters connected therewith and incidental thereto.' The preamble of the said Act lists out the details of various regularization schemes commencing with G.O.Ms. No. 87 dated 12.02.1992 up to G.O.Ms. No. 419 dated 30.07.1998 and also reference to the decision of this Court in WP. No. 25011 of 1998 dated 25.01.2002 referred to above whereunder G.O.Ms. No. 419, as above, was quashed. The preamble, further, recites that consequent on quashing the aforesaid orders, the demolition of unauthorized construction shall have to be taken up by the Government and whereas such demolition of thousands of buildings shall result in causing hardship to the public and such demolition might invite litigation from the public and involve huge expenditure for the State exchequer. It also, further,

recites that the Government have regularized several unauthorized constructions as per the Government orders issued from time to time and several persons paid huge amounts in response to the orders issued by the Government in G.O.Ms. No. 419 dated 30.07.1998 and whereas the repayment of amounts already collected by the Government under the several Government orders involves huge financial burden to the local authorities and thereby hampering developmental programmes of the local authorities in the State and whereas to avoid such hardship, huge financial expenditure and litigation, the Government have decided to enact a law to empower the Government to regularize the unauthorized constructions made in the said urban areas and to validate the actions of the authorities in regularizing the unauthorized constructions in pursuance of the orders issued by the Government from time to time.

10. In the background of the aforesaid preamble, Section 2 of the said Amendment Act provided that notwithstanding anything contained in the HMC Act, 1955, the Andhra Pradesh Municipalities Act, 1965 and the Andhra Pradesh Urban Areas (Development) Act, 1975, the Government shall have power to regularize unauthorized constructions made by the owners or individuals, who constructed the buildings unauthorizedly or in deviation of the sanctioned plan upto 30.06.1998, filed voluntary declarations or applications for regularization as stipulated in the various Government orders and to regularize the same after levying the penal amount in accordance with the procedure prescribed or the orders issued in this regard. Further, Section 3 inserted and enacted under the said Amendment Act has validated all the actions taken by the competent authorities to regularize the unauthorized constructions under the aforesaid G.O.Ms. No. 419 dated 30.07.1998. It is to be noted that the aforesaid AP Act 6 of 2003 was not challenged even earlier nor is under challenge in the present batch of cases. As would be noticed from above, the aforesaid Act merely authorizes the Government to regularize unauthorized constructions up to 30.07.1998.

11. The unauthorized constructions, which were regularized under the aforesaid scheme of G.O.Ms. No. 419 after the AP Act 6 of 2003, however, did not result in curbing the menace of unauthorized and illegal constructions in the city and the other urban areas including the municipalities. It appears to us that in view of the

repeated GOs issued by the Government from 1992 onwards commencing with G.O.Ms. No. 82 referred to above, a perception was created among the builders and citizens that even if unauthorized constructions are taken up and completed, eventually the Government would come up with another regulation scheme and such violators would get away with the violations with impunity. It is also to be noticed that even in spite of these legislative enactments inclusive of AP Act 6 of 2003 no stringent penal provision was introduced in any of the municipal laws dealing with the Corporations or Municipalities or other urban areas, with the result the building activity continued unabated either with sanction or without sanction and as such, the activity became so uncontrollable that the municipal authorities, either designedly or on the pretext of want of staff and machinery, were unable to take any preventive action including any drastic action of demolition of such unauthorized constructions.

12. One such matter came up before this Court when a Division Bench of this Court was hearing WA. No. 2130 of 2005. The said writ appeal was concerned with the unauthorized constructions made in Begumpet area of the twin cities and this Court had passed series of orders. which are apt to be extracted here. On 02.02.2006, this Court observed as under:

In compliance of the direction given by the Court on 21.12.2005, Commissioner, Municipal Corporation of Hyderabad has supplied list of the cases pending in the courts at Hyderabad and Secunderabad, in which injunctions have been granted at the instance of the parties who have raised constructions in violation of the sanctioned building plans. In some of these cases, buildings have been or are being constructed without obtaining sanctioned plan.

Chief Judge, City Civil Court, Hyderabad, is directed to obtain necessary information from the concerned courts to which all the injunction matters were transferred, and send the same to this Court indicating the disposal of injunction applications by those courts. The needful be done within a period of two weeks from today.

In reply to the Court's query, learned Counsel for Municipal Corporation, Hyderabad submitted that violations of various provisions concerning the erection

of buildings invites fine as enumerated in Schedule U of the Hyderabad Municipal Corporations Act, 1955 (for short 'the Act').

We have gone through Schedule U of the Act and find that the fine prescribed therein is highly insignificant and does not operate as deterrent against the illegal constructions.

The schedule was framed more than 50 years ago. It is high time that the Schedule is adequately revised and the fine is made substantially punitive.

Commissioner, Municipal Corporation of Hyderabad is directed to file an affidavit after consulting experts on the subject and suggest quantum of fine which may be imposed in cases of different kinds of violations of sanctioned building plans. The needful be done within two weeks from today.

In order to obviate the possibility of misuse of injunction orders passed by the subordinate courts at Hyderabad and Secunderabad, we deem it proper to direct that none of the plaintiffs shall be entitled to continue with the construction activities on the strength of the injunction orders passed by the civil courts.

Municipal Corporation of Hyderabad is directed to issue public notice within 48 hours from today incorporating this direction of the Court so that the violators of the building plans and other statutory provisions may become aware of the possibility of a direction being given by the Court for demolition of the illegal and unauthorized constructions.

The case be listed on 17th February, 2006.

In pursuance of the above orders, a High Level Expert Committee has been constituted vide G.O.Rt. No. 177 M.A & U.D. Department, dated 18.02.2006 to suggest necessary amendments to Schedule 'U' of the HMC Act, 1955 and AP U A (D) Act, 1975 with special emphasis on the quantum of fines to be imposed in cases of different kinds of building violations.

This Court in W.A. No. 2130 of 2005 in its orders dated 21.02.2006 has issued directions that

Committee constituted by State Government vide G.O.Rt. No. 177 dated 18.02.2006 shall also look into the following issues:

(i) Whether the minor deviations made in the construction of buildings after obtaining sanctioned plan should be regularized

(ii) The committee should also go into the issue of regularization of constructions made without obtaining sanctioned plan and suggest whether such constructions made up to this day can be regularized on the condition of submission of building plan to the competent authority and sanction thereof subject to payment of heavy fine/penalty.

The High Level Expert Committee has submitted its first report on 17.05.2006 and second report on 07.07.2006. The Committee has made following recommendations:

(i) Enhanced Penal rates under Schedule U & V of Municipal Corporations Act and A.P.U.D.A Act for various building violations suggested.

(ii) To formulate a scheme to penalize unauthorized constructions made up to a specified date and up to certain limits to avoid hardships to owners of such unauthorized constructions.

(iii) The rates for penalization of these existing unauthorized constructions are also suggested.

(iv) Amendments to Municipal Laws suggested.

The above reports were placed before this Court, and by further order dated 27.07.2006, observed as under:

We have gone through the report, dated 26.07.2006 sent by the Chief Judge, City Civil Court and have no hesitation to express our dissatisfaction over the disposal of cases by nine Courts.

It appears that the attention of the Chief Judge has not been invited to the earlier direction given by the Court for expeditious disposal of the injunction suits in which

Municipal Corporation, Hyderabad is a defendant. The Chief Judge, City Civil Court should undertake a fresh exercise and assign the suits for injunction and/or appeals in which Municipal Corporation, Hyderabad and Hyderabad Urban Development Authority are defendants to identified officers with specific instruction that they are expected to deal with and dispose of cases expeditiously without granting any adjournment. It should be made clear to the officers concerned that any delay on their part will be viewed by the High Court on judicial side with severe adversity.

The Chief Judge, City Civil Court should send further report within fifteen days.

For consideration of that report, the case be listed on 22.08.2006.

Registrar (Judicial), Andhra Pradesh High Court is directed to communicate this order to the Chief Judge, City Civil Court today itself.

Learned Advocate General has placed before the Court letter No. 28/TPS/MCH/HO/05 dated 07.07.2006 sent by Shri M. Prasada Rao, Former Commissioner and Director of Municipal Administration, Hyderabad to Secretary to Government, M.A. & U.D. Department. This letter is accompanied by second report submitted by High Level Expert Committee constituted by the State Government in furtherance of the directions given by this Court.

We have gone through the second report and are of view that the fines suggested in first report as well as second report is highly inadequate. In order to check the menace of unauthorized constructions and violation of the sanctioned building plans, it is absolutely imperative for the State to make provision for levy of exemplary fines, which would operate as deterrent against those who are in the habit of taking law into their own hands insofar as the constructions of buildings and encroachment on public lands are concerned.

It will be highly appreciated if the State, while amending the relevant statutory provisions, delete the provision regarding compounding of violation of municipal Acts and other similar statutes which regulate construction of buildings etc. Other steps, which will go a long way to curb the menace of unauthorized and illegal

constructions is to make such activity cognizable offence and constitution of special courts to deal with such cases.

The learned Advocate General says that the State Government has already decided to bring about suitable amendments in the municipal legislations keeping in view the recommendations made by High Level Expert Committee. He says that this exercise is likely to take six to eight weeks.

While appreciating the stand taken by the State Government to implement the recommendations of High Level Expert Committee, we deem it proper to observe that the State Government may also keep in mind the suggestions made by the Court while amending the statutes.

For consideration of the matter relating to the steps taken by the State Government in furtherance of the reports submitted by High Level Expert Committee and the observations made by this Court, the case shall be listed on 28.09.2006.

With a view to curb the menace of illegal constructions in the garb of order of status quo passed by the Courts, we direct that notwithstanding the tenor and nature of the injunction orders passed in all the cases pending in the Court at Hyderabad, Secunderabad and Ranga Reddy, none of the persons, who is a plaintiff or appellant before these Courts shall be entitled to raise construction over the disputed site. This would necessarily mean that all the injunction orders or orders of status quo passed by the Civil Courts shall stand modified to that extent.

This unusual order has been passed by us because, we are informed that in a majority of cases, the plaintiffs or appellants, after getting the order of injunction from the Courts concerned, continue the construction activities and threaten the municipal authorities and the authorities of Hyderabad Urban Development Authority with the initiation of contempt proceedings, if steps are taken to stop the construction activities.

13. The reports of the expert committee were in two parts viz. Report I and II. The first report was submitted with covering letter dated 17.05.2006 by the committee

and the second report under covering letter dated 07.07.2006. The reasons for unauthorized constructions, which are enumerated by the said committee, are already mentioned earlier in this judgment. The committee also noted the constraints in controlling the unauthorized constructions, which include lack of awareness among the citizens regarding necessity of having a building with adequate open spaces to provide natural light and ventilation, gross and inadequate town planning staff with urban and local bodies to regulate unauthorized constructions, lack of modern equipment and trained personnel to demolish the unauthorized constructions, inasmuch as submission of occupancy certificate to get essential services viz. electricity, water, sewerage etc. and keeping in view the necessity to control all unauthorized constructions, the committee suggested amendments to HMC Act and various other measures including the amendment to schedule U provided for levying of deterrent fine for violations. The committee also suggested preventive action for regularizing unauthorized constructions and similar amendments, which will be applicable to AP Municipal Corporations Act and AP Urban Areas (Development) Act etc.

14. In the second report overall view of the various regularization schemes in the past was taken and it also took note of the latest policy of the Government when it had issued Hyderabad Revised Building Rules, 2006 in G.O.Ms. No. 86 Municipal Administration dated 03.03.2006 applicable to Hyderabad Metropolitan area and extendable to all the urban areas in the State. The said policy was aimed at effectively curbing the unauthorized constructions. However, with a view to tackle large number of unauthorized constructions existing, particularly, in the major cities of Hyderabad, Vijayawada and Visakhapatnam neither there was manpower nor machinery to take up demolition nor there was any provision to levy penalty. The committee also noted that several persons have purchased the buildings without any awareness about the deviation to sanctioned plan by the builder and it was practically not possible/feasible to demolish all unauthorized constructions. The committee, therefore, recommended penalization of unauthorized constructions in the development area of HUDA and in the urban areas including Municipal Corporation of Hyderabad. The recommendations of the committee included the suggested rates of structures, which would be eligible for penalization and the proposed amendments to HMC Act and AP Urban Areas (Development)

Act were suggested. As would be noticed from above, the said II report was also placed before this Court as reflected from the order of this Court dated 27.07.2006 extracted above.

15. Based on the above recommendations, steps were taken by the Government to amend HMC Act, AP Municipalities Act, AP Municipal Corporations Act and AP Urban Areas (Development) Act including amendment to the schedule U and V of HMC Act and Urban Areas (Development) Act and consequently AP Act 9 of 2008 was enacted.

16. In the meanwhile, the HMC Act, the Vijayawada Municipal Corporation Act, the Visakhapatnam Municipal Corporation Act, the AP Municipal Corporations Act, the AP Municipalities Act and the AP Urban Areas (Development) Act were amended by enacting AP Act 6 of 2008, which received the assent of the Governor on 16.04.2008 and was published in the AP Gazette Extraordinary Part IV - B dated 18.04.2008. The aforesaid Act amended Section 461 of the HMC Act by inserting Sub-section (3) thereto and the said section provided for punishment or fine by any person, who undertakes or carries out construction or development of any land in contravention of master plan or without permission, approval or sanction or in contravention of any condition subject to which such permission, approval or sanction has been granted. Further, a new Section 461-A was also inserted empowering the Commissioner to make an order for removal or discontinuance of any such unauthorized development or an order directing sealing of such development. Similar provision was inserted in AP Municipalities Act by substituting Section 340 with a new provision Section 340-A was inserted on the same lines as Section 461-A referred to above. Similarly under the AP Urban Areas (Development) Act, similar amendment was made by amending Section 41 and inserting Section 43-A and all the said amendments were extended to and applied to Vijayawada Municipal Corporation Act and Visakhapatnam Municipal Corporation Act and to any municipal corporation constituted under the AP Municipal Corporations Act, 1994.

17. In the chronology thereafter, the AP Act 9 of 2008 was enacted to give effect to the recommendations of the expert committee referred to above by enacting

Sections 452-A, 455-A and 455-AA and allied provisions in other cognate Acts and G.O.Ms. No. 901 dated 31.12.2007 was issued, which is the last of the aforesaid enactments, which are singularly or otherwise questioned in this batch of matters. Now, we shall take up each of the individual writ petitions in this batch of cases in the serial in which they were argued by the learned Counsel on either side.

WP. No. 1069 of 2008:

18. This writ petition challenges AP Ordinance 15 of 2007, which later became AP Act 9 of 2008. The petitioner also challenges G.O.Ms. No. 901 dated 31.12.2007 and G.O.Ms. No. 112 dated 31.01.2008, which partially amended G.O.Ms. No. 901.

19. Mr. D. Srinivas, learned Counsel for the petitioner contends that G.O.Ms. No. 901 affected the rights of the apartment owners. The primary contention raised by the learned Counsel, therefore, is the aforesaid impugned enactments seriously affect the ecology and environment and affects water supply, sewerage and traffic movement facilities and the impugned Ordinance and the rules violate the right of life of the citizens as it confers unbridled powers on the Municipal Commissioner to regulate unauthorized constructions. It is also contended that the previous attempt of the Government in 1998 vide G.O.Ms. No. 419 dated 30.07.1998 whereunder unauthorized constructions made up to June 1998 were sought to be regularized, was quashed by this Court and again the impugned provisions have been brought-in, which makes the regularization a regular phenomenon. The said impugned Ordinance and the scheme, therefore, violates Articles 21 and 14 of the Constitution of India and also affects the AP Apartments (Promotion of Construction and Ownership) Act, 1987.

20. In support of his contention, the learned Counsel relied upon a decision of the learned Single Judge of this Court in CSR Estates v. HUDA : 1998 (6) ALT 540. The said decision dealt with and interpreted various provisions of the AP Apartments (Promotion of Construction and Ownership) Act wherein it was held that the said Act has been given overriding effect vide Section 32 thereof and that once a declaration is given by the builder relating to the plan under Section 4 of the Act, he cannot unilaterally alter the plan and file amended declaration unless

the said amended declaration is duly executed and registered by all the flat owners.

21. He also cited a Division Bench judgment, which considered the appeal against the aforesaid judgment of the learned Single Judge, in C. Shekar Reddy v. CSR Estates Flat Owners Welfare Association : 2003 (3) ALT 413 : 2003 (3) ALD 553 (D.B.) which affirmed the judgment of the learned Single Judge as above. He has also relied on a decision in Friends Colony Development Committee v. State of Orissa : (2004) 8 SCC 733 decided by the Honourable Supreme Court and particularly placed reliance on Para 25, which is extracted below: Though the municipal laws permit deviations from the sanctioned constructions being regularized by compounding but that is by way of an exception. Unfortunately, the exception, with the lapse of time and frequent exercise of the discretionary power conferred by such exception, has become the rule. Only such deviations deserve to be condoned as are bona fide or are attributable to some misunderstanding or are such deviations as where the benefit gained by demolition would be far less than the disadvantage suffered....

In Para 26 the Supreme Court observed as follows:

26. The application for compounding the deviations made by the builders should always be dealt with at higher level by a multi-membered High Powered Committee so that the builders cannot manipulate. The officials who have connived at unauthorized or illegal constructions should not be spared. In developing cities the strength of the staff, which is supposed to keep a watch on the building activities should besuitably increased in the interest of constant and vigilant watch on illegal or unauthorized constructions.

22. Learned Counsel would, further, contend that powers of the Commissioners under the impugned G.O.Ms. No. 901 is unguided and arbitrary and no distinction has been made between innocent and deliberate violations. It is contended that relaxation granted to G.O.Ms. No. 901 by further G.O.Ms. No. 112 dated 31.01.2008 is also liable to be declared as illegal as it deletes Clause (i) from Rule 9 of G.O.Ms. No. 901. Clause (i) as originally drafted in G.O.Ms. No. 901 was one of the categories of the sites where penalization scheme was not applied and the

same was in the following words:

(i) Buildings that are in conformity with the land use approved in the master plan/zonal development plan.

Under G.O.Ms. No. 112 the said Rule 9(i) and 9(m) were deleted, with the result there is no prohibition for penalization even where the buildings are not in conformity with the approved land use (clause (i)) and the constructions made are not within the building lines of major road of width 80 feet within the limits of Greater Hyderabad Municipal Corporation (GHMC); Vijayawada and Visakhapatnam Municipal Corporations and the road width of 60' in the urban areas (clause (m)). Under G.O.Ms. No. 112 while the said clause 9(i) and 9(m) were deleted Rule 5(3) was amended by inserting the Sub-rules (4) to (7) and Rule 5(7) substituted Clause (m) of Rule 9 above. The said Sub-rule (7) deals with the constructions made within the building lines of major roads as above and provides that the regularization and penalization shall be done subject to the property owner furnishing legally enforceable undertaking that he shall surrender the land falling within the building line to local body or urban development authority free of cost as and when required in future for road widening or other public purpose.

23. As mentioned above, the learned Counsel questions G.O.Ms. No. 112 as well on the same ground and has relied on a decision of the Supreme Court in *M.C. Mehta v. Union of India* : 2006 (3) SCJ 577 : (2006) 3 SCC 399 : 2006 (4) 8.4 (DNSC) and particularly paragraphs 33, 53 and 61 thereof. The aforesaid decision dealt with sealing of properties in Delhi, which were either constructed or used contrary to the permissible use in the master plan and in that context, the Honourable Supreme Court held that the constructions cannot be permitted to go on in this manner forever. It also felt that on the one hand various laws are enacted and expert planners prepare master plans and on the other hand, the said illegal activities go on unabated without having any respect for law and other citizens. Thus, though the laws are passed, enforcement of laws and implementation of the orders is utterly lacking, which results in total lawlessness and therefore, the identification of such violators and appropriate action against

such blatant misuse of properties and large-scale violations cannot be ignored. The Supreme Court, therefore, expressed a very serious anguish against such violators. The learned Counsel urged that the violations in the present case also need to be viewed from the said angle.

WP. No. 1894 of 2008:

24. The relief claimed in this writ petition is also similar to the one claimed in WP. No. 1069 of 2008 referred to above and the petitioners in this writ petition are owners of two plots, who question the constructions made by respondents 4 to 10 while constructing a residential building. Individual plot owners are also made party respondents 11 to 16 and it is alleged that while litigations were pending between the parties the impugned Ordinance and the GOs have been issued whereunder the builder seeks regularization of unauthorized constructions. The Ordinance itself is issued to avoid debate on the Bill in either of the two Houses and as such, the Ordinance itself is brought out in an undemocratic manner. Previous attempts of regularization by the Government in G.O.Ms. No. 419 and its striking down by this Court is also relied upon and the main contention raised is relating to sufferings of the neighbours, who are affected by regularization and that their easementary rights would be seriously violated.

25. He also questioned the process of regularization on the ground that civil and writ proceedings against the illegal constructions are already pending between the parties. Thus, primarily the petitioners are objecting the constructions, being made by the neighbour, which are grossly unauthorized and which are sought to be regularized under the impugned proceedings. By way of an amendment to the prayer vide WPMP. No. 25638 of 2008 the subsequent G.O.Ms. No. 112 dated 31.01.2008 was also challenged. Since the relief claimed is similar to the one in WP. No. 1069 of 2008 there is no impediment for allowing the said petition. WPMP is accordingly ordered.

26. We have heard Sri S. Sainath, learned Counsel for the petitioners.

27. Learned Counsel would contend that the impugned proceedings affect public interest and safety and the setbacks are necessary in the interest of neighbours. It

is also contended that under AP Act 6 of 2003 while the regularization of all constructions between 01.01.1985 to 30.06.1998 are covered, the present Act again refers to constructions made from 01.01.1985 to 15.12.2007. He contends that though it stipulated that it is a one-time measure, the Government is resorting to repeated measures of this nature. All the provisions of the impugned G.O.Ms. No. 901 provide that on such penalization and regularization though local authorities shall issue proceedings and action for enforcement initiated or contemplated against such offending constructions shall stand withdrawn and occupancy certificate will be issued to the applicant vide rule 10 of the Rules. According to the learned Counsel such withdrawal of action seriously affects the neighbour. He also contends that withdrawal of Rule 9(m) by subsequent G.O.Ms. No. 112 dated 31.01.2008 is also illogical and arbitrary.

28. Learned Counsel has relied upon the following decisions in support of his contentions. *K. Ramadas Shenoy v. The Chief Officers, Town Municipal Council* : (1974) 2 SCC 506 : AIR 1974 SC 2177 and particularly he relied upon Para 28 of the said decision. The aforesaid case arose out of a sanction granted by the Municipal Council, Udipi where permission was granted to the contesting respondents to construct a Cinema Theatre, which was objected to by the appellant on the ground that construction of a Cinema Theatre was contrary to town planning scheme, as the area is purely a residential area. While upholding the said contention the Supreme Court observed in Para 28 as follows:

An illegal construction of a cinema building materially affects the right to or enjoyment of the property by persons residing in the residential area. The Municipal Authorities, owe a duty and obligation under the statute to see that the residential area is not spoiled by unauthorized constructions...

If the scheme is nullified by arbitrary acts in excess application of the powers of the municipal Commissioner, the Courts will quash the orders passed by the municipalities in such cases.

29. He also relied upon another judgment of the Supreme Court in *V.M. Kurian v. State of Kerala* : AIR 2001 SC 1409 : 2001 (3) ALT 18.1 (DNSC) wherein exemption was granted by the Government without there being any

recommendations from the Greater Cochin Development Authority and the same was held to be beyond the power of the Government, as it could not act in the absence of such recommendations by interpreting Rule 5 of the Rules, which fell for consideration. Another decision relied upon by the learned Counsel is that of a Division Bench of this Court in *Y. Jyothirmoy v. Municipal Corporation of Hyderabad*, Hyderabad : 2007 (2) ALT 410 : 2007 (2) ALD 533 (D.B.) wherein the question involved was validity of the order of demolition issued by the Commissioner with respect to unauthorized constructions, though the proceedings for regularization of the unauthorized constructions under 2003 Act were pending. Further in *Friends Colony's case* (4 supra) referred to earlier is also relied upon. Another judgment of the Supreme Court in *Consumer Action Group and Anr. v. State of Tamil Nadu* : AIR 2000 SC 3060 : (2000) 7 SCC 425 : 2000 (5) ALT 5.1 (DNSC) is also relied upon, particularly Para 41 thereof.

30. Learned Counsel also relied upon the decision in *L. Chandra Kumar v. Union of India* : AIR 1997 SC 1125 which laid down law relating to judicial review vested in the High Court and Supreme Court under Articles 226 and 32 respectively of the Constitution of India. It is held as part of the basic structure of the Constitution of India and as such the decision of all Courts and tribunals within the respective jurisdiction are held to be subject to judicial superintendence of the High Court and the Supreme Court.

WP. No. 7542 of 2008 & WP. No. 4409 of 2006:

31. In these writ petitions neither AP Act 9 of 2008 nor G.O.Ms. No. 901 is questioned and as such these writ petitions are deleted from this batch to be heard separately.

WP. No. 542 of 2008:

32. The relief sought in this writ petition is questioning the inaction of the Municipal Corporation of Vijayawada in preventing the illegal constructions being made by the respondent No. 2 and consequently for direction to the Municipal Corporation to take action and demolish the illegal constructions.

33. In the counter filed by the second respondent it was alleged that he has made application to the first respondent for regularization of deviation of the construction in terms of amended provisions i.e. Sections 455-A and 455-AA and in terms of regularization and penalization scheme and in that context the writ petitioner had contended that even the Commissioner cannot use his discretion to regularize unauthorized constructions contrary to public interest.

A learned single Judge of this Court under order dated 12.08.2008 was of the opinion that since the interpretation of virus of Sections 455-A and 455-AA is being considered in WP. No. 1069 of 2008 and batch, this writ petition was referred to be heard along with this batch.

34. Learned Counsel for the petitioner, Mr. S. Ramachandra Rao, submitted the following points for consideration and relied upon several decisions of the Supreme Court.

1. Sections 452-A, 455-A and 455-AA introduced by Act 9 of 2008 enable regularization of structures which are in violation of floor area or which are constructed without sanctioned plan or which are in deviation of the sanctioned plan. The public policy behind such a provision appears to be to protect owners of property from undue harassment by Municipal Officials for small deviations of sanctioned plan and protect the right of the owners of properties to put their property to use which they choose.

2. All these sections say the Commissioner 'may' regularize such constructions. The word 'may' indicates that it is not mandatory for the Commissioner to regularize such construction merely because an application for regularization is made. This implies that the Commissioner may also refuse to regularize and relied upon a decision of the Supreme Court in *The Labour Commissioner v. Burhanpur Tapti Mills Limited* : AIR 1964 SC 1687 particularly Para 9.

3. The Commissioner may regularize such constructions where the public interest in not regularizing the construction outweighs the private interest of the Builder who built such constructions or of the purchasers who purchased such constructions. Some of the public interest criteria are set out in Rule 9 in G.O.Ms.

No. 901 dated 31.12.2007. In cases covered by Rule 9, the Commissioner can refuse to regularize.

4. The order of the Commissioner involves civil consequences as rights of the violator of the building rules and that of the other affected parties like neighbours would be adjudicated. It is settled law that a hearing should be provided to a party whose rights are likely to be prejudiced by any order likely to be passed by a quasi judicial or administrative body involving civil consequences.

Although the Sections 452A, 455-A and 455-AA and G.O.Ms. No. 901 do not mention of any opportunity to be given to persons who are likely to be affected by proposed regularization, such a requirement has therefore to be read into the said G.O. and also the statute. The Hyderabad Municipal Corporations Act, 1955 does not exclude the operation of the principles of natural justice and therefore principles of natural justice must be read into the statute and the neighbours or other persons likely to be affected by the order of regularization must be heard before the orders are passed by the Commissioner In exercise of powers under these sections. The learned Counsel relied upon the following decisions of the Supreme Court in *Maneka Gandhi v. Union of India* : AIR 1978 SC 597 particularly Paras 32, 57, 58 and 59 thereof; *Institute of Chartered Accountants of India v. L.K. Ratna and Ors.* : AIR 1987 SC 71 Para 16 thereof; *S.C. and Weaker Section Welfare Association (Regd.) v. State of Karnataka* : AIR 1991 SC 1117 Para 15 thereof.

5. The Municipal laws regulating the building construction activity may provide for regulations as to setbacks, floor area, the number of floors, extent of height of the building and the nature of use to which a built up property may be subjected in any particular area. The individuals as property owners have to pay some price for securing peace, good order, dignity, protection and comfort and safety of the community. Thus the object behind the rules is maintenance of public safety and convenience.

6. The Municipal Corporation being a creature of the statute is bound to carry out its functions within the four corners thereof. It is required to follow the statute scrupulously.

7. While exercising the power conferred by the above sections, the Commissioner has to balance the interest of the violator and the interest of the public including neighbours and other persons in the locality depending upon the nature and degree of violation of the statute and the rules made thereunder. He also relied upon a decision of the Supreme Court in Consumer Action Group's case (9 supra), Para 30 thereof.

8. Neighbours who are affected by illegal constructions have locus standi to challenge such constructions or oppose their regularization by the Commissioner. This has to be implied into the statute and the regulations as it is in the public interest to do so. He relied upon the following decisions: K. Ramadas Shenoy's case (supra), Paras 27 to 29 thereof; Bhagwandas and Ors. v. Harish Chetwal and Anr. 1983 (1) ALT 78 (NRC); K. Jawahar Reddy v. State of AP. : 2003 (4) ALT 582 : 2003 (3) ALD 195 (D.B.) (para 18), thereof and Yasseen Khatoon v. Commissioner, Municipal Corporation of Hyderabad : 2005 (4) ALT 252 (para 15) thereof.

9. Any exercise of the power to regularize illegal constructions without hearing the affected parties such as neighbours would be violative of Article 14 and 300A of the Constitution of India and also the principles of natural justice and void. He relied upon a decision of the Supreme Court in State of Orissa v. Dr. Binapani Del : AIR 1967 SC 1269 thereof.

10. The purpose behind the Building Rules in relation to set-backs is that not only the property owner but also his neighbours have adequate privacy and would get natural light and air which would promote public health, peace and public convenience. It is open to a neighbour to waive such right or acquiesce in its violation if he chooses to do so. But where there is no such waiver or acquiescence, such rights have to be upheld and no order of regularization should be passed in such cases.

35. Since the virus of the impugned provisions is alone being decided in this judgment, all other aspects in the writ petition are not dealt with herein. The writ petition is accordingly deleted from this batch to be heard separately by an appropriate learned Single Judge.

WP. No. 2063 of 2008:

36. In this writ petition the relief sought for is similar to WP. No. 1069 of 2008 in addition to the petitioner seeking a consequential direction to the second respondent - Greater Visakhapatnam Municipal Corporation, not to regularize the unauthorized constructions made on the pent house at the premises in question.

37. It is alleged in the affidavit that a civil litigation questioning the said unauthorized construction is pending between the parties in O.S. No. 1548 of 2003 before the I Additional Junior Civil Judge, Visakhapatnam. Here also the previous regularization scheme in G.O.Ms. No. 419 dated 30.07.1998 was questioned by the petitioner in WP. No. 25011 of 1998, which was later, allowed by Division Bench. However, later the validation Act 6 of 2003 was passed by the State Legislature and later the present impugned provisions and the scheme of penalization is issued by the State. Thus, the basic contention raised by Smt. S.V. Ratnam, learned Counsel for the petitioner is that the impugned provisions are contrary to the rights conferred on the neighbour or affected parties under the AP Apartments (Promotion and Construction of Ownership) Act, 1987.

WP. No. 15611 of 2008:

38. The petitioners seek to challenge only G.O.Ms. No. 901 dated 31.12.2007 and G.O.Ms. No. 112 dated 31.01.2008 as illegal and arbitrary and violative of Articles 21 and 300A of the Constitution of India and seek a consequential direction to the second respondent - Greater Hyderabad Municipal Corporation (GHMC) not to regularize the illegal constructions by respondents 4 to 9 and other reliefs.

39. We have heard Sri G. Chandraiah Naidu, learned Counsel for the petitioners, who contended that the impugned GOs violate citizens right to free air and light. He also made exclusive reference to the brochure published by the respondents while answering various queries of the citizens regarding the penalization scheme under the chapter 'Frequently Asked Questions' in the said brochure. Learned Counsel placed reliance on I.R. Coelho v. State of Tamil Nadu : 2007 (2) ALT 1 (SC) : 2007 (1) SCJ 694 : AIR 2007 SC 861. This decision concerns and deals with the questions relating to laws placed in Schedule IX of the Constitution of

India and where the protective umbrella of Article 31B and the basic power of judicial review are considered. Learned Counsel relied upon several paragraphs in the said judgment viz. Paras 51, 102, 103, 135, 144 and 146 wherein the Supreme Court dealt with the power of judicial review, basic structure of the Constitution of India and the questions considering the extent of judicial review permissible in spite of IX schedule laws in the light of the basic structure theory. We are afraid the said decision has no relation to the issue involved in this batch of writ petitions.

40. Similarly, the learned Counsel relied upon a judgment of Mahendra Baburao Mahadik v. Subhash Krishna Kanitkar : 2005 (3) SCJ 414 : (2005) 4 SCC 99, which arose out of applications made for regularization, which were found to have suffered from wilful suppression of material facts even before the Supreme Court and on facts, the regularization was found not justified and permissible. The said decision also did not deal with the question regarding the virus of the provisions as involved in the present batch.

WP. No. 17859 of 2008:

41. The relief sought for in this writ petition is seeking to declare the inaction of the second respondent - GHMC in not taking steps to remove unauthorized constructions contrary to the sanction plan as illegal and sought implementation of general directions of Hyderabad Urban Development Authority (HUDA) addressed to the second respondent to take action against the unauthorized and illegal constructions. In this writ petition, neither the amended provisions nor G.O.Ms. No. 901 or 112 is questioned. Further, the builder, who has made alleged offending constructions, is also not impleaded as party. Hence, this writ petition is also deleted from this batch to be heard separately by appropriate learned single Judge.

WP. No. 8578 of 2008:

42. This writ petition is filed in public interest by Forum for Better Hyderabad questioning the power of regularization conferred on the authorities under AP Ordinance 15 of 2007 and the consequential G.O.Ms. No. 901 dated 31.12.2007.

43. By WPMP. No. 4539 of 2008 the petitioner has sought amendment of the prayer to replace the AP Ordinance 15 of 2007 by the words AP Act 9 of 2008. We had permitted the learned Counsel for the parties to make submissions with regard to the said amended relief and as such the application is allowed. In this writ petition, a private party respondent sought leave to implead him and to oppose the writ petition vide WPMP. No. 14513 of 2008. We had heard the party-in-person also and as such the application is allowed.

44. Sri K.S. Murthy, learned Counsel for the petitioner submitted that the impugned provisions of G.O.Ms. No. 901 dated 31.12.2007 violate the 73rd Constitutional amendment. He relied upon Articles 243G, 243W and 243ZE to contend that the impugned provisions take away the fundamental authority of the local self-government. He also contended that regularization of offending constructions would seriously affect civic amenities. He also submitted that National Building Code stipulations are grossly violated by these unauthorized constructions and as such regularization contrary thereto ought not to be allowed. According to the learned Counsel structural stability of the constructions and thereby right to life is not kept in mind by the respondents and as such structural safety is required to be insisted upon not only for high rise buildings but also for non-high rise buildings. The proportion of population and building density in zonal development plan is also being ignored resulting in serious strain on the civic amenities. According to him, no proper groundwork and study has been made either by the municipal corporation or by the urban development authority and challenges the impugned provision as arbitrary.

45. Learned Counsel relied upon a decision of the Supreme Court in Kurian's case (7 supra), which is referred to above. We have already quoted that the aforesaid decision has no application as on facts it was found by the Honourable Supreme Court that the Government had granted exemption without there being any recommendations as required under law. Learned Counsel also relied upon a decision of the Supreme Court in Friends Colony's case (4 supra), which is also referred to above. Finally, the learned Counsel would contend that affected persons must have an opportunity to ventilate their grievances. Learned Counsel finally would place reliance on a decision of the Supreme Court in State of

Rajasthan v. H.V. Hotels (P) Limited : 2007 (4) SCJ 483 : (2007) 2 SCC 468 : 2007 (6) ALT 27.3 (DNSC) for the proposition that power of exemption is not to be exercised freely and the power to relax a building rule, regulation or requirement is an exception to the rule and it is to be used with caution and for the further proposition that regularization of floor area ratio could not have been granted without Development Authority being impleaded as a party. In the said decision the Honourable Supreme Court considered the power of relaxation contained in the amended byelaws.

WP. No. 16381 of 2008:

46. This writ petition is filed questioning G.O.Ms. No. 901 dated 31.12.2007 and G.O.Ms. No. 112 dated 31.01.2008. Learned Counsel for the petitioner moved an application for amendment vide WPMP. No. 4542 of 2009 on 20.02.2009 seeking to challenge regularization and penalization rules as contrary to the principles of natural justice. Since we have already heard the learned Counsel on the said issue, this application is allowed.

47. The writ petition is filed by the Apartments Residents Welfare Association, which is said to be registered with the District Registrar, Visakhapatnam on 09.08.2005 and it has claimed that the petitioner has made several representations including the one to the Honourable Chief Minister complaining of coercive steps being taken by the official on the ground that the last date given in the impugned GOs is getting over. It is contended that the aforesaid G.O.Ms. No. 419 is illegal, as it did not give any exemption to apartments and the penalization charges per flat ought to have been fixed per square feet of the area of deviation and not at a flat rate. Learned Counsel criticizes the table in the annexure to the said GO on the ground that it treats major and minor deviations with the same penalization charges, which is arbitrary. According to the learned Counsel, therefore, the discretionary power vested in the Commissioner and the said GO is unchannelised, vague and it is alleged that by this method the Corporation is collecting security deposit from the builders as well as the penalization charges from the occupiers resulting in double taxation. He also contends that under Rule 8 small flats are not exempted.

WP. No. 6562 of 2008:

48. This writ petition is filed by a political party in public interest seeking declaration that the regularization and penalization rules are ultravires and arbitrary.

49. Learned Counsel, Sri S. Niranjan Reddy, appearing for the petitioner contends that the rules regarding penalization are challenged on the ground that instead of collecting penalization charges from the builder the same is being collected from bonafide purchasers. Learned Counsel relied upon the objects of the Bill to contend that while the aforesaid Bill and the scheme is aimed at penalizing the builder as a deterrent measure, in effect the penalization charges are being levied and collected from the occupiers, who are the bona fide purchasers of the flats. Learned Counsel has filed brief note of his submissions, which primarily question the burden of payment of penalization amount imposed on the occupier rather than the builder. The aforesaid contention is supported by the provisions of Section 455-AA and reliance is placed upon the words 'deviation to the building made is sought to be penalized' which invariably refers to the builder, who makes the deviation. The words 'made by the owner or as the case may be by any individual' as used in the said provision, according to the learned Counsel can only mean the builder or the owner and the innocent purchaser, who bonafidely purchases the flat, is not to be penalized for acts or omissions of the owner or the builder.

50. The contention of the learned Counsel in other words is that provisions of Section 455-AA must be read in a manner that means the owner or builder responsible for the construction and consequently are alone liable for payment of penalization amount.

WP. Nos. 16623 and 23494 of 2008:

51. These writ petitions are filed seeking a Mandamus declaring the action of the second respondent - Kakatiya Urban Development Authority (KUDA) in applying G.O.Ms. Nos. 901 and 902 dated 31.12.2007 to the house constructed by the petitioners without due permission from the Gram Panchayat, Gopalapuram,

Warangal District as illegal.

52. During the hearing of the writ petitions, We pointed out to Mr. Y. Rama Rao, learned Counsel appearing for the petitioners that the virus of the provisions is not questioned by the petitioner and the only relief sought for is G.O.Ms. Nos. 901 and 902 are not applicable to the petitioner. The question involved in the writ petitions, therefore, is really not the subject matter of this batch. These writ petitions are accordingly deleted from this batch to be heard separately by an appropriate learned Single Judge.

WP. No. 15787 of 2008:

53. The relief sought for in the writ petition is to quash the notices issued by the second and third respondents i.e. Vijayawada Urban Development Authority and the Commissioner, Tenali Municipality by declaring G.O.Ms. Nos. 901 and 112 dated 31.12.2007 and 31.01.2008 respectively as illegal and void.

54. Sri Dharma Rao, learned Counsel for the petitioner has brought to our notice the impugned notices issued by the Commissioner, Tenali Municipality informing the petitioner that he has constructed the building contrary to the plan and also with deviations and brought to his notice the opportunity given for regularization of unauthorized constructions. The earlier notices of the Vijayawada Urban Development Authority dated 30.04.2007 points out the violation made by the petitioner requiring him to submit explanation.

55. During the hearing, we pointed out to the learned Counsel that as per the document filed by him, Page No. 23 of the material papers contains the letter of the petitioner dated 14.07.2008 addressed to the Municipal Commissioner, Tenali Municipality that the petitioner wants to regularize the building under BPS scheme and paid Rs. 10,000/-vide demand draft dated 12.07.2008 towards penalty and requisite fee for regularization. We, therefore, pointed out to the learned Counsel that having sought regularization, the petitioner cannot turn around and question the BPS scheme itself.

56. Learned Counsel, thereupon, has filed WPMP. No. 6805 of 2009 seeking to place on record the letter of the petitioner dated Nil addressed to the Municipal Commissioner, Tenali Municipality seeking withdrawal of his application for regularization. The petitioner, therefore, submits that his request for regularization having been withdrawn, he is entitled to question the impugned GOs. Learned Counsel contends that the aforesaid impugned rules of regularization are arbitrary and has relied upon the decisions of the Supreme court in Dwaraka Prasad Laxmi Narain v. State of U.P. : AIR 1954 SC 224 and A.N. Parasuraman v. State of T.N. (1989) 4 SCC 682.

WP. No. 2861 of 2008:

57. Another welfare association has questioned G.O.Ms. No. 901 dated 31.12.2007 as well as G.O.Ms. No. 112 dated 31.01.2008. The contentions raised in this writ petition are similar to the one raised in WP. No. 6562 of 2008 referred to above.

58. Sri Ghanta Rama Rao, learned Counsel for the petitioners submits that the official respondents have failed to discharge their statutory duty and on account of their persistent failures, the menace of unauthorized constructions has grown up to such proportion that the municipal bodies are unable to take up preventive action. The penalization scheme now introduced again allows the builders to go scot-free and only the innocent buyers will be compelled to shell down the penalization amount. The said impugned GOs are accordingly questioned on the ground that they are wholly arbitrary.

WP. No. 7133 of 2008:

59. The writ petition challenges the Ordinance 15 of 2007 and consequently G.O.Ms. No. 901 dated 31.12.2007 and G.O.Ms. No. 112 dated 31.01.2008 as arbitrary, which aspect is being considered in this batch.

WP. No. 16025 of 2008:

60. Petitioners seek to challenge G.O.Ms. Nos. 112 and 113 dated 31.01.2008 and the substance of the relief coupled with the averments in the affidavit show

that they are aggrieved by the lay-out regularization scheme covered by G.O.Ms. No. 113 whereas in this batch, we are considering the regularization scheme covered by G.O.Ms. No. 901. Hence, this writ petition is deleted from the batch to be heard separately.

SUBMISSIONS OF THE LEARNED ADVOCATE GENERAL:

61. The learned Advocate General has taken us through the legislative history, previous adjudications and the scope of the present batch of cases. He contends that none of the petitioners have challenged the legislative competence of the State in enacting the AP Act 9 of 2008 whereunder the impugned provisions - Sections 452-A, 455-A and 455-AA were enacted. Further, G.O.Ms. No. 901 was issued in pursuance of Section 455-AA as in the nature of policy guidelines of the State and it is not, as if, that the Commissioner of the Corporation is given an uncontrolled and unguided power and discretion to regularize any construction. He, further, submitted that so far as the provision similar to Section 455-AA enacted by the Tamil Nadu State by incorporating Section 113A to the Tamil Nadu Town and Country Planning Act, 1971 is concerned, the same was held to be valid by the Honourable Supreme Court in the case of Consumer Action Group's case (9 supra).

62. The learned Advocate General also relied upon a decision of the Supreme Court in *Government of Andhra Pradesh v. P. Laxmi Devi* : 2008 (2) ALT 100 (SC) : 2008 (2) SCJ 723 : AIR 2008 SC 1640, which contains a very in depth discussion on the theory of judicial review of statutes and has relied upon several paragraphs of the said judgment. It is his, further, submission that the resultant scheme, which is covered by G.O.Ms. No. 901, has emerged after directions of this Court to appoint an Expert Committee and the said committee having gone into the root cause and the manner of deviations, has suggested remedial action as well as the mechanism, which is to be adopted hereafter to ensure that such maladies do not recur. As per the said high-level expert committee report, the Government has examined the entire issue and the same was also apprised by this Court in the earlier writ petition referred to in the preamble of the judgment above and after duly providing necessary safeguards in the scheme itself, the regularization is

proposed. According to the learned Advocate General, therefore, the regularization is not with respect to all and sundry violations irrespective of the other necessary requirements of planned development of the city and in that view of the matter, Rule 9 of the Rules framed under the G.O.Ms. No. 901 clearly provides the necessary safeguards and it is not, as if, that the wholesale regularization is envisaged under these rules. He, further, contends that basically the impugned scheme is not for regularization but for penalization. The report I & II of the high-level expert committee is, thus, relied upon, reference to which is already made in the preamble of the judgment above.

63. To the extent of meeting the allegations in the individual writ petitions, the learned Advocate General submits that individual grievance of the neighbours including their claims under the Easements Act or affecting such other civil rights are concerned, the aforesaid scheme would not affect the same inasmuch as the scheme merely envisages penalization of irregular and illegal constructions from the standpoint of municipal laws. He also points out that regulation 9(j) which stipulates that sites under legal litigation/disputes regarding ownership of the site or building are not covered by the aforesaid scheme, such individual grievances are open to be adjudicated upon before any law Courts and inasmuch as such dispute between the builder/owner and the neighbour would not give rise to any cause of action for a neighbour to challenge the very scheme itself. He, further, submits that the cases of individual buildings and the grievances made by the neighbours against the offending constructions, therefore, has no relevance to the issue involved in this batch. The scheme of penalization cannot be said to be arbitrary based on such individual grievances and the invocation of Article 21 by the petitioners is totally misplaced as on facts of each of such cases the infringement of civil right is alleged. Similar contentions based upon the AP Apartments (Promotion of Construction and Ownership) Act, 1987 are also not sustainable inasmuch as the very wording of Section 455-AA is with reference to municipal laws in general viz. HMC Act, AP Municipalities Act, AP Municipal Corporations Act and AP Urban Areas (Development) Act. The regularization and penalization is intended only so far as the aforesaid Acts are concerned and in view of that, the Apartments Act or the rights or liabilities thereunder remains unaffected.

64. Learned Advocate General, lastly, submits that in view of enactment AP Act 6 of 2003 the statutory basis was provided for earlier regularization scheme under G.O.Ms. No. 419 dated 30.07.1998 and thereby the defect pointed out by this Court in C. Kulsum Reddy's case (1 supra) was cured and the validation of regularization under the aforesaid scheme and the regularizations made under the aforesaid scheme were statutorily validated and the same remains unchallenged. Later, the State also enacted AP Act 6 of 2008 whereunder all the municipal laws were amended to provide fine to the tune of 10% of the value of the land for any contravention or with imprisonment for a term, which may extend to three years and thereby the Legislature has taken stringent action against the said violations and the further provision for sealing of the property is also added, inasmuch as vide Section 461(4) and Section 461-A so far as HMC Act is concerned. Further, under the present AP Act 9 of 2008 the enactment of Section 452-A provides for regularization of violations and floor area ratio in non high-rise buildings, which is available up to 10% of the permissible setbacks on payment of fine as provided. Similarly, under Section 455-AA the buildings constructed without sanctioned plan can be regularized provided necessary plan, on payment of requisite fee, is submitted together with all parameters of all relevant laws including Fire Services Act and National Building Code is satisfied.

65. Learned Advocate General points out that there is no serious challenge to these two provisions viz. Sections 452A and 455A by any of the petitioners. So far as Section 455-AA is concerned, the said provision enables the Commissioner to regularize and penalize the constructions either unauthorizedly made or in deviation of sanctioned plan as a one time measure subject to payment of penal amount as prescribed and compliance with necessary guidelines of the State policy, which are set out in detail in G.O.Ms. No. 901. It is stated that the discretion of the Commissioner is neither unguided nor unchanneled and as such, the Article 14 of the Constitution of India is not attracted on the facts and circumstances of the case.

66. Learned Advocate General brought to our notice that G.O.Ms. No. 901 underwent amendment vide G.O.Ms. No. 112 dated 31.01.2008 and the later GOs were issued in view of several representations received by the Government from

various quarters including public and accordingly, the said modifications are made. Primarily, under the aforesaid modification, the time limit of 90 days as stipulated under Rule 3 of G.O.Ms. No. 901 was split into two parts i.e. 50% of the amount along with submission of application and balance 50% within a period of six months thereafter. The same, therefore, cannot be said to be arbitrary. Further, amendments to Rule 5(7) really ensures that even though the regularization of buildings is made within the building line of major roads of the width of 80', the same is subject to giving an undertaking by the owner/builder that if required for road widening in future or any other purpose, he shall forego that part of the construction falling within the building line, free of cost. The said provision, therefore, sufficiently safeguards the road width and the building lines and even if Clause (m) of Rule 9 is deleted the said amended Rule 5(7) would take care of the situation fully. Further, with regard to Rule 8 it was amended to provide RCC house up to two stories i.e. G+1 in sites up to 100 sq. metres, as against earlier Rule 8 providing for single storey in sites up to 100 sq. yards, also is in public interest and as such not arbitrary. Similarly, the deletion of Clause (i) of Rule 9 also cannot be said to be arbitrary in view of several representations received by the Government seeking deletion of the said clause. The said G.O.Ms. No. 112 has, further, reduced penalization charges also with a view to make it affordable for general public and for rationalization thereof, which cannot be said to be arbitrary. The time limit of 90 days prescribed in Rule 3 of G.O.Ms. No. 901 within which the application for regularization or penalization could be made was further extended by the Government in (i) G.O.Ms. No. 272 dated 28.03.2008 up to 30.04.2008; then further under (ii) G.O.Ms. No. 328 dated 30.04.2008 time is extended up to 31.05.2008; further under (iii) G.O.Ms. No. 384 dated 31.05.2008 time was extended till 30.06.2008 and lastly under (iv) G.O.Ms. No. 455 dated 28.06.2008 it was extended till 15.07.2008. Thus, though the time for making application is extended, the cut off date with respect to the constructions made up to 15.12.2008 alone were permissible to be considered and mere extension of dates for making applications would not affect the validity of the impugned provisions.

Learned Advocate General, therefore, urged that these writ petitions being devoid of merit are liable to be dismissed.

67. Apart from the learned Advocate General, Mr. J.V. Suryanarayana, senior advocate, appearing for one of the respondents in WP. No. 4409 of 2008 and WP. No. 7542 of 2008 made the following submissions. While the learned senior counsel fairly conceded that Section 455-A is in public interest but questions the validity of Section 455-AA on the ground that the discretion therein lacks any guidelines. According to him, the legislative power so exercised is against public interest and all unauthorized constructions are sought to be legalized under the aforesaid provision. He also submitted that though it is styled as a one-time measure, there are series of instances, on earlier occasions, where such regularization schemes were issued by the Government and thereby allowed rampant unauthorized constructions in the city and every builder and owner continues to take up unauthorized constructions with impunity. Learned senior counsel, therefore, submits that if such regularizations are to be allowed the other regulatory provisions under the HMC Act and other municipal acts, which deal with application of powers of the Commissioner to call for information of such unauthorized constructions, issue show cause notice against violations and power of demolition, would all become otiose.

68. While dealing with G.O.Ms. No. 901 the learned senior counsel would contend that the definition of authorized technical personnel under Rule 2(1) is too vague and what scrutiny would such technical personnel do under Rule 6 with respect to any such application received is left entirely for such persons' dictates, which is clearly unguided. According to the learned Counsel public interest and safety is completely given a go by in enacting these provisions. Learned senior counsel relied upon some decisions of the Supreme Court in Pleasant Stay Hotel and Anr. v. Palani Hills Conservation Council and Ors. : (1995) 6 SCC 127; Mahendra Babubrao's case (supra); Kurian's case (supra); Suo Motu Petitioner v. State of Rajasthan : AIR 2005 Rajasthan 82; Maneka Gandhi's case (supra) particularly Para 121 thereof, which deals with Article 21 vis-a-vis the liberty of citizens; S.P. Gupta v. President of India : AIR 1982 SC 149, particularly Para 22 thereof.

69. Mr. V. Venkataramana, learned Counsel, appearing for respondents in WP. No. 1894 of 2008 supported the impugned provisions by contending that the petitioners have failed to show any infringement of fundamental rights and has

relied upon a decision of Supreme Court in Dharam Dutt v. Union of India : AIR 2004 SC 1295 for the proposition that no motives can be attributed when the competent legislature has enacted a law within its competence. The reasons for enquiry into the motives, which persuaded the legislature into the passing of the Act, are of no use while considering the validity of the Act. He also relied upon Shri Ram Krishna Dalmia and Ors. v. Shri Justice S.R. Tendolkar and Ors. : AIR 1958 SC 538 which a case arising out of Commissions of Enquiry Act and Para 11 is relied upon for the proposition that even the classification made by the Legislature, if founded on different bases, according to the objects sought to be achieved, the same would also be valid and not violative of Article 14 of the Constitution of India. He has also lastly, relied upon Confederation of Ex-Servicemen Association v. Union of India 2006 (8) SCJ 427 : (2006) 8 SCC 399 particularly Paras 27 to 30 and 61 to 64.

SUBMISSIONS OF PARTY-IN-PERSON:

70. Mr. V. Sitaramaiah, party-in-person, has sought impleadment of himself as respondent No. 3 in WP. No. 6562 of 2008 and the said implead petition WPMP. No. 11349 of 2008 was ordered on 25.09.2008. He has, accordingly, filed a counter and supports the impugned provisions. In WP. No. 8578 of 2008 also he has filed a similar application for impleadment vide WPMP. No. 14513 of 2008. We had, accordingly, ordered the same on 20.02.2009. He has, thereafter, filed a counter affidavit with material papers and at his request, We have heard him also.

71. In the counter affidavit filed, he states that his son owns a flat in which he is residing with his family members and sought impleadment as special power of attorney to look after the flat's welfare, court cases etc. According to him, the impugned provisions and the BPS scheme is a welfare scheme by the Government in the interest of general common class of people, who innocently purchased the flats and houses, which contained inherent deviations. According to him, the entire class of such bona fide purchasers is an exploited class, which has parted with their life savings in purchasing the flats and is residing there with their families for several years. According to him, the majority of the buildings are constructed in deviation and violation of approved plan and if one wants to buy a

flat there is hardly any building, which could be certified as in conformity with the approved plan and the byelaws. He, therefore, submits that it is the casual and lethargic attitude of the officials of the corporation, which has resulted in the present menace where everybody has resorted to unauthorized constructions and sold the flats to the innocent buyers and they are now made to litigate, as builders have disappeared from the scene after selling the flats to individuals. He, further, submits that the flat owners, now residing, are around two lakh families, which are neither criminals, who violated the municipal laws nor are even indirectly parties to such constructions and they being the only victims, the striking down of provisions would only result in their flats getting demolished. According to him, therefore, demolition of flats where two lakh families are residing and costing about Rs. 40,000/- crores would be a complete national waste and he criticizes the petitioners in WP. No. 6562 of 2008 (Lok Satta Party) and WP. No. 8578 of 2008 (Forum for Better Hyderabad) on the ground that instead of helping the innocent two lakh families and helping the existing exploited members of public, these writ petitions are filed challenging the impugned schemes. He submitted that Rule 9 of the Rules gives complete safeguard to the public interest and the Government interest and as such, no invalidation is attached to the impugned provisions. He also submitted in his counter affidavits two alternatives viz. one demolition of 50,000 illegal buildings working out to about 1 lakh flats and financial loss to about 1 1/2 lakh families and second alternative is penalization of illegal constructions, which roughly comes out to Rs. 12,000/- per flat. According to him, therefore, quashing of the BPS scheme would be totally against public interest.

72. In the documents annexed to his counter affidavit he has filed sample document showing inspection of unauthorized construction and illegal buildings carried out in Malkajgiri Municipality vide Government Memo. No. 1681/M1/07-1 dated 24.02.2007 which had noted that out of 317 buildings inspected deviations were found in 313 buildings and only four buildings out of 317 buildings were constructed as per approved plan. The violations regarding plot coverage accounted for 294 out of 317, FAR violation was found in 253 out of 317, setback violation was found in all the 317 buildings whereas parking violation was found in 81 and action was initiated by the municipality only with respect to 23 cases out of which in 13 cases court cases were pending. 70 buildings, which were meant for

individual residential buildings were converted into residential apartments out of 241 and 23 buildings, which were initially permitted for construction of individual residential buildings were converted into residential cum commercial buildings. The reasons for such lapses were also noted in the report, which primarily includes lack of supervision and timely action by officials.

QUESTIONS FOR CONSIDERATION:

73. In the light of the above rival contentions, the following questions arise for consideration:

- (i) Whether the AP Act 9 of 2008 is valid and enforceable?
- (ii) Whether G.O.Ms. No. 901 dated 31.12.2007 issued under the impugned provisions is arbitrary?

ANALYSIS:

Though the impugned provisions under Act 9 of 2008 refer to different provisions inserted under the HMC Act, AP Municipalities Act as well as AP Urban Areas (Development) Act, for the purpose of convenience reference herein is made to the provisions in HMC Act as they are similar to the amendments to the other allied Acts.

74. The Constitutional validity of the impugned provisions herein is required to be examined in the light of the parameters of judicial review as laid down in various decisions of the Supreme Court and various High Courts including this Court. However, the latest decision of the Supreme Court has discussed the said aspect in great detail and the judgment itself states that similar issues, which are often faced by the Courts, are necessary to be clarified so as to lay down the scope of judicial review in such cases. Since invalidation of statute is a grave step and the presumption of Constitutionality being available with respect to the impugned legislation, We have carefully considered the submissions on the either side 'in the light of the aforesaid decision of the Supreme Court reported in P. Laxmi Devi's case (24 supra). Before discussing the aforesaid decision it is to be noted that there is no serious challenge in any of these cases with regard to Sections 452-A

and 455-A under the AP Act 9 of 2008. In fact, as noted above, one of the senior counsel appearing for the respondents, though supporting the petitioners, has fairly stated that Sections 452-A and 455-A is desirable provision as it envisages regularization subject to fulfillment of all statutory requirements. It has, therefore, to be held that Sections 452-A and 455-A as valid.

75. In the decision of the Supreme Court in Laxmi Devi's case (24 supra) referred to above, the aforesaid issue viz. validity of statutory provisions, was discussed from several angles and in Para 44 the Supreme Court held as follows:

44. In our opinion, there is one and only one ground for declaring an Act of the legislature (or a provision in the Act) to be invalid, and that is if it clearly violates some provision of the Constitution in so evident a manner as to leave no manner of doubt. This violation can, of course, be in different ways, e.g. if a State legislature makes a law which only the Parliament can make under List I to the Seventh Schedule, in which case it will violate Article 246(1) of the Constitution, or the law violates some specific provision of the Constitution (other than the directive principles). But before declaring the statute to be unconstitutional, the Court must be absolutely sure that there can be no manner of doubt that it violates a provision of the Constitution. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must always be preferred. Also, the Court must make every effort to uphold the constitutional validity of a statute, even if that requires giving a strained construction or narrowing down its scope vide *Mark Netto v. Government of Kerala and Ors.* : AIR 1979 SC 83 (para 6). Also, it is none of the concern of the Court whether the legislation in its opinion is wise or unwise.

Further, in Paras 49, 54 and 55, the Supreme Court observed as follows:

49. In our opinion the legislature must be given freedom to do experimentations in exercising its powers, provided of course it does not clearly and flagrantly violate its constitutional limits.

54. In our opinion adjudication must be done within the system of historically validated restraints and conscious minimization of the judges personal

preferences. The Court must not invalidate a statute lightly, for, as observed above, invalidation of a statute made by the legislature elected by the people is a grave step. As observed by this Court in *State of Bihar v. Kameshwar Singh* : AIR 1952, SC 252 (274): 'The legislature is the best judge of what is good for the community, by whose suffrage it comes into existence.

55. In our opinion, the Court should, therefore, ordinarily defer to the wisdom of the legislature unless it enacts a law about which there can be no manner of doubt about its unconstitutionality.

In Para 59 the Supreme Court observed as follows:.Constitutional Law of India (3rd Edn.) page 119 found approval in *Delhi Transport Corporation v. D.T.C. Mazdoor Congress* : 1991 (Supp) 1 SCC 600 : AIR 1991 SC 101. The Court held:

Seervai in his book *Constitutional Law of India* (3rd Edn) has stated at page 119 that:.the courts are guided by the following rules in discharging their solemn duty to declare laws passed by a legislature unconstitutional:

(1) There is a presumption in favour of constitutionality and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt: 'to doubt the constitutionality of a law is to resolve it in favour of its validity'.

(2) A statute cannot be declared unconstitutional merely because in the opinion of the court it violates one or more of the principles of liberty, of the spirit of the Constitution, unless such principles and that spirit are found in the terms of the Constitution

In conclusion the Supreme Court has held Paras 65 and 69 as follows:

65. The Court must, therefore, make every effort to uphold the constitutional validity of a Statute, even if that requires giving the statutory provision a strained meaning, or narrower or wider meaning, than what appears on the face of it. It is only when all efforts to do so fail should the Court declare a statute to be unconstitutional.

69. All decisions in the economic and social spheres are essentially ad hoc and experimental. Since economic matters are extremely complicated, this inevitably entails special treatment for special situations. The State must therefore be left with wide latitude in devising ways and means of fiscal or regulatory measures, and the Court should not, unless compelled by the statute or by the Constitution, encroach into this field, or invalidate such law.

76. It is also to be borne in mind that the Courts have been adopting another device under the principles of reading down and the principles of severability, with a view to save the Constitutionality of the impugned provisions.

77. It is now well-settled that if a part of the Statute or a Rule is found to be offending the Constitutional safeguards and if such part is severable from the rest so as to make the rest of the provisions valid and enforceable, the offending part can be severed or read down so as to sustain the Constitutional validity of the rest of the part of the statute. The principle of severability, undoubtedly, is attracted only when the rest of the provision independently exists and is enforceable without the offending part.

78. The principle of severability is well recognized by the honourable Supreme Court as early as in *R.M.D.C. v. Union of India* : AIR 1957 SC 628 as well as in later decision in *Satyawati Sharma v. Union of India* : 2008 (7) SCJ 890 : (2008) 5 SCC 287. In the last of the decisions referred to above the Supreme Court had occasion to consider Section 14(1)(e) of the [Delhi Rent Control Act, 1958](#) making distinction between premises let for residential and non-residential purposes by restricting landlord's rights to seek eviction of tenant from premises let for residential purposes only. When the validity of the said provisions was in issue before the Supreme Court, the entirety of Section 14(1)(e), which was impugned was not struck down and only part thereof, which was offending the Constitution was severed without doing violence to the remaining part.

79. In *Calcutta Gujarati Education Society v. Calcutta Municipal Corporation* : (2003) 10 SCC 533 the Supreme Court applied the rule of reading down a provision of law to make the particular provision workable and to bring it in harness with the other provisions of the statute. Para 35, which is relevant, is necessary to

be extracted:

35. The rule of 'reading down' a provision of law is now well recognized. It is a rule of harmonious construction in a different name. It is resorted to smoothen the crudities or ironing out the creases found in a statute to make it workable. In the garb of 'reading down', however, it is not open to read words and expressions not found in it and thus venture into a kind of judicial legislation. The rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute. It is to be used keeping in view the scheme of the statute and to fulfill its purposes. See the following observations of this Court in the case of *B.R. Enterprises v. State of U.P.* : (1999) 9 SCC 700.

First attempt should be made by the courts to uphold the charged provision and not to invalidate it merely because one of the possible interpretations leads to such a result, howsoever attractive it may be. Thus, where there are two possible interpretations, one invalidating the law and the other upholding, the latter should be adopted. For this, the courts have been endeavouring, sometimes to give restrictive or expansive meaning keeping in view the nature of legislation, may be beneficial, penal or fiscal etc. Cumulatively it is to subserve the object of the legislation. Old golden rule is of respecting the wisdom of legislature that they are aware of the law and would never have intended for an invalid legislation. This also keeps courts within their track and checks individual zeal of going wayward. Yet in spite of this, if the impugned legislation cannot be saved the courts shall not hesitate to strike it down. Similarly, for upholding any provision, if it could be saved by reading it down, it should be done, unless plain words are so clear to be in defiance of the Constitution. These interpretations spring out because of concern of the courts to salvage a legislation to achieve its objective and not to let it fall merely because of a possible ingenious interpretation. The words are not static but dynamic. This infuses fertility in the field of interpretation. This equally helps us to save an Act but also the cause of attack on the Act. Here the courts have to play cautious role of weeding out the wide from the crop, of course, without infringing the Constitution. For doing this, the courts have taken help from the preamble, Objects, the scheme of the Act, its historical background, the purpose for enacting

such a provision, the mischief, if any which existed, which is sought to be eliminated. ... This principle of reading down, however, will not be available where the plain and literal meaning from a bare reading of any impugned provisions clearly shows that it confers arbitrary, uncanalised or unbridled power.

In the light of the above principles we have considered the issues raised herein.

POINT No. 1:

80. It is also to be noticed that legislative competence of the State in enacting the aforesaid amendment Act is not in question in this batch of cases, as none of the learned Counsel for the petitioners have addressed submission on that behalf. The validity of the impugned Act, therefore, has to be considered only from the standpoint of whether the said Act is in conflict with the Constitution. With the aforesaid in the background, it would be noticed that the main attack of the learned Counsel for the petitioners is on Section 455-AA of the HMC Act on the ground that power of regularization and penalization conferred on the Commissioner is unchannelized, unguided and as such, is arbitrary. The several decisions on behalf of the petitioners are, however, not useful in considering the said aspect as the said decisions are either relating to individual cases where regularization or exemption is granted contrary to the Legislative mandate or in cases where undue favouritism to a particular individual case is clear and apparent. For instance, the case of Pleasant Stay Hotel's case (25 supra) as well as Kurian's case (7 supra) and Mahendra Baburao Mahadik's case (20 supra) would fall in the above category and really are not cases, which deal with the vires of any provisions. In all those cases, the exemption or regularization granted in individual cases was questioned and validity thereof was decided. Similarly, the other decisions cited by some of the learned Counsel for the petitioners viz. Maneka Gandhi's case (12 supra); Peerless General Finance and Investment Co. Limited v. Reserve Bank of India : AIR 1992 SC 1033; E.P. Royappa v. State of Tamil Nadu : AIR 1974 SC 555; L. Chandra Kumar's case (supra); K. Ramadas Shenoy's case (supra) also do not deal with the question involved in the present case, as discussed above.

81. The Division Bench decision of this Court in C. Kulsum Reddy's case (supra), relied upon by some of the learned Counsel for the petitioners to contend that

similar regularization scheme in G.O.Ms. No. 419 dated 30.07.1998 was struck down by this Court, has also no relevance in view of the present legislative scenario. The Legislature has provided, by amending the parent statute, the provision under which the State is empowered to take up scheme of regularization. In fact, in the aforesaid decision this Court itself has noted in Para 4 as follows:

4. ... If the State Government is empowered under a definite entry to legislate and there is no legislation it may exercise the power but once there is legislation the Government cannot use its executive power to defeat the legislation. The only way in such a situation is amendment in the legislation. This is settled law and the Courts have consistently taken this view that when a power is sought to be exercised in a particular way by the legislation the executive has to follow the methodology laid down by such legislation.

(emphasis supplied)

82. Y. Jyothirmoy's case (8 supra) decided by another Division Bench of this Court was also a case, in the light of legislative environment, then existing. The said scenario has now undergone a change by the Legislature enacting and amending the parent acts by insertion of provisions 461 (3) and 461 -A so far as HMC Act is concerned and allied provisions in the other municipal laws under AP Act 6 of 2008. Thus, under AP Act 9 of 2008, further amendments to the parent Acts are made by inserting Sections 452-A, 455-A and 455-AA in the HMC Act and allied provisions insofar as other municipal laws are concerned. Thus, the deficiency in the Act pointed out by the Division Bench of this Court in C. Kulsum Reddy's case (1 supra) is now been supplied by the Legislature by amending the parent act and providing for legislative basis for such scheme.

83. One of the learned Counsel for the petitioners also relied upon Maneka Gandhi's case (12 supra) and particularly Paras 121 to 126 therein. We are at loss to appreciate as to how the said decision helps the petitioners while supporting their arguments on Article 21 of the Constitution of India. Right to life as claimed by the petitioners is not merely that of the petitioners but all the owners of the properties as well. The procedural safeguards and concessions granted with respect to the constructions by law, therefore, cannot be said to deprive any

fundamental right to life of a neighbour and the contentions of the petitioners on that premise are clearly unsustainable. It is in cases where setback violations take place or in cases where the FSI or FAR is exceeded; then neighbour of such offending construction may, at the most, claim that his easementary right or his right to light and air is affected but it would be wholly unsustainable for him to contend that his right to life is being affected on account of such construction. The challenge to the provisions from the standpoint of violations of Article 21 of the Constitution of India, in our view, is, therefore, totally unsustainable and is liable to be rejected.

84. Similarly, K. Ramadas Shenoy's case (6 supra) relied upon by the petitioners was a case where the challenge to the permission to construct a cinema theatre in a residential locality was upheld by the Supreme Court. The proposition that a neighbour has a right to object in such cases was upheld by the Supreme Court in the following words as mentioned in Para 29:

29. The Court enforces the performance of statutory duty by public bodies as obligation to rate payers who have a legal right to demand compliance by a local authority with its duty to observe statutory rights alone. The scheme here is for the benefit of the public. There is special interest in the performance of the duty. All the residents in the area have their personal interest in the performance of the duty. The special and substantial interest of the residents in the area is injured by the illegal construction.

The said aspect is not in dispute and as has been discussed herein the legal rights of the neighbours against offending constructions are neither taken away nor are nullified by the provisions impugned in this batch of cases. The orders of regularization or penalization, which are envisaged to be passed under the impugned provisions, merely secures the said offending constructions from drastic provisions, such as sealing, demolition etc. under the municipal laws. The apprehensions of the petitioners that all their rights, which are primarily in the nature of easementary rights are lost on account of such regularization or penalization is, therefore, fundamentally incorrect.

85. So far as the basic challenge to Section 455-AA is concerned, the decision of the Supreme Court in Consumer Action Group's case (9 supra) a provision similar in nature viz. Section 113-A inserted in the Tamil Nadu Town and Country Planning Act was considered by the Honourable Supreme Court. For the sake of appreciation, it is appropriate to extract Section 113-A and Section 455-AA and allied provisions, which are as follows:

TAMIL NADU TOWN & COUNTRY PLANNING ACT, 1971:

113-A. Exemption in respect of development of certain lands or buildings.-(1) Notwithstanding anything contained in this Act or any other law for the time being in force, the Government or any officer or authority authorized by the Government, by notification, in this behalf may, on application, by order, exempt any land or building or class of lands or buildings developed immediately before the date of commencement of the Tamil Nadu Town and Country Planning (Amendment) Act, 1988 (hereafter in this section referred to as 'the said date') in the Chennai Metropolitan Planning Area, from all or any of the provisions of this Act or any Rule or Regulation made thereunder, by collecting regularization fee at such rate not exceeding twenty thousand rupees per square meter, as may be prescribed. Different rates may be prescribed for different planning parameters and for different parts of the Chennai Metropolitan Planning Area.

(2) The application under Sub-section (1) shall be made within ninety days from the said date in such form containing such particulars and with such documents and such application fee, as may be prescribed.

(3) Upon the issue of the order under Sub-section (1), permission shall be deemed to have been granted under this Act for such development of land or building.

(4) Nothing contained in Sub-section (1) shall apply to any application made by any person who does not have any right over the land or building referred to in Sub-section (1).

(5) Save as otherwise provided in this section, the provisions of this Act, or other laws for the time being in force, and Rules and Regulations made thereunder,

shall apply to the development of land or building referred to in Sub-section (1).

(6) Any person aggrieved by any order passed under Sub-section (1) by any officer or authority may prefer an appeal to the Government within thirty days from the date of receipt of the order.

HYDERABAD MUNICIPAL CORPORATIONS ACT, 1955:

455-AA. Notwithstanding anything in the Act, the Municipal Commissioner may regulate and penalize the constructions of buildings, made by the owner, or by an individual as the case may be, unauthorisedly or in deviation of the sanctioned plan as on the date of commencement of the Andhra Pradesh Municipal Laws and Urban Areas (Development) (Second Amendment) Act, 2008 as a one time measure, as per the procedure and by levying such penal amount as may be prescribed and upon payment of such amount all pending or contemplated proceedings and action of enforcement shall be deemed to have been withdrawn and the competent authority shall issue necessary Occupancy Certificate to the owner or the individual as the case may be.A.P. MUNICIPALITIES ACT, 1965:

218-A. Notwithstanding anything in the Act, the Municipal Commissioner may regulate and penalize the constructions of buildings, made by owner, or by an individual as the case may be unauthorisedly or in deviation of the sanctioned plan as on the date of commencement of the Andhra Pradesh Municipal Laws and Urban Areas (Development) (Second Amendment) Act, 2008 as a one time measure, as per the procedure and by levying such penal amount as may be prescribed and upon payment of such amount, all pending or contemplated proceedings and action of enforcement shall be deemed to have been withdrawn and the competent authority shall issue necessary Occupancy Certificate to the owner or the individual as the case may be.A.P. URBAN AREAS (DEVELOPMENT) ACT, 1975:

46. (1) It is open to the Vice-Chairman to regularize constructions made without obtaining sanctioned plan subject to fulfilling the following conditions:

(a) Submission of building plans to the competent authority duly paying all categories of fees and charges.

(b) The construction shall be subject to the condition that all parameters laid down in relevant statutes, Master Plan, Zonal Development Plan, Building Bye-Laws, Building Rules and other relevant Government Orders including Andhra Pradesh Fire Service Act, 1999 and the National Building Code are satisfied;

(c) Payment of penalty equivalent to Thirty Three Percent (33%) of the various categories of fees and charges payable by the applicant for obtaining building permission in addition to the regular fee and other charges payable.

(2) Any offence made punishable under this Act in respect of Non-High Rise buildings may be regularized by the Vice-Chairman or any officer authorized by the Vice-Chairman in this behalf to the extent of violations made to the setbacks on each side of each floor except building line up to 100% of the permissible setbacks, on payment of fine equivalent to one hundred percent of the value of the land as fixed by the Registration Department applicable at the time of regularization in respect of violated floor area, subject to the condition that the sanctioned plan has already been obtained in each case.

86. It would be noticed from the above provisions that substantially the provisions are on similar lines. Before the Honourable Supreme Court also, a contention was raised that the enactment of the aforesaid provisions does not subserve the policy under the Act and public interest and the aforesaid provisions merely seeks to legitimize all the violations under the Act and Rules and Regulations and condones all executive acts, which is the cause of reaching the situation on account of inaction of the Government machinery and that the said provision would greatly prejudice public security, safety, fresh air, light and convenience to the public at large. Para 36 of the aforesaid judgment dealt with the aforesaid contention in the following words:

36...Section 113-A read with the Statement of Objects and Reasons clearly indicates Legislature's intent and policy, instead of demolishing illegal constructions to regularise them by charging regularisation fees. Thus no similar

attributable vice could be attached to Section 113-A which was submitted for Section 113. Section 113-A, Legislature itself lays down what is to be done by the Government, while in Section 113 Government is conferred with wide discretion though to act within the channel of the policy. In Section 113-A hardly any discretion is left on the Government while in Section 113 very large discretion is left. Challenge to Section 113 is unguided wide power to a delegatee, but no such challenge could be made against Legislature. Section 113-A is mandate of the Legislature itself to grant exemption and realise regularisation fees (sic) no discretion on the delegatee. Hence we hold Section 113-A as a one time measure is valid piece of legislation and challenge to its validity has no merit....

(emphasis supplied)

In Paras 37 and 38 the Supreme Court recorded as follows:

37. Mere reading of this reveals, administrative failure, regulatory inefficiency and laxity on the part of the concerned authorities being conceded which has led to the result, that half of the city buildings are unauthorised, violating the town planning legislation and with staring eyes Government feels helpless to let it pass, as the period of limitation has gone, so no action could be taken. This mess is the creation out of the inefficiency, callousness and the failure of the statutory functionaries to perform their obligation under the Act. Because of the largeness of the illegalities it has placed the Government in a situation of helplessness as knowing illegalities, which is writ large no administrative action of demolition of such a large number of cases is feasible. The seriousness of the situation does not stay here when it further records, this is the pattern in other metropolitan cities of India. What is the reason? Does the Act and Rules not clearly lay down, what constructions are legal what are not? Are consequences of such illegal constructions not laid down? Does the statute not provide for controlled development of cities and rural lands in the interest of the welfare of the people to cater to public conveniences, safety, health etc.? Why this inaction? The Government may have a gainful eye in this process of regularisation to gain affluence by enriching coffers of the State resources but this gain is insignificant to the loss to the public, which is State concern also as it waters down all preceding

developments. Before such pattern becoming cancerous to spread to all part of this country, it is high time that remedial measure is taken by the State to check this pattern. Unless the administration is toned up, the persons entrusted to implement the scheme of the Act are made answerable to the laches on their failure to perform their statutory obligations, it would continue to result with wrongful gains to the violators of the law at the cost of public, and instead of development bring back cities into the hazards of pollution, disorderly traffic, security risks etc. Such a pattern retards the development, jeopardises all purposeful plans of any city, and liquidates the expenditure incurred in such development process.

38. We may shortly refer to the possible consequences of the grant of such exemption under Section 113-A by collecting regularisation fees. Regularisation in many cases, for the violation of, front set-back, will not make it easily feasible for the Corporation to widen the abutting road in future and bring the incumbent closer to the danger of the road. The waiver of requirements of side set-back will deprive adjacent buildings and their occupants of light and air and also make it impossible for a fire engine to be used to fight a fire in a high rise building. The violation of floor space index will result in undue strain on the civil amenities such as water, electricity, sewage collection and disposal. The waiver of requirements regarding fire staircase and other fire prevention and fire fighting measures would seriously endanger the occupants resulting in the building becoming a veritable death trap. The waiver of car parking and abutting road width requirements would inevitably lead to congestion on public roads causing severe inconvenience to the public at large. Such grant of exemption and the regularisation is likely to spell ruin of any city as it affects the lives, health, safety and convenience of all its citizens. This provision, as we have said, cannot be held to be invalid as it is within the competence of State Legislature to legislate based on its policy decision, but it is a matter of concern. Unless check at the nascent stage is made, for which it is for the State to consider what administrative scheme is to be evolved, it may be difficult to control this progressive illegality. If such illegalities stays for a long, wave of political, humanitarian regional and other sympathies develop. Then to break it may become difficult. Thus this inflow has to be checked at the very root. State must act effectively not to permit such situation to develop in the wider

interest of public at large. When there is any provision to make illegal construction valid on ground of limitation, then it must mean Statutory Authority in spite of knowledge has not taken any action. The functionary of this infrastructure has to report such illegalities within shortest period, if not, there should be stricter rules for their non-compliance. We leave the matter here by bringing this to the notice of the State Government to do the needful for salvaging the cities and country from this wrath of these illegal colonies and construction.

(emphasis supplied)

Section 455-AA, therefore, cannot be said to be ultravires the powers of the State Government and the above decision itself answers similar contentions of the learned Counsel for the petitioners raised in this batch of cases.

POINT No. 2:

87. It is also to be noted that AP Act 6 of 2003 as well as AP Act 6 of 2008 was not under challenge. Now it has to be examined as to whether the power of regularization conferred on the Commissioner under the aforesaid provisions is unguided, unchannelized and thereby the said provision is rendered arbitrary. It is also to be remembered that the aforesaid scheme particularly under Rule 9 of G.O.Ms. No. 901 is based upon the report of the expert committee constituted by the State in pursuance of the orders of this Court in WA. No. 2130 of 2005 dated 21.02.2006 extracted above. The said high-level expert committee suggested enhanced penal rates under Schedule 'U' and Schedule 'V' of HMC Act and amendments to AP Urban Areas (Development) Act respectively. It also suggested formulated scheme to penalize unauthorized constructions made upto specified date upto certain limit. It also suggested rates of penalization and amendments to the municipal laws and this Court in the above writ appeal vide orders dated 27.07.2006 had examined the expert committee report and observed that the recommendations would serve deterrent against violators and it is in the light of the Reports I and II of the said expert committee that the Government had come up with the amendments above to various municipal laws and the scheme as discussed above. Rule 9, in particular, which keeps the regularization of certain types of constructions outside the purview of general amnesty scheme, is in

conformity with the recommendations of high level expert committee under Para 5.5. of the I report dated 17.05.2006.

88. As we have discussed above, in order to guide the said discretion under Section 455-AA rules under G.O.Ms. No. 901 dated 31.12.2007 were enacted and published. As briefly discussed above, the regularization and penalization under Section 455-AA and the allied provisions of other municipal laws opens with a non-obstante clause to regulate and insulate the said constructions from the Municipal Corporations Act and allied municipal laws; provided the application falls within the permissible rules under G.O.Ms. No. 901. The apprehensions of the petitioners that their rights under the Apartments Act, Easements Act or all pending civil litigations etc. will be affected on account of such regularization and thereby their attempt to oppose the aforesaid scheme, is not sustainable in view of the fact that non-obstante clause under Section 455-AA is intended to insulate the said offending constructions only against the rigors of municipal laws. Thus, if any offending construction is regularized or penalized, it would only mean that the municipal authorities would not proceed against the same on the ground that any building bye-laws, zoning regulations or sanctioned plan is violated. The said regularization, therefore, per se, has no effect on the legal rights, if any, of any other person. Any civil right of such person is affected by G.O.Ms. No. 901 dated 31.12.2007 and thereby G.O.Ms. No. 901 is arbitrary on that account is, therefore, not sustainable.

89. The most important provision in saving Section 455-AA from the vice of unguided discretion is contained in Rule 4 and Rule 9 of the Rules framed under G.O.Ms. No. 901. Rule 4 is as follows:

4. Prior clearance from other Authorities/Departments in certain cases:

(1) In the following cases, prior clearance shall be ensured by the Competent Authority before considering the application under these Rules:

(a) In respect of cases of residential buildings 18 m and above in height, Commercial buildings 15 mts. and above in height, and buildings of public congregation like schools, Cinema theatres, function halls and other assembly

building on plot area of 500 sq. mts. and above or of height above 6 mts as stipulated in Section 13 of the Andhra Pradesh Fire Services Act, 1999 from Fire Service Department.

(b) From Airport Authority of India wherever applicable.

(c) In case of buildings of height above 15 mt, necessary certificate from licensed structural engineer with regard to structural safety compliance of such buildings need to be submitted.

(2) Applicants shall submit such application along with the above details within the stipulated time. However, an additional time period of three months will be allowed for filing the Clearance as required under Rule 4(1)(a) and Rule 4(1)(b).

90. From the above it is clear that all regularizations relating to high-rise buildings to both residential and commercial nature as well as buildings where public congregation is visualized, are required to satisfy the norms of Andhra Pradesh Fire Services Act and clearance from the Fire Services Department is essential. Similarly, the Airport Authority of India's clearance is also necessary where it is applicable. Thus, the prior clearance of fire services authorities in case of high rise residential or commercial buildings and such prior clearance of Airport Authority of India wherever applicable, is a pre-condition for considering any application for regularization and penalization. The contention on the part of the petitioners that all requirements under the Fire Services Act etc. are given a go-by is factually incorrect. So far as the argument of ignoring structural safety while considering such regularization and penalization is concerned, Rule 4(1)(c) requires a necessary prior clearance certificate from a licenced structural engineer certifying structural safety compliance of a building, which is of height of 15 metres above. This necessarily ensures and provides that structural safety is not ignored even while considering regularization and penalization.

91. It is, however, true that structural safety with respect to buildings below 15 metres is not provided for in the aforesaid rules. There must be several instances, where building may not be exceeding height of 15 metres and may be constructed on a very small plot area, where the height to which it is constructed may not be

permissible from the standpoint of structural safety, population density etc. The requirement of prior clearance on structural safety certificate having been restricted only with respect to building with a height above 15 metres, in our opinion, requires to be appropriately read down so as to save the said rules from the vice of arbitrariness. It cannot be denied that any construction whether illegally raised or raised in deviation of sanctioned plan must conform to minimum structural safety standards. So far as Rule 4(1)(c) is concerned, therefore, in our opinion the requirement of prior structural safety compliance from a licenced structural engineer must be insisted upon for all buildings and not necessarily only the building of the height of above 15 metres. The words 'of height above 15 mt' is necessary to be severed and struck down and the rest of the Rule 4(1)(c) is valid and enforceable.

92. So far as Rule 9 is concerned, the said Clauses (a) to (m) thereof stipulate that for a building falling within any of the above, penalization of unauthorized constructions under the impugned scheme will not be considered. The said Sub-clauses (a) to (m) have undergone a marginal amendment under G.O.Ms. No. 112 dated 31.01.2008, which shall be discussed hereafter. However, a look at the Clauses (a) to (m) would be useful. Rule 9 is extracted as under:

9. Penalization not to apply to certain sites:

Penalization of unauthorized constructions shall not be considered in the following cases and in cases where public interest and public safety are likely to be adversely affected, viz.

(a) Encroachment on Government land or property belonging to Public undertakings, Andhra Pradesh Housing Board, Andhra Pradesh Industrial Infrastructure Corporation, Urban Development Authority, Local Body, Endowments, Wakf Board etc.

(b) Land for which the applicant has no title;

(c) Surplus land declared under Urban Land Ceiling/Agricultural Land Ceiling/lands resumed under Andhra Pradesh Assigned Lands (POT) Act;

(d) Buildings affected under alignment of any road or proposed road under Master Plan/Zonal Development Plan/Road Development Plan or any other public roads/MRTS/BRTS;

(e) Tank bed and Sikham lands;

(f) Areas prohibited for construction under G.O.Ms. No. 111 MA & UD Dept., dated 08.03.1996 (protection of Catchment area of Osmansagar and Himayatsagar lakes);

(g) Prohibited areas under the Coastal Regulation Zone and such other environmentally restricted zones as may be prescribed;

(h) Layout/Master Plan open spaces/Areas earmarked for Recreation Use in Master Plan/Zonal Development Plan;

(i) Buildings that are not in conformity with land use approved in Master Plan/Zonal development Plan;

(j) Sites under legal litigation/disputes regarding ownership of the site/building;

(k) Area earmarked for parking as per sanctioned plan;

(l) Unauthorized constructions without any building sanction in unapproved/unauthorized layouts, for which prior approval of site/plot under regulation of unapproved/unauthorized layouts rules shall be obtained;

However in case of Rule 9(i), application for penalization will be accepted if the applicant encloses the Acknowledgment of the Application made for regulation of the unauthorized site/plot under the relevant rules to the competent authority.

(m) Regulation and penalization shall not be done for the constructions made within the building line of major roads of width 80 feet and above within the limits of Greater Hyderabad Municipal Corporation, Greater Visakhapatnam Municipal Corporation, Vijayawada Municipal Corporation and roads of width 60 feet and above in rest of the urban areas as per Master Plan/Zonal Development Plan.

93. Under G.O.Ms. No. 112 dated 31.01.2008 Rule 3 was amended to provide payment of penal amount in two instalments, which really has not much of a bearing on the issue. The Sub-rule (3) is added to Rule 5 and newly added Sub-rules (4), (5) and (6) merely deal with reduction of penalization charges, which also has not much of relevance. The Sub-rule (7), however, is important, which is extracted hereunder.

5(7). In case of constructions made within the building line of major roads of width 80 feet and above within the limits of Greater Hyderabad Municipal Corporation, Greater Visakhapatnam Municipal Corporation, and Vijayawada Municipal Corporation and roads of width 60 feet and above in rest of the urban areas as per Master Plan/Zonal Development Plan, the regulation and penalization shall be done subject to the property owner furnishing a legally enforceable undertaking that he will surrender the land falling within the building line to local body/UDA free of costs as and when required in future for road widening or other public purposes.

The rest of the amendments under G.O.Ms. No. 112 including the revised table for penalization charges are not in much controversy or dispute except in one writ petition, which will be discussed appropriately.

94. It will be noticed from the above that no application for regularization or penalization shall be considered, most importantly, with respect to lands belonging to the State Government or local bodies; where constructions are on the land belonging to the State Government or local authorities or land; where the title of the applicant is not established as well as the lands covered by surplus land under the Urban Land Ceilings, Agricultural Land Ceilings and resumed lands under the AP Assigned Lands (Prohibition of Transfers) Act etc. Clauses (d) and (e) prohibit any regularization and penalization of buildings, which are constructed in the affected alignment of roads proposed under Master Plan/Zonal Development Plan/Road Development Plan or other public roads or tank bed and sikhams lands as well as under Clause (f) constructions prohibited in the areas of Osmansagar and Himayatsagar lakes including prohibited areas under the Coastal Regulation Zone and on environmentally restricted zones. The impermissibility or inapplicability of the entire scheme of regularization and penalization with respect

to constructions falling within any of the above categories make it clear that the regularization is not applicable in a wholesale manner to any building whether constructed unauthorizedly and whatever may be the violations. The discretion of the Commissioner to regularize and penalize, under the parent provisions, is thus, circumscribed by the restrictions as mentioned above and the buildings constructed in any of the above prohibited categories are outside the purview of the scheme of regularization. The contention, generally on the part of the petitioners, that under the aforesaid scheme the Government would be free to regularize all or any of the constructions by condoning all or any of the violations, therefore, clearly overlooks the above prohibited areas under the scheme itself.

95. So far as Clause (h), (i) and (m) of Rule 9 are concerned; they are necessary to be dealt with separately. Clause (h) prohibits constructions in layout or master plan open spaces earmarked for recreation use in the master plan or zonal development plan. The plain reading of the aforesaid provisions would mean that in other than recreation use zones, the regularization and penalization would be permissible even if constructions are made in the mandatory open spaces in the layouts or the master plan in such zones. The very basic purpose of leaving mandatory open spaces in the layouts and master plan would be completely defeated if such constructions are also to be allowed in the open spaces earmarked. It is now well settled that open spaces required under the Layout Rules or Master Plan are aimed to provide necessary lung space for the residents and whatever may be the compulsion, the open spaces are required to be meant as such and cannot be utilized for any other purpose. We are, therefore, unable to appreciate the Clause (h) and the purpose behind the same. Further, Clause (h) permits regularization of constructions made in such mandatory open spaces in zones other than recreation use zone, which is not based on any reasonable criteria. The requirement of open spaces in any layout or master plan irrespective of the purpose for which the zone is reserved is required to be kept as such and is not allowed to be frittered away by permitting constructions and later on permitting such constructions to be legalized by the scheme of regularization or penalization. The Clause (h), therefore, to our mind, negates the very purpose on mandatory open spaces and when the law does not approve of any such violations of mandatory open spaces there is no question of legalizing the constructions made

therein. In fact, the open spaces in the layouts or the master plan vest in the local authority and would automatically assume the category of the land or property belonging to the Government or local authority and would fall under Clause (a) of Rule 9. When the scheme under G.O.Ms. No. 901 itself mandates under Clause (a) that any constructions made in the land belonging to the Government or local authority shall not be considered for regularization and penalization, the same would squarely apply to all such mandatory open spaces in the layout or master plan in all zones under the master plan and zonal development plans and in that view of the matter, the words 'for recreation use' in Clause (h) of Rule 9 is clearly arbitrary and is required to be struck down and severed while retaining rest of Clause (h) as valid.

96. So far as Clause (i) is concerned, it was originally envisaged that buildings, which are not in conformity with the approved land use shall not be considered for penalization or regularization and no exception could have been taken to the same. In fact, retention of such Clause (i) in G.O.Ms. No. 901 would also save the aforesaid rules from the vice of arbitrariness but surprisingly under G.O.Ms. No. 112 Clause (i) of Rule 9 is deleted. The State is not able to substantiate any reasoning in support of deletion of Clause (i) of Rule 9 when originally Clause (i) had sought to restrict the penalization and amending the same within the four corners of use in a particular zone. Under the A.P. Urban Areas (Development) Act the use of land or premises, which is not in conformity with the approved land use, is required to be discontinued and it is envisaged that all uses of land or building within a particular zone shall be in conformity with the approved land use. The successful implementation of the master plans, which are always prepared after an elaborate technical study and after ensuring the division of city into separate zones for that purpose by making plans, would be nullified, if non-conformity uses are legalized under the present scheme of regularization and penalization. Further, the said deletion of Clause (i) would amount to modification of master plan/zonal development plan to the extent of allowing the said building to be used for a nonconformity purpose. Under the AP Urban Areas (Development) Act, specific provision under Section 13 is enacted together with the Rules to enable any person to seek modification of the master plan. The said elaborate procedure is provided under the AP Urban Areas (Development) Act only to

ensure that as far as possible the approved land use must be maintained in every zone. By deletion of the said Clause (i), therefore, the State has licenced non-conformity use of land in any zone. Hypothetically it allows a purely commercial building to be legalized into a purely residential zone and a purely residential building into a purely industrial zone etc.

97. Learned Advocate General is also not able to substantiate any reasoning on the part of the State Government in deleting the said Clause (i) from G.O.Ms. No. 901 vide amendments made under further G.O.Ms. No. 112 dated 31.01.2008. In some of the writ petitions in this batch, G.O.Ms. No. 112 is also questioned. We are of the view that such challenge deserves to succeed to the extent of Clause (i) and to that extent G.O.Ms. No. 112 is liable to be declared arbitrary and unsustainable and thereby Clause (i) under Rule 9 of G.O.Ms. No. 901 is retained and is made expressly applicable to all such building applications for regularization or penalization and no such application shall be considered if it violates Clause (i).

98. Under Clause (j) of Rule 9, sites in legal litigation/disputes regarding ownership of a site or building are not covered by the aforesaid scheme. The apprehensions of some of the learned Counsel for the petitioners that their pending civil litigations would be affected on account of regularization or penalization is, therefore, not sustainable in view of clear mandate of Clause (j) above. Further, under Clause (k) no such regularization is permissible with regard to areas earmarked for parking as per sanctioned plan. The contention of the learned Counsel for the petitioners that the constructions made in the parking spaces would get legalized is also not sustainable and such contention is advanced in ignorance of the safety valve of Clause (k) under Rule 9. Similarly, under Clause (l) the unauthorized construction in land not covered by layout or unauthorized layouts also require prior clearance of such layout, which by itself safeguards and ensures that at least, layout sanction is granted and only thereafter the building application is taken up for consideration for regularization or penalization. The State has framed separate rules regarding regularization of unauthorized layouts under G.O.Ms. No. 902 dated 31.12.2007, but however, the same is not the subject matter of this batch of cases.

99. Further, under Clause (m) it was originally provided that on all major roads of width of 80 feet and above within the Greater Hyderabad Municipal Corporation, Greater Visakhapatnam Municipal Corporation, Vijayawada Municipal Corporation and roads of width 60 feet and above in other municipal and urban areas, no constructions affecting the building line would be permissible for regularization. Under G.O.Ms. No. 112 the aforesaid Clause (m) is also deleted and based on that some of the learned Counsel contended that once the building line on such major roads is ignored and regularization is allowed, it will be impossible in the future to take up any development on all such roads. As mentioned above, the aforesaid Clause (m) was deleted vide G.O.Ms. No. 112 dated 31.01.2008. However, in the place of Clause (m) Rule 5(7) was inserted, which is extracted above. Under the said Sub-rule (7) of Rule 5 though the buildings constructed within the building line on such major roads can be considered for regularization or penalization but is subject to an undertaking given by the owner/builder that in the event of any part, thereafter, is being affected in future road widening or other public purpose, he would surrender the affected portion without claiming any compensation. In other words, therefore, while buildings made within the building line of such major roads, even if regularized and penalized, that would not make such construction immune from requirement for public purpose including road widening in the future. On the contrary, in such eventuality, the Government would be entitled to the affected portion without the necessity of paying any compensation to the owner/builder, in view of the undertaking, from such person, secured by the Government at the time of regularization itself. To our mind, therefore, the aforesaid provision sufficiently safeguards the public interest and it is not, as if, that once construction is regularized within the building line on major roads, no development of the said road could take place at any future time. The said construction even if regularized and penalized would not make it immune from requirement of any part thereof for any public purpose including road widening in future. Deletion of Clause (m) under G.O.Ms. No. 112 dated 31.01.2008 is, therefore, sufficiently safeguarded by insertion of Rule 5(7) and thereby the contention to the contrary raised by the learned Counsel for the petitioners is not sustainable.

100. We shall now deal with three other contentions of the learned Counsel for the petitioners viz. the questions raised on behalf of two petitioners, who are before this Court in the capacity of pro-bono publico viz. WP. No. 6562 of 2008 (a registered political party) and WP. No. 8578 of 2008 (a society functioning for the betterment of Hyderabad). The basic contention advanced on behalf of the learned Counsel for the petitioner in WP. No. 6562 of 2008 is only with respect to the penal charges imposed on the bona fide purchasers and not on the owner or the builder. The detailed submissions of the learned Counsel for the petitioners are already extracted above and the said argument is based upon the reading of Section 455-AA and the object of the Act to penalize the builder/owner. It is to be appreciated that when a builder or owner makes constructions, it is for the purchaser to make all reasonable enquiries, especially as the rights of the buyer and seller are set out in detail under Section 55 of the Transfer of Property Act. The theory of 'buyer beware' emerges from the said principles that diligent and reasonable enquiries must be made by the purchaser so that any patent defects could be discovered and if possible remedied before the buyer purchases the property. The most basic requirement before purchasing an immovable property being to make inspection and discovery of title and link document of the seller would necessarily include examination of sanctioned plan under which the construction is taken up. Even a layman's examination of a sanctioned plan would reveal to him as to whether the constructions are in conformity thereof or not. It has been contended by some of the petitioners and the party-in-person that the builders invariably do not show the sanctioned plan and thereby the innocent purchaser is made to purchase an apartment or a building without knowing as to whether the constructions are permissible or not and legal or not. The basic fallacy in the said argument is apparent from the fact that if a buyer purchases an apartment without taking due and reasonable care it is not open for him to further contend that he is a bona fide purchaser and as such needs to be protected. It is not possible to adjudicate in these proceedings as to whether the purchaser is all innocent and bona fide purchaser and it has to be presumed that the theory of 'buyer beware' is applicable to all such purchases.

101. All that apart, the State is not concerned as to who pays for penalization as long as application for penalization is received accompanied by the requisite fee.

Whether the penalization charges are to be borne by the builder or the owner or the subsequent purchaser is a matter entirely among themselves and the State is no way concerned as to who pays. It is also to be remembered that the ultimate benefit of penalization or regularization goes to the subsequent purchaser, who is in possession of such unauthorized construction on the basis of his purchase. It would, therefore, be wholly untenable to accept the contention that while the benefit of regularization and penalization would be retained by the purchaser but he should not be made to pay for such regularization and penalization. The State, which has come up with the scheme, has offered to the general public to avail the scheme. If a subsequent purchaser does not desire of availing the scheme and if he insists that only the builder or the owner must pay, the consequences of not applying within the prescribed time would also be that of the subsequent purchaser. The contention of the petitioners, therefore, that in no case they should be made liable to pay and the object of deterrence against owner or builder would be lost if subsequent purchaser is made to pay, is unsustainable. The deterrent against unauthorized constructions and the heavy penalties envisaged would by itself deter any unauthorized constructions in the future as the legislations and the rules framed thereunder themselves provide penalties against unauthorized constructions.

102. Now the other challenge by the petitioners in WP. No. 8578 of 2008 based upon the 73rd amendment to the Constitution is also not sustainable on a deeper examination. It is to be remembered that under the impugned provisions, the local bodies are not dealing with any urban planning as such and the impugned provisions are primarily meant to safeguard the urban planning as far as possible and at the same time balancing the unauthorized constructions to save majority of the buildings within the city from the only option of demolition. It is, no doubt, true that some violations may affect the National Building Code as well as the ideal and model building byelaws necessary for maintaining ecology and growth of the environment in an organized manner but such problems are faced in all the metropolitan cities within the country. The Chennai Municipal Corporation as well as the New Delhi Municipal Corporation have already shown method and manner in which the problems are attempted to be tackled and reasonable rate of success achieved therefrom. Fortunately, in the present case, the master plan itself is not

changed as was done in New Delhi Municipal Corporation and further, fortunately, in the present case, the restrictions under Rule 9 of G.O.Ms. No. 901 as discussed in detail above, have saved the said basic provision of regularization and penalization viz. Section 455-AA from the vice of arbitrariness and unguided exercise of discretion. We, therefore, think that the functional autonomy of local self-government is not taken away just because the scheme of regularization is proposed which will benefit public at large and each local self-government. So far as structural safety and stability is concerned, we have already dealt with the said aspect in some detail and with the modifications as suggested in this judgment. We are of the view that neither fire safety requirements nor the structural safety requirements on any constructions is allowed to be given a go by.

103. Learned Counsel relied upon Kurian's case (7 supra), which is already discussed above that the said case dealt with the case of exercise of power of exemption without recommendation and is clearly not applicable. Similarly, the proposition of Friends Colony's case (4 supra) and Consumer Action Group's case (9 supra) relied upon by the learned Counsel is already dealt with and discussed as above.

104. So far as the submissions on the part of the party-in-person are concerned, most of the said submissions are considered under various heads as above. It is, however, to be noted that regularization and penalization scheme is no premium on dishonest and unauthorized construction activity witnessed in the city and other urban areas but is only a scheme to ameliorate the acute shortage of housing felt by general public and to offset the national waste, which could be the result of wholesale and massive demolitions required to be made by all the municipal authorities all over the State leading to other related problems of rehabilitation of thousands of families residing in the said objectionable buildings. The one time measure envisaged under the impugned provisions and the rules, as discussed above, is by itself stringent and not a wholesale licence in favour of the unauthorized constructions and in the larger public interest several pre-conditions are required to be met and exclusion clauses apart, as discussed in detail above. The party-in-person, who is said to represent innocent buyers of the said unauthorized constructions, as held above cannot be said to be so innocent a

buyer as is projected. But, however, as a policy, the State Government, felt it necessary to act in aid of large number of such occupants of unauthorized constructions, the scheme was envisaged with the modifications proposed herein, therefore, according to us, is valid and challenge to the impugned provisions and the rules except to the extent indicated herein deserves to be answered in negative.

105. In this context one more aspect relating to Section 461(3) (sic. 461(4)) needs a mention. The said section enacted by AP Act 6 of 2008 is not subject matter of any challenge but the said aspect in the context becomes relevant and we shall place our views on the subject. The said provision envisages that, whoever, either himself or through any other person undertakes or carries out any construction in contravention of master plan or permission shall be punished with imprisonment for a term which may extend to three years or with fine which may extend to 10% of the value of the land. The purpose of the aforesaid provision is to enable the local authority to prosecute such violators and provide a stringent punishment of imprisonment of a term, which may extend to three years. However, the escape route provides for imposition of fine in lieu of punishment of imprisonment, which may completely dilute the stringent deterrent envisaged in the basic provision. The payment of 10% of the value of the land is no deterrent against unauthorized constructions inasmuch as the person, who takes up construction, would reap benefit of much more value than the said 10%. The said escape route, which dilutes the deterrent effect of the said provision, needs a serious re-look by the State Legislature. Even if the State Legislature intends to provide a penalty of mandatory fine in lieu of imprisonment for such offence, such mandatory fine should be commensurate and deterrent enough to ensure that violators do not get away by paying a pittance of fine and thereby frustrate the provision of prosecution for a municipal offence envisaged therein.

CONCLUSION

106. In view of our conclusions on point No. 1 and point No. 2 above, the provisions under the impugned Amendment Act cannot be said to be unconstitutional or invalid. G.O.Ms. No. 901 dated 31.12.2007, which was issued

under the said impugned provisions, also cannot be said to be arbitrary except to the extent of part of Clause (h) of Rule 9, which we have struck down in Para 95 above and deletion of Clause (i) of Rule 9 vide G.O.Ms. No. 112 dated 31.01.2008 has also been declared arbitrary and unsustainable vide our conclusions in Para 97 above. We have considered various Sub-clauses (a) to (m) of Rule 9 and in particular part of Rule 4(1)(c) was struck down. We have also held in this judgment that except to the extent indicated herein the rest of the Rules are sustainable and are neither arbitrary nor unconstitutional. Thus, the principle of severability, to our mind, is necessary to be applied to sever the partial invalidity of part of the provisions of Rules framed under G.O.Ms. No. 901 dated 31.12.2007 to save the said GO from contravention of Constitutional limitations.

107. By the aforesaid principles, Rule 4(1)(c) under G.O.Ms. No. 902 (sic. 901) requiring satisfaction of structural safety only with respect to buildings of height of above 15 meters, however, does not stand to reason. If the said Rule 4 (1)(c) is read down accordingly, the said requirement shall be applicable to all buildings irrespective of height.

108. In conclusion, therefore, the provisions of Sections 452-A, 455-A and 455-AA are declared valid and within the competence of the State Government. The rules under G.O.Ms. No. 901 Municipal Administration and Urban Development (M1) dated 31.12.2007 and G.O.Ms. No. 112 Municipal Administration and Urban Development (M1) dated 31.01.2008 are also declared valid except to the extent of declaring Rule 4(1)(c) as applicable to all buildings irrespective of height and part of Rule 9(h) is struck down to include all open spaces earmarked for any use in the master plan or zonal development plan; further amendment IV of G.O.Ms. No. 112 to the extent of deleting Rule 9(i) of the Rules under G.O.Ms. No. 901 is declared arbitrary and invalid and consequently, Rule 9(i) shall remain in operation as part of the scheme under G.O.Ms. No. 901.

109. Before we part with this case, one other aspect is required to be dealt with. During the hearing, we received suggestions including one from the learned Advocate General that there should be effective monitoring of the entire gamut of regularization and penalization and it was urged that this Court would take up the

said monitoring so as to ensure that the malady sought to be remedied does not recur at any time in future. We have given our earnest consideration to the said aspect. We also felt that keeping in view the pressure of work and demand on the time of this Court, the periodical monitoring of work under the impugned scheme by this Court may not be feasible and as such, we have evolved an alternative mechanism, which we think should serve the purpose of monitoring the work under the impugned scheme. It is evident from the Rules 1 to 10 of the Rules framed under G.O.Ms. No. 901 that it is only the applicant, who is involved in the entire process upto the issuance of occupancy certificate after completion of entire process of regularization and penalization. One of the grievances of some of the learned Counsel for the petitioners was that there is no mechanism where an objector to the said scheme could ventilate his objections. Any objector including a neighbour of an offending construction, undoubtedly, has locus and would be entitled to object to the construction including objection from the point of view of ineligibility of a particular construction from the provisions of the scheme itself. The provisions of G.O.Ms. No. 901 do not in any way provide for such objector being heard either before or after such orders for regularization are issued in favour of the applicant. Under Rule 11 if an applicant is aggrieved by an order passed by the competent authority an appeal is provided to a committee, which would be constituted by the Government under Rule 14. No such appeal is, however, available to an objector. The said issue can be looked at from two different alternatives: (i) a mechanism can be provided in the rule itself where a right of appeal is conferred not only on an applicant aggrieved but also on any person, who is desirous of registering objections against the proposed action of the competent authority and till the said appeal is heard and decided the orders of the competent authority passed ultimately under Rule 10 would be declared provisional and subject to its confirmation by the appellate authority and (ii) to leave it open for the objector to question the decision of the competent authority or the appellate authority, as the case may be, by approaching the common law Courts and to ventilate his grievance accordingly.

110. In the scheme of things as it stands under the Rules no such locus or hearing is provided to an objector and thereby he has no other remedy except to approach common law Courts for appropriate relief. We have already held above that all

such regularizations and penalizations would not affect the easementary or civil rights of any neighbour and as such, he would be free to ventilate his grievance before the competent civil Court, if he so desires. We are also of the further view that the Government may consider amendment of Rules 11 and 14 so as to provide right of appeal to an objector or a third party and till such decision of the appellate authority the orders of regularization or penalization including occupancy certificate issued under Rule 10 would remain provisional and subject to confirmation of such appellate authority. Under Rule 14 the State is required to constitute an appellate committee for examining appeals under Rule 11. We feel that the work of monitoring as well as serving as an appellate authority can well be entrusted to the high level expert committee, which has submitted report I and II to the Government on the very same subject. The said high level expert committee comprised of (i) Former Commissioner & Director of Municipal Administration - Chairman, (ii) Director, Town & Country Planning - Member, (iii) Professor, Architecture & Urban Planning, School of Planning & Architecture, JNTU, Hyderabad - Member, (iv) Director (Planning), HUDA, Hyderabad - Member, (v) Additional Director of Municipal Administration Officer, C&DMA; - Member, (vi) Officer on Special Duty, Municipal Administration & Urban Development - Member and (vii) Chief City Planner, Greater Hyderabad Municipal Corporation - Member Convenor. We are of view that the said committee should be further constituted to serve as a Monitoring Committee to ensure compliance of the provisions and rules relating to penalization and regularization and the said committee would be required to submit report on the work done at every interval of six months to the Secretary to the Government, Municipal Administration & Urban Development and on the basis of the report of the monitoring committee appropriate remedial action shall be taken by the Government within a reasonable time.

111. We are also of the view that the said monitoring committee may also serve as an appellate authority as envisaged under Rule 14 for reviewing the decisions of the competent authority, in the aforesaid capacity would also do monitoring work envisaged herein. We hope and trust that the State Government shall take appropriate prompt action in this respect, which would substantially provide a forum to the objectors to ventilate their grievances against the orders of the competent authority and would sufficiently safeguard the object, purpose and the

scheme of regularization and penalization envisaged by the Government.

Subject to the above, all the writ petitions are disposed of accordingly. However, WP. No. 4409 of 2006 and WP. Nos. 7542, 542, 17859, 16623, 23494 and 16025 of 2008 are deleted from this batch to be heard separately by an appropriate Bench. There shall be no order as to costs.

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