

Civil Writ Jurisdiction Case No 12831 of 2008
with
Civil Writ Jurisdiction Case No 17775 of 2008
with
Civil Writ Jurisdiction Case No 14287 of 2007

In the matter of applications under Articles 226 and 227 of the
Constitution of India.

Drikung Charitable Society through its General Secretary True Lhamo, daughter of
Lama Kalsang, residing at – North of Kalachakra Ground, P S – Bodh Gaya,
District – Gaya

- **Petitioner**

(In CWJCs No 12831 & 17775 of 2008)

- 1 Jimi Verma, son of Shiy Long, resident of Bodh Gaya, Tola : Rajapur, Police
Station : Bodh Gaya, District : Gaya
- 2 Gautam Verma @ Gautam Kumar Verma, son of Shiy Long, resident of Bodh
Gaya, Tola : Rajapur, Police Station : Bodh Gaya, District : Gaya

- **Petitioners**

(In CWJC No 14287 of 2007)

Versus

- 1 The State of Bihar
- 2 The District Magistrate, Gaya Collectorate, Gaya
- 3 The Deputy Development Commissioner, Gaya
- 4 The Nagar Panchayat Bodh Gaya through its Executive Officer, Bodh Gaya,
Gaya
- 5 The Block Development Officer, Bodh Gaya, Gaya
- 6 The Circle Officer, Bodh Gaya, Gaya
- 7 The Superintendent of Police, Gaya
- 8 The Sub-Divisional Police Officer, Bodh Gaya, Gaya
- 9 The Officer-in-Charge, Bodh Gaya, Gaya
- 10 Gaya Municipal Corporation, Gaya through the Municipal Commissioner, Gaya

- **Respondents**

(In CWJC No 12831 of 2008)

- 1 The State of Bihar
- 2 The District Magistrate, Gaya Collectorate, Gaya
- 3 The Deputy Development Commissioner, Gaya
- 4 The Nagar Panchayat Bodh Gaya through its Executive Officer, Bodh Gaya,
Gaya
- 5 The Block Development Officer, Bodh Gaya, Gaya
- 6 The Circle Officer, Bodh Gaya, Gaya
- 7 The Superintendent of Police, Gaya
- 8 The Sub-Divisional Police Officer, Bodh Gaya, Gaya
- 9 The Officer-in-Charge, Bodh Gaya, Gaya
- 10 The Principal Secretary of the Government, Urban Development & Housing
Department, Government of Bihar, Patna
- 11 Gaya Municipal Corporation, Gaya through the Municipal Commissioner, Gaya

- **Respondents**

(In CWJC No 17775 of 2008)

- 1 The State of Bihar
- 2 The District Magistrate –cum- Collector, Gaya

- 3 The Commissioner, Gaya Municipal Corporation, Gaya
4 The Nagar Panchayat, Bodh Gaya through Executive Officer, Nagar Panchayat,
Bodh Gaya

- **Respondents**
(In CWJC No 14287 of 2007)

Appearance :

- For the petitioners :** M/s Mrigank Mauli, Gajendra Pratap
Singh, Vinay Mistry, Advocates
For the State : M/s Lalit Kishore, AAG I, Girija Shankar
Prasad, GP I, Chakradhari Sharan
Singh, AAG VI, Manoj Priyadarshi,
SC XVII, Deepak Sahay Jamuar, AC
to AAG VI, Ajay Kumar Singh, AC
to SC XVII, Prashant Sinha, AC to
GPI
For the Nagar Panchayat : M/s Ashok Kumar & Amarnath Singh,
Advocates
For the Municipal Copn : Mr Rabindra Priyadarshi, Advocate

CORAM: HONOURABLE MR JUSTICE NAVANITI PRASAD SINGH

CAV JUDGMENT

(Per: HONOURABLE MR JUSTICE NAVANITI PRASAD SINGH)

1 These three writ petitions have been heard at length. The first two writ petitions being CWJC No 12831 of 2008 and CWJC No 17775 of 2008 are by the same petitioner challenging the actions of the respondents in ordering it to stop construction and demolish that whatever has been made on the ground that it is now in conflict with the master plan of Bodh Gaya. The case of the petitioner, in these two writ petitions, is firstly that they, having valid building sanction which was granted much prior to the publication of the draft master plan, which building sanction was also duly renewed, their building sanction or construction in accordance with the said sanction, cannot become invalid or illegal on subsequent publication of a master plan on the ground that it was now in conflict with the draft master plan or the master plan. Alternatively, their submission is that the draft master plan/master plan is itself invalid and that being so, sanction to and

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construction by the petitioner cannot be held to be invalid. In the third writ petition, that is CWJC No 14287 of 2007, petitioners assert that they had applied for sanction of building plan which was not refused. It is a case of deemed sanction and, thus, their construction could not be held to be illegal and no order declaring it to be illegal or for its demolition could be passed without drawing up a proper proceedings, issuing them notice, hearing them in this regard.

2 It may note that the first two writ petitions were earlier heard by this Court and were allowed by judgment and order dated 08.12.2009. It appears that the third writ petition was not decided in any manner. In respect to the first two writ petitions, this Court, inter alia, held that they had applied for and were undisputedly duly granted sanction by the Gaya Regional Development Authority (GRDA) for their building long before even the draft master plan for Bodh Gaya was published calling for objections. Thus, it was a pre-existing sanction which could not be invalidated by subsequent master plan. They had been granted due renewal of their sanction by the GRDA as well. Thus, notwithstanding the subsequent publication of the draft master plan and its finalization, their sanction could not be invalidated nor their construction deemed to be illegal even though it was now in conflict of the subsequent master plan. In such a situation, this Court, on the earlier occasion, did not consider it prudent to go into the question of validity or otherwise of the mater plan of Bodh Gaya.

3 It may be incidentally noted here that while these two writ petitions were being argued, the then Advocate General Shri P K Shahi was appearing for the State. He was not very sanguine about the validity of the master plan and, as such, as noted in the final order passed, he had consented to the order, as proposed by the Court, as noted therein above, so that the issue of master plan is not decided.

4 It appears that Bodh Gaya Nagar Panchayat, which was the

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contesting respondent in the two writ petitions, preferred a Letters Patent Appeal (LPA). It may also be noted that respondent-State did not prefer any appeal. Upon stay granted by Division Bench, petitioners also preferred an LPA. The Division Bench, hearing the intra court Letters Patent Appeal, by its order dated 27.04.2010 passed in LPA No 622 of 2010 and LPA No 340 of 2010, set aside the order passed by this Court and requested this Court to decide both the writ petitions on merit including the issue of the validity of the master plan and, thus, remanded the matter for fresh consideration. The matter has been reassigned to this Court by orders of Hon'ble the Chief Justice. While these two writ petitions were being reconsidered, the third writ petition, which had earlier got separated, once again got united with these two writ petitions again by assignment from the Hon'ble the Chief Justice. Upon remand from the Division Bench, these writ petitions were heard extensively once again.

5 In the first writ petition, that is CWJC No 12831 of 2008, the challenge is to Annexure-9 being letter under Memo No 2244 dated 16.04.2005 by the District Magistrate -cum- Collector, Gaya to the Vice Chairman GRDA, Subdivisional Officer, Sadar Gaya, Deputy Superintendent of Police, Bodh Gaya, Executive Officer, Nagar Panchayat, Bodh Gaya, Block Development Officer, Bodh Gaya, Circle Officer, Bodh Gaya, Secretary, Bodh Gaya Temple Management Trust, Bodh Gaya and Officer-in-charge, Bodh Gaya Police Station. By this letter, he has intimated to the aforesaid authorities that a master plan for Bodh Gaya is under contemplation and, as such, they should take steps to see that no construction is carried out which would contravene the draft master plan which is likely to be published. The challenge thereafter is to Annexure-6, the notice issued by the Executive Officer of Bodh Gaya Nagar Panchayat dated 17.06.2007 whereby the petitioner was intimated that the construction carried out by it was in contravention

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to the mater plan for Bodh Gaya, as duly notified and, as such, it should not proceed with its construction even as per the sanctioned plan, the validity of which plan had expired. Also under challenge is Annexure-8, the notice dated 08.07.2008 from the Executive Officer, Nagar Panchayat stating that the explanation given by the petitioner was unacceptable and the construction being in contravention of the master plan should be stopped immediately and it should show cause why demolition orders be not issued. Equally in challenge is Annexure-11 of the Nagar Pancayat dated 14.08.2008 whereby it is clearly stated that the building plan earlier sanctioned and subsequently renewed on 06.02.2007 by the GRDA falls within the core zone of the Bodh Gaya Master Plan, as such, direction has been issued to demolish all constructions already made and desist from further construction.

6 In the second writ petition, that is CWJC No 17775 of 2008, the challenge is to the draft and the final master plan for Bodh Gaya. The draft master plan was published by the GRDA under the Bihar Regional Development Authority Act, 1981 (BRDA) on 31.08.2005 and the final master plan was notified under the Bihar Municipal Act, 2007 on 12.10.2007 as by then the BRDA Act, 1981 had been repealed.

7 In my view, the decision of this Court in relation to the first two writ petitions would itself decide the fate of the third writ petition. As such, the first two writ petitions are being considered in detail at the first instance.

8 The controversial area of land in all the writ petitions is situated within the Bodh Gaya Nagar Panchayat. This area is a part of the GRDA duly constituted under the BRDA Act, 1981. The Development Authority has the authority to promote and secure planned development of a region and Section 23 of the BRDA Act prohibits any use of land or development thereof without previous permission in writing of the Authority which permission has to be granted in

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accordance with the provisions of the development plan, as prepared by it. This Act, that is BRDA Act was in force upto the time when the Bihar Municipal Act, 2007 was enacted and enforced on 05.04.2007 which Regional Development Authority Act was repealed by Section 488 of the Bihar Municipal Act, 2007 with effect from 05.04.2007, inter alia, vesting the powers under the Municipal Act aforesaid. The Nagar Panchayat is a part of the Municipality under the Bihar Municipal Act of 2007.

9 Thus, upto 05.04.2007, the matter in relation to building plan/sanction and the master plan for the region was exclusively governed by the provisions of the BRDA Act, 1981 by virtue of Sections 76 and 77 of the said Act whereafter upon its repeal, the provisions were incorporated in the Bihar Municipal Act, 2007.

10 The petitioner, in the first two writ petitions, is a Charitable Society. It had acquired about 1.7825 acres of land at Bodh Gaya for construction of a Meditation Centre known as Amitabh Meditation Centre. It is not in dispute that on 20.02.2004, they made an application to the GRDA which was duly constituted under the BRDA Act, 1981 for sanction of building plan on the said land. It was registered as Plan Case No 10 of 2004 and duly sanctioned on 26.02.2004. As noticed above, Section 76 of the BRDA Act gives an overriding effect to the provisions of the said Act over all other Acts in respect of matters covered therein.

Sections 76 and 77 of the BRDA Act, 1981 are quoted hereunder:

76. Effect of other laws.-(1) *The provisions of this Act, and the rules and regulations made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law.*

(2) Notwithstanding anything contained in any such other law development in any area in accordance with the provisions of this Act or rule and regulations made thereunder shall not be deemed to be unlawfully undertaken or carried out by reason only of the fact

that permission, approval or sanction required under such other law for such development has not been obtained.

77. Restriction of power of a local authority to make rules, regulations or bye-laws in respect of certain matters.- *Notwithstanding anything contained in any law for the time being in force, no rule, regulation or bye-law which is inconsistent with any provision of the Act or any rule or regulation made under it shall be applicable within the area notified under sub-section (2) of Section 1 of this Act.*

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From the aforesaid, it would be seen that it is the Regional Development Authority that has the primacy and the supremacy in matters of building sanctions in the area for which it is constituted and, accordingly, applications were made by the petitioners and due sanction accorded by it. In view of Sections 76 and 77 noted above, no objection certificate (NOC) or other sanctions from any other authority was required. Yet it appears, upon insistence by the Bodh Gaya Nagar Panchayat, on 10.12.2005, petitioner sought for no objection certificate from the Municipality that is the Nagar Panchayat. Finding no response, it repeated the request on 16.12.2005. Finding no response, again a notice was sent on 25.04.2006 pointing out that construction was started as per the approved sanctioned plan which had long been delayed and no response would be taken as deemed grant. Here, it may be noticed that under Section 188 (3) of the Bihar and Orissa Municipal Act, 1922, as then in force, it is clearly stipulated that if there is no refusal by the Municipal authorities within a month on receipt of request for grant of building sanction, it would be deemed that the request had been granted. This has to be read in conjunction with Sections 76 and 77 of the BRDA Act 1981, as noticed above. Constructions, as per the sanctioned plan, were then taken up but being law abiding organization as the construction had not been completed within three years of the grant of initial sanction to the plan by the GRDA because of the delay caused by the Nagar Panchayat, upto payment of requisite fee, on 06.02.2007,

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petitioner sought renewal of its building plan. On the same very day, the Vice Chairman of the GRDA granted renewal by due endorsement on the sanctioned plan which is evident from the copy thereof which is annexed as Annexure-2 to the writ petition. The fact that renewal was granted is not in dispute as the same stand admitted by the respondent-Nagar Panchayat as would be evident from their letter No 482 dated 14.08.2008 (Annexure 11 – one of the impugned annexure itself). In this, it is admitted by the Nagar Panchayat that the petitioner had got a plan sanctioned which was duly renewed on 06.02.2007 but their stand was that the sanction was in conflict with the draft master plan which was published on 03.08.2005 and, as such, petitioner was restrained from proceeding further with its work and to demolish whatever it had done. It has rightly been submitted on behalf of petitioner that this letter deliberately omits the date when the building plan sanction was granted because that would have demolished the case of the Nagar Panchayat. The date, when the building plan was sanctioned, was 26.02.2004 long before the draft master plan was published.

12 It is in this perspective, the first issue is to be decided. The question would, thus be, whether building plan duly sanctioned and which is not alleged to be in conflict with the then existing master plan can become invalid or illegal on a subsequent master plan being made which varies building conditions? In my view, normally it cannot be so. The reason is simple. Once a building plan is sanctioned according to the existing master plan, a person acquires the right to build according to sanctioned plan. Having built accordingly, if there is subsequent changes in the master plan, firstly the new master plan can only be made taking into account existing sanctions and buildings but if it wants to alter the position in any manner, then firstly it must so be provided that all existing sanctions and buildings, which would be now in conflict with the master plan, would have to be demolished for

which State would have to pay reasonable compensation. State cannot say that I will alter the master plan, declare already duly constructed buildings to be illegal and leave it to the owner to demolish it and suffer losses because of it. That would amount to deprivation of property without compensation. That would be most unreasonable and arbitrary. Unfortunately, this is exactly what the authorities are seeking to do though the draft master plan or the master plan in question does not contemplate any such action. To the contrary, petitioner has brought on record photographs and made positive statements that the draft master plan, as published on 03.08.2005, has been made without taking into account existing structures and sanctions. All around constructions have been in existence and made in the core zone which is shown as zone of no construction. There have been constructions from before and constructions have been made even after publication of the draft master plan with or without sanction but it was only the petitioner who had duly sanction plan which is virtually being singled out. The photographs and the averments have not been controverted in this regard. I would not concern myself in these aspects for the moment as they would be dealt with in detail when I will come to the second issue.

13 Suffice to say that when building sanction was granted by the GRDA on 26.02.2004, it was in accordance with law. It has never been the case of the respondents that on 26.02.2004, the sanction, as granted by the GRDA which was the competent authority, was wrong or illegal in any manner. If that be so, then a plan, duly sanctioned, cannot, by any stretch of imagination, become illegal upon subsequent change in the master plan which I think is the only position in law. A person, like the petitioner who has invested over Rs 2 crores in the construction, cannot be told that the construction, though on basis of a duly legally sanctioned plan, is now invalid because the master plan has now changed. A valid grant of

sanction cannot be invalidated by subsequent change in master plan.

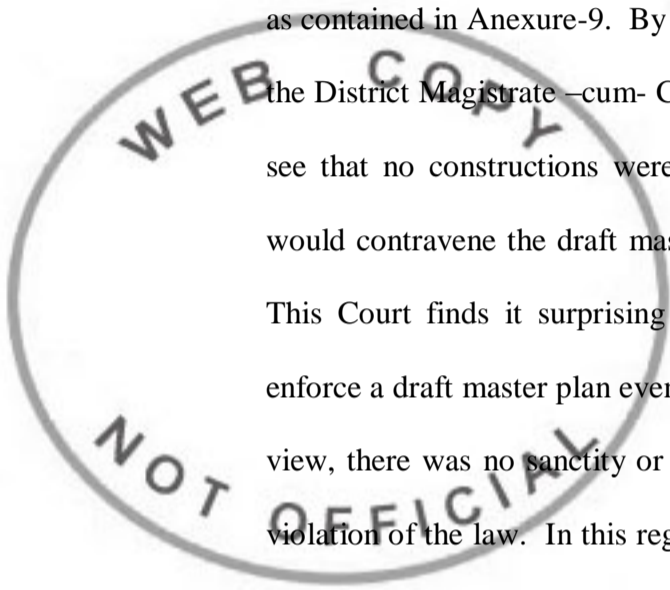
14 I may only note one more thing on this issue. In case the GRDA or for that matter, the Nagar Panchayat or for that matter, the State Government wanted a construction free zone around the Mahabodhi Temple known as the core zone, it can do so but in such a case, it would have to compensate all persons (all without discrimination) before asking them to remove their constructions.

Unfortunately, in the present case, no such step has been taken by any of the authorities to act in that manner. Constructions are there all along the core zone including constructions by State Organizations themselves which are new constructions but they have not been touched. Only a few, like the petitioner, have been harassed which, in my view, is not permissible. It may be noted here that petitioner has specifically asserted that it repeatedly informed the Nagar Panchayat about the construction, though, in law, it was not required of it to obtain a no objection certificate or any clearance from the Nagar Panchayat having already obtained sanction from the GRDA. Not a chit of paper has been brought on record to show that at any point of time either GRDA or the Nagar Panchayat (prior to the notices issued when substantial construction has been made) took any decision and communicated the same to the petitioner not to undertake construction as per the sanctioned plan. Once, the plan was sanctioned and construction made according to the sanctioned plan, in my view, subsequent change in the master plan cannot invalidate the sanction as the sanction, when it was granted, was legal and valid.

15 Thus, I have no option but to hold that the three impugned notices, as issued by the Executive Officer of the Bodh Gaya Nagar Panchayat, as contained in Aneexures-6, 8 and 11 being notices dated 17.06.2007, 08.07.2008 and 14.08.2008, are clearly issued under a wrong premise and cannot be supported by law. Petitioner was constructing as per plan sanctioned on 26.02.2004 which

sanction has not been shown to be illegal or wrong by any authority or any respondents in any manner for the simple reason that the draft master plan itself was published for the first time on 31.08.2005 long after the sanction had been granted.

16 Here, it would also be appropriate to refer to the impugned communication dated 16.04.2005 by the District Magistrate –cum- Collector, Gaya, as contained in Annexure-9. By the said directions, as issued to the State authorities, the District Magistrate –cum- Collector, Gaya issued directions to the authorities to see that no constructions were carried out or permitted to be carried out which would contravene the draft master plan of Bodh Gaya which was to be published. This Court finds it surprising that what the Collector was trying to do was to enforce a draft master plan even before it was finalized for draft publication. In my view, there was no sanctity or sanction of law in this regard rather it was in utter violation of the law. In this regard, I may refer to Section 23 of the BRDA Act. It clearly provides that after publication of a draft plan, no person shall carry out any development in respect of any such land without previous permission in writing of the authority, which permission can only be granted in conformity with the provisions of the said draft mater plan. When the law provides that the restriction would be operative only upon publication of the draft master plan then it was not open to the Collector to direct authorities not to allow constructions which would be in conflict with the draft master plan which was yet to be published. It is well established that if the law provides for the procedure in respect of a matter then the procedure, as prescribed, must be followed and all other steps are impliedly prohibited. This is well established rule which the learned Collector ignored. The authorities could not have acted upon such directions much less till the draft master plan was published which, as noted above, could not affect sanctions granted or constructions sanctioned prior to its publication.



17 It is in view of the aforesaid finding that this Court had earlier, with the consent of the Advocate General, proceeded not to decide the issue of the master plan as that would have been academic because notwithstanding the fact whether the draft master plan and the final master plan was valid, the construction of petitioner could not be invalidated but, as noted above, the Division Bench, in appeal by the Nagar Panchayat and not by the State, has directed this Court to decide all issues on merits. Thus, notwithstanding the finding above in favour of the petitioners which disposes of the writ petitions favourably to the petitioners, this Court must, in obedience to the direction of the Division Bench, proceed to decide the validity of the draft and the final master plan of Bodh Gaya with whatever consequences that may follow. In effect, the impugned notices are invalid and unenforceable.

18 In order to appreciate the challenge to the draft and the final master plan of Bodh Gaya, which was notified on 31.08.2005 and allegedly finally published after approval of the State Government on or about 30.12.2006, it would be appropriate to look to the statutory provisions in this regard. Prior to the BRDA Act, the aspect of town planning and building were controlled by the Bihar Restriction of Uses of Land Act, 1948 and the Bihar Town Planning and Improvement Trust Act, 1951. The provisions in regard to town planning and building were then incorporated in the BRDA Ordinance, 1974 which was promulgated on 19.09.1974 repealing the earlier two Acts, as referred to above. This Ordinance was then kept operative on the statute book by successive Ordinances right from 1975 to the last being Ordinance No 191 of 1981 when finally the present Act being the BRDA Act, 1981 (being Bihar Act 40 of 1982) was finally enacted. After assent by the President, on 23.01.1982, it was published in the Bihar Gazette (Extraordinary) dated 25.01.1982. Suffice to say that the

schemes and the building bye-laws, which were framed in the earlier Acts, continue to apply in so far as they were not repugnant to anything contained in this BRDA Act of 1981 under schemes framed thereunder. This Act, as the preamble would state, was to provide for land development of various regions of the State. By virtue of Section 1 (2), the Act was to come into force on such date and in respect of such area as the Government was to notify. Chapter-IV of the Act deals with regional plan, master plan and zonal development plan. A reference to Sections 16, 17, 18 and 19 of the Act would show that once an area is notified by virtue of Section 1 (2) of the Act, a Regional Development Authority is to be created for that region. The Authority is then to carry out regional socio-economic and geographical survey of the region and prepare a regional plan (Section 16). It is simultaneously required by virtue of Section 17 to carry out socio-economic and physical survey for the development area within the framework of the regional plan and prepare a draft master plan, the contents of which are specified in Section 18 of the Act. Simultaneously or as soon as thereafter as may be, the Authority shall proceed with preparation of zonal development plan for each zone into which the development area may be divided by virtue of Section 19 of the Act.

19 Thus seen, the Authority first is enshrined with statutory duty and obligation to conduct socio-economic, geographical and physical survey of the region for which it has been constituted and also of development area and zonal development area before it proceeds any further. This is obviously a necessity inasmuch as most of the areas, where the Act was sought to be implemented, were already urbanized areas having roads, towns and villages with buildings for various purposes pre-existing and no plan for development can take place without having due regard to pre-existing infrastructure. The Act does not per se contemplate that once regional zonal development plans are made then all buildings pre-existing

must be demolished by whomsoever constructed and whenever constructed and rebuilt according to the plan specifications. Of course, the Act takes into account that it may be necessary for planned development to change the nature of existing constructions but in that case, the State Government, by virtue of provisions contained in Chapter V of the Act, would be obliged to compulsorily acquire lands for proper implementation of the plan and without such acquisition, the pre-existing rights cannot be trampled over for that would be unreasonable and arbitrary. To illustrate if land is required for road widening because of necessity of time and development then merely restricting land owners right to construct on their land is not sufficient. The land, which is earmarked for expansion of road, must be immediately acquired and once acquired the land owners right cease on those acquired lands on which roads can be expanded or laid out but not otherwise. Without taking into consideration the topography and the pre-existing constructions, a development plan is only a paper formality which does not go well with the legislative scheme of the Act. The pre-existing structures and the rights of the land owner cannot, thus, be ignored while considering a draft master plan either for the region or zone constituted therein. A new planned city cannot be made out of an old existing city except by acquiring the lands and the existing structures. This is the first essential step that has to be taken.

20 Now we come to the concept of “Authority”. Section 2 (b) defines Authority to mean the Regional Development Authority as constituted under Section 3 of the Act. A reference to Section 3 of the Act would show that the Authority is a body corporate and, as such, a statutory body with well defined members. If we look to the members, as envisaged under sub-section (3) of Section 3, it would be seen that it is a representative body of not only technocrats and bureaucrats but indirectly of the people likely to be affected.

21 Section 11 of the Act, as contained in Chapter II, gives out the objects of the Authority which generally is to secure planned development of a region or a development area with ancillary powers. This has to be read with the provisions of Chapter III which lays down the responsibilities, powers and functions of the Authority.

22 A combined reading of these provisions, as noted above, would show that the sole authority responsible for the planned development of a region notified alongwith development or zonal development areas therein is the “Authority” under the Act. It is the Authority which has to take a decision for planned development of a region or areas constituted therein so much so that as noted above by virtue of Section 76 of the Act read with Section 77 thereof, the Act has overriding effect over all other laws.

23 It is in perspective of these statutory provisions that the petitioner has ventured to submit on the facts, which are to be noticed, that the GRDA having been constituted under the Act for areas which regional development area included Bodh Gaya, as per notification of the State Government in terms of Section 1 (2) of the Act read with Section 8 (1) thereof, by notification No SO 152 dated 02nd February, 1983 but the said Authority, at no point of time, took a decision to revise the development plan for Bodh Gaya, as has been done presently. The decision was taken by the Central Government at New Delhi. Development plan was drawn up on the directions of the Central Government by HUDCO at Delhi without the socio-economic, geographical and physical survey of Bodh Gaya and once the plan was finalized by HUDCO to the satisfaction of the Central Government without even a request from the GRDA, it was sent to the Tourism Department of the Government of Bihar with a direction to implement it in Bodh Gaya. The Tourism Department, Government of Bihar then forwarded it imposing its views on the GRDA which

allegedly then passed a resolution, in obedience to it, to publish it as a draft master plan calling for objections, if any. The whole scheme of the Act was given a total go-bye. Facts have been pleaded and not denied by the respondents including the State and the Nagar Panchayat that the Development Authority was totally bypassed and the decision of Central Government thrust upon it. Nothing emanated from the Authority. In fact, there was no physical survey of the area. An area in this master plan around the Mahabodhi Temple has been shown as a core zone which is supposed to have no constructions but in fact if physical survey had been conducted, it would have shown that over 90% of that core zone had pre-existing structures making the entire concept of core zone meaningless. It was core zone only on paper and not on land. Core zone of no construction could have been achieved if it was really so intended by acquiring the entire land in the core zone for the purposes of the plan and then demolishing the structures but that was not even envisaged making the whole exercise a mockery and fraud on the statute and statutory powers. The legislative supremacy and independence of the statutory Authority, the Regional Development Authority was completely eroded, if not compromised by the development plan being thrust upon it by the Central and the State Government and existing master plan drastically modified. There has been no consideration whatsoever either by the Central Government or by the State Government or by the GRDA of the existing master plan which was being totally undone.

24 Here, it may be noticed that it is not in dispute that when the GRDA was constituted in 1983, as noticed above there existed since 1973, a master plan for Bodh Gaya. Notwithstanding the constitution of the statutory Authority, the Central Government and the State Government, de hors any recommendation by this statutory Authority, took upon themselves to modify the master plan. It has not

been the case, even of the State, that at any point of time, the GRDA even proposed the necessity of changes in the master plan which was pre-existing. The Regional Development Authority never considered this aspect of the matter much less even made any request to the State Government or the Central Government in that regard who have both totally ignored the provisions of the BRDA Act and worked in contravention or in ignorance thereof to impose its views over an independent statutory body which is the Authority under the Act. That is impermissible. On paper, the new Bodh Gaya master plan as has now been sought to be imposed looks good but, because of the physical infrastructure that exists, totally destroys the whole concept of the world heritage city that is planned without noticing the pre-existing structures. Petitioner's specific pleadings supported by photographs showing that within the core zone which is supposed to have no constructions, not only private constructions are going on, constructions belonging to Government and semi-Government Organizations have been recently made and are being made destroying the whole concept of the heritage city but those have not been objected to. The no building area of the core zone and one kilometer around the Mahabodhi Temple is a contradiction in terms as substantial area within it is already a developed township. The respondents have been unable to contradict these specific averments of Act.

25 One of the contentions raised by the petitioner of first two writ petitions was that it had purchased the land for a valuable consideration more than a decade prior to the draft master plan, for construction of a meditation centre which it was entitled in law as it then existed. Now, if its sanctioned construction is to be stopped and it is required to demolish whatever construction was made upon due sanction with prohibition of construction being there by reasons of now falling within core zone then it was incumbent upon the Government to acquire the entire

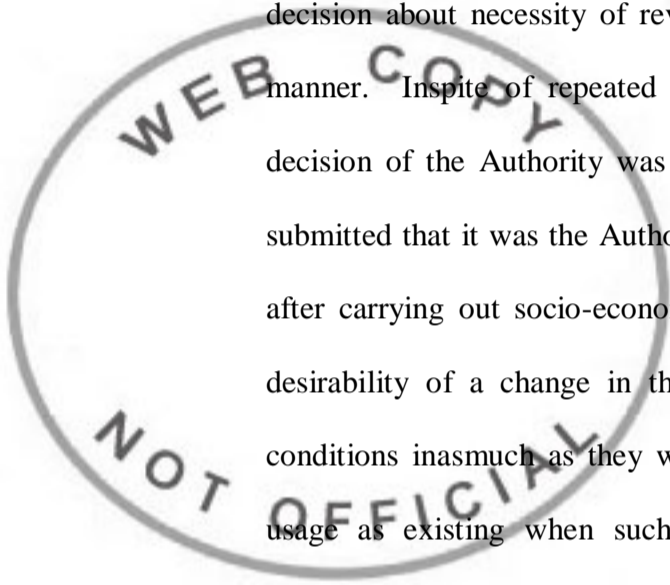
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property after due compensation as is also envisaged under the Act but while doing so, they would have to acquire all other lands within the core zone and not doing so would be a hostile discrimination. The concept of core zone cannot be enforced in a minor part of the core zone with no meaning of core zone in the rest of the area. On behalf of petitioners, it is also submitted that the notifications with regard to draft and final master plan have not been issued in accordance with law. The procedure, as prescribed, has not been followed and that being so, the notifications lack legal sanctity.

26 In substance, the submissions are (i) the legislature have conferred power solely on the Authority under the Act to take decisions to revise master plan. There being no decision of the Authority rather decision having been imposed on the Authority, the entire exercise is bad, (ii) Authority is a statutory body and it is that statutory body which has to take all actions and decisions. In the facts of the case, duly constituted Authority did not take the decisions, as such, the decisions cannot be said to be decisions under the Act and, thus, are not binding and lack legal sanctity, (iii) before the Authority takes a decision to revise master plan, the Act predicates regional, geographical, socio-economic survey which is essential pre-condition for framing and enforcing master plan. In the facts of these cases, this not having been done at all and the draft master plan and the master plan having been made de hors ground reality, is invalid, (iv) the right to enjoy property cannot be curtailed in the garb of regulation which curtailment is absolute without due compensation, and (v) the statutory procedure for notifying, publishing draft and final notifications not having been followed, the notifications in these cases are invalid.

27 In order to substantiate the first line of submission, learned counsel for the petitioners submits that Section 11 of the BRDA Act provides for the objects

of the Authority. As noted earlier, Authority is a statutory body created under the Act. Chapter III of the Act provides for responsibility of the Authority and it is Chapter IV which deals with preparation of regional plan which includes master plan. As noted earlier, a master plan existed for Bodh Gaya. The fact, which is not denied, is that the Authority under the Act, duly constituted, did not take any decision about necessity of revising or changing the existing master plan in any manner. In spite of repeated opportunities given by the Court, no such initial decision of the Authority was pleaded or brought on record. Petitioners rightly submitted that it was the Authority under the Act which has the statutory sanction after carrying out socio-economic, geographical and physical survey to consider desirability of a change in the master plan. These surveys are essential pre-conditions inasmuch as they would reveal the existing status of the land and its usage as existing when such decisions are taken. The respondents and, in particular, the Nagar Panchayat has failed to bring on record any chit of paper much less authentic paper or document to show that either there was a decision of the Authority to show the necessity or desirability of a new master plan for Bodh Gaya nor has any paper been brought on record to show that the Authority, at that point of time, took any decision or conducted any survey of the development area in any manner. In my view, it has rightly been submitted that this pre-condition, not being there, it cannot be said that there was any decision by the Authority as constituted under the Act which initiated the process of formulating principles for making a draft master plan by revising the earlier existing master plan. To the contrary, the concerned respondents have placed on record and have clearly admitted that the decision emanated from the Central Government which has no authority under the Act. The Central Government directed HUDCO, a Central Government undertaking to prepare a master plan having secured declaration of the Mahabodhi



Temple as a world heritage site. HUDCO, on its own without any decision or direction of the Authority under the BRDA Act, made a concept plan for Bodh Gaya in and around the Mahabodhi Temple which was declared as a world heritage site, a core zone was carved out. In this core zone, within distances specified from the Mahabodhi Temple, was declared area of no construction – open green area.

There are other facets to the plan. This plan of HUDCO was then sent by the Central Government to the Department of Tourism, Government of Bihar for implementation at Bodh Gaya. The Department of Tourism then sent it purportedly to the Authority under the Act for implementation. Thus seen, no decision emanated from the Authority rather decision was imposed on the Authority which is destructive of the provisions of the Act. Virtually, the Authority was acting under the dictates of the State and the Central Government. It cannot be said that it was the decision of the Authority. In absence of decision of the Authority, the entire exercise was an exercise in futility, an exercise in defiance of law.

28 In my view, the submission based on the aforesaid facts is sound. It is well established that when a procedure has been prescribed by law to do an act then that act can only be done in the manner prescribed and all other modes are impliedly prohibited. In this connection, I may refer to the decision of the Constitution Bench of the Apex Court in the case of *Hukam Chand Shyam Lal – Versus- Union of India and Others* since reported in AIR 1976 Supreme Court 789 and, in particular paragraph-18, relevant part whereof is quoted hereunder:

“It is well settled that where a power is required to be exercised by a certain Authority in a certain way, it should be exercised in that manner or not at all, and all other modes of performance are necessarily forbidden. It is all the more necessary to observe this rule where power is of a drastic nature.”

29 Here, I may point out that even though the initial opinion and recommendation of the Authority may be subject to approval of the State

Government ultimately, it cannot be said that there is no useful purpose of the initial decision or recommendation which has to emanate from the Authority under the Act. If we look to the scheme under the Act, it would be seen that Authority is a representative body for the local area and, therefore, the legislature have given it the authority to take decisions in that regard though ultimately those decisions are to be approved by the State Government. It cannot be argued that in absence of the initial decision or recommendation or formation of the opinion by the Authority, the State Government can take a decision and impose it upon the Authority. That would be destructive of the scheme of the Act and would take away the very independence and the responsibility of statutory Authority. It would not be the decision of the Authority but would be decision of the State Government which is not a statutory Authority.

30 In this connection, on behalf of petitioners, reliance, in my view, has rightly been placed on two decisions of the Apex Court. First being the case of *Bahadursinh Lakhubhai Gohil –Versus- Jagdishbhai M Kamalia and others since reported in (2004) 2 Supreme Court Cases 65* wherein in paragraph-26, this is what their Lordships have stated:

“26. It is also well settled that if any decision is taken by a statutory authority at the behest or on the suggestion of a person who has no statutory role to play, the same would be ultra vires.”

From this, it is clear that in the present case, the statutory authority to initiate the process of revising master plan was the Authority under the BRDA Act, 1981. As already seen, it never took a decision in this regard. The decision was taken by the Central Government sent to the State Government and it was imposed by the State Government on the Authority which, in view of the above decision, would be clearly ultra vires.

31 The second decision rightly relied on which would also be equally

relevant for the second point under consideration is the case of *State of Punjab and others –Versus- Sanjeet Singh Grewal and others, (2007) 6 Supreme Court Cases 292*. In this case, State, in order to set up a new township, started process by notifying acquisition of land under the Land Acquisition Act. This was challenged on the ground that there was a Punjab Regional and Town and Planning Development Act, 1995. Under the said Act, a statutory Board was created on which the power to take such decisions had been vested though such decisions had to be finally approved by the State Government. It was submitted that the State Government, on its own, decided and took recourse to Land Acquisition Act. The statutory authority of Board had been given a total go bye and, thus, the acquisition proceedings were bad. The High Court agreed with the petitioners and set aside the acquisition proceedings. State came in appeal to the Apex Court. One of the contentions that was raised, as noticed in paragraph-15 of the reports, was that as in all cases, the ultimate sanctioning authority was the State, the State was not required to move the Board first and the State could have on its own taken the initiative. In paragraph-26 of the reports, their Lordships clearly negated these contentions. Their Lordship, noticing the provisions of the Act of 1995, inter alia, held that it was the authority of the Board which had to take the first step and it was, thereafter, that the Board may designate planning agencies. This is further emphasized in paragraph-32 of the reports. What is more significant what their Lordships held in paragraphs-43, 44 and 45 of the reports which are quoted hereunder:

43. In the instant case admittedly, the provisions of Section 56 were completely ignored and without declaring the planning area by notification in the Official Gazette, and without following the procedure laid down therein, which included consideration of objections and suggestions from the public apart from government departments, authorities and institutions, the authority constituted under Section 31 without authority of law

selected a site for a new town and made its recommendation to the Government for its approval, and later moved the Government for acquisition of land under Section 42 of the Act of 1995. All these actions were in complete breach of the mandatory provisions of Section 56 of the Act, and therefore void.

44. The argument that the Government is the final authority and was not bound to consult the Board cannot be countenanced since that is in the teeth of the mandatory provisions of Section 56 of the Act. The legislature having enacted a statute and expressly provided a procedure for declaration of a planning area, which involved consideration of objections and suggestions from the public and publication of the declaration in the Official Gazette, the State could not have adopted a different procedure in breach of express provisions, completely ignoring the existence of the Board, the apex authority under the Act, and obliterating the provision for public participation in the matter of declaring a planning area.

45. We have, therefore, no hesitation in holding that the declaration of the planning area, a site for a new town, was never validly made by the competent authority after following the prescribed procedure and, therefore, there was in law no validly selected site for a new town, nor a validly declared planning area. Consequently, there was no justification for acquisition of land to set up a new town. The public purpose stated in the impugned notifications was non-existent in view of the fact that there was no planning area validly declared by the competent authority for the development of which any land was required. Section 42 which provided for acquisition of land under the provisions of the Land Acquisition Act could not, therefore, be invoked, since Section 42 came into operation only when land was required for the purposes of the authority under the Act of 1995, and not for any other purpose.

32 The Apex Court, thus, upheld the judgment of the High Court striking down the acquisition proceedings. Similar is the position here as has been shown above and will be noticed while discussing the second point in issue in this regard as well. The statutory authority to initiate the procedure after surveys is the Authority under the BRDA Act of 1981. The State Government, or for that matter, the Central Government has no role to play yet without any survey, without any

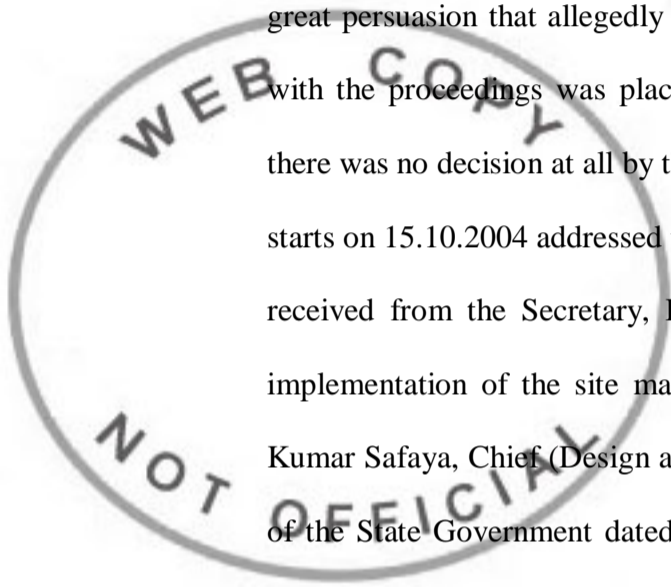
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opinion being formed by the Authority under the BRDA Act, 1981 of the necessity for revising the master plan, the State imposed its decision on the Authority giving complete go bye to the statutory provisions as contained in the BRDA Act. The Apex Court clearly held that even though the State was the final authority in the matter, it made little difference because the statutory authority and the statutory scheme could not be bypassed. In other words, when a statutory authority is by law created for and with a purpose then it is that statutory authority that should take all the decisions and no decision could be imposed on it nor can the decision be taken by someone else and the functions of the Authority delegated by the non-statutory authority on someone else and then imposed on the Authority so as to complete the formalities. Such decisions and actions would be clearly ultra vires the Act.

33 Thus, I have no option but to hold that in absence of a decision by the Authority to initiate the process for revision of the master plan, a decision of the Central Government or the State Government, as imposed upon the Authority being contrary to the provisions in the scheme of the Act, renders the entire exercise bad and invalidates the master plan or the draft master plan, as the case may be.

34 As a second submission on behalf of the petitioners, it is submitted that under the Act, it is the Authority which is the statutory body which has to take decisions and actions. It is submitted that this Authority has a defined Constitution, as prescribed under Section 3 of the Act. They submit that if the proceedings of the Authority are seen, it would show that it was never the Authority that was taking decisions in any meeting duly called. It was sometime the Divisional Commissioner presiding over some meeting in which decision purporting to be decisions of the Authority was taken. It was sometime the District Collector who would preside over meeting and take decisions of the Authority and for the Authority whereas these persons are not statutory persons or the statutory authority.

The decisions were taken as if the district administration was the Authority. To verify this, this Court repeatedly asked the respondents to produce the proceedings of the Authority. In the counter affidavits filed, what was annexed, was synopsis of the proceedings and not the proceedings themselves. Court repeatedly asked for the proceedings on basis of which synopsis were being prepared and filed. It was after great persuasion that allegedly the file of the GRDA in relation to the master plan with the proceedings was placed on record. The proceedings reveal in fact that there was no decision at all by the Authority for revision of master plan. The noting starts on 15.10.2004 addressed to the Vice Chairman. It states that a letter has been received from the Secretary, Department of Tourism, Government of Bihar for implementation of the site management plan, as submitted by one Shri Ramesh Kumar Safaya, Chief (Design and Development), HUDCO, New Delhi. This letter of the State Government dated 04.10.2004 was addressed to the Commissioner – cum- Secretary, Urban Development Department, Government of Bihar, District Magistrate –cum- Collector, Gaya and Chairman, GRDA. As would be seen, the Chairman of the Regional Development authority under the Act is the Minister of Urban Development Department or a person nominated by the State Government. The Collector of the district is neither the Chairman nor a member duly nominated in this regard. There is no meeting of the Authority and no decision of the Authority in the file where the Authority considers the matter rather at different times, different people are called and decisions taken in most casual manner giving total go bye to the statutory Authority. A non-statutory body keeps considering various aspects and deliberates and sends reports and takes decisions. Probably, it is because of this fallacy in the entire approach that, instead of filing in the counter affidavit the proceedings of the Authority duly constituted, only synopsis were being filed. Even the decision to publish the draft master plan appears to have been



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taken in most casual manner by a non-statutory body purporting to act as an Authority. Similarly, when we come to purported decision to consider the objections, the matter is referred to Mr Safaya of HUDCO who is unaware of the ground realities and asked for particulars in order to decide the objections. To these aspects, I will refer later but suffice to say that the statutory Authority was never duly constituted or convened to consider the matter. It cannot, thus, be said that the decisions taken were decisions of the statutory Authority. In fact, they were the decisions of the Central Government sent to the State Government and imposed upon the Authority which itself was never called for in any duly constituted meeting to consider the same. It cannot, thus, be said to be the decision of the Authority in a meeting duly constituted. If that be so then the decision to publish the draft master plan itself, being based on a decision of a non-statutory body, cannot have any legal sanctity.

35 Records reveal that pursuant to the directions of the Department of Tourism, Government of Bihar, the Commissioner, Magadh Division, acting as the Chairman of the GRDA organized a press conference in presence of local residents in which various people were present. This is to be found at page-103 and is dated 03.08.2005 of the proceedings filed of the Regional Development Authority. The decisions taken in this public meeting and press conference is now sought to be made the proceedings of the Regional Development Authority which is to be found at page-112. The statutory body, that is the Authority, was never duly noticed nor was any due meeting in this regard held. It was a press conference –cum- a public meeting and proceedings and decision for publication of draft master plan was taken.

36 It is not that the authorities were unaware of the provisions because at page-102 of the file, it clearly showed that it had been noticed that survey

analysis had to be done, existing land use plan had to be looked into but all that was given a go bye. Who all were noticed is not even on record as it was a press conference –cum- public meeting. It was not a meeting under the Act.

37 Thus, in my view, the legislative intent and scheme, as mandatorily provided, is given a complete go bye. The statutory body was never called in a meeting to take a decision. In fact and in law, there was no decision of the Authority, there being no notice to the members of the Authority. Factually, a decision had already been made by the State and the Divisional Commissioner, the Collector and other officials were merely executing the decision which is not permissible in law. Thus, this submission on behalf of the petitioners must also be accepted that the decision to publish the draft master plan and subsequently to deal with objections were all non-statutory and would be of no legal effect lacking the legislative sanction. The draft master plan itself being not in accordance with law, it lacked sanctity under the Act and cannot be used for any purpose much less restricting rights of citizens in relation to enjoyment of their property.

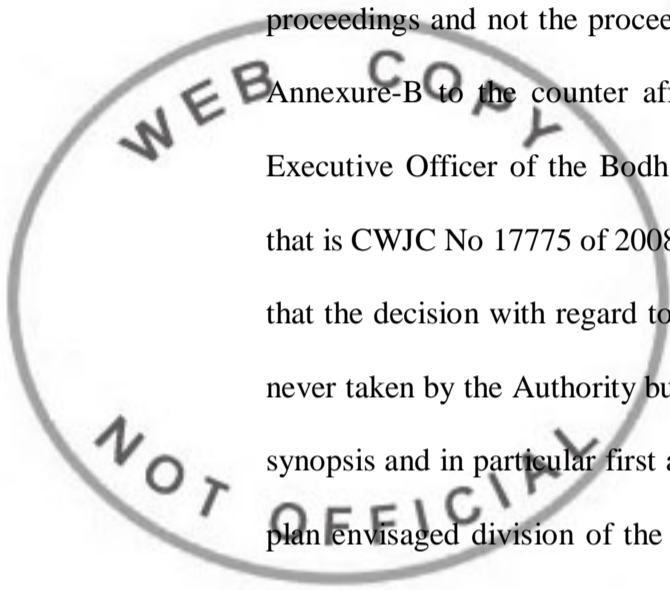
38 Now coming to the third submission which again hits at the initial point that is a reference to Chapter IV of the Act would show that before a plan is to be formalized, the authorities must be aware of the ground realities. This can only be achieved by first surveying the entire area, as predicated in Sections 16 and 17 of the Act. The reason is simple. Bodh Gaya town has existed and developed over century. There existed a master plan. Now if the master plan had to be revised or a new master plan prepared then necessarily the existing topography and structures had to be taken note of because it would be a development of already developed area. If we come to the facts, it would be seen that though the Mahabodhi Temple has been declared a world heritage site when the plan, as proposed by HUDCO which has been adopted as the draft and the final master plan,

is to be implemented then there is a core zone around the said temple. In the core zone, there are various areas within specified distances from the Mahabodhi Temple which are designated as no construction area. Petitioners' lands fall within such an area but if ground reality is seen and if surveys were actually conducted, it would show that substantial majority of this core zone/no construction area already had buildings, shopping complexes, hotels, residential areas constructed making the core zone meaningless. In fact, petitioners had rightly submitted that core zone would be a paper formality and a paper concept far from ground reality. Could there be a master plan or a revised master plan de hors the ground reality, on paper, yes but in practice, no? Unless the implementation of the revised master plan or draft master plan predicates acquisition of property and demolition of constructions which is not contemplated at all, the concept of heritage city is good and laudable so long as it is on paper but when the concept is to be implemented, it is to be found that it is ill-suited because of existing constructions all around for which no provision is made in the draft or the final master plan.

39 To put it in factual perspective, what is found is that within 500 meters of the temple, there are shopping complexes, hotels and other residential accommodations and commercial complexes existing from before which are all within no construction core zone. People, with vacant land beyond this and falling within core zone, are now being prohibited from any further constructions. That is a meaningless and senseless exercise of power. It cannot be said that it is a planned development. This situation has arisen only because the condition precedent to the exercise of power, that is, a survey of existing structures was never done. If survey of existing structures were done then such bald declaration of core zone, no construction area could have been made. It leads to bizarre situation and renders planned development totally unplanned and only a paper formality. Thus,

conditions precedent having not been completed, all subsequent actions became invalid and meaningless.

40 In relation to this, it is important to note, as referred to earlier also, that the respondents were reluctant to bring the original proceedings of the GRDA on record. What they were filing was only an abstract chronological orders of proceedings and not the proceedings themselves. The same have been annexed as Annexure-B to the counter affidavit filed on behalf of respondent No 4 by the Executive Officer of the Bodh Gaya Nagar Panchayat in the second writ petition that is CWJC No 17775 of 2008. A reference to the same would show and establish that the decision with regard to the revision of the existing master plan was in fact never taken by the Authority but was imposed upon it, as noted earlier. From those synopsis and in particular first as on 15.04.2005, it has been noticed that the master plan envisaged division of the Nagar Panchayat into twenty sectors but there was nothing to show as to which ward or which designated area fell in the sectors. This clearly shows that in fact there had been no survey at all prior to preparation of the master plan. It was sent back to Mr Safaya of HUDCO. Then proceedings dated 03.08.2005 would show that the draft master plan was discussed with local representatives and press by the Commissioner, Magadh Division, as noted earlier and on the same day, the meeting of the GRDA is said to have been held. The synopsis would show that Mr Safaya of HUDCO was present. Even though the master plan had been sent for depicting therein the areas, again it is to be found that the plan, which was being discussed, did not give any particular of the revenue circle or other particulars and it was noticed that local people will not be able to understand the plan. Mr Safaya was again requested to show the revenue circles in the master plan but, notwithstanding this grave fallacy, it was decided to notify the draft mater plan. Of course, there was no depiction of existing structures as well.



41 These facts clearly show that in fact the draft master plan was mere paper formality prepared at Delhi without there being reference to local existing structures in and around the Mahabodhi Temple. In fact, it would be right to say and it has rightly been submitted that the draft master plan was nothing but an eyewash giving a total go-bye to the legislative intent and scheme, as noted above with regard to geographical, socio-economic and site survey before the exercise of making a development plan is undertaken by and at the instance of the Authority.

42 Thus, I have no option but to hold that the condition precedent for initiating the process of preparation of draft master plan or revising an existing master plan was not complied with rendering the entire exercise a futile exercise.

43 Now coming to the fourth submission made on behalf of petitioners with regard to right to enjoy property and curbing the same to the extent of extinguishing it without due compensation. It has been pleaded and it has not been controverted that the land had been purchased by the petitioners for setting up a Meditation Centre more than a decade prior to the controversial master plan being proposed. Even before the proposals were taken up for consideration, the petitioners had obtained due sanctions for building the Meditation Centre and had started construction and invested over Rs 2 crores. Now if the master plan is to be given effect to, which came subsequently, then falling within the core zone, they have no right left to enjoy in the said property inasmuch as they could not make any construction thereon. A right to enjoy property is a valuable right and if right to construct upon it is taken away then there is hardly any right left to enjoy. This would virtually amount to confiscating the entire property. In terms of Article 300A of the Constitution of India, it would amount to deprivation of property which could only be done in accordance with procedure established by law. If we now refer to the provisions of the BRDA Act, it envisages compulsory acquisition of

land for the purposes of implementation of the master plan. Thus, if the authorities want to enforce the concept of core zone as a non-construction zone, then all property situated therein constructed or not constructed ought to have been acquired and all constructions thereon, without any discrimination, had to be demolished for implementation of the master plan but that was never intended and it is virtually the petitioners who are singled out for restricting the constructions while all other constructions including multi-storeyed buildings, commercial complexes, much closure to the Mahabodhi Temple, are allowed to remain untouched. This cannot be permitted. This would be highly arbitrary and grossly discriminatory. When the law envisaged and gave authority to the Authority to compulsorily acquire property then if they were sanguine about implementation and enforcement of the master plan, they had no option but to acquire all properties without discrimination within the core zone and compensate owners for this absolute restriction on construction on the properties, construction being now in conflict with the master plan which came subsequently. This not having been done or contemplated to be done, the actions of the respondents in restricting the petitioners and taking away their right to construct and enjoy the property cannot be sustained. It would have been a different matter if on a part of petitioners' land, some restrictions were imposed but they were allowed to use the other part of the land subject to safety and other regulations by construction upon it, as in cases of fall back/set back or leaving vacant areas adjacent to roads and building, height restrictions but in the present case, the restriction is absolute and no construction whatsoever is permissible on the entire land making it useless and, thus, the necessity to acquire.

44 Only to illustrate, it has rightly been pointed out by the petitioners that if under the master plan, a public road is to be made which would cross or encroach upon private land then this can only be permitted after the lands are

acquired after due compensation being paid and not otherwise. The right to use the land cannot be restricted ad infinitum on the plea that it may be acquired sometime in future. Thus, even this contention of the petitioners must succeed.

45 In this connection, petitioners have rightly relied on the judgment of the Apex Court in the case of *M Naga Venkata Lakshmi –Versus- Visakhapatnam Municipal Corporation, (2007) 8 Supreme Court Cases 748*. In that case, the writ petitioner had moved the High Court for direction to the Visakhapatnam Urban Development Authority to permit her to build upon land which she had purchased. It appears that when she purchased the land, the area was unapproved lay out. After her purchase, that area was shown as reserved open space in the approved lay out, thus, restricting her right to construct. It was, therefore, her plea that having had the land from before, she should be permitted to construct otherwise it would amount to deprivation of property, and there being no compensation, would be bad. The High Court negated her plea and the matter traveled to Supreme Court. While allowing the writ petition and remanding the matter for fresh consideration, this is what the Supreme Court said in paragraphs-7, 8 and 9:

7. On what basis the layout plan had been drawn resulting in deprivation of a valuable right of the appellant, therefore, was required to be determined. Furthermore, if VUDA wanted to deprive the appellant from a valuable right of property, the question which should have been posed was as to whether therefor the authorities should have acquired the property or not.

8. We may notice that recently a Bench of this Court in Chairman, Indore Vikas Pradhikaran v Pure Industrial Coke & Chemicals Ltd held: (SCC p 732, para 56) “56/58]. Property, while ceasing to be a fundamental right would, however, be given express recognition as a legal right, provisions being made that no person shall be deprived of his property save in accordance with law.”

9. Prima facie, it appears that there is no provision in terms whereof the appellant could be deprived of her right to property without payment of any compensation.

46 Now coming to the last submission on behalf of petitioners being the fifth submission with regard to the procedure for notifying, publishing the draft master plan and finalizing the same. In this connection, reference may be made to Sections 21 and 68 of the Act which is quoted hereunder:

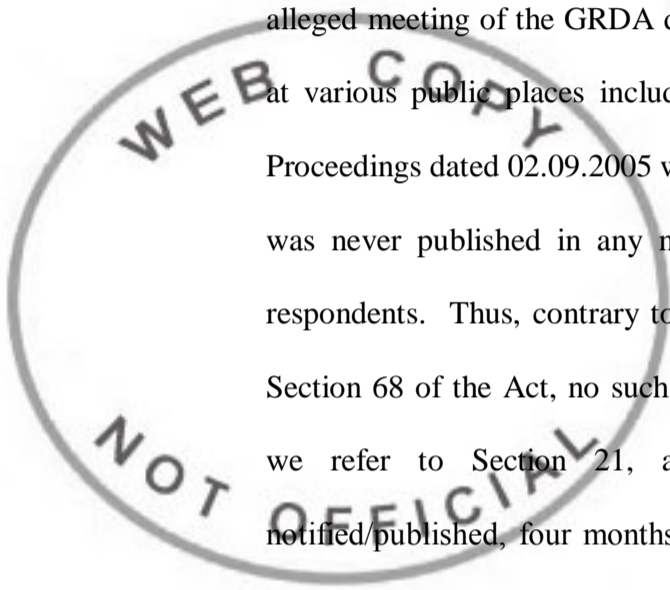
21. Procedure to be followed in preparing and approving the plan.-(1) Before preparing any plan finally and submitting it to the State Government for approval the Authority shall prepare a draft Plan and publish it by making a copy thereof available for inspection, and publishing a notice in such form and manner as may be prescribed by rules made in this behalf inviting objections and suggestions from any person with respect to the draft plan before such date as may be specified in the notice, not being earlier than four months from the publication of the notice.

(2) The authority shall after giving adequate opportunity to the concerned persons of being heard and after considering the suggestions, objections and representations, if any, modify the draft plan, if necessary, and submit it to the State Government for approval.

68. Public notice to be in writing signed by the Secretary and sealed and widely published in the locality by affixing copies and by beat of drum, by publishing in local English and Hindi daily newspapers.-Every public notice given under this Act shall be in writing under the signature of the Secretary of the Authority with its common seal and shall be caused to be widely known in the locality affected thereby affixing copies thereof at conspicuous public places within the said locality and by publishing the same by beat of drum and also in one prominent local English and one Hindi daily newspaper in their three consecutive issues.

47 It is to be firstly noted that the draft or the final master plan has effect on the people who are covered thereunder. On the whole, it may be for the benefit of the people but individually it restricts their rights. It cannot be denied that it has adverse consequences on the enjoyment of their right and, thus, they are vitally interested in it. It is because of that Section 21 provides that once the Authority prepares a draft plan, it shall publish it by making copies of it available and by publishing a notice in such form and manner as may be prescribed by Rules

for inviting objections. If we refer to Section 68, it says that every public notice given in this Act should be widely circulated in the local affected area and by publishing the same, inter alia, in one prominent English and one Hindi daily newspaper in their three consecutive issues. What has been done in the present case and it has not been disputed and it is also evident from the proceedings of the alleged meeting of the GRDA dated 03.08.2005 that it was decided to be displayed at various public places including publication in newspaper and district gazette. Proceedings dated 02.09.2005 would show that it was notified at public places but it was never published in any newspaper which fact has not been denied by the respondents. Thus, contrary to the decision of the Authority and notwithstanding Section 68 of the Act, no such notification was issued in any newspaper. Then if we refer to Section 21, again it clearly contemplates that after it is notified/published, four months' time from the publication of the notice has to be given for objections to be filed only after consideration of which the matter has to be sent to the State Government for its approval. The synopsis of the proceedings, as appended to the counter affidavit in the second writ petition, would show that the draft master plan, though purported to have been gazetted in the district gazette on 31.08.2005, was displayed at public places between the period 05.09.2005 to 03.12.2005 and objections were taken up for consideration on 08.12.2005. For considerations of objections, a four members committee was formed which consisted of Chief Town Planner, Bihar, Executive Officer, Road Constructions Department, Executive Engineer, Public Health and Engineering Department, Gaya and Executive Engineer, Bihar State Housing Board, Gaya with special invitees being Divisional Forest Officer, Gaya, Administrative Officer, Gaya Pollution Control Board, Block Development Officer, Bodh Gaya, District Transport Officer, Gaya, Executive Engineer, Electric Supply Subdivision, Gaya, Administrative



Officer, Archaeological Survey, Gaya. It would be seen that this committee, which started consideration of objections received was not the Authority, as contemplated under the Act. It received objections apparently only upto 08.12.2005 which period was much less than four months, as statutorily provided. Again, the objections were considered and ultimately on 21.07.2006, decisions were taken and again Mr Safaya of HUDCO was asked to make certain changes and send the revised draft master plan which was then, by the alleged Advisory Committee of the Authority, approved on 08.11.2006 to be sent to the State Government for its approval. It appears that the Minister, Urban Development Department –cum- Chairman of the GRDA approved the draft master plan on 15.12.2006 and ultimately the State Government published the master plan on 12.10.2007 under the provisions of the Bihar Municipal Act, 2007 which had now come into force repealing the BRDA Act, as noted earlier.

48 In the counter affidavit filed by the State duly sworn by the Secretary, Urban Development Department, it is clearly admitted that the master plan was notified in the gazette on 31.08.2005 and objections were invited on 05.09.2005 and the last date for filing objections was 03.12.2005 which clearly shows that less than four months' time, as stipulated in Section 21, was given for objections. In the same counter affidavit, it is stated that though the Government has notified the approved master plan on 12.10.2007, in view of serious objections, the same is still under consideration of the Government.

49 Thus, it would be seen that there was no publication of the draft master plan in any newspaper whatsoever. The period of objection was curtailed contrary to the statutory provisions, as contained in Section 21. Though the final approval was granted by the State Government, in its counter affidavit, it still says that it is still under consideration. These facts clearly show not only that the

statutory provisions and the schemes have not been followed once again which invalidates all actions for enforcement of the master plan and it has rightly been so submitted by the petitioners.

50 Now coming to the stand of the Bodh Gaya Nagar Panchayat which has contested the matter. Shri Amarnath Singh, learned counsel appeared for the Bodh Gaya Nagar Panchayat. He has not controverted the facts and the legal position, as noted above, but has based his submission primarily on Section 488 of the Bihar Municipal Act, 2007. In order to appreciate his submissions, it must be noted that earlier that is prior to the Bihar Municipal Act 2007, in respect of Gaya, it was the Bihar Municipal Act, 1922 that applied and also applied were the provisions of the BRDA Act, 1981 which later Act had an overriding effect over the former. All steps for preparation of draft master plan and sending it to the State Government for approval were purported to be taken under the BRDA Act of 1981 but in the meantime, the Bihar Municipal Act, 1922 and the BRDA Act, 1981 were repealed by the Bihar Municipal Act, 2007 which was notified in the official gazette on 05.04.2007 and, as such on and from the same date, by virtue of Section 1 (3) of the said Act, it came into force. Chapter XXXVI of the Bihar Municipal Act, 2007 deals with buildings. As noted earlier in this judgment, prior to this Act, building sanctions were dealt with under the provisions of the BRDA Act of 1981. Those provisions having been repealed are now incorporated with changes in the present Municipal Act. Section 313 prohibits constructions without sanction. The provision of sanctioning the building plan is now with certified Architects. Section 315 makes it penal for constructing buildings in contravention of the building bye-laws. There is no provision under the Municipal Act which derecognizes building sanctions already granted but Section 320 of this Act provides that all building construction plans which are pending for approval before the Regional

Development Authority on or before the commencement of this Act shall be dealt in the manner prescribed in this Act. In fact of the present case, it would be seen that when this Act came into force, there were no building plans pending approvals so far as petitioners are concerned. The plan had been sanctioned on 26.02.2004 and renewal granted on 06.02.2007.

51 Now we may come to the main argument on behalf of the Nagar Panchayat with reference to Section 488 of the Bihar Municipal Act, 2007 which is quoted hereunder:

488. Repeal and Savings.-(1) With effect from the date of coming into force of this Act, the Bihar Municipal Act, 1922, Patna Municipal Corporation Act, 1951, Bihar Municipal Corporation Act, 1978, Bihar Regional Development Authority Act, 1981, Bihar Town Planning & Improvement Trust Act, 1951, Bihar Restrictions of Uses of Land Act, 1948, Bihar Municipal Ordinance, 2007 shall stand repealed.

(2) Gram Panchayats, Panchayat Samities and Zila Parishads, constituted under the Bihar Panchayat Raj Act 2006, whose jurisdiction extends over the Municipal Area shall not exercise powers and functions as have been entrusted to the Municipality under this Act.

(3) The Regional Development Authorities set up under the Bihar Regional Development Authority Act, 1981, the Improvement Trust or Town Planning Authority set up under the Bihar Town Planning and Improvement Trust Act, 1951, the Controlling Authority constituted under the Bihar Restriction of Uses of Land Act 1948, shall cease to exist with effect from the date this Act comes into force,

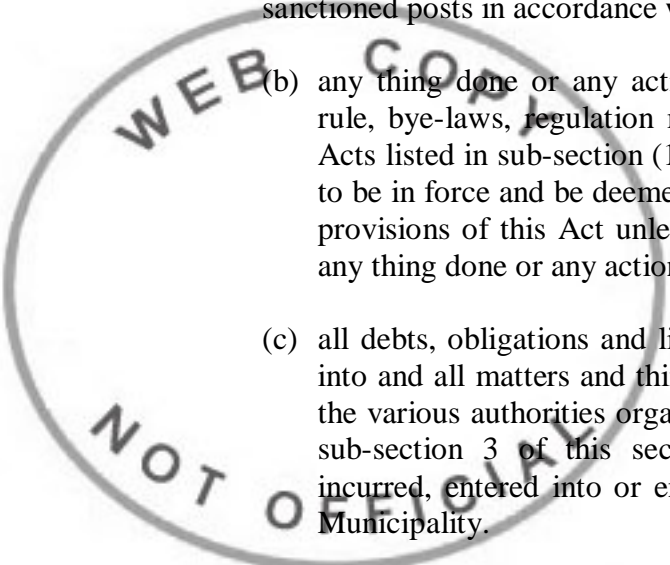
(4) Notwithstanding the provisions of sub-section (1) : and sub-section (3)

(a) Subject to the scrutiny of the requirements of the Municipality assessed by an officer or officers appointed by the State Government, every such officer or other employee serving with various authorities, organizations set up under the Acts listed in sub-section (1) and (3) of this section, immediately before the date of the commencement of this Act and on and from such date shall be deemed to have been transferred to and become an officer or other employee of the Municipality with such designation as the Municipality may determine and may hold office by the same tenure, at the same remuneration and on the same terms and conditions of service as he would have held if the Acts were not repealed, and shall continue to do so unless and until such tenure, remuneration and terms and condition

are duly altered by the Municipality.

Provided that any service rendered by such an officer or other regular employees before the repeal of the Act shall be deemed to be service rendered under the Municipality.

Provided further that the officer or officers appointed by the State Government shall screen and verify service record of each officer and employee and only such officers and employees shall be absorbed in the municipality which have been appointed against duly sanctioned posts in accordance with law by a competent authority.

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- (b) any thing done or any action taken (including any appointment, rule, bye-laws, regulation made, granted or issued under various Acts listed in sub-section (1) and (3) of this section shall, continue to be in force and be deemed to have been done or taken under the provisions of this Act unless it is superceded modified/altered by any thing done or any action taken under this Act.
 - (c) all debts, obligations and liabilities incurred, all contracts entered into and all matters and things engaged to be done by, with or for the various authorities organizations set up under the Act listed in sub-section 3 of this section shall be deemed to have been incurred, entered into or engaged to be done by, with or for the Municipality.
 - (d) all properties movable and immovable and all rights, title, and interest in any property vested in the authorities organizations (set up under the Acts) listed in sub-section (1) and (3) of this section shall vest in the Municipality and all properties in possession of such organizations shall be deemed to be due to the Municipality.
 - (e) all suits, prosecution, and other legal proceedings instituted or which might have been instituted by, for, or against the said authorities organization listed in sub-section (1) and (3) of this section may be continued or instituted by, for or against the Municipality.
 - (f) all sums charged on any property under various Acts listed in sub-section (1) of this section or the rules or regulations framed thereunder shall continue to be charged on that property and the charge shall be enforceable by the Municipality.
 - (g) from the date Act comes into existence, Municipality will have the same right as the said various authorities, organizations had in all lands within the area notified under sub-section (1) and (3) of the Act which were previously held by the said various authorities, organizations on lease from the State Government for a certain period or the possession of which has been delivered to the aforesaid authorities/organizations;

(h) the Municipality shall continue to enjoy the powers to realize the various sources of income in terms of levies, fees, cess, etc; otherwise empowered to be realized by said various authorities organization under their respective Acts and rules and regulations framed thereunder specified under sub section (3) of this section of the Act, as if the said authorities were still functioning under their respective statutes until the same are amended by the Municipality from time to time.

(5) Notwithstanding such repeal, anything done or any action taken in exercise of any power conferred by or under the Acts/Ordinance referred in sub-section (1) shall be deemed to have been done or taken in exercise of the powers conferred under this Act, as if this Act were in force on the day on which such things or action was done or taken.

52 The contention on behalf of the Nagar Panchayat, which is primarily contesting these writ petitions through their learned counsel Shri Amarnath Singh, is that any act, howsoever done and whatsoever done under the BRDA Act, 1981 is not only saved but is validated by virtue of Section 488 (4) (b) read with Section 488 (5) of the Bihar Municipal Act, 2007 and that being so all those acts done under the BRDA Act, 1981 cannot now be subjected to challenge on any ground whatsoever. In other words, the defence of Nagar Panchayat is that though under the BRDA Act 1981, it was the Authority thereunder which had to initiate plans for revision of master plan, the Authority had to conduct surveys before it took such a decision, it had to publish the draft for objection giving four months' time to file objection, notwithstanding those conditions not being satisfied when the draft master plan was published, those actions are not open to challenge any more and they are saved and validated by the aforesaid provisions of the Municipal Act. In other words, all or any invalidity, irregularity and illegality committed earlier got validated by the said provisions and became immune from challenge after the BRDA Act, 1981 was repealed.

53 I am unable to persuade myself to accept this submission on behalf

of the Nagar Panchayat. Accepting this contention would be that an illegal act or unlawful act or an act without jurisdiction under the repealed Act would, without a validating Act specifically, become validated. That is surely not the legislative intent, for Section 488 of the Municipal Act is “Repeal and Savings” clause and not a “Validating and Saving” clause.

54 In this regard, we must first appreciate the necessity and purpose of a Repeal and Savings clause. Competent legislatures have the plenary power to enact legislations. With the power to enact legislations, they have inherent power to amend and repeal those legislations within their legislative jurisdiction. But while repealing legislation or a set of legislations, the legislature may decide to replace the legislation so repealed by a new or a new set of legislation. The ordinary effect of repeal of a legislation would be to obliterate the legislation from the statute books as if it had not existed but where fresh legislation is simultaneously made or not made then if there be necessity to preserve actions and decisions taken under the repealed legislation then it becomes necessary to introduce a saving clause in absence of which everything would vanish. It is for this continuity that while repealing a statute and reenacting a statute or not, savings clause is introduced. There is an essential distinction between a validating clause and a savings clause. The distinction is that a savings clause saves all actions, decisions etc duly taken, done or suffered under the repealed Act whereas a validating clause is one which presupposes invalidity and then, by making amendments, validates those actions retrospectively removing the invalidity. If these principles and distinctions are kept in mind then there would be no difficulty in understanding the scope of Section 488 (4) (b) and Section 488 (5) of the Bihar Municipal Act, 2007. A reference to Section 488 (4) (b) would show that it is saving all actions which were earlier taken or done under the repealed BRDA Act

as if they were done under the Bihar Municipal Act, 2007 which is also the scope of sub-section (5) of the said Section 488. These provisions do not for a moment imply nor is the import of the section that whatever act that was done under the BRDA Act even if not in conformity with the Act, even if contrary to the provisions of the Act, even if without following the procedure under the Act, would become a valid act and its validity would be covered and protected by the Municipal Act. In my view, all that these provisions of the Repeal and Savings clause contemplate is that all acts duly, validly done under the BRDA Act, 1981 would continue to be valid as if done under the Municipal Act for in absence of such a savings clause, all acts done under the BRDA Act would cease to be operative and would vanish.

55 Mr Amarnath Singh, learned counsel for the Nagar Panchayat has relied on four judgments of the Apex Court in support of his extreme submission, as noted above. These are the cases of **Bishambhar Nath Kohli and others – Versus- State of Uttar Pradesh and others, AIR 1966 Supreme Court 573** and, in particular, paragraph-10 thereof, **Qudrat Ullah –Versus- Municipal Board, Bareilly, AIR 1974 Supreme Court 396** and, in particular, paragraph-18 thereof, **Gajraj Singh etc –Versus- The State Transport Appellate Tribunal and others etc, AIR 1997 Supreme Court 412** and **Vishwant Kumar –Versus- Madan Lal Sharma and another (2004) 4 Supreme Court Cases 1**. I have gone through all the aforesaid four judgments. All the four judgments deal with Section 6 of the General Clause Act that is the effect of repeal. Unfortunately, Section 6 of the General Clause Act, which applies to central legislations, does not apply firstly because we are not dealing with central legislations. Secondly, because the principles therein would apply if there was nothing stated in the Act which repeals the earlier Act. Here, in the present case, we have a specific Repealing and Savings

clause and, as such, it is the scope of that clause which would govern the case. Further, the cases, as referred by the respondent-Nagar Panchayat, relate to the rights of parties in respect of the repealed Act after repeal. In some case, the question was whether the right to sue would continue and in some cases, the question was whether and to what extent rights and liabilities would be preserved. Here, the question is different. The challenge is that the requirements of the repealed Act, while taking action thereunder, have not been satisfied. It is for that purpose I must first refer to the aforesaid two clauses. They do not validate an invalid action. They only provide continuity to actions taken. When Section 488 (4) (b) and 488 (5) talks of anything done or any action taken, it specifically mentions of anything done or any action taken under the repealed enactment which, in my view, would imply anything duly done or any action duly taken under those repealed Acts. Then and only then they would be deemed to be acts done or actions taken under the repealing Act only for the purposes of continuing them. The scope of those provisions is not that any act done under the repealed enactment even in violation of the provisions of the repealed enactments would become valid and be deemed to be acts under the Municipal Act for the simple reason that this clause is not a validating clause but a savings clause. It only saves those acts which were earlier done in accordance with the earlier acts which being repealed. It cannot give legitimacy to invalid acts or invalid actions. That could only be done by validating Act which this section does not purport to be.

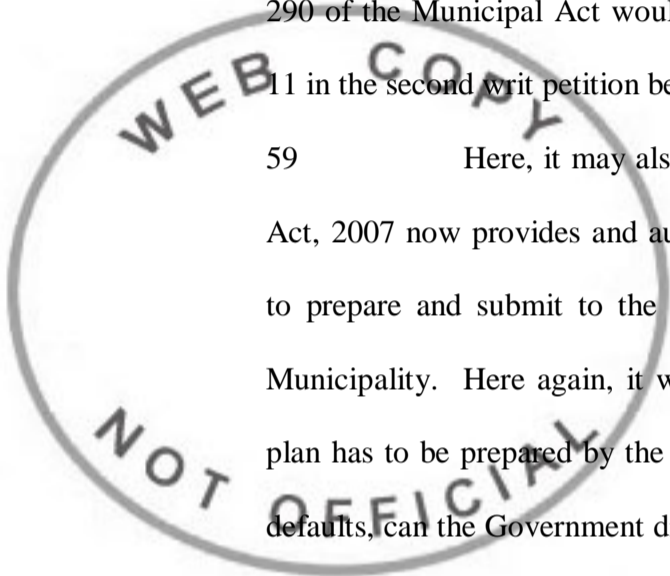
56 It is then submitted by Mr Amarnath Singh, learned counsel for the Nagar Panchayat that after the repeal of the BRDA Act 1981, the validity of actions taken thereunder during its tenure has now to be judged not with reference to the BRDA Act, 1981 but with reference to the provisions of the Municipal Act, 2007 which has replaced it. In other words, his submission is that notwithstanding the

procedure of the BRDA Act not being followed, notwithstanding the fact that the Authority duly constituted under the BRDA Act did not take decisions as those provisions requiring the acts to be performed in the particular manner or by authorities under the Act not having been so done, those provisions being absent under the Municipal Act, those requirements could not be insisted upon for judging the validity of those actions then taken. To put it simply, as the procedure for preparation of original plan, civil survey and master plan, as contained in Chapter IV of the BRDA Act, 1981 or for that matter contents of master plan contained therein, are not provided in the Municipal Act, actions taken under the BRDA Act, 1981 are not open to challenge any more even if those actions did not follow or fulfill the requirements under those sections. I am unable to accept any of these contentions for the simple reason that the Repeal and Savings clause of the Municipal Act does not envisage any such thing. It does not validate invalid actions and saves them. It saves only valid actions for the purposes of continuity and does not put those actions beyond challenge. Thus, if an act done or action taken under the BRDA Act is found to be invalid in view of the provisions of the BRDA Act, its invalidity cannot be cured by reasons of the Repeal and Savings clause contained in the repealing enactment of Municipal Act and this Court is competent to declare such acts to be invalid. The effect of submission of Shri Singh for the Nagar Panchayat would be that an act or decision, invalid at inception, would become valid by reason of repeal of the Act. Unfortunately, an invalid act is not like wine which becomes better with time.

57 With due respect to learned counsel, he was forced to take this extreme position because he was not in a position to defend the actions under the BRDA Act in fact and it is because of that he virtually argued that the Repeal and Savings clause was in fact validating and saving clause which is not correct.

58 Thus, in my view and in view of the finding that decisions were not taken by the Authority duly constituted under the Act and the actions of the authorities were not in conformity with the procedure prescribed under the Act, the draft master plan was invalid since inception and, thus, even the approval granted to it by the State Government after the repeal of the BRDA Act in terms of Section 290 of the Municipal Act would be of no consequence. Hence, Annexures-9 and 11 in the second writ petition become unenforceable.

59 Here, it may also be noted that Section 290 of the Bihar Municipal Act, 2007 now provides and authorizes the Government to require a Municipality to prepare and submit to the Government a draft/master plan in respect of the Municipality. Here again, it would be noticed that the draft development/master plan has to be prepared by the Municipality and it is only where the Municipality defaults, can the Government direct the Chief Town Planner or other consultants to prepare the development or master plan. It is not the case of the Nagar Panchayat that at any time, there was any such direction by the State Government to the Municipality or any failure of the Municipality in that regard to follow the direction. Thus, the provisions of Section 290 with regard to directions of the State Government or preparation of plan by the consultant on the directions of the State Government do not arise. As we have seen earlier even the State Government never directed HUDCO to prepare the draft master plan. Even if we assume that Section 290 of the Bihar Municipal Act, 2007 is retrospectively stretched back, which it is not, even this provision has never been complied with. Of course, the final approval of the draft master plan which was pending from the time of the BRDA Act, 1981 could have now been approved under sub-section (3) of Section 290 of the Bihar Municipal Act, 2007 provided it had been submitted for approval having been duly made in accordance with the BRDA Act which, in view of my



findings earlier, it was not.

60 For the reasons aforesaid, in my view, the petitioners having already been granted sanction for building long prior to the publication of the draft master plan and they having acted upon it, the sanction could not invalidate by virtue of the draft master plan which came subsequently to the draft master plan is invalid for not having been made in accordance with the BRDA Act, 1981 and its approval by the State Government under Section 290 of the Bihar Municipal Act, 2007 does not give it legitimacy so as to invalidate the sanction granted to the petitioners.

61 In fairness to the learned counsel for the petitioners, before closing, one more stand of theirs must be noted which again could not be countered by the respondents. It was pointed out that a Division Bench of this Court in the case of Md Mustaque –Versus- State of Bihar since reported in 2004 (4) PLJR 17 has clearly held that Section 3 of the BRDA Act of 1981 was in conflict with Article 243D of the Constitution and, as such, was held to be ultra vires. If that be then there is no statutory authority which had the power to make a draft master plan or seek its approval under the said Act. All exercise, at least after such declaration by this Court and after 15.07.2004 would be a nullity as being performed by a non-statutory body especially as the State legislature did not rectify the position till the enactment of the Bihar Municipal Act, 2007. All acts earlier done under the BRDA Act of 1981 by the purported Authority were acts not of the Authority under the Act but by an authority which was non-existent. The submission is correct and must succeed but I will not base my judgment solely on this issue for granting relief to the petitioners.

62 Thus, the petitioner of the first two writ petitions are entitled to complete their constructions according to the earlier sanctioned plan and the

respondents are restrained from creating any impediments in that regard.

63 Now coming to the third writ petition. The third writ petition challenges the order by which it has been directed to demolish its constructions as being without sanction. The first thing to be noted is that neither under the provisions of the BRDA Act, 1981 nor under the provisions of Bihar Municipal Act, 2007 is there any Authority to order demolition of any authorized structure without any prior notice or proceedings in that regard. On this score alone, this third writ petition has to be allowed. It may also be noticed that the writ petitioners in this third writ petition have pleaded it to be a case of deemed grant, that is, they had applied for sanction which, having not been refused and no refusal communicated, would be deemed to be granted. In this connection, I may note that deemed grant is only to the extent, if at all, where the sanction is sought in accordance with building bye-laws as then applicable. The deemed sanction would not be available in case where sanction is sought in contravention to the building bye-laws then in force. Therefore, it would be a question of fact whether the building sanction, as applied for, was or was not in accordance with the building bye-laws as in force at the time when the application was made. That can only be judged in a duly constituted proceedings by the competent authority in that regard but at the same time, I may point out that in view of my finding with regard to the validity of the draft master plan or for that matter, the State approved draft master plan, that would not now be applicable to the case of the third writ petitioners and the case would have to be decided by the competent authority in accordance with the building bye-laws prior to the draft master plan of 2005 or its approved version. Impugned notices are, accordingly, set aside and this matter is remanded for reconsideration.

61 With these findings, observations and directions, these writ

petitions stand allowed.

(Navaniti Prasad Singh)

*Patna High Court,
The 25th of January, 2012,
AFR, M E Haque/*

