

(1998) 04 PAT CK 0041

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 5682 of 1986

Avinash Kumar Singh

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 07-04-1998

Acts Referred:

Bihar Ancient Monument and Archaeological Sites Remains and Art Treasures Act, 1976
— Section 3(1), 3(3)

Citation : AIR 1998 Patna 107 : (1998) 2 PLJR 238

Hon'ble Judges : Asok Kumar Ganguly, J

Bench : Single Bench

Advocate : Ashok Kumar Keshri and Ramesh Kumar Sinha, for the Appellant;
V.N. Sinha, G.P. IX and Ajay Jha, J.C. to G.P. IX, for the Respondent

Judgement

Asok Kumar Ganguly, J.—This writ petition was initially filed for issuance of a writ of mandamus directing the respondents to publish the final notification u/s 3(3) of the Bihar Ancient Monument and Archaeological Sites, Remains and Art Treasures Act, 1976 (hereinafter called the said Act). It was also stated that in the said notification the areas of the three hills, namely, Ramshila Hills, Pretshila Hill and Brahmayoni Hills and Vishnupad Temple at Gaya have been prescribed. At the time when the writ petition was filed a notification u/s 3(1) of the said Act was issued and published in the Bihar Gazette on 12-3-1985. The petitioner's case is that the town of Gaya is one of the most well known places of pilgrimage for the persons professing Hindu religion and is commonly known as Gaya Dham and its surrounding hills are known as Ramshila Hills, Pretshila Hill and Brahmayoni Hills and are places of religious sanctity. It is further stated in the writ petition that the Hindu pilgrims have been visiting the said hills and performing the religious rites, offering sharadh and pind-dan on the said hills and are making Parikrama of those hills and as such digging of any portion of the aforesaid hills for carrying on mining operation in any portion of the aforesaid hills affects the sanctity and religious sentiments attached to Hindu faith and is violative of Articles 25 and 26 of the Constitution of India. It has also been stated

that various religious festivals and fairs are held in and around the said Hills during Pitrapaksha, Navratra, Shravan and Shivratri when people assemble there for performing Puja according to the religious rituals and at the top of Ramshila hill there is an ancient temple of Lord Shiva containing lingam called "Pataleshwar Mahadeva". The petitioner cannot accept the mining operation started on the aforesaid hills and for the prevention of the same various proceedings were initiated. However, the State Government issued a notification on 28-12-1970 declaring that the aforesaid hills have been reserved for public purposes. But the said notification was amended subsequently by another notification dated 8-6-1974. Such amendment of notification was challenged before this Court and it appears from paragraph 18 of the writ petition that such notification was quashed by this Court.

2. Thereafter several proceedings were initiated and ultimately a notification was published in the Bihar Gazette on 12-3-1985 under the signature of the Additional Secretary, Department of Education (Archaeological and Museum) by which the areas and extent of the aforesaid three hills have been defined plot wise and village wise and boundaries were also given of each of the hills. A copy of the said notification is disclosed as Annexure-I to this writ petition.

3. The said notification was issued under the provisions of the said Act. The said Act is a State legislation and it appears that the same is modelled on the lines of the Central law, namely, Ancient Monuments and Archaeological Sites, Remains and Art Treasures Act, 1958 (Act 24 of 1958). Section 3 of the present Act is almost identical with the similar provisions in Section 4 of the Central Act.

4. When the writ petition was filed initially, only the notification u/s 3(1) of the said Act was issued but as no final notification was issued even after the expiry of two months from the date of notification i.e. 12-3-1985. This writ petition was filed with a prayer for issuance of a writ of mandamus directing the respondents to issue final notification u/s 3(3) of the said Act. It has been stated in paragraph 27 of the writ petition that all the paraphernalias for issuing final notification have already been completed as would appear from annexure-2 to the writ petition but even then the final notification was not published.

5. Thereafter during the pendency of this writ petition final notification u/s 3(3) of the said Act was published on 7-5-1987. It has been alleged that the areas defined u/s 3(3) of the said Act is wholly incorrect and factually wrong. It has been further said that a number of plots have been intentionally and purposely not included in the said notification dated 7-5-1987 and a large chunk of the three hills have been left out. Learned counsel, for the petitioner submits that the initial notification which was issued u/s 3(1) of the said Act would show that in respect of Brahmayoni hill an area of 485.99 acres of land was notified, in respect of Ramshila hill an area of 91.68 acres of land was notified and in respect of Pretshila hill an area of 267.57 acres of land was notified but the final notification which has been published during the pendency of this writ petition and which has been impugned by amendment in this writ petition shows that

only a truncated portion has been notified in respect of Brahmayoni hill. While previously it was 485.99 acres of land but in the final notification it was reduced to 178.45 acres of land. Similarly in respect of Pretshila hill, the notification u/s 3(1) of the said Act shows the area of 267.57 acres of land but in the final notification it was reduced to 163.17 acres of land and in respect of Ramshila Hill the area notified in terms of notification u/s 3(1) of the said Act was 91.68 acres and only the same was maintained in the final notification.

6. In the counter affidavit which has been filed in this matter the stand of the State Government is that it is the exclusive jurisdiction of the State Government to notify the area of the said hills under the said Act and as such the said notification is final and it is open to the State Government to reduce the area in the final notification.

7. In the counter affidavit, reference has been made to various proceedings which have been initiated in respect of the said hills. It has also been stated that a title suit was filed being Title Suit No. 108 of 1977 and the said title suit was actually filed for determination of area of those three hills. The said title suit was initially decreed and upon appeal being filed, the said appeal was allowed and the judgment and the decree was remitted to the trial Court and during the pendency of the suit on remission, the same was dismissed for default. This Court on perusal of the various orders annexed to the said affidavit finds that a Division Bench judgment of this Court in C. W. J. C, No. 1932 of 1986 presided over by a Division Bench consisting of Hon"ble Mr. Justice Lalit Mohan Sharma and Hon"ble Mr. Justice R. N. Prasad, (as their Lordships then were), has some relevance to the points at issue. In the said judgment their Lordships were of the opinion that there is no dispute on the question that the said hills are sacred hills and they need protection but the dispute is about the area of the hills in question. Their Lordships were of the opinion that if the petitioners want any declaration about the area of the said hills, the same should be decided on the basis of the title suit where evidence can be gone into and the matter has to be decided and in fact at the material time such a suit was pending. On the basis of these facts their Lordships expressed their opinion that the dispute relating to the area of the said hills cannot be effectively determined in the writ jurisdiction. This Court is obviously in respectful agreement with the said conclusion of the learned Judges. This Court is also of the opinion that the dispute which the petitioner has raised in this case about the area of the hills in question, cannot be decided by a writ Court. But the question is whether the State Government can reduce the area which was fixed u/s 3(1) of the said Act.

8. In the other counter affidavit the respondents have stated that such reduction was made on the basis of the objection raised by the Mines and Geology Department vide its letter dated 20-12-1985. In the said letter of the Mines and Geology Department there was a request to call for a meeting for discussions regarding the monuments in question and it was also stated that vide letter No. 453 dated 22-1-1986 the Director (Mines) raised objection regarding the area of

the monuments and pointed out that in the draft notification the area has been included which does not require any protection. The details in connection with the said objection have been mentioned in paragraphs 4 and 5 of the counter affidavit filed by respondents Nos. 1 to 4 in this proceeding but strangely enough in the order which has been passed by the authorities u/s 3(3) of the said Act by notification dated 7-5-1987 it has been stated that no objection has been received from the public.

9. The final notification, therefore, purports to reduce the area without receiving any objection against the initial notification.

10. It is well settled that the legality of an order will have to be decided on the basis of the recitals in the order itself provided the order is a public order and the same is publicly made. It is no doubt true that in the instant case the final notification is a public order having been publicly made which shall either stand or fall on the basis of the recitals in the order itself. Since the public notification u/s 3(3) of the said Act in so many words recites that there is no objection, the reduction of the area cannot be supported on the basis of the materials disclosed in the affidavit. This principle of law is also well settled by the Supreme Court right from 1952 in the case of Commissioner of Police, Bombay Vs. Gordhandas Bhanji, and which has been reiterated in the subsequent decision in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, .

11. So going by the aforesaid ratio, this Court cannot uphold the final notification dated 7-5-1987 by which there has been a reduction of area on the strength of materials disclosed only in the affidavit as ex post facto rationalisation of the notification u/s 3(3) of the said Act. It is no doubt true that the Government while publishing final notification may differ from the initial notification but that exercise of power by the State Government must be based on some materials but if no objection has been received by the State Government as it appears from the notification u/s 3(3) of the said Act, this Court fails to understand on what materials the State Government has reduced the area mentioned in the notification u/s 3(1) of the said Act.

12. It is undoubtedly true that the Government has the discretion and authority to pass final publication u/s 3(3) of the said Act but the discretion of the Government in such matters is never unfettered. The Courts have repeatedly held that Professor-Wade has urged that plea of unfettered discretionary power is "constitutional blasphemy (p. 39 of Administrative Law, 6th Edition). In that treatise, at page 399, the learned author has further opined that in a system based on rule of law, "unfettered governmental discretion is a contradiction in terms". Therefore, discretion is never unfettered and must be reasonably exercised on some relevant materials. In the impugned notification no material has been disclosed and on the other hand it recites that no objection has been received. So this Court is left wondering on what basis the area mentioned in the notification u/s 3(1) of the said Act was reduced.

13. However, this Court, in respectful agreement with the judgment of the Division Bench referred to earlier, holds that in this writ petition the exact area of those hills which needs protection cannot be decided. But one thing is clear that in a matter which affects the religious sentiments of a large section of people and in respect of which there is history of previous litigation, in such a matter the State Government must exercise its discretion u/s 3(3) of the said Act of issuing a permanent declaration with due application of mind and upon consideration of relevant materials, if it proposes to reduce the area.

14. It is of course true that there is no statutory obligation u/s 3(3) of the said Act to disclose the reasons but having regard to the nature of the controversies and the public interest involved in the matter, it is incumbent upon the State Government to disclose some reasons in the notification u/s 3(3) of the said Act if the "State Government decides to reduce the area which was declared u/s 3(1) of the said Act. Disclosure of reasons in the facts of this case would operate as a check on exercise of power in an arbitrary manner. And in the instant case the impugned notification u/s 3(3) of the said Act is totally lacking in reason.

15. Various authorities on Administrative Law, Professor Dr. Smith, being the most eminent among them, have regarded the duty to give reasons as "one of the principles of good administration". The giving of reasons atleast assures the Court that the following exercise has been undertaken by the authority exercising statutory power:--

(i) There has been a close examination of the relevant issues. This automatically ensures the elimination of irrelevant issues and considerations.

(ii) There is some standard and basis in decision making.

(iii) Such disclosed reasons do provide a guide for similar decision making in future.

(iv) If the decision is to be based on objections, if any taken, as is the provision u/s 3(3), then a reasoned decision would demonstrate that the right of raising objection is not an empty ritual.

So in the premises aforesaid, and in the facts of this case the decision of reduction of area of those hills in the final publication without any objection to the area mentioned in the preliminary notification is an arbitrary decision. Nondisclosure of any reason in the impugned decision, in the facts of this case, has infected the legitimacy of the entire decision making process.

16. In that view of the matter, this Court quashes the impugned notification which has been disclosed as Annexure-4 to this writ petition and directs the State Government to issue a fresh notification u/s 3(3) of the said Act considering the objections, if any, received against the notification u/s 3(1) of the said Act. Such notification must be issued by the State Government within a period of two months from the date of service or production of a copy of this order upon the appropriate authorities of the State Government. While issuing

the said notification the State Government would indicate if they want to reduce area notified u/s 3(1), some reasons in the notification itself in order to demonstrate that it has not acted arbitrarily or without proper application of mind. Till such notification is issued the area of those hills as mentioned in the notification u/s 3(1) of the said Act must continue to remain protected area.

17. With the above direction, this writ petition is allowed to the extent indicated above. Annexure-4 to the writ petition is hereby quashed. There will be no order as to costs.