

(1978) 09 PAT CK 0016

In the Patna High Court

Case No : Civil Writ Jur. Case No. 1336 of 1977

Dr. (Mrs.) Shakuntala Singh and Another

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 04-09-1978

Acts Referred:

Constitution of India, 1950 — Article 31(2)

Patna Municipal Corporation Act, 1951 — Section 270(2), 4

Citation : AIR 1979 Patna 91

Hon'ble Judges : K.B.N. Singh, C.J;S. Shamsul Hasan, J

Bench : Division Bench

Advocate : B.C. Ghose and Dilip Kumar Sinha, for the Appellant; S.N. Jha, Standing Counsel No. 2, B.P. Pandey, Jr. Counsel, Basudeva Prasad, (for Nos. 2, 3 and 4), Radha Mohan Prasad and Mrs. Renuka Sharma, (for No. 7) and Birendra Mohan Singh, (for No. 2), for the Respondent

Final Decision : Allowed

Judgement

S. Shamsul Hasan, J.—The petitioners in this writ application have prayed for quashing two notices, one dated the 28th July, 1977 (Annexure 4) and the other dated the 30th July, 1977 (Annexure 8), both issued by the Patna Municipal Corporation (Respondent No. 2-hereinafter to be referred to as "the Corporation"), as also for issuance of writ of mandamus restraining respondent No. 2 and its officers (respondents Nos. 3 and 4) from interfering with the petitioners' personal private property and their rights over the lands described in the two sale deeds, extracts copies of which have been filed as Annexures 1 and 2 to this writ application.

2. The petitioners' case, in short, which is also not in dispute, is that they are purchasers of ten kathas of land bearing plots Nos. 31C and 32/2055 appertaining to Khata No. 540, situated in Mauza Dhakanpura Lodipur (now commonly known as the Boring Road area), Police Station Kotwali, from one Shrimati Hemawati Sinha, wife of Shri Shivaji Prasad Sinha, I.P.S., Additional I.G.

of Police, Bihar, by means of two sale deeds, both dated the 12th July, 1973, one in favour of petitioner No. 1 in respect of seven kathas (Annexure 1), and the other executed in favour of petitioner No. 2 in respect of three kathas (Annexure 2). Originally, the aforesaid plots of land belonged to one Babulal Gope, who sold the same to one Smt. Satirani Devi, by a registered sale deed dated the 20th Sept. 1937. Smt. Satirani Devi, in her turn, sold those two plots to the aforesaid Smt. Hemawati Devi by a registered sale deed dated the 31st May 1949 and the latter got herself mutated in respect of the lands purchased by her. At about the same time, one Smt. Usha Sinha, sister of Smt. Hemawati Sinha also purchased ten kathas of land appertaining to the same plots, adjacent north, and her land lay to the adjacent south of Boring Road. By a mutual agreement Smt. Usha Sinha gave a small strip of land to Smt. Hemawati Sinha, her sister, to provide her an access to Boring Road, and the latter, in lieu thereof, gave an equivalent area of land lying adjacent to her sister's land to Smt. Usha Sinha, and it is said that after this mutual arrangement, both the sisters got the entire area, including the passage, enclosed by a pucca boundary wall in 1966. The passage is never meant for public use, which fact is supported by an affidavit filed by Shri Shivaji Sinha, husband of Smt. Hemawati Sinha, in a revision petition arising out of a proceeding u/s 144 of the Cr. P. C. relating to the land, which petition was disposed of by the 4th Additional Sessions Judge, Patna. The right of the petitioners over the strip of land, meant for private passage to the Boring Road, as mentioned earlier, was recognised by the Patna Improvement Trust, Patna Water Board and the State of Bihar, and, petitioner No. 1 constructed a drain and laid out water pipe over the land with the approval of the Water Board, the Public Works Department and the Corporation. According to the petitioners, no part of the aforesaid strip of land was a means of access for the public and has never been a public thoroughfare. Since the date of the purchase, it is stated, the petitioners have right, at all times and hours, to prevent all other persons from going over the said land and using it in any way and, as stated above, the land is bounded by a pucca boundary wall with a gate at the entrance facing Boring Road. A petition was, however, filed by one Shri Gyan-deo Sharma (respondent No. 9) along with several other persons before the Corporation, stating that as the land in question is a road, it should be taken over by the Corporation for the benefit of the people of the locality. That petition, signed by sixteen persons gave details of the petitioners' land along with other lands. I may mention here that subsequently, several of the aforesaid signatories of the petition, filed affidavits saying that they had signed the petition in question under a misconception that it was actually a petition to the Corporation for arranging for proper drainage of the area and not for asking for a road through plots Nos. 31C and 32/2055 belonging to the petitioners. In their affidavits they have also averred that a petition to this effect was also filed before the Assistant Administrator of the Corporation on the 15th Nov. 1977 and a copy thereof was also annexed to the affidavits. Having come to know of the filing of the petition by Gyandeo Sharma and others requesting the Corporation to take over the petitioners' aforesaid strip of land as a public road, the petitioner filed a petition before the Administrator of the

Corporation on the 28th April, 1977 (Annexure 5) bringing to his notice the fact that the passage in question is not a road but a private link meant to connect the house of the petitioners with Boring Road, and pointing out to him the existence of a public passage running northward, a little away, to the east and west of the plots of the petitioners, and asserting as false and mala fide the claim made by Gyandeo Sharma and others for taking over this passage of the petitioners as a public road. In spite of this objection made by the petitioners, the Administrator of the Corporation (respondent No. 3) issued a notice (Annexure 4) on the 28th July, 1977, purporting to be one under Sub-section (2) of Section 270 of the Patna Municipal Corporation Act 1951 (hereinafter to be referred to as "the Act") intimating his intention to declare the aforesaid private and personal passage of the petitioners to be a public street, avoiding therein all reference to the plot numbers of the petitioners' land, and, as will appear from the notice itself, even without forwarding a copy thereof to the petitioners. It will not be out of place to mention here that only a day before, by a letter dated the 27th July, 1977 (Annexure 7) the petitioner No. 2 and others had been asked by the Chief Engineer of the Corporation to appear before the Administrator on the 2nd Aug., 1977, in connection with the hearing of the objection petition filed by the petitioners on the 28th April, 1977 (Annexure 5), as mentioned earlier. On getting information about the issue of the notice (Annexure 4) and on receipt of the second notice (Annexure 8) dated the 30th July, 1977, asking petitioner No. 2 to stop construction of the garage on the passage in question, petitioner No. 2 vide his letter dated the 30th July, 1977 (Annexure 9) objected to it, and also asserting that the garage had been built on his own private land, which does not come within the purview of the definition of "street" as given in Section 4 (vv) of the Act, and that it had been built according to the approved plan. In spite of the fact that the notice (Annexure 4) speaks of one month's time to file objection to the intended declaration of the petitioners' private land as public street, and petitioner No. 2 had, in fact, filed an objection on the 30th July, 1977 (vide Annexure 9), the Corporation got a proceeding u/s 144 of the Cr. P. C. started against petitioner No. 2, restraining him from constructing the garage on the land in question and a notice to that effect was received by petitioner No. 2 from the Subdivisional Magistrate, Sadar, Patna--vide Annexure 10 dated 1/2-8-77 to the writ application Against the order starting a proceeding u/s 144 of the Cr. P. C. the petitioner moved the Sessions Judge of Patna under S. 397 of the Cr. P. C., which application was disposed of in favour of petitioner No. 2 by the 4th Additional Sessions Judge, Patna, by his order" dated the 21st Sept., 1977.

3. When this writ application had earlier come up for hearing on the 36th Nov. 1977, it was urged on behalf of the Corporation (respondent No. 2) that as an alternative remedy by way of appeal to the District Judge under Sub-section (3) of Section 270 of the Act was available to the petitioners and the petitioners had filed such an appeal against Annexure 4 before the District Judge of Patna, they should seek their remedy there. Learned counsel for the petitioners, on the other hand, contended that the subject-matter of the writ application was of a much

wider amplitude than that of the appeal u/s 270 (3) of the Act. The writ application is one under Article 226(1)(a) of the Constitution for enforcing the petitioner's fundamental right under Article 19(g) of the Constitution in respect of their property and hence there was no question of exhausting the alternative remedy by way of appeal to the District Judge. Learned counsel for both the parties, however, agreed that the writ application be kept pending and the appeal filed by the petitioners against Annexure 4 before the District Judge, Patna, be directed to be disposed of within one month, and it was ordered accordingly. In the appeal before the District Judge, however, a completely opposite stand was taken on behalf of the Corporation to the effect that no appeal under Sub-section (3) of Section 270 of the Act lay against the first notice of intention to declare a "street" as a "public street" but against the second notice declaring a "street" as a "public street" and the appeal filed by the petitioners was premature. This stand of the Corporation found favour with the District Judge and he held that the appeal filed by the petitioners was not maintainable. Thereafter, when the writ application was taken up for hearing, Mr. Basudeva Prasad, learned counsel appearing on behalf of the Corporation fairly conceded, at the outset, that the above stand of the Corporation taken before the District Judge was incorrect, and that an appeal lay only against a notice intimating the intention of declaring a street as a public street u/s 270 (2) within thirty days the notice is first exhibited, and no appeal lay from the notice declaring a street as a public street. Mr. Prasad also fairly conceded, and in my opinion, correctly, that two alternative remedies are available to the owner of the land, i.e. (i) to file an objection, as provided under Sub-section (2) of Section 270 of the Act, within thirty days of the first exhibition of the notice intimating the intention to declare a "street" as a "public street", or (ii) to file an appeal within the same period before the District Judge, as provided u/s 270 (3) of the Act.

4. Mr. B. C. Ghose, learned counsel appearing on behalf of the petitioners has urged that the Corporation has no jurisdiction to issue notice u/s 270 (2) of the Act in respect of a private land belonging exclusively to an individual over which the outsiders have no access, for declaring it to be a public street, and, that such notice can only be issued in respect of a "street" as defined in Section 4 (vv) of the Act. According to Mr. Ghose, before acting u/s 270 (2) of the Act for the purpose of issuing such a notice, the Corporation must satisfy itself that the land in question comes within the definition of a "street" as laid down in Section 4 (w) of the Act.

5. The second contention of Mr. Ghose is that if the owner of a land lodges objection to the intended declaration of that land as a public street, the Chief Executive Officer of the Corporation has to stay his hands and is precluded from declaring it as a public street, as provided u/s 270 (2) itself. Mr. Ghose has contended that as the petitioners in the instant case filed objections on the 19th and the 20th Aug., 1977 respectively to the proposed declaration of their land as a public street by the Corporation u/s 270 (2) of the Act within the statutory period of thirty days of the issue of the notice (Annexure 4), Annexure 4 was

rendered nugatory in terms of the provisions of Sub-section (2) of Section 270 itself. According to Mr. Ghose, the Chief Executive Officer of the Corporation can declare a "street" to be a "public street" only when the owner or the majority of the owners of such a street have no objection thereto and not otherwise, and after objection by the petitioners, the notice dated the 28th July, 1977 (Annexure 4) has to be treated as cancelled. In support of his contention Mr. Ghose has referred to the judgment of the Additional Sessions Judge (Annexure 11) from which it appears that a Judicial Magistrate was deputed to hold local inspection of the disputed passage and to report about its physical features. The order (Annexure 11) shows that the passage of the petitioners which is the subject-matter of the notice (Annexure 4) was enclosed on all sides by old compound wall. Mr. Ghose has also contended that the said land is undoubtedly a part of the compound of the petitioners without anyone else's house abutting on it, and in view of the fact that no outsider ever used the passage or has been allowed to it as a means of egress and ingress to the Boring Road, it does not at all come within the definition of "street" as given in Section 4 (vv) of the Act

6. The petitioners' assertion that plots Nos. 31C and 32/2055 (in which they have their disputed private road or passage) belong to them has not been controverted in the counter-affidavit filed on behalf of respondent No. 3 nor has it been pointed out to us that anybody other than the petitioners and the members of their family has a right to use it or has ever used it for any purpose whatsoever. Mr. Basudeva Prasad also fairly conceded that it is not the Corporation's case that the petitioners were not the owners of the aforesaid plots including the passage and that the impugned notice does not relate to that passage in the petitioners' land. It is thus manifest that the petitioners having exclusive control over this private road or passage of theirs, such a piece of land or road cannot come within the purview of the definition of the expression "street" as given in Section 4 (w) of the Act, which reads as follows:--

" "street" means any road, lane, gulley, alley, passage, pathway, square or court, whether a thoroughfare or not which is accessible to the public whether permanently or temporarily; and includes every vacant space, notwithstanding that it may be private property and obstructed wholly or partly by any gate, post, chain or other barrier, if houses, shops or other buildings abut thereon and if it is used by any persons, whether occupier of such buildings or not, as a means of access to or from any public place or thoroughfare, but shall not include any part of such vacant space which the occupier of any such building has a right at all hours to prevent all other persons from using as aforesaid." (Underlinings are mine).

At this juncture, it will be useful to refer to the definition of the expression "Public street", as given in Section 4 (pp) of the Act, the relevant portion of which reads as follows ;

" "public street" means any street--

(a) heretofore levelled, paved, metalled, channelled, sewerred and repaired out of municipal or other public funds over which the public have a right of way; or

(b) which under the provisions of Section 270 is declared to be or under any provisions of this Act becomes, a public street;"

From the aforesaid definition it is apparent that a "public street" means a street which is maintained out of the municipal or other public fund and over which the public have a right of way, or any other such street which u/s 270 is declared to be, or under any provisions of the Act, becomes a "public street". What is of importance is that under the Act only a "street" can be declared to be a "public street". u/s 71 of the Act, with the coming into force of the Act, the properties belonging to the Patna City Municipality, Patna Administration Committee and Patna-Bankipore Joint Water Works Committee vest in the Corporation. By virtue of S, 72 all property of public institutions and endowments for the management, control and administration of which the Corporation is charged also vests in the Corporation for the purposes mentioned in that section. The other mode of acquisition of property by the Corporation is by way of acquisition of Immovable property or easement by agreement as envisaged under S, 73, and where that is not possible, it can acquire such property as needed for public purposes under the Land Acquisition Act, 1894, on payment of compensation. A private person can also get his land converted into a "street" within the definition given in Section 4 (vv) of the Act by offering his land for the purpose in accordance with the provisions contained in Sections 266 to 269. It is not the Corporation's case that the petitioners have, in any manner or at any point of time, offered their aforesaid piece of land for being converted into a "street", as envisaged in Sections 266 to 269 of the Act.

7. It is in this background that the question of conversion of a street into a public street, as envisaged u/s 270, needs to be examined. Under Sub-section (1) of Section 270, a piece of land owned by an individual, if offered by the owner for being converted into a street in accordance with the provisions contained in Sections 266 to 269 and converted as such, can be declared, on his offer, as a "public street" by the Corporation. Sub-section (2) and (3) of Section 270, which are relevant in this case, may be usefully quoted :--

"(2) The Chief Executive Officer may at any time, by a notice exhibited in any street or part of a street not maintained by the Corporation, give intimation of his intention to declare the same a public street and, unless within one month next after such notice is first exhibited the owner or the majority of owners or such owners of such street or such part of street, lodges objection thereto with the Corporation, the Chief Executive Officer may, by a notice exhibited in such street or part, declare the same to be a public street vested in the Corporation.

(3) Any person aggrieved by a notice under Sub-section (2) may appeal within thirty days from the date the notice is first exhibited, to the District Judge, who shall give reasonable opportunity of being heard to the appellant and the

Corporation."

From the aforesaid provisions it is manifest that it is only in respect of any street that the Chief Executive Officer can by notice give intimation of his intention to declare it a public street, and if no objection is filed by the owner or the majority of owners of such street within a period of one month next after such notice is first exhibited, then and then only the Chief Executive Officer is entitled, by means of a second notice exhibited in such street, to declare it a public street vested in the Corporation. In case of objection by the owner or the majority of owners of such street within the statutory period mentioned above, the second notice declaring it to be a public street and vesting in the Corporation cannot be issued. The reason behind such restriction is that a street belonging to an individual or a group of persons can only vest in the Corporation either by his or their consent, or by acquisition, and non-filing of objection by the owner or majority of owners will be taken as a tacit consent to such declaration by the Corporation as a public street and vesting in the Corporation. Any other construction will make the provision unconstitutional, inasmuch as it would amount to acquisition of one's property without payment of any compensation and thus violative of Article 31(2) of the Constitution. It is well settled principle of construction of a provision of a statute that where two interpretations thereof are possible, the one which sustains the vires of the provisions and subserves its purpose is to be preferred to the one which makes it ultra vires. As already observed, it admits of no doubt that in case of objection by the owner or majority of owners, the first notice u/s 270 (2) intimating the intention of the Corporation to declare a street as public street lapses with that objection, leaving no scope for issue of a second notice declaring it to be a public street and vesting in the Corporation. As I have discussed earlier, u/s 73 of the Act acquisition of an Immovable property can be made by the Corporation by agreement or by acquisition u/s 74. The Act does not empower the Corporation to take somebody else's property by any other method than by his consent, either express or implied.

8. The main contention of Mr. Basudeva Prasad appearing on behalf of the Corporation, based on the counter-affidavit filed on behalf of the Corporation is that the Chief Executive Officer is entitled in law to issue the first notice u/s 270 (2) intimating his intention to declare a private street as public street and to consider and dispose of objections, if any, filed within the statutory period. He has submitted that filing of an objection to the first notice u/s 270 (2) within the statutory period, does not make the notice as to the intention to declare a street as public street nugatory, as contended by Mr. B. C. Ghose. According to his submission, the present writ application is premature, inasmuch as the Chief Executive Officer of the Corporation has not as yet disposed of the objection filed consequent upon the issue of the first notice (Annexure 4) which he is entitled to dispose of under the law, one way or the other. He has further contended, though not seriously, that compliance with the provisions of Section 4 (vv) is not a precondition for initiation of a proceeding u/s 270 (2) for declaring a street as a

public street.

9. The rival contentions of learned counsel for the parties in this regard now remain to be considered. I have already held that it is only such road of a private individual which comes within the definition of street as given in Section 4 (vv) that can be declared to be a public street u/s 270 (2). It, therefore, becomes manifest that the Corporation before issuing a notice u/s 270 (2) intimating its intention to declare a street to be a public street, must satisfy itself, first, that the so-called street really comes within the definition of "street" as given in Section 4 (vv). Since the Corporation is in possession of all the materials which could indicate the nature of a particular property situate within the Corporation, it is not open to it to indulge in a roving enquiry in this regard with regard to any holding, for asserting that the property is a street, by issuing a notice of intention u/s 270 (2). That question has first to be determined and is a condition precedent for issue of a notice like Annex. 4. I have already stated that in the present case, the passage in the petitioners' plots, which is sought to be declared as a public street, is undoubtedly not a road, lane, gulley etc. and the petitioners have a right, at all hours, to prevent others from making use of it as a passage. This fact has not been denied by the Corporation nor is it asserted that the petitioners' private passage comes within the mischief of the definition of a "street" as given in Section 4 (vv) nor the petitioners' right to prevent all others from using it as a passage has been denied. It will be relevant to mention here that much before the issue of the impugned notice (Annexure 4), when the petitioners came to know of the sinister move of Gyandeo Sharma and others for getting their private passage declared as a public street, they filed their objection (Annexure 5) on the 28th April, 1977, pointing out that it is their private passage meant exclusively for their use and as such it cannot be declared to be a public street and also mentioned therein that there are public passages running northwards a little away to the east and west of the petitioners' plots. As a matter of fact, on the 27th July, 1977, the Corporation issued a notice (Annexure 7) fixing 2nd Aug., 1977 for consideration of this objection. Surprisingly enough on the very next day of issue of Annexure 7 and a few days earlier than the date fixed for hearing the objection, the impugned notice (Annexure 4) was issued on the 28th July, 1977, intimating the intention to declare the petitioners' private passage as a public street. It may be emphasised, as found by me, that the petitioners have exclusive right over the passage at all hours to prevent all other persons from using it as a passage to Boring Road, there being no other residence abutting the passage. It will not be out of place to mention here that from the sketch map of the locality filed by the petitioners, the correctness of which has not been challenged by the respondents, it appears that there is a separate road in the vicinity which serves as a means of access for the public to Boring Road. Moreover, it is also not without significance that although respondents Nos. 8 and 9 filed counter-affidavit, none appeared to oppose the writ application nor Mr. Basudeva Prasad relied upon any portion of their counter affidavit. In my concluded opinion, therefore, the Corporation has no jurisdiction

to issue the notice (Annexure 4), inasmuch as the basic condition for issue of a notice of the kind was completely lacking in the present case.

10. On a close reading of the provisions of Section 270 of the Act it is manifest that in respect of a street the Chief Executive Officer has to issue a notice indicating his intention to declare it a public street and to wait for a period of one month. If no valid objection is filed to such a notice, then alone he gets jurisdiction to declare the street in question as a public street vesting in the Corporation. It seems to be the scheme of the Act that such vesting of a street has to be made by the tacit consent of the owner or the majority of the owners of such a street and not otherwise. The section does not authorise the Chief Executive Officer, in case of objection filed within the statutory period, to declare the street as a public street. After a valid objection, he must stay his hands and the notice loses all its force. Had it not been so, then a remedy by way of appeal against the second notice declaring the street to be public street would have been also provided in the Act itself. It has not been contended by Mr. Prasad that there is any provision for appeal from such an order before the District Judge. It is, therefore, manifest that no power vests in the Corporation to declare a street as public street, once an objection to the earlier notice intimating such intention is filed by the owner or majority of owners is filed within the statutory period.

11. As a result of my above findings, the impugned notice (Annexure 4) must be held to be illegal, or at any rate, having lost its force after the objection filed by the petitioners and has to be quashed.

12. Coming to the notice dated the 30th July, 1977 (Annexure 8), it is apparent that it is an off-shoot of the first notice (Annexure 4) issued u/s 270 (2) of the Act. It is stated in Annexure 8 that petitioner No. 2 is contemplating construction of a garage, without permission on the passage which was sought to be declared as a public street which is illegal, and petitioner No. 2 has been asked to stop the construction of the aforesaid garage within his compound wall. This gave rise to a proceeding u/s, 144 of the Code of Criminal Procedure, which has been quashed and decided in favour of petitioner No. 2, as already mentioned above. In the counter-affidavit filed on behalf of respondent No. 3, it has been stated in para 7 that petitioner No. 2 obtained sanction for construction, of the garage from the Patna Regional Development Authority, which sanction was obtained mala fide immediately after the notice under Sections 237 and 242 (2) and (3) of the Act (Annexure 8) was served on the 30th July, 1977. Petitioner No. 2 in para 12 of his reply to this counter-affidavit has characterised this allegations as maliciously false and has asserted that he had applied for such sanction much earlier, which was granted on the 30th July, 1977. In this background, when Annexure 4 is being quashed, this notice (Annexure 8), which seems to be an off-shoot of Annexure 4, has lost its force. Mr. Basudeva Prasad has rightly not put forward any argument in support of this notice.

13. In the result, the writ application is allowed and Annexures 4 and 8 are quashed. In the circumstances of the case, there will be no order as to costs.

K.B.N. Singh, C.J.

I agree.