

**(1974) 05 PAT CK 0001**  
**In the Patna High Court**  
**Case No : A.F.A.D. No. 15 of 1969**

Kedarnath Sah and Others

APPELLANT

Vs

Narendra Prasad Shah and Others

RESPONDENT

**Date of Decision :** 17-05-1974

**Acts Referred:**

Bihar and Orissa Municipal Act, 1922 — Section 386(1), 62  
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, 91

**Citation :** AIR 1974 Patna 359

**Hon'ble Judges :** S.N.P. Singh, J;S.K. Jha, J

**Bench :** Division Bench

**Advocate :** Prem Lall, Jagannath Jha, M.P. Mishra and Bishwanath Agrawal, for the Appellant; J.C. Sinha, Anish Chandra Sinha and Sailesh Chandra Sinha, for the Respondent

**Final Decision :** Dismissed

## Judgement

Jha, J.—This is an appeal by the defendant second party against a judgment of reversal. The plaintiffs-respondents first party, five in number, instituted a suit purporting to sue in a representative capacity under the provisions of Order 1, Rule 8 of the CPC (hereinafter referred to as the Code") being members of the public of the Bhagalpur Municipality, as well as in their individual capacities. The main relief prayed for in the suit was a declaration to the effect that a sale deed dated the 23rd of March, 1961 executed by the Special Officer of the Bhagalpur Municipality which was at the relevant time superseded by the State Government under the provisions of the Bihar and Orissa Municipal Act, 1922 (hereinafter referred to as "the Act") was illegal, invalid and conferred no title on the appellants. The Bhagalpur Municipality was impleaded as defendant No. 1 and the Special Officer as defendant No. 2, they being respondents Nos. 6 and 7 to this appeal. The further prayer was for a permanent injunction restraining the appellants from making any structure and also for a mandatory injunction directing the appellants to remove the existing structure from the municipal land in question, namely, 634 sq. feet equivalent to 11 dhurs 10 dhurkis in a lane

commonly known as Anand Ausdhalaya Bye-Lane in Mohalla Khalifabagh, in Ward No. 4 of the Bhagalpur Municipality in the town of Bhagalpur. The averments made in paragraphs 4 and 5 of the plaint are to the effect that the aforesaid Anand Ausdhalaya Bye-Lane emanates from the main Anand Ausdhalaya Road and runs towards north in a circuitous way and terminates near the house of plaintiff No. 1. On either side of the Bye-lane there are houses abutting it without any space between those houses and the Bye-Lane. A small piece of open land which has been a part and parcel of the said Bye-Lane has been in use of the residents and house owners including the plaintiffs and the public in general and the said piece of open land is the only breathing space in a very densely populated area, where the incoming and outgoing vehicles can cross each other in the Bye-lane or the vehicles can stop for loading or unloading and other purposes for the use of the plaintiffs and others. The service of latrines and drains of the houses specially of plaintiffs Nos. 3 and 4 and others is being effected through the said open space and the rubbish and refuse and garbage of all the houses abutting the Bye-Lane are also collected on the aforesaid open space for clearance and carriage by the sanitation department of the Municipality. The said open space has been in use as a part of the road for the purposes of the public and also of the plaintiffs and other inhabitants of the aforesaid Bye-Lane since time immemorial and is still required for the aforesaid purposes. The further case of the plaintiffs-respondents first party was that the appellants-defendants second party formerly lived as a tenant in a house of plaintiff No. 3, which was later on purchased by one Radha Devi, who is not a party to the present proceedings. The aforesaid defendants had encroached upon a small portion of the said open space of the Bye-lane by erecting a tinshed and a "bhathi" (oven). Subsequently Radha Devi aforesaid evicted the appellants from the house and the Municipality took action against them under the provisions of Sections 196 and 198 of the Act for removal of the said encroachment from the municipal land, The appellants then bringing the municipal employees in their collusion prevailed upon the Special Officer of the Municipality to sell to them a Portion of the open land described above for a consideration of Rs. 1,725/-. The respondents first party-plaintiffs came to know of this clandestine transaction only on the 9th of May, 1961 when the appellants were making preparations for erecting a thatched house on the said open land of the Municipality. The respondents first party along with others protested with the result that the appellants could not get possession over the land. The land in dispute, it is asserted, is still needed by the Municipality for its use, and the public of the municipal area in general and the respondents first party in particular have, been greatly prejudiced and their valuable rights infringed by the illegal act of the Special Officer in purporting to sell the municipal land in favour of the appellants without any authority in law to do so.

2. The defence of the Municipality, the Special Officer as well as the appellants was that the land in question was a cul de sac and of no use to the Municipality and, therefore, the Special Officer sold it in favour of the appellants. The

additional defence of the appellants was that they were already in possession of the land in question for more than thirty years before the transaction of sale was entered into and that on account of such possession the land was sold to them.

3. It may be mentioned at the outset that the notices as contemplated by Order 1. Rule 8 of the Code were not issued and the trial proceeded, and both the courts below have decided the case on the footing of the suit having been filed by the plaintiffs-respondents first party in their own right. Indeed, it has not been disputed at the Bar that the provisions of Order 1, Rule 8 of the Code embody merely an enabling rule. This rule does not debar a member of a community from maintaining a suit in his own right even though the act complained of may also be injurious to the whole community. If, therefore, in any case of the present nature, the plaintiffs show that they have their own rights which have been infringed, then irrespective of the fact that they are members of the public and suffer along with them, the injury to themselves would be sufficient damage to entitle them to bring a suit in their own right.

4. The trial Court while dismissing the suit held that the Special Officer of the Bhagalpur Municipality was competent to sell the municipal land while the Municipality was in a state of supersession in view of the provisions of Section 386(1)(b) of the Act. It further held that the appellants case that they were already in possession for the past thirty years was not correct. The suit between the parties was treated as between private parties and on a further finding that the lane in question was of no utility to the Municipality, the plaintiffs' suit was dismissed. On appeal by the respondents first party the Lower Appellate Court held, inter alia, that the land in question was very much in use not only by the people of the locality, but also by outsiders. The persons on whose houses the lane abuts have the right to use every part of the lane. Having considered the entire evidence threadbare, the Lower Appellate Court also came to "the conclusion that the Municipality did require the disputed portion of the land. The court of appeal below further held that the Special Officer had no right to sell the municipal land in view of the specific provisions of Section 386(1)(c) of the Act which laid down that all property vested in the Commissioners shall, during the period of supersession, vest in the Government. The court of appeal below further held that the suggestion that even after the sale of the disputed portion enough width of the lane was still left for use was of no avail. On these findings the lower Appellate Court decreed the plaintiffs' suit.

5. Mr. Prem Lall, learned Counsel for the appellants urged the following points in support of this appeal:

(1) No notice under Order 1, Rule 8 of the Code having been issued and the suit having been contested as between private parties, special damage must be proved by the plaintiffs before a decree could be passed in their favour.

(2) The Municipality was the sole Judge to decide as to which land it required for its use and which it did not so require.

(3) The Special Officer having satisfied himself that the land in question was no longer of any use to the Municipality, he had rightly exercised his power to sell and that by virtue of the provisions of Section 386(1)(b) of the Act he was fully competent in law to sell the municipal land to the appellants.

6. I shall deal with the points urged on behalf of the appellants in the reverse order. Taking the last two points first, it has to be decided as to whether during the period of supersession of the Municipality, the Special Officer had the right to sell any municipal land or not, if he chose to decide that the land was no longer required for the purposes of the Municipality. Section 386 (1) of the Act reads as follows:

"386 (1) when an order of supersession has been passed under, the last preceding section, the following consequences shall ensue:-- (a) all the Commissioners shall, as from the date of the order, vacate their offices as such Commissioners;

(b) all the powers and duties which may, under the provisions of this or any other Act, be exercised and performed by the Commissioners, whether at a meeting or otherwise, shall, during the period of supersession, be exercised and performed by such person or persons as the State Government may direct;

(c) all property vested in such Commissioners shall, during the period of supersession, vest in the Government."

On the strength of Section 386(1)(b), it was argued that all the powers and duties which could be exercised or performed by the Commissioners, whether at a meeting or otherwise, could during the period of supersession be also exercised and performed by the Special Officer. It was further argued that Section 62 of the Act laid down that

"the Commissioners at a meeting may purchase or take on lease any land for the purposes of this Act, and may sell, lease, exchange or otherwise dispose of any land not required for such purposes or which has been acquired by them for the purpose of being leased".

It was contended that the Commissioners at a meeting had the requisite power to decide firstly that any land was "not required for such purposes", and secondly to dispose of such land by sale or otherwise. It was, therefore, submitted that u/s 386 (1) (b) of "the Act both these powers could in law be exercised by the Special Officer. These submissions, in my view, cannot stand the test of, scrutiny. This argument does not take into account the special feature of Section 386(1) (c) which specifically lays down that during the period of supersession all property vested in the Municipal Commissioners shall vest in the Government. Clause (b) of Sub-section (1) of Section 386 of the Act merely empowers the Special Officer to administer the municipal law during the period when the Municipality stands superseded. The administration of such Municipal law does not comprise within its ambit the power to divest the Municipality of any

Municipal property during the period of its supersession and it is for this specific purpose that the Legislature expressly laid down that all Municipal property shall remain vested in the Government during the period of supersession. There would be little sense in the specific provisions of Clause (c) of Sub-section (1) of Section 386 of the Act if it be presumed that the Special Officer was even empowered to transfer the municipal land, for then, the Legislature could very well have laid down that all Municipal property shall during the period of supersession vest in such person or persons as the State Government may direct, in clause (b) of Sub-section (1) of Section 386 of the Act itself. Any transfer of Municipal property by the Special Officer during the period of supersession must, in my view, be held to be void. I am fortified in my view by a decision of the Supreme Court in *Hitkarini Sabha, Jabalpur Vs. The Corporation of the City of Jabalpur and Others*, . That was a case where the powers of the Administrator u/s 57 of the Madhya Pradesh Municipalities Act (2 of 1922) were being considered.

Section 57(3)(b) and (c) of the Madhya Pradesh Act correspond respectively to the provisions of Section 386 (1) (b) and (c) of the Act in question. While dealing with a lease executed for thirty years by the Administrator under the Madhya Pradesh Municipalities Act, the Supreme Court held that the officer who executed the lease deed had no power to lease out the property in question and the grant of the lease was wholly null and void. The provisions of law of our Act and the Madhya Pradesh Act referred to above being in *pari materia*, it has to be held that the Special Officer in the instant case had no power to execute the impugned sale deed dated the 23rd of March, 1961. As a necessary corollary it follows that the powers vested in the Municipal Commissioners at a meeting u/s 62 of the Act to decide whether a particular piece of municipal land was required for municipal purposes or not could not also vest in the Special Officer. In this connection it is also worth while to notice a Bench decision of this Court in *District Board of Manbhum Vs. Bengal Nagpur Railway Co. and Another*, where dealing with the provisions of Section 73 of the Bihar and Orissa Local Self Government Act (3 of 1885) and the powers of the District Board thereunder it was held that a road side land is only under the control and administration of the District Board which hold it for the purpose of maintaining the road and cannot divert it for any other use by leasing it out for the purpose of putting up permanent structures thereon. The evidence discussed by the Lower Appellate Court on the basis of which it has come to the conclusion that the land in dispute was required by the Municipality is sufficient to sustain the finding. I may also state here that Mr. Sailesh Chandra Sinha, learned Counsel for the Municipality, after its supersession has terminated, has supported the finding of the Lower Appellate Court although at the trial and before the Lower Appellate Court while the Municipality was still under supersession, the Special Officer representing the Municipality had taken the stand that the land was no longer required for Municipal purposes. I see no justifiable reason to take a view different from that of the Lower Appellate Court.

7. Then remains the only question which was rather vehemently argued by learned Counsel for the appellants. Learned Counsel relying upon a Bench decision of this Court in *Smt. Chandrawati Devi and Others Vs. Rameshwar Kaviraj and Others*, urged that a distinction has to be made between a public road in which the public in general has a right of way and a quasi public road where the privilege is used by only one particular section of the community. In the earlier type of cases unless it is a suit in a representative capacity, special damage must be proved whereas in the latter type of cases, no such special damage need be proved. According to learned counsel, the present case is one in which the plaintiffs base their right in a public highway and as such in the absence of proof of special damage, their suit ought not to have been decreed. Before advertng to the features of the case referred to above, I may here indicate some well established principles of law about which there has been no serious controversy at the Bar. A person in the immediate neighbourhood and entitled to use a local public thoroughfare has a special cause of action, and that irrespective of whether he has proved special damage or not. The principle is that a person of an immediate community or section of the public who is deprived of the amenity provided for that particular section may be deemed to have suffered loss without proof of such loss. The case of *Dasrath Mahto and Others Vs. Narain Mahto and Others*, was a case of this nature where two eminent Judges of this Court Harries C.J. and Fazl Ali J. held that where the roadway in question passed the houses of the plaintiffs and the defendants, who proceeded to make certain constructions on their land and encroached upon the thoroughfare roughly, two-thirds of the highway so that the persons residing in the vicinity were compelled to use only a third of the width of the roadway, the inhabitants were entitled to seek the removal of the obstruction without proving special damage. The objection to the non-maintainability of the suit on account of its not having been framed under either Section 91 or Order 1, Rule 8 of the Code was negatived. To the same effect is the decision of this Court in the case of *Pahlad Maharaj and Others Vs. Gauri Dutt Marwari and Another*, . The case of *District Board of Manbhum Vs. Bengal Nagpur Railway Co. and Another*, may also be referred to in this connection for the proposition that the right of access to the highway at all points where a land adjoins the highway belongs not only to the owner of the land, but also to the occupier and the occupier can sue for removal of an obstruction interrupting his right of access to the highway. Even the fact that the owner or occupier of the adjacent land has fenced it off or raised a gateway on the other side cannot affect his right of access to the highway as aforesaid.

8. A case very much in point laying down a number of principles in this connection is that decided by the Supreme Court in the *Municipal Board, Manglaur Vs. Sri Mahadeoji Maharaj*, . That was a case under the Uttar Pradesh Municipalities Act. There was a metalled road running through a plot of land belonging to the plaintiff and on either side of the metalled road there was open space, on either side of which there was a municipal drain. The public had been

using the road for decades and the Municipality had been maintaining the road and the drains. The Municipality was seeking to erect a structure on the vacant site lying between the drains and the road. The plaintiff having brought a suit for permanent injunction against the Municipality restraining it from putting up the structure, the Supreme Court held that -- (1) inference of dedication of a highway to the public way may be drawn from a long user of the highway by the public; (2) the fact that only a part of the pathway is metalled does not necessarily limit the width of the pathway; (3) the Municipality has the exclusive right to maintain and control the surface of the soil and so much of the soil below and the space above the surface as is necessary to enable it to adequately maintain the street as a street. It has also certain property in the soil of the street which would enable it as owner to bring a possessory action against trespassers; (4) the Municipality could not put up the structures which it intended to erect on the vacant site for that was not necessary for the maintenance or user of the road as a public highway. It is true that in that case the plaintiff was also held to be the owner of the soil in general subject to the rights of the Municipality and the public to pass and repass on the highway, but the principles enunciated by their Lordships of the Supreme Court are equally applicable to the facts of the present case. In the instant case, the findings of the lower appellate court based on the evidence on record are that the plaintiffs have their houses abutting the Bye-Lane in question. They have been using the same for long time past and even the other members of the public used the same. The sale of the disputed portion of land substantially reduced the width of the path in front of the houses of the plaintiffs and that the fact that even after the sale of the disputed portion some width of the Bye-Lane was still left for use of the plaintiffs does not in law make any difference. In such circumstances, it must be held that the plaintiffs had succeeded in establishing their right apart from the rights that the public in general may have had in this public Bye-Lane, and that, as such, even if special damage need be proved, it had been so proved. The question therefore, raised by learned Counsel for the appellants remains academic in nature. Be that as it may, the case of Smt. Chandrawati Devi and Others Vs. Rameshwar Kaviraj and Others, strongly relied upon by learned Counsel may be referred to in this connection. In that case the plaintiffs were the Central Bank of India and its employees and one member of the public. Originally the plaintiffs had instituted that suit on behalf of the public under Order 1, Rule 8 of the Code as also in their individual capacities on the ground that they suffered special damages. After the decision of the trial court the Bank vacated the holding No. 94 where its office was situate at the time of the institution of the suit, namely, by the side of the Halliday Road in the town of Gaya and during the pendency of the appeal before the first appellate court the seventh plaintiff, who alone had originally joined as a member of the public as one of the plaintiffs filed a petition alleging that he had never felt any inconvenience on account of the settlement of the suit land with the defendants of that suit yet he had joined the Bank and its employees as a plaintiff under the pressure of the Manager of the Bank. The original defendant No. 1 of that suit, who had supported the original

plaintiff's case was subsequently transposed to the category of a plaintiff as plaintiff No. 8 by orders of the High Court. Taking into consideration the subsequent event which had happened since after the institution of the suit, namely, that the original plaintiffs had moved away from the area in question and had no special injury affecting the plaintiffs individually or damage peculiar to anyone of them this Court held that in the absence of proof of special damage the suit could not be decreed, as it was a case of allegation of encroachment upon a public road in the full sense of the term as distinguished from a quasi public road. The distinction was focussed by one of the learned Judges Ramratna Singh, J. in paragraph 21 of the judgment at page 431 where it was said that where the privilege to use a road is enjoyed only by one particular section of the community or by inhabitants of two or three villages and not by others, the road is not a public road. Such private ways generally have their origin in custom, but such ways can be converted into a public highway after user by the general public sufficient to raise the presumption of dedication. The contention which was negatived in that case was that irrespective of the fact whether a person of Gaya town lived by the side of the Halliday Road every person of the town would be deemed to suffer particular inconvenience justifying the inference of special damage. While overruling this argument, it was held that unless the plaintiffs prove that they had frequently to pass through the foot-path of which the suit land formed a part, they could not succeed without proving special damage. It will thus be seen that even on the authority of Smt. Chandrawati Devi and Others Vs. Rameshwar Kaviraj and Others, , the plaintiffs-respondents first party had sufficiently proved their special rights and the special injury caused to them apart from any injury that may be caused to the public of Bhagalpur Municipality in general.

9. The plaintiffs are all residents of the locality in which the Bye-Lane in question is situate, their houses all abut on the lane, and on the findings of the Lower Appellate Court they have been using the Bye-Lane in question since long time past. In such circumstances, even if the quasi public path-way was in course of time converted into a public road the presumption of lost grant or dedication is bound to arise on the facts of the instant case. The appellants having already been found to have obtained no title on the basis of the impugned deed of sale dated the 23rd of March, 1961, the suit of the respondents first party was rightly decreed by the court of appeal below.

10. For the aforesaid reasons, in my view, there is no merit in this appeal and the judgment and decree, passed by the lower appellate court are hereby affirmed and the appeal is dismissed with costs.

Singh. J.

11. I agree.