

(2009) 02 PAT CK 0131
In the Patna High Court
Case No : CWJC No. 14482 of 2008

Khawaja Shahid Jaan

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 13-02-2009

Acts Referred:

Bihar Municipal Act, 2007 — Section 2(83), 207, 232, 233, 235
Constitution of India, 1950 — Article 300A, 31(2)

Citation : (2009) 2 PLJR 578 : (2010) 8 RCR(Civil) 2705

Hon'ble Judges : Ramesh Kr. Datta, J

Bench : Single Bench

Advocate : Rajendra Prasad Singh, Rashid Izhar and Om Prakash, Ravindra Priyadarshi, for the Appellant; Shishir Kumar, for the Respondent

Final Decision : Allowed

Judgement

Ramesh Kr. Datta, J.

I.A. No. 6561 of 2008:

1. The interlocutory application has been filed for permitting the applicants to intervene as intervener respondents in the present writ petition. It is stated that all the three applicants have easementary right over the 10" wide passage with respect to which the present dispute relates. In the aforesaid circumstances, the prayer for intervention is allowed. I.A. No. 6561 of 2008 is, accordingly, disposed of.

2. Heard learned counsel for the petitioner, learned counsel for Gaya Municipal Corporation, learned counsel for the interveners and learned counsel for the State.

3. The petitioner seeks quashing of a part of the Advertisement dated 7.5.2008 published in the "Hindustan" daily Hindi Newspaper by the Gaya Municipal Corporation in Item No. 24, by which the tender has been invited for construction of pucca road on the private passage (lane) of the petitioner and for

consequential reliefs.

4. The petitioner filed the writ application in his personal capacity as well as in the representative capacity on behalf of shareholders of the family of the petitioner who, according to him, hold title and possession over the land falling in the portion of Plot No. 13322 of the Cadestral Survey. The said land is said to have belonged to Sir Khwaja Mohammad Noor, who had purchased the same in the year 1919 by registered sale deed. Subsequently, there was a partition, etc. with respect to the said land among family members. From time to time certain plots of the said land were sold to other private persons and in the said sale deeds 10" wide passage (lane) in the campus of the petitioner's land was left for the ingress and egress of the purchasers, who were declared to have the right of easement over the said 10" wide passage. The case of the petitioner is that suddenly the authorities of the Gaya Municipal Corporation have published the aforesaid advertisement dated 7.5.2008, which has been done without any notice to the petitioner or any family members of the petitioner who have absolute right over Plot No. 1460/13322 (old). The petitioner objected to the advertisement by filing an application before the respondent-Municipal Corporation stating that the petitioner has confirmed title over the land but no action was taken on his application by the Municipal Corporation. However, when subsequently the materials were downloaded for the construction work, the petitioner approached this Court.

5. Learned counsel for the petitioner submits that the 10" wide passage in question is the private lane of the petitioner with only easementary right so far as the purchasers are concerned, but the same cannot be treated by the Corporation as a public street for the purpose of making any construction thereon. It is submitted that if they intend to declare the same as a public street, then they will have to comply with the provisions of Section 207 of the Bihar Municipal Act, 2007. In this respect, learned counsel for the petitioner refers to Section 240(2) of the Act, which provides as follows:-

"240(2). The Chief Municipal Officer may, at any time, by a notice fixed up in any street or part thereof, not maintainable by the Municipality, but which has already been levelled, paved, metalled, flagged, channeled, drained, sewerred, conserved and lighted to his satisfaction, give intimation of his intention to declare such street or part thereof to be a public street, and unless within thirty days of such notice, the owner or anyone of the several owners of such street or such part of a street, lodges objection thereto at the office of the Municipality, the Chief Municipal Officer may, by notice, in writing, put up in such street or part thereof, declare such street or part thereof, as the case may be, to be a public street vested in the Municipality."

6. It is contended that unless all the owners agree to the declaration of private street as a public street, it is not open to any Municipal body to declare the same as a public street in view of the above provisions. Learned counsel also refers to Sections 235 and 236 of the Act which are quoted below:-

"235. Minimum width of new public street.-No new public street made, or declared as such, under this chapter, shall be less than ten meters in width including the footpath: provided that such width may be reduced by the Municipality in the case of a class "C" municipal area or a transitional area, for reasons to be recorded in writing, but the width shall in no case be less than six meters.

236. Acquisition of lands and buildings for public streets, public parking places and transportation terminals.- (1) The Municipality may, subject to the other provisions of this Act, require to be acquired:-

(a) any land together with structure including building, if any, standing thereon for the purpose of opening, widening, extending or otherwise improving any public street, parking or transportation terminal, square, park or garden or of making a new one or for enforcing the regular line of street,

(b) in relation to any land or any structure including building as aforesaid, such land or structure including building as the Municipality may think expedient, outside the regular line or projected regular line of the public street as aforesaid, and

(c) any land for the purpose of laying out, or making, a public parking place.

(2) Where any land or structure including building is required to be acquired under sub-section (1) and the Municipality is satisfied that the remaining portion of the land will not be suitable or fit for any beneficial use to the owner, it shall, at the request of the owner, proceed for the acquisition, in addition, of such remaining portion of the land which shall, on acquisition, vested in the Municipality.

(3) Where any land or structure including building is required to be acquired under sub-section (1) or subsection (2), the procedure for such acquisition as provided in this Act shall apply."

7. It is submitted by learned counsel on the basis of the above provisions that within a Municipal Corporation area a new street can be only made or declared not less than ten meters in width including the footpath. It is urged that the present private passage being only 10" wide can in no way be declared as public street and even if the Municipal Corporation proceeds with making the same a public street it will have to acquire the land for the said purpose and without going for acquisition it would not be open to the Municipal authority to treat the same as public street against the wishes of the petitioner in view of the clear provisions of Section 240(2) of the Act.

8. It is, thus, submitted by learned counsel that the right of any public body, whether Municipal or otherwise, to interfere with private property is circumscribed by the mandate of Article 300A of the Constitution of India under which no private property can be acquired except according to procedure established by law. For the said reasons, learned counsel contends that the

action of the Gaya Municipal Corporation is contrary to the Constitutional mandate and the provisions of the Bihar Municipal Act, 2007.

9. In support of the aforesaid proposition, learned counsel for the petitioner relies upon a decision of a Division Bench of this Court in the case of Dr. (Mrs.) Shakuntala Singh and Another Vs. State of Bihar and Others, where dealing with the provisions of Section 270(2) of the earlier Patna Municipal Corporation Act, which is similar to the provisions of Section 240(2) of the present Act, this Court in paragraph No. 7 held as follows:-

"7. It is in this background that the question of conversion of a street into a public street, as envisaged under S. 270, needs to be examined. Under sub-s. (1) of S. 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 Ss. 266 to 269 and converted as such, can be declared, on his offer, as a "public street" by the Corporation. Sub-ss. (2) and (3) of S. 270, which are relevant in this case, may be usefully quoted:-

"(2) The Chief Executive Officer may, at anytime, 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-ss. (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 Art. 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 under 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, under Sec. 73 of the Act acquisition of an immoveable property can be made by the Corporation by agreement or by acquisition under 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".

10. Learned counsel for the Gaya Municipal Corporation, on the other hand, relying upon the statements made in the counter affidavit of the Corporation, submits that the passage in question is now being used by a large number of persons other than the petitioner, who are residing in the Mohalla and the 10" wide lane is the only way for the residents of that area and the passage in question is now being used by the public at large and the petitioner has lost his exclusive right and the passage has assumed characteristic of public street. It is further submitted that the petitioner and his family have lost their title after conferring the right to the purchasers to use the passage for ingress and egress in their house. It is further submitted that Masjid, Madarsa and Majar are constructed over the land of late Bibi Anishul Fatima and children of the locality used to go through that 10 feet passage to attend their classes in the said Madarsa and people of the locality used to go in the said Masjid for Ibadat by the said road. Reference is also made to an order dated 2.12.1981 passed by the Executive Officer of the Gaya Municipal Board with respect to the said 10" wide passage, but learned counsel for the Gaya Municipal Corporation fairly admitted, in view of the stand taken in reply to the counter affidavit, that the said matter did not relate to the present passage claimed by the petitioner as private passage.

11. Learned counsel relies upon the provisions of Sections 45, 232 and 233 and Section 2(83) of the Act, which provides for core Municipal functions as also in relation to public street and definition of public street. Particularly, he relies upon the definition of public street which has been defined to mean any street, road, lane, gully, alley, passage, pathway, square or courtyard, whether a thoroughfare or not, over which the public have a right of way.

12. It is submitted on the basis of the above, i.e., the duty and function of the Municipal Corporation to see that the road being used by the members of the public is maintained in a proper manner, that the Gaya Municipal Corporation was only performing its duty with respect to the said passage of land which has now acquired the nature of a public street in view of the aforesaid provisions of the Act.

13. Learned counsel for the intervener has also made a submission on the line of

what has been argued by learned counsel for the Gaya Municipal Corporation.

14. On a consideration of the aforesaid submissions, this Court finds sufficient force in the submission of learned counsel for the petitioner. From the materials on the record, it is evident that the 10" wide passage in question is a private land of the petitioner and members of his family over which the right of easement for ingress and egress was created in favour of those persons who had been sold various plots of land adjoining the said 10" passage. The creation of the right of easement in favour of the said 8-10 purchasers cannot lead to the conclusion that the right of property of the petitioner over the said private land ceased to exist and it became a public street. The same is not borne out from the provisions of the Bihar Municipal Act, 2007 which are similar to the provisions of the earlier Patna Municipal Corporation Act, which has been repealed by it. A Division Bench of this Court on examination of erstwhile provisions has clearly held that the Act (Patna Municipal Corporation Act) does not empower the Corporation to take somebody else's property by any other method than by his consent, either express or implied and the same can be declared or made a public street either by the consent of the owner of the property or by acquisition of the same u/s 74 of the previous Act which corresponds to Section 236 of the present Act. It was also held therein that any other interpretation of the provisions of the earlier enactment would amount to acquisition of the property of individual without payment of any compensation and thus would be violative of Article 31(2), now Article 300A, of the Constitution. The said ratio decided by this Court applies with full force in the present matter. In the light of the above discussions, the writ application is allowed. The Advertisement dated 7.5.2008 with respect to Item No. 24 (Annexure-4) is, accordingly, quashed and the authorities of the Gaya Municipal Corporation are restrained from interfering with the said passage of the petitioner except in accordance with law.