
(2016) 02 PAT CK 0020

In the Patna High Court

Case No : Civil Writ Jurisdiction Case Nos. 4514 and 8341 of 2013

Rakesh Kumar Sharma and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 12-02-2016

Acts Referred:

Bihar Ancient Monument and Archaeological Sites Remains and Art Treasures Act, 1976
— Section 12, Section 18, Section 19, Section 2, Section 21, Section 21(1), Section 24, Section 25, Section 3, Section 3(1), Section 3(3), Section 4
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Citation : (2016) 02 PAT CK 0020

Hon'ble Judges : Kishore Kumar Mandal, J.

Bench : Single Bench

Advocate : Siya Ram Shahi, Manish Dhari Singh and Anil Kumar Singh, for the Appellant; Kinkar Kumar, S.C.-27, for the Respondent

Final Decision : Dismissed

Judgement

Kishore Kumar Mandal, J.—1. Both the writ applications have been heard together with the consent of the parties as they involve common questions of law and identical/similar facts. The order present shall govern them. Relevant facts for resolution of the dispute shall be drawn from C.W.J.C. No. 4514 of 2013.

2. I have heard both the counsels appearing for the petitioners and Mr. Kinkar Kumar, the Counsel for the respondent State.

3. Centre of the dispute is the declaration of Tekari Qila (9 Aana) in the district of Gaya and the surrounding areas thereto as ancient monument, archaeological site and remains to be a protected area in exercise of the power under Section 3(3) of Bihar Ancient Monuments and Archaeological Site, Remains and Art Treasure Act, 1976 (for short "the Act") enacted by the State Government to provide for preservation of ancient monument and archaeological sites and remains. Vide notification dated 23.02.2011 (Annexure-1), the State Government in the Department of Art, Culture and Youth in consideration of the

notification issued under Section 3(1) of the Act declared the Qila as the protected site or area. The petitioner claims owner(s) of the land detailed in paragraph 4 of the application which is also notified under Annexure-1 as the protected site/area. The respondents, it is contended, arbitrarily or illegally included the land of the petitioner which surround the Qila (protected monument) or archaeological site without taking any proceeding to acquire them in accordance with the Land Acquisition Act. It is a mala fide and/or arbitrarily action of the State.

4. Mr. Shahi who advanced the leading submissions on behalf of the petitioner(s) contends that Section 19 of the Act provides for acquisition of the land/area in terms of Land Acquisition Act, 1894 in public interest and to pay compensation to the land owners like the petitioners. No such acquisition of his land was made after paying adequate compensation therefor. The action is demonstrably arbitrary as the notification under Section 3(1) of the Act was issued in October, 1993 whereas the order/notification declaring the Qila and the surrounding areas as protected monument or archaeological site was passed on 23.02.2011. A grievance was raised in this regard before this Court in C.W.J.C. No. 20888 of 2012. Vide order dated 07.11.2012 (Annexure-3), the same was disposed of permitting the petitioner to raise the grievance before the Director, Art, Culture and Youth Department (Archaeological Directorate) of the Government of Bihar for exclusion of the land of the petitioner(s). A representation was filed by the petitioner on 03.12.2012 (Annexure-4) which was considered and disposed of by the respondent Director vide order dated 18.02.2013 (Annexure-5) stating as under:--

5. Since, only a limited right of the use of the land was allowed under the impugned communication, the present writ petition has been filed. He would reiterate that no such curtailed right of the use of the land of the petitioner can be ordered or passed without acquiring the land in accordance with law. Grant of such limited right to use the land would amount to infringement/breach of the constitutional right of the petitioner(s) enshrined under Article 300A of the Constitution of India.

6. The State Counsel, in contra, supported the notification (Annexure-1) as also the order contained in Annexure-5. It is submitted that the orders have been passed within the bounds of the Act. If that be the case then the petitioner cannot legitimately raise a grievance of breach of his constitutional right.

7. Rival contentions of the parties shall be examined in the light of the provisions of the Act. Section 2 of the Act while defining ancient monument provides in 2(iii) thereof the portion of land adjoining such site which may necessary or required for the preservation, protection, upkeep and maintenance of the same. If in the opinion of the government any ancient monument and archaeological site including remains thereof require protection of the State then a declaration to that effect can be made in terms of Section 3 of the Act. A general notice under Section 3(1) of the Act is to be issued to all persons concerned and copy whereof

is required to be affixed at conspicuous places near the site/monument as the case may be. Any person interested can file objection to such declaration within two months thereof. The State Government under Section 3(3) of the Act on considering the objections, if any, received, declare by notification in the Official Gazette the ancient monument or the archaeological sites and remains as a protected monument or protected area. On such declaration, the government may with the sanction of the State Government either purchase or take a lease of area, accept a gift or bequest of any protected monument.

8. Section 12 of the Act provides as under:--

"Acquisition of protected monument - If the State Government apprehends that a protected monument is in danger of being destroyed, injured, misused or allowed to fall into decay, it may acquire the protected monument under the provisions of the Land Acquisition Act, 1894 (I of 1894), as if the maintenance of the protected monument were a public purpose within the meaning of that Act."

9. Sections 18 and 19 of the Act provide thus:

"18. Restrictions on enjoyment of property rights in protected area.--(1) No person, including the owner or occupier of a protected area, shall construct any building within protected area or carry on any mining, quarrying, excavating, blasting or any operation of a like nature in such area, or utilize such area or any part thereof in any other manner without the permission of the State Government:

Provided that nothing in this sub-section shall be deemed to prohibit the use of any such area or part thereof for the purpose of cultivation in such cultivation does not involve the digging of more than one foot of soil from the surface.

(2) The State Government may, by order, direct that any building constructed by any person within a protected area in contravention of the provisions of sub-section (1) shall be removed within a specified period and, if the person refuses or fails to comply with the order, the Director may cause the building to be removed and the person shall be liable to pay the cost of such removal.

19. Power to acquire a protected area.--If in the opinion of the State Government any protected area contains an ancient monument or antiquities, it may acquire such area under the provisions of the Land Acquisition act, 1894 (1 of 1894) in the interest of public purposes."

10. Section 25 of the Act may have some relevance although not referred or relied by the parties which is as under:--

"25. Acquisition of antiquities by State Government.--(1) If the State Government apprehends that any antiquity mentioned in a notification issued under sub-section(1) of section 24, is in danger of being destroyed, removed, injured, misused or allowed to fall into decay or is of opinion that, by reason of its historical or archaeological importance, it is desirable to preserve such

antiquity in a public place, the State Government may make an order for the compulsory acquisition of such antiquity and the Director shall thereupon give notice to the owner of the antiquity to be acquired.

(2) Where a notice of compulsory acquisition is issued under sub-section (1) in respect of any antiquity, such antiquity shall vest in the State Government with effect from the date of the notice.

(3) The power of compulsory acquisition given by this section shall not extend to any image or symbol actually used for bona fide religious observances."

11. I would first deal with the contention of the petitioner that owing to delay in notifying the orders under Section 3(3) of the Act, the same has become bad in law. Merely, delay in doing so ipso facto shall not render the notification bad in law. There may be diverse reasons for such delay. The State acts through various hands. The Court is unable to find much force in the submission as nothing has been submitted or shown that the notification of the respondent State challenged in the writ petition was issued with any mala fide intention and/or contrary to the provisions of the Act. On the contrary, the presumption in law is that the State acts according to law and for public interest.

12. It has been vehemently argued by the petitioner that the rights of the petitioner to hold and use his land has been curtailed by the respondents without any authority of law. Much reliance is placed on Article 300A of the Constitution of India which reads thus:--

"300A. Persons not to be deprived of property save by authority of law:-- No person shall be deprived of his property save by authority of law"

13. The provision noted above is clear and unambiguous. The State is entitled to clamp conditions or deprive the right to hold property but only in accordance with law. Even if such restrictions on the right to use of the property are to be enforced, the same must find source rooted in law. I have noticed in detail the relevant provisions of the Act which empowers the State to impose the condition of restricted use of the land. The purpose is more than obvious. It is for preservation of ancient monument and archaeological sites and remains. Ancient monuments includes the portion of the land adjoining to such site which may be necessary or required for the preservation, protection, upkeep and maintenance of the same. It is germane to mention here that the virus of the Act is not under challenge. The relevant provisions contained therein and noted above provide for restriction on the enjoyment of property right in the protected area. In the context of provisions contained in Sections 4 and 19, it has been submitted that the word "may" appearing in those provisions should be construed to mean as "shall". In other words, if the ancient monument and the archaeological sites and remains including the portion of the land adjoining such site is/are required to be declared as protected sites then the State Government should necessarily acquire the land under the Land Acquisition Act in the interest of public purpose(s). The petitioner shall have no objection if his land included in the

notification is acquired and fair compensation is paid.

14. In rebuttal, the Counsel for the State has submitted that various options to the State, in this regard, have been provided in the Act. In that context, the word "may" appearing in those provisions cannot be construed to mean "shall".

15. The petitioner in order to solidify his submission on this score has relied on *D.K. Basu versus State of West Bengal*, (2015) 8 SCC 744. The Apex Court in the said case dealt with the provisions of the State Human Rights Commission contained in the Protection of Human Rights Act, 1993. While examining the provisions contained in Section 21(1) thereof, the Court noted that the Parliament used the word "may" in sub-section (1) of Section 21 which provide for the setting up of State Human Rights Commission whereas, in contrast, the word "shall" in sub-section 3(1) is used which provide for the constitution of a National Commission. The contention of the defaulting States that while a National Human Rights Commission is mandatory, the State Commission is not, was negated. Interpreting diverse provisions of the Act, it was held that the use of the word in the context of the Act is not by itself a determinative of the principal nature of power or obligation conferred or created under a provision. The well established principles of interpretation was adumbrated that the use of the word "may" does not always mean that the authority under which the power is vested may or may not exercise that power. This would depend upon the object and purpose of the enactment under which the said power is conferred as also related provisions made in the enactment. In the context of the present Act, Section 4 provides for the acquisition of right in a protected monument. The Director may with the sanction of the State Government purchase or take a lease of or accept a gift or bequest of any protected monument. Under sub-section 16(a) thereof, it has been provided that the Director with the sanction of the State Government may where rights have been acquired by the Director in respect of any monument by virtue of any sale, lease, gift or will, relinquish, by notification in the official gazette, the rights so acquired to the person who would for the first time the owner of the monument if such rights had not been acquired. Keeping these provisions in mind, I shall notice the provisions contained in Section 19 of the Act on which the petitioner placed reliance to contend that the word "may" appearing in the said provision shall mean "shall". The Court while analyzing such submission shall keep in mind the purpose of the conferment of the power upon the authority, the context in which such power has been conferred as also the circumstances in which it is meant to be exercised. Section 12 of the Act provides that if the State Government apprehends that a protected monument is in danger of being destroyed, injured or misused or allowed to fall in decay, it may acquire the protected monument under the provisions of the Land Acquisition Act. Different modes of acquisition(s) have been set out in Section 4 such as purchase or taking on lease or accepting the gift or bequest of any protected monument. Having regard to these provisions in the Act as noted and discussed above, the Court is unable to agree with the contention that they compel mandatorily for such a construction. Accepted rule

of interpretation shall also not sustain such interpretation of the word "may" in Section 19 of the Act. The contention of the petitioner is held not sustainable in law.

16. The above conclusions of the Court on the points/issues raised having been answered against the petitioner, the writ application is bound to fail. I order accordingly.

17. No order as to cost(s).