(1968) 02 CAL CK 0024

In the Calcutta High Court

Case No : Civil Rule No. 478 (W) of 1964

Rash Behari Dass APPELLANT

Vs

State of West Bengal RESPONDENT

Date of Decision : 28-02-1968

Acts Referred:

Bengal Municipal Act, 1932 — Section 105, 108(1), 221, 94, 95
Constitution of India, 1950 — Article 226, 31, 31(2)
Land Acquisition Act, 1894 — Section 4, 50(1), 5A, 6

Citation : (1969) 2 ILR (Cal) 634

Hon'ble Judges : D. Basu, J

Bench : Single Bench

Advocate : Ranjit Kr. Banerjee and Bidyut Kr. Banerjee, for the Appellant;C.C. Ganguli, Bratendra Narayan Banerjee, Maulisri Mukherjee and Bibhuti Bhasan Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

D. Basu, J.—This is directed against the Notification No. 17796 of November 15, 1961, issued u/s 4 of the Land Acquisition Act, 1894, (hereinafter referred to as ''the Act'') regarding C.S. plot 404, Chandernagore, which is at annEx. D to the petition.

2. The Petitioner''s case is that the acquisition proceedings are ultra vires and colourable having been initiated at the instance of one Manindranath who failed to purchase the disputed land from the vendor of the Petitioners while the Petitioners succeeded. Manindranath approached the Municipal Corporation of Chander nagore (hereinafter referred to as ''the Corporation'') with the proposal that he would convey the land to the Corporation for the creation of a municipal park and play-ground if the Corporation moved the Government for compulsorily acquiring the disputed land at the cost of Manindranath, who offered to pay Rs. 50,000 as the compensation money required for such acquisition, and the Corporation accepted this proposal by their resolution of August 25, 1959. The

State Government, however, refused to move for the acquisition of the land at the instance of a private individual and, consequently, it was agreed between Manindranath and the Corporation (agreement dated May 19, 1960, at annEx. B) that Manindranath would donate to the Corporation the sum of Rs. 50,000 for the purpose of creating the public park as aforesaid and to name the park after some relation of Manindranath and that, in pursuance of this agreement, the Corporation would move the Government for acquiring the disputed land which was specified in the agreement.

3. In pursuance of the said agreement, the Corporation passed the resolution of annEx. C dated May 23, 1960, by which the Corporation agreed to offer the compensation money from the Corporation fund in pursuance of the agreement with Manindranath previously entered into to the effect that he would donate Rs. 50,000 for the purpose. The Corporation then submitted its proposal for acquiring the land, to the Collector of Hooghly, who had been previously consulted, and it is in pursuance of that resolution that the impugned notification u/s 4 of the Land Acquisition Act has been issued.

4. After the publication of the impugned notification, the Petitioner filed an objection u/s 5A of the Act on December 26), 1961, (annex. E) stating, inter alia, that they intended to construct a, building on the said land and that their application to the Corporation in this behalf had already been sanctioned on January 18,1961, that the machinery of compulsory acquisition had been set in motion at the instance of a private individual named Manindranath and that the interests of his family estate had been reserved in various respects in the agreement between him and the Corporation, that there was already a park near about the disputed land, and that an alternative vacant site was available for the purpose if it was intended to be purchased.

5. The Petitioners further aver that in spite'' of reminders the proceeding u/s 5A of the Act has not been concluded but, on the other hand, by a letter of December 30, 1963, (annex. F) the Collector directed the Petitioners to be present on the land on January 6, 1964, when measurement of the structures already existing on the disputed land was proposed to be taken. The Petitioners came to Court on April 21, 1964, challenging the acquisition proceedings as mala fide and complaining that no fair consideration of the Petitioner''s objection u/s 5A was possible in view of the terms and conditions of the agreement between the Corporation and Manindranath on the basis of which the acquisition proceedings have been started.

6. Separate affidavits-in-opposition have been filed by (a) Respondents 1-3, the State of West Bengal and its officers and (b) Respondent 4, the Administrator of the Corporation.

7. Before entering into the merits of the grounds urged by the Petitioners, it would be necessary to dispose of the preliminary objection raised on behalf of the Respondents. That objection, as raised in paras. 14 and 15 of the counter-

affidavit of Respondents 4, is self contradictory. In para. 14 it is contended that the petition should be rejected on the ground of delay inasmuch as the Petitioners have come to Court in 1964 to challenge a notification of 1961 while in para. 15 of the counter-affidavit it is urged that the petition is premature inasmuch as the proceeding u/s 5A before the Collector in which the Petitioners have raised the identical points has not yet been -disposed of.

8. Apart from that it is curious to find that though the statutory Administrator of the Municipality was maintaining on January 15,1965, that the objection u/s 5A had not yet been disposed of, agreeing with the Petitioners on that point, the Land Acquisition Officer of Hooghly, who filed the affidavit on behalf of Respondents Nos. 1-3, on January 12,1965, states that it was he who bad inspected the land and submitted his report to the Additional Collector who disposed of the objection u/s 5A on November 11, 1963, rejecting the objection u/s 5A. The said report of the Collector has not been annexed to the counter-affidavit and from the averments in the affidavit of the Land Acquisition Officer, it is abundantly clear that the order of the Additional Collector referred to was passed in camera and there is nothing to show that it was ever communicated to the Petitioners. It is also striking that while it is alleged that the Collector''s report to the State Government was submitted as early as November 1963, the State Government had not yet passed its order when the Petitioners came to Court, and even by the time the counter-affidavit was filed.

9. The question of delay cannot patently arise when the objection proceedings u/s 5A against the impugned notification u/s 4 have not yet been disposed of by the State Government whose decision only is final under the Statute. Nor can the petition be thrown out as premature on the ground that the proceedings u/s 5A has not been concluded. The reason is that exhaustion of statutory remedy is not a bar to the jurisdiction of the Court under Article 226 particularly where the jurisdiction of the statutory authority to exercise the statutory powers (in the present case, the power conferred by Section 4 of the Act) is questioned. The preliminary objections are therefore overruled.

10. It has been held in various pre-Constitution cases that the various statutory provisions for compulsory acquisition of private lands must be strictly complied with in order to give validity to the acquisition proceedings, e.g. Rameswar v. Secretary of State (H907) ILR 34 Cat. 470 (480-1), In Re: Manickchand AIR 1921 Cal. 916 and Ponnaia alias Arulanandudayan and Others Vs. The Right Hon''ble the Secretary of State for India in Council, . This principle applies with greater force when it has been enshrined in the Constitution in Clauses (1) and (2) of Article 31. Whether for a simple deprivation or for compulsory acquisition, it is laid down by Clauses (1) and (2) of Article 31 that it can be effected only by the authority of law. This constitutional protection would be rendered useless or would pay only lip service to the requirements imposed by the relevant law if the statutory provisions are used for a colourable purpose.

11. The doctrine against a colourable use, which extends to the exercise of any

statutory powers, was applied by the Privy Council long ago to the case of a compulsory acquisition under the Land Acquisition Act to hold that the provisions of the Statute cannot be allowed to serve as a cloak of attempting to obtain a transfer of an indefeasible title under the guise of a public purpose? Luchmeswar v. Darbhanga Municipality (1890) ILR 18 Cal. 99 P.C.?and has been followed in numerous decisions [e.g. Ponnaiah v. Secretary of State (Supra)] and has found support from the Supreme Court in Valjibhai Muljibhai Soneji and Another Vs. The State of Bombay (Now Gujarat) and Others, ; Barkya v. State of Bombay (1961) 1 S.C.R. 128 and Shyamlal Vs. State of Uttar Pradesh, .

12. The relevant provision in the Land Acquisition Act, 1894, under which the machinery set up by that Act, can be resorted to by a local authority is Section 50(1), which says:

Where the provisions of this Act are put in force for the purpose of acquiring land at the cost of any fund controlled or managed by a local authority...the charges of and incidental to such acquisition shall be defrayed from or by such fund?.

13. There is further the overall condition laid down in Section 4 of the Act as well as in Article 31(2) of the Constitution that the acquisition is sought to be made for a public purpose and a municipal purpose is a public purpose, provided, of course, the. move on the part of the Municipality is intra vires, that is to say, is authorised by and is within the scope of the Statute governing the powers of the Municipality: Arrmlya v. Corporation of Calcutta AIR 1922 P.C. 333. The reason is that the Municipality, being a statutory authority, can exercise its powers only for a purpose which is authorised by the Statute: Monilal v. Improvement Trust (1917) 22 C.W.N 1, In re Manickchand and Hemabai v. Secretary of State (1914) 19 C.W.N. 305.

14. Since there has been no declaration by the State Government as yet u/s 6 of the Act in the instant case, it is open to the Petitioners to show that not only has the move been made by'' the Municipality in the absence of a public purpose but also that the power to acquire for a public purpose has been colourably used by the Municipality at whose instance the acquisition proceedings have been admittedly initiated. But before adverting to the application of the doctrine against colourable use to the facts of the instant case, let us inquire if the statutory requirements for acquiring the disputed land by the Municipality have been prima facie complied with.

15. Section 98 of the Bengal Municipal Act, 1932, (hereinafter) referred to as ''the Municipal Act'') says:

98 (1) When any land?is required (a) for the purpose of this Act...the State Government may at the request of the Commissioners at a meeting, proceed to acquire it under the provisions of the Land Acquisition Act, 1894.

(2) Before requesting the State Government to acquire land for the purpose referred to in Clause (b) of Sub-section (1), the Commissioners shall obtain

previous sanction of the State Government and give due notice of their intention and an opportunity to any objector, who appears within such period as they may fix, to be heard in this connection.

(3) On payment by the Commissioners, of the. compensation awarded under the Land Acquisition Act...the land shall vest in the Commissioners.

(4) The Commissioners shall be bound to pay to the State Government the Cost...referred to in the Sub-section (3), of any land acquired for the Commissioners on their application under the provisions of Sub-section (1).

16. My attention has also been drawn to the provision in Section 221(a) of the Act:

The Commissioners in pursuance of a decision arrived at a meeting may?

(a) Lay out and make new streets, squares and gardens.

17. The resultant of the foregoing statutory provisions is that in order to validate a proceeding for acquisition of land for the creation of a park?

(a) There must be a decision of the Commissioners assembled at a meeting to make a new square and further that land is required to be acquired for this purpose.

(b) After this decision is made the Commissioners must obtain the previous sanction of the State, Government to acquire land for the purpose.

(c) The Commissioners shall then give notice of such intention and an opportunity to any person to submit objections to such proposal within the time specified in the notice.

(d) The Commissioners must hear the objections.

(e) The Commissioners, if they overrule the objections, shall then assemble at another meeting to request the Government to proceed to acquire the land under the Land Acquisition Act.

(f) The compensation for the acquisition must be paid out of the Municipal funds.

(g) Upon the payment of such compensation the land shall vest in the Commissioners.

18. Let us now examine each one of these elements with reference to the facts of this case:

(a) It is to be noted that the machinery of a compulsory acquisition of private land is vested on the doctrine of Eminent Domain under which the Sovereign has an overriding power to expropriate the private title for a public purpose. A decision that this is a public purpose and that it is necessary to acquire a land for that purpose by using the machinery of compulsory acquisition is thus necessary to initiate the proceedings. Since, in the instant case, the public purpose alleged is the purpose of the Municipality such initial decision must be made by the Municipality as required by the foregoing statutory provisions.

19. This decision is two-fold, namely-

(i) that a new park is needed by the Municipality to carry out the purpose of the Act;

(ii) that a land has to be acquired compulsorily to fulfill that need.

20. It has been rightly contended by Mr. Ghosh on behalf of the Petitioners that neither of the preceding conditions has been fulfilled in the instant case:

(i) The averment in para. 12 of the petition that there is an existing park close to the disputed site is not effectively rebutted by either of the counter-affidavits. In this situation, the need for a decision by the Municipal Commissioners to have an additional park at the disputed site is all the more necessary before expropriating a private owner.

But, as is evident from annEx. A, the proceedings were not initiated by any such decision on the part of the Commissioners. The earliest move was from Manindranath, who wrote a letter to the Corporation on August 19, 1958, stating that he. would acquire the disputed land and hand it over to the Corporation if the Corporation agreed to set up a public park on that land subject to his conditions. There was thus no initial decision of the Commissioners to have a new park ; agreeing to the proposal of Manindranath was no decision to hold that a new park was needed for the purpose of the Corporation under the Act.

(ii) Nor was the decision to acquire the disputed land coming from the Corporation. The Commissioners did not at all consider the questions whether the need for an additional park, if any, could be fulfilled by using the vacant lands already at the disposal of the Corporation or whether any other alternative land was suitable for the purpose. Manindranath proposed that he would acquire the disputed plot, in particular, at his cost, and hand it over to the Corporation. To assent to this proposal which might have been felt to be innocuous to the Corporation was altogether different from considering the need for acquiring the disputed land, and not any other, by using the machinery for compulsory acquisition as distinguished from a private treaty. It is abundantly clear from the recitals in annexes. A and C that the proposal that the Corporation would initiate a proceeding for acquisition, took place only subsequently, simply because the proposal of Manindranath was not acceptable to the Collector of Hooghly, and the preamble to annEx. B states that the Corporation has agreed to take necessary steps for acquisition because of the request of the said donor Manindranath. This is not a decision contemplated by Sections 98(l)(a) and 221(a) of the Municipal Act.

(b-d) Sub-section (2)- of Section 98 of the Municipal Act expressly enjoins that before the Corporation may request the Government to acquire the land needed for the making of a park, etc., the Corporation must take two other steps?

(i) It must obtain the previous sanction of the State Government to such proposal, and (ii) also hear the possible objectors to the proposal after it is notified for the information of the public.

21. It is clear from the very recitals in annexes. A and C that neither of the above two steps were taken by the Commissioners before writing to the Government to start proceedings for acquisition. When, at the inception, Manindranath proposed to donate the land, the Commissioners requested the Government to do the needful? so that Manindranath Das can procure the land as early as possible. It is evident that it did not strike the Commissioners that any previous sanction of the Government or any hearing of the objectors or even of the owner of the land which was specified in Manindranath''s letter was necessary.

22. Similarly, when on May 23, 1960, the Commissioners took up for consideration the advice of the Collector that the acquisition proposal must be initiated by the Corporation and not Manindranath, the Corporation never thought that either of the two require-merits must be complied with. Any negotiation with the Collector would not serve the purpose of the statutory requirement to obtain the previous sanction of the State Government. It is a pity that the Collector who is supposed to be the adviser of the Corporation did not advise the Corporation to formally write to the State Government for its previous sanction as required by the Statute. Apart from that, even after the advice of the Collector, the Corporation did not write to the State Government, but the Mayor recommended that a proposal may be submitted to the Collector of Hooghly for acquisition of C.S. plot No. 404, This did not amount to writing to the State Government unless the Collector was the State Government, it was for the Collector himself to have disillusioned the Commissioners on this point.

It is firmly established that non-compliance with a condition precedent, such as obtaining the previous sanction or approval of a specified authority renders the exercise of a statutory power null and void: Hansony Corporation v. Grand Mere (1904) A.C. 789; AIR 1934 9 (Privy Council) and Commissioner of IT. v. Pratapsingh AIR 1961 S.C. 1026 (1028). Similar is the construction of a statutory provision to the effect that an administrative decision or act shall be done only after giving notice or after hearing certain persons: Ealing B.C. v. Minister of Housing (1921) 2 All E.R. 639; Narayanas v. I. T. O. AIR 1959 S.C. 213 (215); Gullapalli Nageswara Rao etc. Vs. The State of Andhra Pradesh and Others, , and Mineral Development Ltd. Vs. The State of Bihar and Another, . Nothing in this behalf was done by the Commissioners in the instant case.

23. Even a hearing of the objections by the Collector u/s 5A of the Land Acquisition Act would not cure the omission of the Commissioners to hear them u/s 98(3) of the Municipal Act, because the two are separate requirements of two different Statutes at two different stages and for different purposes. Where the machinery under the Land Acquisition Act is to be used at the instance of a municipality, the provisions of that Act as well as of the Bengal Municipal Act

must be complied with. The hearing u/s 98(3) is required to enable the Commissioners to decide whether they would propose the compulsory acquisition of any land. In this case there was no such hearing; and the Commissioners did not apply their minds to the initial question because they acted at the move of Manindranath that this very disputed land must be acquired.

24. The initiation of the proceedings by the Commissioners, relied upon by the Respondents in the instant case, was thus ultra vires ab initio and, therefore, a nullity and that renders invalid the acquisition proceedings in toto.

25. In para. 6 of the counter-affidavit filed on behalf of the Respondents 1-3 it was stated that the Mayor submitted his proposal for acquisition of the land which was at annEx. A to the counter-affidavit, but this letter was not annexed to the counter-affidavit. This omission cannot be explained away as due to inadvertence because it was the duty of the learned Advocate for the Government and his office to verify whether the documents specified in the body of the affidavit as annexures were in fact appended to the counter-affidavit before it was filed. This practice, which may very well operate as a fraud on the Court in particular circumstances, can be effectively depreciated by awarding substantial costs against the Government which only can put them to inquiry into how this has happened in the instant case.

26. On the merits, I should observe that even the production of this letter would not have shown compliance with the statutory requirement of Section 98(2) inasmuch as this letter is not mentioned in the counter-affidavit as seeking the previous sanction of the Government (but only submitting the proposal to the Collector). The words Commissioners shall obtain previous sanction in Section 98(2) further require that the request for such previous sanction must come from the Commissioners assembled at a meeting. The text of the Commissioners'' resolution of May 23, I960, gives no suggestion that they were seeking or had obtained the previous sanction of the State Government to make a proposal of acquiring the disputed land before submitting such proposal to commence the proceedings under the Land Acquisition Act.

(e) Reading Sub-sections (1) and (2) of Section 98 it is clear that after overruling the objections the Commissioners shall again assemble at a meeting to resolve that the land in question must be acquired under the Land Acquisition Act and, accordingly, make a request to the State Government to take necessary steps. There is no compliance with this requirement either.

(f) The facts relating to this point are more complicated. Though eventually upon the advice of the Collector, the Commissioners decided to pay the cost of acquisition from the Corporation fund, it was not an unconditional decision. It is worded as follows (annex. C):

___and the entire cost incidental thereto may against the background of the terms of conditions, as embodied in the agreement since executed between the Corporation and Sri Das, be met from the Corporation fund.

27. u/s 99 of the Municipal Act, it is one of the conditions for the validity of acquisition proceedings that the compensation money must be paid by the Commissioners and that the Commissioners are bound to pay that amount. They are not, of course, to pay out of their own pocket. The statutory local authority has a public fund at their disposal to carry out their duties under the Act, called the Municipal Fund (Section 105) and any money may be spent out of this fund only for any of the purposes under the Act, which are catalogued in Section 108(1) and the construction of squares, gardens, etc., is one of them. It is because the statutory body is thus authorised to spend public money that the Statute hedges in its powers by so many limitations, substantive and procedural.

28. Sub-sections (3) and (4) of Section 98, therefore, mean that the compensation money must be paid out of the municipal fund. That is also required by Section 50(1) of the Land Acquisition Act. Now, a sum may be paid out of the municipal fund only if there is at the credit of the fund the amount to be spent. There cannot be any expenditure unless there is a receipt to cover it. Section 105 provides how the fund is to be constituted and maintained and Clause (a) says that?

There shall be constituted for each municipality a fund called the Municipal Fund and there shall be placed to the credit thereof?

all sums received by or on behalf of the Commissioners under this Act or otherwise.

29. A local authority, like a private person, is not apparently debarred from accepting a donation from a private person, but it can be used by the authority for the purpose of the Act only if and after it has been credited to the local or municipal fund, and placed unconditionally at the disposal of the municipality, as has been held by the Madras High Court in Ponnaiah v. State of Madras (Supra). It is clear from annEx. B that, till the date of this agreement, Manindranath had not credited to the municipal fund any money for the purpose in question. Nor did the agreement specify any date by which he would have to pay in the money to the credit of the municipal fund. In fact, Clause (2) suggests, by the words through the Land Acquisition Collector that the money promised by Manindranath would never enter into the coffers of the municipal fund but would pass direct from Manindranath to the Land Acquisition Collector. Clause (1) of the agreement merely stipulated that Manindranath would bear and pay all costs and expenses for acquisition. The municipality has no power under the Statute to launch into any programme involving a liability on the public fund, relying upon any such personal covenant.

30. In answer to the averment in para. 12 of the petition that Manindranath had not yet paid anything to the Corporation, it is stated in para. 11 of the counter-affidavit of the Administrator of the Corporation that the donor Manindranath Das has already submitted a Bank Guarantee of National and Grindlays Bank Ltd. which is valid till December 22, 1965, and the same is for an amount of Rs.

50,000.

This, however, is not compliance with the procedure for putting an amount to the credit of the municipal fund. A bank guarantee is nothing but an undertaking by a third party, namely, the banker to pay the specified sum during the subsistence of the guarantee. Admittedly, the guarantee in this case was upto December 22, 1965-Supposing Manindranath died before the guarantee was renewed for a further term, the Corporation would be without any means to appropriate any money coming from Manindranath. Worse than that would be a refusal of Manindranath to renew the guarantee at any further point of time prior to its appropriation by the Land Acquisition Collector for paying the statutory compensation; in that case, the Corporation will be left only with the personal covenant contained in the agreement to enforce the liability against Manindranath. Without the least doubt the Municipal Act did not authorise the Corporation to initiate any acquisition proceeding relying upon their contingent success on a litigation upon a personal covenant. Above all, if annEx. C be the resolution in pursuance of which the State moved the machinery under the Land Acquisition Act (there being nothing else before the Court), it is evident that it is not consonant with the absolute liability of the Commissioners for the compensation money which is a condition of the acquisition u/s 98(4), for, the resolution of the Corporation is to pay the costs against the background of the terms and conditions as embodied in the agreement.

It may very well mean that the Corporation will pay only if Manindranath Das pays. Such a resolution is not sufficient in law to sustain a proposal for acquisition of land required for the purpose of the Act by the statutory corporation.

(g) Section 95 of the Municipal Act says that, subject to the exceptions mentioned therein all property within the Municipality must vest in and belong to the Commissioners and shall be under their direction, management and control. Property which is acquired by the Municipality in exercise of the power conferred by Section 94 will similarly vest and when the mode of acquisition is statutory, the vesting will take place after the compensation money is paid by the Municipality, u/s 98(3).

31. The statutory body has no power to spend the public moneys to acquire a property which does not vest in it absolutely, free of any conditions, which are derogatory to the powers of the Municipality under the Statute in respect of its direction, management and control over the property, for discharging the duties under the Statute. When the Corporation initially entered into the terms offered by Manindranath there was a term in annEx. A which patently went against an absolute vesting of the property in the Corporation insofar as it stipulated that, in case of failure on the part of the Municipal Corporation to make the land fit for use as playground and park, the Municipal Corporation shall have no hold on the ground.

32. Presumably, on legal advice available through the Collector, this damaging term has been dropped from the agreement at annEx. B, which is at the foundation of the resolution of the Corporation at annEx. C. Nevertheless, there are other obligations imposed by annEx. B, which are inconsistent with the direction, control and management of the disputed property by the statutory body, without any interference from any extraneous person or persons.

33. Clause (3) of the agreement thus imposes a liability upon the Corporation to convert the disputed land into a park and playground, at its own costs, within the stipulated period of two years. This is nothing but fettering the discretion of the Corporation in the matter of exercise of its statutory powers. Further, it imposes a contractual liability upon the Corporation to spend an unascertained sum within a specified time at the! instance of a private person. Numerous are the decisions which lay down that a statutory local authority cannot fetter the exercise of its statutory powers, duties and discretion even by a contract which is otherwise valid: William Cory and Sons v. City of London Corporation (1951) 2 All E.R. 85, Ayr. Harbour Trustees v. Oswald (1883) 8 App. Case 623 (634); Southend on Sea Corporation v. Hodson (1961) 2 All E.R. 46.

34. Similar offensive is the term No. 4, that the Corporation shall have no liberty or power to utilize the said property for any other purposes. The Corporation, under the Municipal Act, has the power, subject to statutory limitations, to use the property vested in it and to divert it to some other use, provided of course, the purposes for which it is used for the time being is a purpose coming within the scope of the Act. This power cannot be fettered by contract with anybody.

35. Clause (7) provides for a- mediation by the trustees of the family property of Manindranath, in case any dispute regarding the use of the said park arises in future, and in case of failure at such settlement, the award of the Collector as an arbitrator shall be final.

36. I have got serious doubts whether the Corporation can put itself to such limitations as a condition for acceptance of a gift from an individual for acquiring a property which is to be vested in the Corporation under the Statute.

37. I have no doubt that the impugned acquisition proceedings have been ultra vires ab initio, on various grounds as demonstrated above.

38. III. For the same reason, the initiation of the proceedings by the Commissioners has involved a colourable use of their statutory power.

39. I agree with the Respondents that it is not possible for the Petitioners to establish that part of their case which is contained in para. 2 of the petition, namely, that Manindranath was a rival intending purchaser of the disputed plot and that when the Petitioners succeeded in purchasing it, Manindranath sought to vindicate his grudge by attempting to deprive the Petitioners through acquisition proceedings without impleading Manindranath.

40. But even the defect of the petition in that behalf does not stand in the way of

establishing the other elements which are apparent from the records and which go to show how the Commissioners made a colourable use of their power.

(i) The fact that Manindranath specified the disputed plot with proper description in his initial proposal to the Corporation shows that he knew this land and had an eye over it for the perpetuation of the name of his family by opening a park in the name of an ancestor or family members with some control over its use by the Corporation.

(ii) Because of this specification the Corporation did not consider it necessary whether an additional park was at all necessary and whether the disputed plot was suitable for that and, if so, whether the machinery of compulsory acquisition should be resorted to acquire the disputed plot which was obviously a residential plot purchased by the Petitioners to build structures and that there was already a garage in existence on a portion of it, as it is admitted by the Additional Magistrate in his report which is reproduced in para. 5 and in para. 11 of the counter-affidavit of the Respondents 1-3.

(iii) In the case of Manickchand (Supra) it. was observed that a municipal corporation could not use its powers under the Municipal Act to acquire land even for another local authority and even though such other authority pays in the compensation money to the initiating local authority in advance (vide p. 918). It is profitable to quote the observations of Greaves, J. in that case.

I do not think it was ever the policy of the Calcutta Municipal Act that the special powers given to the Corporation for acquiring land for certain purposes named in the Act, were to be used to enable another body to acquire land through the medium of the Corporation, however, estimable the purpose....

I think the powers of acquisition of land under the Act are limited to cases in which the Corporation itself is going to widen a street or effect an improvement.

41. The principle involved in the above observation applies to the instant case. The provisions of the Bengal Municipal Act may be used by a municipality not when a private person thinks that a new park should be created or a particular land should be acquired for that purpose but only when the urge for that comes from the Commissioners themselves assembled at a meeting. In the instant case, the move for starting the acquisition proceedings by the Corporation would not obviously had taken place had not Manindranath allured the Commissioners by offering money to effectuate his private purpose to make the park in the name of his ancestor or family member and to keep the use of the park under the control of his estate, as stipulated at annexes. A and C already analyzed.

(iv) The Madras decision in Ponnaiah v. Secretary of State (Supra) is authority for the further proposition that it is a colourable use of the powers of the State Government under the Land Acquisition Act where the compensation money is not to come from the public revenues or the funds of the local authority but from a private individual for a specific purpose, for, in such a case, even though the individual''s money may be routed through the public treasury, Government does not get an absolute power of disposal over such money as public revenue.

(v) For the same reason, the use of the powers of the State Government under the Land Acquisition Act, which can be used only for public purposes, has been colourable when the Collector, who involved himself in the negotiations unnecessarily at an early stage, was in the know of the real state of affairs.

42. In the result, this petition must succeed. The Rule is made absolute with costs, assessed at ten gold mohurs, payable by the Respondents 1-3. Let an order in the nature of mandamus do issue restraining them from giving effect to the impugned notification at annEx. D or from proceeding further with the Acquisition proceedings.

