

in the Madras case just referred to. The appeal, in view of our order above, remains competent and has not abated.

The result is that the appeal is allowed. There will be a decree in favour of the plaintiff for the amount which the office will determine in the light of the directions given above; but in the circumstances of this case I will direct that each party will bear his own costs throughout.

HARRIES, C. J.—I agree.

Appeal allowed.

S.A.K.

LETTERS PATENT.

Before Harries, C.J. and Fazl Ali, J.

PATNA CITY MUNICIPALITY

v.

DWARKA PRASAD SINHA.*

Bihar and Orissa Municipal Act, 1922 (B. & O. Act VII of 1922), sections 58, 62 and 172—municipality, whether has an unrestricted power to sell or lease roadway—sections 62 and 172(f), scope of—owner of land abutting on a roadway, whether entitled to access at all points on his boundary.

The owner of land abutting on a roadway is entitled to access to that roadway at all points along the whole length of his boundary.

The power to sell, lease, exchange, or otherwise dispose of any land, given to the Commissioners by section 62 of the Bihar and Orissa Municipal Act, 1922, is not confined to land which has been acquired by the municipality under that section but extends to land which is vested in the municipality by reason of section 58 of the Act.

The word "land" in section 62 includes a road.

* Letters Patent Appeal no. 9 of 1938, from a decision of Mr. Justice Dhavle, dated the 5th of May, 1938.

1939.

RANI
HARSAMUKHI
DASI
v.
AGADHU
MOHAPATRA.

MANOHAR
LALL, J.

1939.

July, 31.
August, 1, 8.

1939.

PATNA
CITY
MUNICIPALITY

v.

DWARAKA
PRASAD
SINHA.

But section 62 does not give an unrestricted power to the municipality; it does not give it a right to lease a road or any part of it if such road is still required for the purposes of the Act, that is, as a public road.

Clause (f) of section 172 of the Act must be read with the preceding clauses and, therefore, the power of sale or of leasing given in that clause must be confined to cases coming within the general scope of the section.

Appeal by defendant no. 2 under clause 10 of the Letters Patent.

The facts of the case material to this report are set out in the judgment of Harries, C.J.

Sir Sultan Ahmed (with him *Rai Gurusaran Prasad, Syed Ali Khan, Rai Parasnath* and *Girijanandan Prasad*), for the appellants.

P. R. Das (with him *B. P. Sinha* and *D. L. Nandkeolyar*), for the respondents.

HARRIES, C. J.—This is a Letters Patent appeal from a judgment of Dhavle, J. in second appeal reversing a decree of the lower appellate Court and restoring the decree of the learned Munsif which was in favour of the plaintiffs.

The plaintiffs were the owners of a property abutting on the Convent Road, Patna City. Between the metalled portion of the roadway and the plaintiffs' boundary was a strip of land upon which a kachcha drain was at one time situate. Between that drain and the plaintiffs' boundary wall was a narrow strip of land which has given rise to the dispute in the present case. The Patna City Municipality, which was defendant no. 2, executed a lease in favour of defendant no. 1 for a period of five years with a certain option to renew. Upon this strip of land defendant no. 1 has erected a petrol pump and the other constructions complained of, and the suit was brought by the plaintiffs for their removal.

The plaintiffs at first alleged that they were the owners of the narrow strip of land between the

kachcha drain and their boundary wall, but eventually they gave up that claim. They, however, alleged that the Patna City Municipality had no right to lease the land in question to defendant no. 1 and that the latter had no right whatsoever to erect the structures complained of and thus obstruct the plaintiffs' access to the roadway.

The main defence relied upon was that the Patna City Municipality had a right by statute to lease or otherwise dispose of this land and that the plaintiffs had no right to object to what had been done in pursuance of the lease granted to defendant no. 1.

The learned Munsif held that the Municipality had no right, in the circumstances of this case, to deal with this land to the detriment of the plaintiffs and accordingly ordered demolition of the offending structures. The learned District Judge came to a contrary finding and dismissed the claim. In second appeal Dhavle, J. held that the Municipality could not give the defendant no. 1 a right to erect these structures and accordingly he reversed the decision of the lower appellate Court and restored the decision of the Munsif.

On behalf of the Patna City Municipality Sir Sultan Ahmed has argued that this strip of land could be leased by the Municipality and that defendant no. 1 could erect the structures now complained of. In this Court an attempt was made to show that this strip of land was something apart from Convent Road; but it is to be observed that throughout the proceedings in the lower Courts it had always been conceded that this disputed strip of land formed part of the roadway and was the property of the municipality by reason of the fact that the road vested in them.

Section 58 of the Bihar and Orissa Municipal Act, 1922, provides for the vesting of certain property in the municipal commissioners. Sub-clause (a)

1939.

PATNA
CITY
MUNICIPALITY
vs
DWARAA
PRASAD
SINHA.

HARRIES,
C. J.

1939.

PATNA
CITY
MUNICIPALITY2a
DWARKA
PRASAD
SINHA.HARRIES,
C. J.

provides that inter alia all roads within the municipality, including the soil, the pavements, stones and other materials thereof, and all drains, bridges, trees, erections, materials, implements and other things provided for such roads are to vest in the municipality. The word "road" is defined in section 3(24) of the Act and the definition is in these terms:—

" 'road' means any road, bridge, footway, lane, square, court, alley or passage which the public, or any portion of the public, has a right to pass along, and includes, on both sides, the drains or gutters and the land up to the defined boundary of any abutting property, notwithstanding the projection over such land of any platform, verandah or other superstructure."

It was the case of the municipality that Convent Road was vested in the commissioners, and such has never been disputed by the plaintiffs. By reason of the definition to which I have just referred, the Convent Road includes on both sides of it the drains or gutters and the land up to the defined boundary of the abutting property. Some attempt was made in this Court to show that the kacheha drain lying between the metalled portion of the road and the plaintiffs' boundary was the defined boundary of the abutting property. In other words, Sir Sultan Ahmed has suggested that the strip of land lying between the drain and the plaintiffs' property is the property abutting on the road and the side of the drain is the boundary of the road. This point was made for the first time in this Letters Patent appeal and has never been taken in the Courts below. Throughout the proceedings it seems to have been conceded by all parties that the defined boundary of this road on the side of the plaintiffs' property was the boundary wall of the plaintiffs' compound. In face of the fact that it has always been the municipality's case that this strip formed part of the road, they cannot now be heard to say that the strip is vested in them as property other than part of the road. In my view there can be no doubt that the plaintiffs' compound wall is one of the defined boundaries of the

Convent Road, and, therefore, all land up to that boundary will form part of the road.

Sir Sultan Ahmed has further argued that even if this strip of land be regarded as part of the road, nevertheless the municipality had a perfect right to lease it to defendant no. 1. He contends that the municipality has power to sell or lease any public road or part thereof, and he relies upon sections 62 and 172(f) of the Bihar and Orissa Municipal Act, 1922. It will be convenient to deal first with the argument based on section 62 of the Act.

Section 62 provides 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. According to the appellants, this gives the municipality an unrestricted right to sell, lease or exchange or otherwise dispose of any road. On behalf of the respondents it has been argued that section 62 has no reference whatsoever to roads, and it only gives the municipality powers to sell land which does not include roads. There is no exhaustive definition of "land" in the Act, and the phrase

"may sell, lease, exchange or otherwise dispose of any land"

seems to be wide enough to cover "road"; but even if it be held that the word "land" does include a road, yet the municipality has not an unrestricted right to sell such road. At its very highest, the power given to the municipality by section 62 is to sell, lease, exchange or otherwise dispose of any land not required for any of the purposes of the Act. If such land is still required for any of the purposes of the Act, then it cannot be disposed of under the powers given by section 62.

In the present case the municipality made no effort to show that this strip of land was no longer

1939.

PATNA
CITY
MUNICIPALITY
v.

DWARNA
PRASAD
SINHA.

HARRIS,
C. J.

1939.
 PAINA
 CITY
 MUNICIPALITY
 v.
 DWARKA
 PRASAD
 SINHA.
 HARRIES,
 C. J.

required for any of the purposes of the Municipal Act, and indeed it would be very difficult for the municipality to establish such a case. The streets in Patna City are notoriously narrow, and it would be practically impossible to satisfy any independent body that any strip forming part of such roads, no matter how narrow, was not urgently required for the use of the public. It was never the case of the municipality that this strip was not required as a road or for other purposes of the Act. The municipality's contention has always been that they have a right to lease or sell the public road or any portion of it and that there is no real restriction to that right.

The contention that the municipality has an unrestricted right to sell a roadway or any portion thereof is a startling one, and in my view is contrary to the plain terms of section 62. That section only gives them a right to sell or lease land if such land is no longer required for the purposes of the Act. Where a road is still required as a road, the municipality have no right to sell it under the powers given by section 62.

The commissioners are given certain powers by section 178 to close a road temporarily for certain purposes. It is expressly provided that if the commissioners so close any road, they shall be bound to provide reasonable means of access for persons occupying holdings adjacent to such road. If the municipality had an unrestricted right to sell or lease roads, it seems somewhat strange that they have only a power to close roads temporarily, and such they can only do if they provide owners of adjacent property with means of access. It would appear that if the municipality do not possess an unrestricted right to close a road, then they cannot possess an unrestricted right to sell or lease a road which might result in its being closed permanently. Placing the most favourable construction to the municipality upon section 62, it cannot give them a right to lease a road or any part.

1939.

PATNA
CITY
MUNICIPALITY
v.
DWARKA
PRASAD
SINHA.

HARRIES,
C. J.

of it if such road is still required for the purposes of the Act, that is, as a public road. The municipality have not established or even tried to establish that this strip is no longer required for the purposes of the Act, and accordingly they had no power to sell it under section 62.

The respondents have suggested that an extremely narrow construction must be placed upon section 62 of the Act. That section gives the commissioners a right to purchase or lease land for the purposes of the Act, and it then goes on to give them a right to sell, lease, exchange or otherwise dispose of any land not required for such purposes. It was argued that the power of sale, lease or exchange is confined to land which has been acquired by the municipality under this section and does not extend to land which is vested in the municipality by reason of section 58 of the Act. In short, it was argued that the power to sell or lease was the power to sell or lease lands which had been purchased for a specific purpose and which were no longer required for such purpose. This, in my view, is too narrow a construction, because the section in terms says that the commissioners may sell, lease or exchange any land subject always that such is not required for the purposes of the Act. In my view the section does empower the commissioners to dispose of land whether acquired by them or whether such has become vested in them by reason of section 58; but such construction does not assist the municipality for the reason which I have already stated that it has not been established that this particular strip was not required for the purposes of the Act. For these reasons I am satisfied that section 62 of the Act did not give the municipality a right to execute the lease in favour of defendant no. 1.

Sir Sultan Ahmed for the appellant relied also upon section 172(f), and he argued that this clause (f) gave the municipality an unfettered right to dispose of any roadway whether such was required or not for the purposes of the Act.

1939.

Section 172(f) is in these terms :—

PATNA
CITY
MUNICIPALITY
B.
DWARAKA
PRASAD
SINHA.
HAMBURG,
C. J.

" The Commissioners may—

(f) subject to the provisions of any rule prescribing the conditions on which property vested in the Commissioners may be transferred, lease, sell or otherwise dispose of any property acquired by the Commissioners under clause (e) or any buildings erected thereon or any land used by the Commissioners for a public road, and in doing so impose any condition as to the removal of any building existing thereon, as to the description of any new building to be erected thereon, as to the period within which such new building shall be completed, and as to any other matter that they deem fit."

It is said that this clause in terms gives the commissioners a right to sell any land used as a public road subject to the provisions of any rule prescribing the conditions on which property vested in the commissioners may be transferred. It is said that no such rules have been drafted.

If this clause was intended to give the commissioners an unrestricted right to sell any road or portion of the road, it appears to me extremely strange that it should have been placed in the section in which it is found. The previous clauses refer to road improvements and improvements to property abutting on the highway. In short, clauses (a) to (e) are clauses relating to schemes of town development and improvement. That being so, it would be natural to find that the last clause (f) had also some reference to road improvement and development. The marginal note to this clause is :

" Power to construct, improve and provide sites on public roads " ;

and if this note formed part of the section, it would conclude the matter against the municipality. It has, however, been held that a marginal note does not form part of the section, and accordingly it cannot be looked at for the purposes of construing this particular section. It is, however, permissible to examine the other clauses and to consider whether clause (f) is to be divorced from its context or must be read with the other clauses. In my judgment,

clause (f) of section 172 of the Act must be read with the preceding clauses and in fact in the opening portion of clause (g) there is a reference to land which has been acquired under clause (e). The commissioners are given power to transfer, lease or sell or otherwise dispose of any property acquired under clause (e) and any buildings erected thereon, that is, property which the commissioners have acquired as being necessary for the purposes of any scheme or work undertaken or projected in exercise of the powers conferred by the preceding clauses. Immediately following this power of sale is the power to sell any land used by the commissioners for a public road; and this, it is said on behalf of the municipality, gives the latter an unrestricted right to sell any road or part of it.

The phrase :

“ any land used by the commissioners for a public road ”

is not a happy one if it was intended to mean any public roadway. A public road is used by the public and not by the commissioners other than as members of the public. In this clause the land contemplated is land used by the commissioners for a public road. It is difficult to say with any certainty what this provision means; but I am satisfied that it does not empower the commissioners to sell any public road. It may mean that the commissioners have power to sell any land which they have acquired under clause (e) and which they have used as a roadway for the purposes of a road development scheme. Again it may possibly mean some road or part of a road which has ceased to be a road or part of a road by reason of any road development scheme. In my view it is not necessary to decide precisely what these words mean; and it is sufficient for this case to hold that the words cannot mean that the commissioners may sell any roadway which is being used by the public as a public highway or thoroughfare.

1939.

PATNA
CITY
MUNICIPALITY

2.
DWARAKA
PRASAD
SINGHA.

HARRIS,
C. J.

1939.

PATNA
CITY
MUNICIPALITY
vs
DWARKA
PRASAD
SENHA.
HARRIES,
C. J.

If this clause gives the commissioners an unrestricted right to sell a road, then it is in conflict with section 62, if "land" in this latter section includes a roadway. As I have stated, section 62 only empowers the municipality to sell land if it is no longer required for the purposes of the Act; whereas it is said that section 172(f) gives them the power to sell a road without any restriction whatsoever.

Section 185(b) of the Act empowers the commissioners to make by-laws consistent with the Act to prevent, prohibit or regulate the use or occupation of any or all public roads or places by any person for the sale of articles or for the exercise of any calling or for setting up any booth or stall, and to provide for the levy of fees for such use or occupation. Under this section the municipality have framed certain by-laws which were published under Government notification no. 2374-L.S.-G., dated the 27th February, 1932. These by-laws provide:—

"1. No person shall be permitted to use or occupy any part of any public road or place for the sale of articles or the exercise of any calling or the setting up of any booth or stall unless he has previously obtained from the Municipal Commissioners a licence in form A appended to these by-laws:

Provided that no licence shall be granted for the erection of a permanent booth or stall.

2. Such licence may be granted for such specified period, not exceeding one year, as may be determined by the Municipal Commissioners, and all such licences shall expire not later than the last day of the year within which they were granted."

These by-laws made under section 185 restrict the rights of the municipality to grant licences. In no case can they grant a licence for the erection of any permanent booth or stall, and the maximum period for which they can grant a licence for a temporary booth or stall is one year. In the present case the municipality have granted a lease for five years with powers to renew which gives the lessee a right to erect permanent structures for the sale of petrol. It is clear that a licence for five years could not be

given, and I cannot understand how something far more substantial, namely, a lease can be validly granted. Section 185 and the by-laws made thereunder show clearly that the municipality have not an unrestricted right to deal with roadways. If they cannot grant a licence to a person to occupy a piece of road for more than a year, then surely they cannot sell a piece of road or lease it for a period of years to enable the lessee to erect buildings necessary for the sale of articles. It seems to me that section 185 of the Act clearly shows that the power of sale or of leasing given in section 172(f) must be confined to cases which come within the general scope of that latter section.

Section 172(c) empowers the commissioners to turn, divert, discontinue or close any public road vested in them. The words are very wide, and, according to Sir Sultan Ahmed, empower the commissioners to close any public road if they so think fit. I have already pointed out that the power of the commissioners to close roads even temporarily is strictly limited (*see* section 178), and, therefore, clause (c) of section 172 must be read in its context. In short, it must be held that the power given to the commissioners to turn, divert, discontinue or close any public road is a power to do so when they are carrying out any road development or road improvement scheme. If the wide words in clause (c) must be given that limited construction, it appears to me that the words in sub-section (f) must also be given a similarly restricted meaning.

In my judgment, the municipality had no power under the Municipal Act to lease this land, and accordingly defendant no. 1 had no right whatsoever to make the structures complained of.

The owner of land abutting on a roadway is entitled to access to that roadway at all points on his boundary. It was suggested that the plaintiff-respondents had no real complaint in this case because

1939.

 PATNA
CITY
MUNICIPALITY

 2.
DWARKA
PRASAD
SINHA.

 HARRIES,
C. J.

1939.

PATNA
CITY
MUNICIPALITY
vs.
DWARAA
PRASAD
SINHA.

HARRIES,
C. J.

they had or could have access to their property. In my view it matters not whether access can be given to them, because these buildings seriously infringe one of their most valuable rights, namely, a right of access to the highway along the whole length of their boundary. In my view these constructions are a serious infringement of the plaintiffs' rights, and that being so, the latter was entitled to insist on their removal.

For the reasons which I have given, I am satisfied that Dhavle, J. was right in holding that the municipality had exceeded their rights in leasing the property to defendant no. 1 and that the lease gave the latter no right to erect these structures to the prejudice of the plaintiffs. That being so, I would dismiss this appeal with costs.

FAZE ALI, J.—I agree.

Appeal dismissed.

S. A. K.

APPELLATE CIVIL.

Before Rowland and Chatterji, JJ.

RAMA PRASAD

v.

MAHARAJA BAHADUR RAM RAN VIJAY PRASAD
SINGH.*

Bihar Tenancy Act, 1885 (Act VIII of 1885), section 60, scope and applicability of—arrears of rent—proprietor's right to such arrears—deceitring on his heir—elder son registered under Bengal Land Registration Act, 1876 (Beng. Act VII of 1876)—suit for rent by elder son—tenant's plea that rent was due to younger son also, whether tenable.

* Appeal from Appellate Decree no. 32 of 1937, from a decision of Babu Nilamta Bagchi, Subordinate Judge of Arrah, dated the 24th September, 1936, reversing a decision of Babu Jugal Kishore Prasad, Munsif of Buxar, dated the 7th August, 1935.

1039.

August 7,
8.