

(2011) 11 AHC CK 0100

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 54455 of 2010

Akhilesh Pathak

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 08-11-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90
Constitution of India, 1950 — Article 300A
Contract Act, 1872 — Section 46
Sales of Goods Act, 1930 — Section 63, 64

Citation : (2012) 1 ADJ 1

Hon'ble Judges : Surendra Kumar, J; R.K. Agrawal, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. Heard learned counsel for the parties.
2. This writ petition has been preferred by the petitioner to issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 22.7.2010 passed by the respondent No. 2/Sub Divisional Magistrate, Nizamabad, Azamgarh, (Annexure 1 to the writ petition) and also for a direction in the nature of mandamus directing the respondent Nos. 2 and 3 namely Sub Divisional Magistrate and Tehsildar/Auction Incharge, Nizamabad, Azamgarh, to issue a release order for the auctioned Bolero Jeep 2003 Model (Chassis No. MA-1XA2 ACB) in favour of the petitioner ensuring release of the vehicle in question from Police Station Gambhirpur, Azamgarh.
3. The respondent No. 2 vide the impugned order dated 22.7.2010 had cancelled the auction dated 19.7.2010 and ordered for re-auction of the vehicle in question on the ground that the re-auction will bring more revenue to the State.
4. The facts giving rise to the present writ petition are that the certain vehicles including vehicle in question unclaimed by their owners were seized by Station House Officer, Police Station Gambhirpur, Tehsil Nizamabad, District Azamgarh.

As the seized vehicles remained unclaimed by their owners for a considerable long time, the vehicles were likely to go defunct for non-use and maintenance and their value got diminished, the Administration thought it proper to put them to public auction. Before the auction, the Regional Transport Officer, Azamgarh, was requested vide letter dated 22.5.2010 by Police Station Gambhirpur for assessing value of each vehicle. The Regional Transport Officer, Azamgarh, after making physical scrutiny and assessment of the vehicle piecewise submitted a report showing approximated reasonable value of the said vehicles. The value of the vehicle in question was assessed at Rs. 75,000/- (Rupees seventy five thousand) only. Subsequently, the respondent No. 2 authorized the respondent No. 3/Tehsildar Nizamabad to conduct the public auction after due publication in the local daily newspapers having wide circulation in the area. The publication relating to the auction in local newspapers was made and common public interested in the vehicle in question invited to appear and bid for it in the public auction to be held on 19.7.2010. In response to the said advertisement, seven bidders including the petitioner attended the auction and made the bids. Before the bid began, a notice dated 19.7.2010 mentioning the terms and conditions of the bid was put on the board which stipulated inter alia that each bidder shall make the security deposit of Rs. 5,000/- before the bidding. The other terms and conditions were that 1/4th of the amount of final bid for the vehicle in question shall be deposited immediately and remaining 3/4th of the amount shall be deposited within fifteen days from the date of the aforesaid auction. It was also stipulated that the release order was to be issued only after the auction was accepted by the respondent No. 3. Accordingly, all the seven persons made the security deposit of Rs. 5,000/- (Rupees five thousand) each.

5. The auction bid continued for four rounds and ultimate bid of the petitioner to the tune of Rs. 85,000/- (Rupees eighty five thousand) was found final after calling the bidders three times to go above it which the bidders did not do. Thus, the highest bid could not be crossed by further bid of higher value. A copy of the progress of the bid upto the highest bidding of Rs. 85,000/- (Rupees eighty five thousand) made by the petitioner, has been annexed as Annexure 4 to the writ petition.

6. As per the terms and conditions of the auction sale, the petitioner deposited a sum of Rs. 25,000/- (Rupees twenty five thousand) with the treasury vide receipt dated 19.7.2010 on the day of the auction itself. The petitioner made the deposit of balance amount of auction bid i.e. Rs. 60,000/- (Rupees sixty thousand) vide treasury receipt, accepted and issued by the respondent No. 3 on 21.7.2010. The auction proceeding to the level of its finality on the highest bid of the amount of Rs. 85,000/- (Rupees eighty five thousand) made by the petitioner was further explicit by the respondent No. 3 in accepting the total amount of Rs. 85,000/- (Rupees eighty five thousand) deposited by the petitioner within time and accepted through the receipts issued by the respondent No. 3 on 19.7.2010 and 21.7.2010.

7. The respondent No. 3 namely Tehsildar/Auction Incharge, Nizamabad, Azamgarh submitted a report about the details of the auction to the respondent No. 2 Up Zila Adhikari, Nizamabad on 22.7.2010 proposing re-auction of the vehicle in question keeping in view the condition of the vehicle in question that the auction of the vehicle could bring more revenue to the State after wide publication through newspapers. The respondent No. 2 by the impugned non-speaking order dated 22.7.2010 agreed with the said report and cancelled the auction directing re-auction according to the rules without affording any opportunity of hearing to the petitioner.

8. After complying with the terms and conditions of the auction and depositing the entire amount of the auction, the petitioner approached the respondent No. 3 on 26.7.2010 for issuance of the release order of the vehicle in question so sold out to the petitioner through above auction in order to approach the police station incharge for release of the aforesaid vehicle in question. It was at that stage, respondent No. 2 disclosed this fact to the petitioner that the vehicle in question could not be released as there was some political pressure against it. The petitioner was orally asked to surrender his claim for the vehicle in question in the auction for some other vehicle.

9. When the petitioner came to know about the order dated 22.7.2010 passed by respondent No. 2, he raised grievance through the letter to the District Magistrate, Azamgarh on 26.7.2010, who called for a report from the respondent Nos. 2 and 3 within three days. The respondent No. 3 submitted a report to the respondent No. 2 on 28.7.2010 wherein the facts of auction proceedings, entire deposit made by the petitioner as the highest bidder and its acceptance by respondent No. 3, was admitted. It was, however, disclosed in the said report that after acceptance of the entire bid amount of auction, it was thought proper to re-put the vehicle in question for fresh auction in expectation of the higher amount as the revenue likely to come. The report of respondent No. 3 dated 28.7.2010 submitted to the respondent No. 2 has been annexed as Annexure No. 8 to the writ petition.

10. The respondent No. 2, accordingly, informed to the Additional District Magistrate (F & R), Azamgarh that since the report/recommendation for re-auction had been made, the release order could not be issued. In the information dated 29.7.2010 made by the respondent No. 2, finality of auction at the highest bid of Rs. 85,000/-(Rupees eighty five thousand), receipt of the total amount of auction deposited by the petitioner was also accepted.

11. The petitioner sought an information under the Right to Information Act by sending a letter dated 28.7.2010 in this matter. The petitioner was furnished the relevant information to the effect that the highest bid of the auction of the said vehicle was to the tune of Rs. 85,000/- (Rupees eighty five thousand) and the highest bidder was the present petitioner Akhilesh Pathak. The auction was cancelled as it did not fetch the sufficient revenue and the amount of bidding was insufficient.

12. It has been averred in the writ petition that no auction after public advertisement having culminated in the highest bid accepted by the auctioning authority coupled with the deposit of entire auction amount accepted by the authority could be cancelled without their being any breach of the terms of the auction or element of fraud in the auction so conducted. Since after auction of the vehicle in question having reached the stage of deposit so accepted and receipt issued by the auction authority/respondent No. 3, the auction could not be cancelled. The only stage thereafter was to issue an order for release of the vehicle in question. No auction so culminated without breach or fraud could be cancelled and that too without opportunity of hearing to the petitioner, who had completed his part as bidder and deposited the entire amount which was accepted by the respondents.

13. According to the petitioner, the impugned order by which the auction of the vehicle in question was cancelled, is arbitrary as passed behind back of the petitioner for unwarranted political pressure and with ulterior motive to oblige the agency behind the picture. The impugned order is violative of the principle of audi-alteram partem and also violative of the right of the petitioner under Article 300A of the Constitution of India.

14. Sri Chhedi Lal Singh, Tehsildar Nizamabad, Azamgarh filed his counter-affidavit on behalf of the respondents deposing that the impugned order dated 22.7.2010 was passed by the competent authority i.e. Sub-Divisional Magistrate, who after considering the facts that the auction bidder has tried to get the vehicle on a very low price which would have resulted in loss of revenue to the State, had rightly cancelled the auction directing afresh auction. The vehicle in question was in a good condition and could bring a better revenue for the State. After considering the condition of the vehicle and bid amount, the re-auction of the said vehicle was recommended and the competent authority agreeing with the recommendation cancelled the auction held on 19.7.2010 and directed for re-auction of the vehicle by the impugned order.

15. It has been averred through the counter-affidavit that the Regional Transport Officer, Azamgarh assessed the value of the vehicle in question tentatively. According to the respondents, the date of auction could not be properly published, only seven persons participated in the bid and only upto fourth round, the bidders signed the bid papers but in the sixth final round of auction, no one signed on the papers due to commotion. It is obligatory that all the papers must be signed by all the bidders relating to the bid. The respondent No. 3/Tehsildar was only supposed to submit a report of the auction and it was only respondent No. 2/S.D.M. who had power to accept the auction bid.

16. It has been further alleged that mere deposit of the money does not mean acceptance of the bid and there was no stipulation for the said auction that the deposit of money meant for acceptance of the bid, the auctioned property can only be released in favour of the highest bidder when the auction is accepted by the competent authority. The repeated grounds of the respondents for cancelling

the said auction are that since the petitioner intended to get the vehicle in question at a very low price by all means and it brought a very low revenue for the State as the vehicle in question was in good condition and could fetch better revenue for the State, the said auction was cancelled and re-auction was directed keeping in view the interest of the State. The petitioner was advised to take his money back and the delay in taking the auction deposited money back would be at his own cost. In the counter-affidavit, mala fides and arbitrariness in passing the impugned order has been denied.

17. The petitioner by way of filing rejoinder-affidavit repeated the averments made in the writ petition calling the auction in dispute as practical and logical on the ground that the vehicle in question deemed to be defunct due to non use since long. Since report of the Regional Transport Officer was found reliable as the basis for the proposed auction, the process of auction was resorted to. It has been further submitted that failure to obtain signature on the last page of the bidding of the above Bolero Jeep if any can be said to be failure of the auctioning authority, the auction could not be affected. It was mere irregularity once the auction in-charge confirming and approving the last and final bid by the petitioner closed the auction as complete and immediately accepting the deposit of 1/4th and more of the highest bid of the auction. Since 3/4th of the balance amount of bidding was deposited by the petitioner well within time and the same was accepted by the auctioning authority/respondent No. 3 without any objection, the auction could not be legally cancelled just on the frivolous ground that the said auction fetched less revenue to the State. It has also been submitted that the respondent No. 3 had occasion before the auction dated 19.7.2010 to postpone, adjourn or cancel the auction proceedings if there was no proper circulation or publication in the area.

18. The learned counsel for the petitioner has further submitted that the respondents may postpone, adjourn or cancel the auction proceedings on the following stages;

- (a) When the R.T.O. had submitted his valuation report on 28.6.2010;
- (b) When the bidders were present on 19.7.2010, they were found to be insufficient in number;
- (c) When the last bid of Rs. 85,000/- was made by the petitioner and before the auction could be closed as completed or at the most on 22.7.2010 when the last deposit of 3/4th amount was made by the petitioner and the same was accepted through receipt by the respondent No. 3. There was no occasion in law for the respondents to cancel the said auction. The auction was cancelled to deny the petitioner of his accrued right to the legitimate claim for release of the vehicle in question. The purpose was to oblige non bidder because of political influence and thereby denied the petitioner of his legitimate right to claim for release of the vehicle.

19. In this writ petition, following points are involved;

(i) Whether after the hammer had been knocked down at the highest bid in a public auction and 1/4 of the bid amount deposited by the highest bidder immediately after the bid and duly accepted, could an auction be cancelled?

(ii) Whether any order cancelling such an auction behind the back of the highest bidder depositing the entire or 1/4th amount of the highest bid could be passed ?

(iii) Whether such an order could be treated to be fair, impartial or legal and without charge of arbitrariness and mala fides ?

(iv) Whether a sale by public auction could be considered on a footing better than ordinary sale in the market ?

20. We have gone through the decision relied upon by the learned counsel for the petitioner in the case of Kayjay Industries (P) Ltd. Vs. Asnew Drums (P) Ltd. and Others, , wherein Hon''ble Apex Court observed that a Court sale is a forced sale and notwithstanding the competitive element of a public auction, the best price is not often forthcoming. The Judge must make a certain margin for this factor. A valuer's report, good as a basis, is not as good as an actual offer and variation within limits between such an estimate, however careful, and real bids by seasoned businessman before the auctioneer are quite on the cards. The businessman makes uncanny calculations before striking a bargain and that circumstances must enter the judicial verdict before deciding whether a better price could be had by a postponement of the sale. If Court sales are too frequently adjourned with a view to obtaining a still higher price, it may prove a self-defeating exercise, for industrialists will lose faith in the actual sale taking place and may not care to travel up to the place of auction being uncertain that the sale would at all go through. The judgment debtor's plea for postponement in the expectation of a higher price in the future may strain the credibility of the Court sale itself and may yield diminishing returns.

21. Hon''ble Apex Court has further observed in the case of M/s Kayjay Industries (P) Ltd. (supra) while dealing with material irregularity and substantial injury under Order XXI, Rule 90 of the CPC that it is the duty of the Court to satisfy itself that having regard to the market value of the property, the price offered is reasonable. The substantial injury without material irregularity is not enough even as material irregularity not linked direct to inadequacy of the price is insufficient. If the Court should go on adjourning the sale till a good price is got, it being a(sic)torious fact that the Court sale and market price are distant neighbour. Otherwise the decree holders can never get the property of the debtor sold. Nor is it right to judge the unfairness of the price by hindsight wisdom. What is expected of the Judge is not to be a prophet but a pragmatist and merely to make a realistic appraisal of the factors and if satisfied that, in the given circumstances, the bid is acceptable, conclude the sale.

22. The Court may consider fair value of the property, the general economic trends, the large sum required to be produced by the bidder, the formation of a syndicate, the futility of postponements and possibility of the litigation and

several other factors dependent on the facts of the each case. Once that is done, the matter ends there. No speaking order is called for and no meticulous post mortem is proper. If the Court has fairly, even if silently, applied its mind to the relevant considerations before it while accepting the final bid, no probe in retrospect is permissible. Otherwise, a new threat to certainty of the Court sale will be introduced. Mere inadequacy of price cannot demolish every court sale. The same principle had been laid down by Hon'ble Apex Court in the case of *Navalkha and Sons Vs. Ramanuja Das and Others*, .

23. Learned counsel for the petitioner has relied upon a Division Bench decision of this Court in the case of *Zila Parishad, Muzaffar Nagar and others v. Udai Veer Singh*, 1989 RD 51, wherein the Division Bench observed that where the highest bid is accepted and highest bidder deposits 25% bid amount within time allowed, the auction cannot be cancelled thereafter. In the case of *Zila Parishad (supra)*, the auction was held on 17.3.1988. The subject matter of the auction was the right to ferry or load or unload animals at the cattle fair for a monetary consideration under the *Uttar Pradesh Zila Parishad and Kshetra Samiti Adhiniyam*, 1959. The auction was closed upon the highest bid having been received. The Zila Parishad attempted to auction the subject matter of the auction to yet another candidate outside the auction subsequently. This led to the highest bidder who had offered the highest bid upon which the auction was closed to seek an injunction to protect the right to carry on his trade by filing civil suit in the civil court. The highest bidder was granted injunction. The Administrator, (Atriakt Mukhya Adhikari) recommended re-auction to be held on 23.3.1988 on the ground that one person (non bidder) had sent higher offer. Thus re-auction was ordered after publication in the newspapers informing the previous highest bidder to take back his deposited amount, the highest bidder had not been intimated that his bid was hence not being acted upon. The cause was a secret unilateral offer, after the auction. The highest bidder was not given any opportunity of hearing before passing the order of fresh auction.

24. This Court further held that the highest bidder was entitled to an opportunity of being apprised of the circumstances for recalling or cancelling the auction. An opportunity was to be afforded before recalling the result of the auction. It was further held that the auction is a sale by a public competition to the highest bidder. Auction sales are of two kinds, with reservation and without reservation. The auction sale is with reservation when the upset price is fixed below which the auctioneer refused to sell. It is not necessary that this particular phraseology be used, it would be enough indication that the seller makes it plain and reserves the right. An auction is without reservation when the goods are sold to the highest bidder, whether the sum paid is equivalent to real value or not. The principle of sale by auction is that the announcement about the auction is a mere information to offer, the actual bids made are all offers, each higher bid superseding the previous bid, and that when the hammer falls on the last bid there is an acceptance and the contract becomes complete.

25. After discussing the provisions of Section 46 of the Contract Act, 1872 relating to reasonable time for performance of promise and Sections 63 and 64 of the Indian Sale of Goods Act, 1930 relating to sale by auction, this Court observed that the highest bidder was made to deposit substantial money within fixed time, another auction was announced without affording an opportunity to the highest bidder to have his say before such an announcement and non rejection of the highest bid within reasonable time, this virtually amounted to rejecting the highest bid without indicating it to the highest bidder and in absence of an opportunity of hearing to him. The attempt to re-auction was surreptitious and entertained unilaterally and secretly and as an after thought. Giving an objective test to the facts and circumstances of the auction and the obligation which the highest bidder had performed and was made to perform, the contract was complete.

26. It was further held by this Court that public bodies conducting public auction will loose their credibility and the conduct or public auction might lead to endless litigations when they will be upset without cause held profitably, regularly and without defect. An auction which has been regularly conducted strictly as desired by a public body or government with no illegality having been pointed out and is at a monetary advantage over the previous year, must be finalised. This Court cannot permit an auction in which no illegality has been pointed out to be abandoned merely because of officials do not act when they should have acted, or chose to act when it was too late to act.

27. The learned counsel for the petitioner has placed reliance on a decision of Hon"ble Apex Court in the case of Shri Radhey Shyam Vs. Shyam Behari Singh, , contending that any auction can be set aside only when there is proof of material irregularity or fraud and not otherwise.

28. The learned counsel for the petitioner drawing our attention to the paragraph 23 of the counter-affidavit filed by Sri Chhedi Lal Singh, Tehsildar on behalf of the respondents, has submitted that the respondents conceded that there had been no breach of terms and conditions relating to the public auction in the present case. No case of material irregularity or fraud was either taken up by the respondents or the same was proved. No notice of the cancellation of auction sale in favour of the petitioner depositing the entire bid amount was given before the aforesaid cancellation of auction and order for re-auction. We may mention here the relevant part of paragraph 23 of the counter-affidavit wherein it has been averred that "However, in reply, it may be stated that there is no breach of terms and conditions of the auction." Paragraph 21 of the said counter-affidavit makes it evident that the petitioner was informed about the impugned order dated 22.7.2010 four days later i.e. on 26.7.2010 and the petitioner was not afforded any opportunity of hearing before passing the impugned order by which the said auction was cancelled and re-auction was ordered. Thus, the impugned order was passed behind the back of the petitioner in a clandestine manner for the reasons best known to the respondents.

29. In the case of Shri Radhey Shyam (supra) it was observed by the Hon''ble Apex Court, what has to be established is that there was not only inadequacy of the price but that inadequacy was caused by reason of the material irregularity or fraud. A connection has thus to be established between the inadequacy of the price and the material irregularity.

30. The material available on record clearly goes to establish that there was no material irregularity or fraud in the impugned auction till finality of the auction, the petitioner was asked to deposit 1/4th of the highest bid amount, there was no question of inadequacy of the price of vehicle in question. Had it been there, the auctioning authority could have cancelled or postponed the auction on the ground of inadequacy of price and submitted report to the competent authority immediately. Not only this, the petitioner who was the highest bidder, was allowed to deposit 1/4th of the bid amount and he immediately thereafter deposited Rs. 25,000/-. The amount was accepted immediately thereafter issuing receipts by the auctioning authority on 19.7.2010. Even thereafter, if the fact regarding inadequacy of the price or material irregularity or fraud was within the knowledge of the auctioning authority, the petitioner was allowed to deposit 3/4th of the balance amount of bid i.e. Rs. 60,000/- on 21.7.2010 and the petitioner was issued a receipt of the deposit of 3/4th balance amount of the bid by the auctioning authority on the same day.

31. Thus, after getting the whole amount of the bid received by the auctioning authority till 21.7.2010, the auctioning authority in a shocking and surprising way recommended to the S.D.M./respondent No. 2 for re-auction of the vehicle in question with some ulterior motive just on the ground of inadequacy of the price. If any inadequacy of price had been within the knowledge of the auctioning authority at the time of completion of the auction, there would not have been any reason for him to submit a report recommending for re-auction subsequently with delay. On the basis of the said report of the auctioning authority dated 22.7.2010, the S.D.M./respondent No. 2 passed the impugned order in one sentence to the effect that "agreed, the auction cancelled, the re-auction be made as per the rules." This by can no stretch of imagination be called a speaking or legal order which was passed behind the back of the petitioner. If for a moment the point of some commotion during the progress of auction was there, the same did not find place in the relevant report dated 22.7.2010 submitted to the S.D.M. by which he recommended for re-auction. The impugned order passed by the respondents appears to be illegal, perverse, unjust, arbitrary and mala fide.

32. The impugned order dated 22.7.2010 passed by the respondent No. 2/Sub Divisional Magistrate, Nizamabad, Azamgarh, (Annexure 1), is set aside. The respondent Nos. 2 and 3 are directed to release the auctioned Bolero Jeep 2003 Model (Chassis No. MA-1XA2 ACB) in favour of the petitioner from Police Station Gambhirpur, Azamgarh.

33. With the aforesaid observations/directions, the writ petition stands allowed.