
(2019) 05 UK CK 0207

In the Uttarakhand High Court

Case No : Special Appeal No. 371, 375, 376, 378, 379, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 394, 373, 374, 377, 380 Of 2019

Radhey Shyam & Others

APPELLANT

Vs

State Of Uttarakhand & Others

RESPONDENT

Date of Decision : 20-05-2019

Acts Referred:

Uttar Pradesh Municipalities Act, 1916 — Section 124
Municipal Corporation Act, 1959 — Section 128
Indian Easements Act, 1882 — Section 60
Constitution Of India, 1950 — Article 14

Citation : (2019) 05 UK CK 0207

Hon'ble Judges : Ramesh Ranganathan, CJ;N.S. Dhanik, J

Bench : Division Bench

Advocate : Arvind Vashistha, Vivek Pathak, Prabha Naithani, Parikshit Saini

Final Decision : Dismissed

Judgement

Ramesh Ranganathan, CJ

1. These appeals are preferred by the petitioners in WPMS No. 2676 of 2018 and batch dated 04.12.2018. Sri Arvind Vashistha, learned Senior Counsel appearing on behalf of the appellants-writ petitioners, Ms. Prabha Naithani, learned Brief Holder appearing on behalf of the State Government, and Sri Parikshit Saini, learned Standing Counsel for the Roorkee Municipal Corporation, would agree that it would suffice, for the disposal of this batch of appeals, if the facts in WPMS No. 2319 of 2018 are noted.

2. Writ Petition (M/S) No. 2319 of 2018 was filed seeking a writ of certiorari to quash the order dated 01.06.2018 passed by the first respondent communicating the same to the petitioners vide notice dated 17.07.2018. The petitioners had earlier filed WPMS No. 2177 of 2018, questioning the order dated 01.06.2018 and the notice dated 17.07.2018; and, since the said writ petition was restricted only to the first petitioner therein, separate writ petitions were filed seeking the

very same relief.

3. Facts, to the limited extent necessary, are that the appellants-writ petitioners were granted lease of a shop, in Ram Nagar Roorkee in District Haridwar, by the Municipal Board, Roorkee after depositing the premium and the monthly rent payable by the petitioners. It is the appellants-writ petitioner's case that these shops were constructed, and the constructed shops were leased out, after the kiosks established therein were removed; while allotting the shops, no provision was made for a stair-case to approach the roof of most of the shops, nor were the petitioners' permitted to construct a staircase, and use the roof of shops to carry on business; and in some cases, though a staircase existed to reach the first floor, its passage was too narrow, to be even put to use.

4. A resolution was passed by the Municipal Board on 10.04.2012 resolving to allot roof-top rights of the leased shops, at a premium, to persons who desired to use it to carry on business. This resolution, according to the appellant-writ petitioners, was passed by the Municipal Board in the exercise of its powers under Section 124 of the U.P. Municipalities Act, 1916 and Section 128 of the Municipal Corporation Act, 1959 (which confer power on the municipality to transfer property vested in it by way of sale, mortgage, lease, gift, exchange etc), with a view to augment the income of the Municipal Board.

5. It is the appellants-writ petitioners' case that, though wide publicity was given by the Municipality while inviting bids for grant of roof-top rights of municipal shops, and an auction was conducted twice, the amount fetched in the auction was not sufficient, possibly because there was no staircase, or any other alternative way to reach the roof-top of the shop; ultimately the appellants-writ petitioners, who were all lessees of the ground floor of the municipal shops, were permitted to construct shops, on the roof of their respective shops; and they had also constructed a staircase within their shops on the ground floor to reach the first floor.

6. WPMS No. 1502 of 2014 was filed before this Court questioning allotment of the first floor of these shops and, by interim order dated 18.12.2014, directions were issued to the District Magistrate to conduct an inquiry. A Committee was constituted by the District Magistrate which, after conducting the inquiry, submitted its report on 03.03.2015. Writ Petition (M/S) No. 1502 of 2014 was finally heard and decided by order dated 08.11.2017, and the first respondent-Principal Secretary Urban Development, State of Uttarakhand was directed to take appropriate action, on the basis of the report dated 03.03.2015, within three months. The first respondent was further directed to fix personal responsibility on all persons involved in this scam, and to take appropriate action against the wrong doers. The Principal Secretary passed an order on 01.06.2018 accepting the report dated 03.03.2015, and set-aside the board resolution dated 10.04.2012. The appellants-writ petitioners invoked the jurisdiction of this Court questioning this order passed by the first respondent dated 01.06.2018, and the notice issued in terms of the said order (notice dated 17.07.2018) directing them

to vacate the premises within seven days

7. On the appellants-writ petitioners invoking the jurisdiction of this Court, the learned Single Judge, in his order in WPMS No. 2676 of 2018 and batch dated 04.12.2018, observed that the appellants-writ petitioners had not raised any objections to the report dated 03.03.2015; relying on the said report this Court had passed an order in WPMS No. 1502 of 2014 dated 18.11.2017, which order has attained finality; the appellants-writ petitioners had contended that the roof-top of their shops were allotted to them for construction of shops; they had constructed the shops on the roof-top spending a huge amount of Rs. 2-3 lacs; and, in view of Section 60 of the Easement Act, the licenses granted in their favour could not be revoked.

8. The learned Single Judge observed that the roof top, of the ground floor shops, were allotted to the appellants-writ petitioners by the Municipal Board, Roorkee for construction of new shops without inviting tenders, or conducting a public auction, to sell or lease the property in their favour; public property, owned by the State or its instrumentalities, could only be sold/leased out by public auction or by inviting sealed tenders; and the purpose of public auction, or of inviting tenders from the public, was to ensure that the State got the highest price for its property, and that fairness was ensured in the allotment of shops.

9. After referring to the judgments of Supreme Court in *Ramana Dayaram Shetty vs. International Airport Authority of India* : (1979) 3 SCC 489; *Kasturi Lal Lakshmi Reddy vs. State of J & K* : (1980) 4 SCC 1; *New Horizons Limited & another vs. Union of India & others* : (1995) 1 SCC 478; *Sachidanand Pandey & another vs. State of West Bengal & others* : (1987) 2 SCC 295; and *Institute of Law, Chandigarh vs. Neeraj Sharma* : (2015) 1 SCC 420, the learned Single Judge observed that the State or its instrumentalities cannot behave like private individuals, and enter into contracts with any person of their choice, to dispose of its property in its own way without any minimum or maximum price; the ordinary rule was that the State, or its instrumentalities, should dispose of public property by way of public auction, or by inviting tenders; if it chooses to act otherwise, its action should be fair, reasonable and free from arbitrariness; and, in case the State or its instrumentalities intend to sell or lease its properties, its action should be transparent and unbiased, and should not suffer from favoritism.

10. The learned Single Judge, thereafter, observed that those who come in from the back door, would have to get out by the same door; since immovable property was allotted to the appellants-writ petitioners, without following the norms and without fixing the minimum price, or without conducting auction or resorting to the tender process, and without an advertisement being issued inviting applications, the action of the Nagar Nigam was not fair/impartial; it was incumbent on the Nagar Palika to act fairly and reasonably; and, since the petitioners had secured the property of the Nagar Nigam without the process of tender or public auction, they could not claim to have perfected any rights over the property merely because they had invested certain amounts.

11. The learned Single Judge observed that such allotment was akin to grabbing public property with the connivance of the Nagar Nigam, Roorkee; and the Nagar Nigam could not take advantage of its own wrong. Holding that this Court would not sit as an Appellate Court, over the administrative decision taken by the State Government pursuant to the directions issued by a coordinate Bench, the learned Single Judge dismissed the writ petition holding that the petitioners could not show any illegality, perversity or jurisdictional error in the impugned order. Aggrieved thereby, the present appeal.

12. Sri Arvind Vashistha, learned Senior Counsel appearing on behalf of the appellants-writ petitioners, would submit that the resolution dated 10.04.2012, whereby roof top rights were granted to the appellants-writ petitioners for construction of shops, has not been set at naught by the Government till date; the appellants-writ petitioners had constructed shops strictly in terms of the board resolution after depositing Rs. 75,000/- each; any irregularity in procedure, in the allotment of such shops by the Nagar Nigam, cannot result in the appellants-writ petitioners being subjected to substantial monetary loss; they had incurred huge expenditure in raising construction on the first floor; the very fact that two earlier auctions did not elicit any response, justified the Municipal Board allotting the first floor to the existing lessees of the ground floor of the municipal shops; and though the appellants-writ petitioners had raised the plea, that Section 60 of the Easement Act disabled the respondents from evicting them from the first floor of their respective shops, the said contention has not been dealt with by the learned Single Judge in the order under appeal.

13. On the other hand, both Sri Parikshit Saini, learned counsel appearing on behalf of the Nagar Nigam and Ms. Prabha Naithani, learned Brief Holder, appearing on behalf of the State Government, would submit that the learned Single Judge was justified in setting aside the allotment of shops illegally granted earlier in favour of the appellants-writ petitioners; while the earlier auctions were only to grant roof top rights, to which no satisfactory response was received by the Nagar Nigam, what was allotted to the appellants-writ petitioners was not roof top rights, but permission to construct shops on the first floor; the decision, to accord permission to construct shops on the first floor, could only have been taken by the Municipal Board after inviting bids afresh either by way of public auction, or through a process of tender, to ensure that the highest possible price is received, and the revenues of the Nagar Nigam are augmented; the appellants-writ petitioners were allotted the rights, to construct shops on the first floor, without restoring to the fair and transparent mode of public auction, or invitation to tender, being resorted to by the Municipal Board; Section 60 of the Easement Act has no application; and the learned Single Judge was justified in dismissing the writ petition as devoid of merits.

14. It is not in dispute that, while the earlier attempts by the Nagar Nigam to invite bids was only for grant of roof top rights over the existing municipal shops, the appellants-writ petitioners were granted permission to construct shops on the

first floor, without resorting to the fair and transparent mode, for the grant of such rights, either by holding a public auction or by inviting bids through a transparent tender process, after giving wide publicity thereto. The mere fact that the appellants-writ petitioners were existing lessees of the ground floor municipal shops, did not confer on them any right to claim allotment of shops on the first floor also.

15. Section 60 of the Easement Act stipulates that a license may be revoked by the grantor, unless it is coupled with a transfer of property, and such transfer is in force; and the licensee, acting upon the license, has executed a work of a permanent character, and has incurred expenses in its execution.

16. The submission of Sri Arvind Vashistha, learned Senior Counsel appearing on behalf of the appellants-writ petitioners, is that since the license granted to the appellants-writ petitioners to construct a building on the first floor, over the ground floor shop leased earlier in their favour, involves transfer of property, and the appellants-writ petitioners had acted in terms of the resolution and had raised construction on the first floor, they are protected under Section 60 of the Easement Act; and the respondents are therefore not entitled to eject them from the subject premises. We must express our inability to agree.

17. The first floor shops, allotted to the appellants-writ petitioners, admittedly belong to the Roorkee Municipal Board which had granted a lease in their favour earlier with respect to ground floor shops. No construction existed, on the first floor, when the ground floor shops were allotted to the appellants-writ petitioners. While the auctions held earlier was only for grant of roof-top rights, to enable the successful bidders to carry on business thereat, the Roorkee Nagar Nigam has surreptitiously, by way of a resolution, conferred on the appellants-writ petitioners the right to raise construction on the first floor; and to carry on business in both the shops on the ground floor and the first floor. While the earlier attempts of conducting auction was confined only to the roof-top rights, without any construction being raised thereupon, the appellants-writ petitioners have been permitted, by way of the resolution dated 10.04.2012, to construct another shop on the first floor, and thereby carry on business in two shops.

18. Even if there is some merit in the submission, urged on behalf of the appellants-writ petitioners, that the Municipal Board was unsuccessful in its earlier attempts to auction the roof top rights, the fact remains that the appellants-writ petitioners were not allotted roof top rights, but the right to raise construction on the first floor and thereby carry on business in two shops, one located on the ground floor and the other on the first floor. The Nagar Nigam ought to have invited bids through a transparent tender process, or should have conducted a public auction, in this regard. Their action, in surreptitiously conferring such rights on the appellants-writ petitioners, falls foul of the law laid down by the Supreme Court in several judgments, some of which have been noted in the order under appeal.

19. It is well settled that sunlight is the best disinfectant, and a fair and transparent mode, of grant of lease hold rights of the first floor shops, either by way of a public auction or by a tender process, should have been resorted to. Having been illegally granted the benefit of being permitted to construct another shop on the first floor, merely because they were lessees of the ground floor shops, the appellants-writ petitioners cannot take advantage of the illegality committed by the Municipal Board, and be heard to contend that, in view of Section 60 of the Easement Act, the Municipal Board is disabled from evicting them from the subject shops on the first floor. Section 60 of the Easement Act would apply only in cases where a license is granted in accordance with law. The said provision has no application where the very grant of a license is arbitrary and illegal, and falls foul of the equality clause in Article 14 of the Constitution of India.

20. We are satisfied, therefore, that the learned Single Judge was justified in refusing to interdict the notice issued by the first respondent on 17.07.2018, in terms of the order dated 01.06.2018, calling upon the appellants-writ petitioners to vacate the first floor shops within seven days from the date of the order. Interference, in an intra-Court appeal, would be justified only if the order under appeal suffers from a patent illegality. We find no such infirmity in the order under appeal. The appeals fail and are, accordingly, dismissed. No costs.

21. Sri Arvind Vashistha, learned Senior Counsel appearing on behalf of the appellants-writ petitioners, would seek two weeks' time for the appellants-writ petitioners to remove the construction raised by them on the first floor. He would also seek a direction to the respondent-Nagar Nigam to refund the sum of Rs. 75,000/- deposited by them for allotment of the first floor shops.

22. Since the request for grant of time, to remove the construction raised by them on the first floor, is not opposed by Sri Parikshit Saini, learned counsel for the respondent-Nagar Nigam, we direct the respondents not to take any coercive steps for demolition of the first floor structures for a period of two weeks from today, within which period the appellants-writ petitioners shall, on their own accord, remove the structures raised by them on the first floor. If they fail to do so, it is open to the Nagar Nigam thereafter to demolish these structures.

23. Suffice it to permit the appellants-writ petitioners to make a representation to the Nagar Nigam claiming refund of the premium of Rs. 75,000/- deposited by them earlier. If any such representation is made, within two weeks from today, the Nagar Nigam shall consider the same, and pass appropriate orders in accordance with law, (without being influenced by the observations made either in the order under appeal or in the order now passed by us), within two weeks thereafter. In case, the Nagar Nigam is satisfied that the said amount of Rs. 75,000/-, paid by each of the appellants-writ petitioners, should be refunded to them, they shall then make such payment within two weeks thereafter