

(2012) 04 AHC CK 0170

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 6228 of 2006

Unique Sahkari Avas Samiti Ltd

APPELLANT

Vs

State of U.P. And Others

RESPONDENT

Date of Decision : 09-04-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 39

Uttar Pradesh Co-operative Societies Act, 1965 — Section 95

Uttar Pradesh Housing and Development Board Act, 1965 — Section 95(1)

Citation : (2012) 4 ADJ 698

Hon'ble Judges : Satish Chandra, J;Devi Prasad Singh, J

Bench : Division Bench

Advocate : Ram Raj, for the Appellant; C.S.C., A.K. Chaturvedi, Ashok Kumar Srivastava and Manish Anand, for the Respondent

Final Decision : Dismissed

Judgement

Hon"ble Devi Prasad Singh, J.-

1. The instant writ petition has been preferred by the petitioners under Article 226 of the Constitution of India against the advertisement of respondents U.P. Avas Evam Vikas Parishad (in short Parishad) for allotment of plots for the commercial use group housing for builders, nursing home etc. and to provide 25% of total acquired land to the cooperative housing societies on preferential basis in accordance to regulation without following the process of public auction. Petitioner Unique Sahkari Avas Samit Ltd. is a registered society under the U.P. Cooperative Societies Act, 1965 and rules framed thereunder. Petitioner No. 2 is the President and petitioner No. 3 is its Vice President. The U.P. Avas Evam Vikas Parishad had launched a scheme known as Vasundhara Yojna for effective implementation of the housing scheme. The Housing Board in pursuance to the power conferred by Section 95 of the Adhinium had framed regulations, namely, Avasiya Bhukhando Evam Bhavano Ke Panjikaran Evam Pradeshhan Sambandhi Viniyam, 1979 (in short 1979 Regulation). One other regulation has been

framed, namely, U.P. Avas Evam Vikas Parishad ki Sampatti Ke Nistaran Sambandhi Viniyam, 1980 (in short 1980 regulation).

2. The opposite parties have launched said scheme in District Ghaziabad and acquired land for the purpose of the scheme. Land measuring 1159.404 acre was acquired. Out of the land acquired, 205.934 acres of land was allotted to the Cooperative Housing Societies leaving 83, 931 acres land unutilized, which according to the learned counsel for the petitioners falls within the quota of 25% reserved for Cooperative Housing Societies. To avail the alleged reservation, the petitioners moved an application on 18.5.2006 to the opposite party No. 3 to allot land within the reserved quota of 25% meant for cooperative housing societies alongwith Bank Draft of Rs. 50,000/-. It shall be relevant to take note of the fact that the petitioners had moved an application on their own and not in pursuance to the advertisement published by the respondents.

3. In response to the petitioners' application by letter dated 24.7.2006, the respondents informed that the allotment shall be done by lottery system that too in pursuance to advertisement in newspaper in due course of time. The Bank Draft of Rs. 50,000/- was returned to the petitioner, copy of which has been annexed as Annexure 9 to the writ petition. Subject to the aforesaid backdrop, the opposite party No. 2 had issued impugned advertisement for auctioning of land of different categories on 9.8.2006 and fixed 25.8.2006. Feeling aggrieved, the petitioners submitted representation (Annexure 11 to the writ petition) to the respondents that no auction should take place without reserving 25% of the total land in favour of cooperative housing society. However, without giving any heed to the petitioners' request by impugned advertisement dated 19.9.2006 contained in Annexure 12 to the writ petition, the respondents invited applications for allotment of plots of different categories without making any reservation for cooperative housing societies on preferential basis and scheduled the auction to be held on 28.9.2006. In response thereto, the petitioners again submitted representation on 22.9.2006 (Annexure 13). Thereafter, the petitioners preferred present writ petition.

4. Initially, an interim order dated 27.9.2006 was passed by this Court but later on it was vacated providing therein that 12000 sq. meters of land shall be kept reserved and shall not be allotted to any one till further order of this Court. This Court also directed by order dated 8.12.2006 to decide petitioners' application (Annexure 14).

5. In response to the order passed by this Court, representation was rejected by order dated 15.2.2007 (Annexure 15), which has also been impugned in the present writ petition. While assailing the impugned order as well as advertisement, learned counsel for the petitioners submitted that under the regulation, the petitioners have got right to claim allotment of land within the quota of 25% and whatever amendment has been done, it is prospective in nature. Since the petitioners had applied in the year 2006, their right shall not be affected. The claim of the petitioners is that since the petitioner is the only

applicant, allotment within 25% quota should be given to it that too without advertisement in the newspaper. It has been vehemently argued that once the respondents themselves have allotted an area of 205.934 acres of land to the Cooperative Housing Societies, they have no right to deny the same benefit to the petitioners-cooperative housing society. It is further submitted that the respondents' order dated 9.10.2007 and any order issued from time to time lacks force of law and cannot override the regulation framed in pursuance to the power exercised under the Act. It is also stated that a false affidavit was filed taking plea that amendment in the Regulation 32(2) is of the year 1995 but actually it is of 2007.

6. So far as the allotment of land to the cooperative housing society is concerned, an affidavit has been filed by Dr. P.V. Jaganmohan, Housing Commissioner of the Avas Evam Vikas Parishad on 5.9.2010 where he admits that under Regulation 1979, there was reservation upto 25% of plots for cooperative Housing Societies, who fulfils the conditions as laid down in Regulation 8 of the said regulations. It is further stated that the allotment to the maximum limit is discretionary and cannot be done without advertisement. It has been stated that certain land/plots were allotted by open auction on 1.1.2005 as given in Annexure CC-2. In pursuance to the resolution of the Board in 1997, a committee was constituted to formulate policy for bulk sale of land to cooperative societies and other persons for which applications and fees were deposited by such persons and thereafter the land was allotted to those persons after approval by the Housing Commissioner in the year 1997, which was done in pursuance to the resolution of the Board date 27.9.1993 by which the Housing Commissioner was authorized to take decision on merit. Copy of the resolution dated 28.2.1997 is filed as Annexure CC-3 to the affidavit. It is further stated in the affidavit that the land of some existing co-operative societies were acquired and with a view to accommodate these cooperative societies and the Housing Board allotted them land in the said scheme which are 7 or 8 in number as disclosed in Annexure CC-4 to the affidavit.

7. From the factual position disclosed by the Housing Commissioner, it appears that the land was allotted to 27 cooperative housing society between June 1997 to July 1998 as is evident from Annexure CC-3 to the affidavit. Annexure No. CC-2 to the affidavit further reveals that the allotment of land by public auction was done on 1.1.2005 in Vasundhara Scheme for Group Housing Society which are 12 in number, sale-deeds were executed between March 2006 to November 2010, to seven cooperative societies whose land were used in Vasundhara scheme. Total 146.666 acres of land were allotted as it appears from Annexure CC-4 to the affidavit.

8. From the aforesaid facts and material on record, it appears that 57.80 acre of land were allotted to 27 Housing Cooperative Societies that too without advertisement in newspaper straightway after receipt of their applications. To 12 cooperative housing societies, land has been allotted after inviting applications

through publication in newspaper on 1.1.2005. Thus, it appears that with effect from 1.1.2005, respondents had allotted the land to cooperative housing society by open auction and same procedure has been followed while inviting applications through impugned advertisement contained in Annexure 12 to the writ petition.

9. Regulation 1979 relied upon by the petitioners' counsel has been framed in pursuance to the power conferred by Section 95(1) of the Uttar Pradesh Housing & Development Board Act, 1965. Clause 2 of Regulation provides that the regulation shall not be applicable in the cases where the Board took a decision to dispose of land through public auction. Clause 3 of Regulation further provides that the regulation shall be applicable in registration of residential plot and houses. For convenience, regulation 2 is reproduced as under :

10. The eligibility condition for registration has been given in regulation 4 and 5. Regulation 7 deals with the registration of cooperative housing society which are already registered under the U.P. Co-operative Societies Act. For convenience, Regulation 7 is reproduced as under :

11. Regulation 29 deals with the manner under which applications may be invited from the eligible persons. Reservation has been provided under Regulation 31. Regulation 32 deals with the preferential matter. For convenience, Regulation 29,30,31, 32 are reproduced as under:

It appears that the maximum reservation shall be 25%. The application may be moved in pursuance to the advertisement made in the newspaper by calling the registered person by registered letter.

12. So far as the petitioner's case is concerned, admittedly petitioner had moved the application on its own and for that no advertisement was published in the newspaper nor it was called upon for the purpose. Reservation is to the maximum extent of 25% but since 2005, respondents are allotting plots only by open public auction as is evident from the affidavit filed by the Housing Commissioner.

13. It is well settled proposition of law that the Government or its instrumentality while dealing with public largesse or properties must proceed by public auction or tender through due advertisement in the newspaper. Once no advertisement was made in the newspaper inviting applications, then there was no occasion for the Housing Board to entertain application and allot the land to the petitioners or any other person merely because they are registered cooperative societies. Rightly by impugned advertisement, decision was taken to proceed with public auction or inviting tender for the land of various categories.

14. Regulation 1980 deals with the subject-matter where the land is to be allotted by public auction. The aim and object as provided under Regulation 2 is as under :

15. Under Regulation 4 of 1980 regulation, eligibility condition has been given

and under regulation 5, reservation has been made for various categories but not for cooperative housing societies. For convenience, Regulation 5 is reproduced as under :

16. The procedure for auction and sale has been provided under Regulation 6. Reservation to co-operative housing societies in 1979 Regulation has been deleted by resolution of Board and notified by office memorandum dated 9.10.2007, copy of which has been annexed as Annexure SA-A to the affidavit. There appears to be no dispute that the reservation with regard to cooperative housing society has been deleted from 9.10.2007 and not earlier but it does not mean that the Board lacks jurisdiction to proceed for open auction for allotment of land to cooperative housing societies. It is always open for the Housing Board to proceed with public auction or tender while allotting its plot or land. Only because in the year 1997, land was allotted to cooperative housing society without public auction shall not make out a case to claim the same on parity. Allotment of land or plot without public auction or advertisement suffers from vice of arbitrariness.

17. Under directive principle of the State policy, Article 39 specified certain principles of policy which are to be followed by the Government regulating the material resources of the community and be distributed in such a manner to subserve common good. The principle behind it is that the national wealth and General-dated 17.8.2011 natural resources are equitably distributed among all Sections of the people. It was in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , their Lordships of Supreme Court observed that the Government, in a welfare State, is a regulator and dispenser of special services providing large number of benefits including leases, contracts, licence, mineral etc. They are steadily taking the place of traditional forms of wealth. Government owns and controls hundreds of acres of pubic Land valuable for mining and other purposes. These resources are available for utilization by private corporations and individuals by way of lease or licence. For achieving the goal of justice, equity, the opportunity of equal participation must be given, i.e., through open public auction or public tender. Their Lordships held that a democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal.

In *Administrative Law* (6th Edn.) by Prof. H.W.R. Wade, the distinction between the powers of public authorities and those of private persons has been discussed as under:

.. The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, no absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law,

unfettered Governmental discretion is a contradiction in terms.

Prof. Wade went on to say:

".....The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.

18. In a case in Akhil Bhartiya Upbhokta Congress Vs. State of Madhya Pradesh and Others, , Hon''ble Supreme Court had considered some of the decisions of Court of appeal, decision of House of Lord, to quote relevant portion :

52. Pad field v. Minister of Agriculture, Fishery and Food, is an important decision in the area of administrative law. In that case the Minister had refused to appoint a committee to investigate the complaint made by the members of the Milk Marketing Board that majority of the Board had fixed milk prices in a way that was unduly unfavourable to the complainants. The Minister''s decision was founded on the reason that it would be politically embarrassing for him if he decided not to implement the committee''s decision.

53. While rejecting the theory of absolute discretion, Lord Reid observed:

Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the Court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reasons, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the Court.

54. In Breen v. Amalgamated Engineering Union Lord Denning MR said:

...The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevantly. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is established by Pad field v. Minister of Agriculture, Fisheries and Food which is a landmark in modern administrative law.

55. In Laker Airways Ltd v. Department of Trade, Lord Denning discussed prerogative of the Minister to give directions to Civil Aviation Authorities overruling the specific provisions in the statute in the time of war and said:

Seeing that prerogative is a discretion power to be exercised for the public good, it follows that its exercise can be examined by the Courts just as in other discretionary power which is vested in the executive.

56. This Court has long ago discarded the theory of unfettered discretion. In *S.G. Jaisinghani v. Union of India*, Ramaswami, J. emphasised that absence of arbitrary power is the foundation of a system governed by rule of law and observed:

In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey-"Law of the Constitution" -Tenth Edn., Introduction ex.). "Law has reached its finest moments", stated Douglas, J. in *United States v. Underlick*, 1951 342 US 98:96 Law Ed 113, "when it has freed man from the unlimited discretion of some ruler....Where discretion is absolute, man has always suffered". It is in this sense that the rule of law maybe said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of *John Wilkes* 1770 98 ER 327,"means sound discretion guided by law. It must be governed by rule, not humour it must not be arbitrary, vague and fanciful

Their Lordships has relied upon the judgment of *Ramana Dayaram Shetty* (supra) and held that the power or discretion of the Government in the matter of grant of largess must be confined and structured by rational, relevant and non-discriminatory standard or norm and in case the Government departs from such standard or norm, the action of the Government would be liable to be struck down.

In *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, , *Ramana Dayaram Shetty* (supra) has been followed and their Lordships held that where the Governmental action fails to satisfy the test of reasonableness and public interest, it would be liable to be struck down as invalid. These principles have been reiterated in a case in *Common Cause A Registered Society Vs. Union of India and others*, ; *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, ; *LIC of India and Another Vs. Consumer Education and Research center and Others*, ; *New India Public School and other etc. Vs. HUDA and others etc.*, and *Niranjan Singh and Another Vs. Prabhakar Rajaram Kharote and Others*, .

19. In *Akhil Bhartiya Upbhokta Congress* (supra), their Lordships of Supreme Court held that even if there is provision with regard to allotment of land without issuing advertisement that would be hit by Article 14 of the Constitution, to quote relevant portion :

At the cost of repetition, we consider it necessary to reiterate that there is no

provision in the Act or the Rules and even in the RBC for allotment of land without issuing advertisement and/or without inviting applications from eligible persons to participate in the process of allotment. If there would have been such a provision in the Act or the Rules or the RBC the same could have been successfully challenged on the ground of violation of Article 14 of the Constitution.

20. In a case in State of Orissa and Another Vs. Mamata Mohanty, , their Lordships held that every action of the State or its instrumentality should not only be fair, legitimate and above-board but should be without any affection or aversion. It should neither be suggestive of discrimination nor even give an impression of bias, favouritism and nepotism.

21. In a case in Humanity and Another Vs. State of West Bengal and Others, , where the allotment was made on the request of allottee, Hon''ble Supreme Court held it to be bad in law. Their Lordships held that it is axiomatic that in order to achieve a bona fide end, the means must also justify the end, to quote relevant portion:

This Court is unable to accept the aforesaid contentions. It is axiomatic that in order to achieve a bona fide end, the means must also justify the end. This Court is of the opinion that bona fide ends cannot be achieved by questionable means, specially when the State is involved. This Court has not been able to get any answer from the State why on a request by the allottee to the Hon''ble Minister for Urban Development, the Government granted the allotment with remarkable speed and without considering all aspects of the matter. This Court does not find any legitimacy in the auction of the Government, which has to act within the discipline of the constitutional law, explained by this Court in a catena of cases. We are sorry to hold that in making the impugned allotment in favour of the allottee, in the facts and circumstances of the case, the State has failed to discharge its constitutional role.

22. In ITC Ltd. Vs. State of Uttar Pradesh and Others, , allotment by way of public auction/tender re-affirmed. Allahabad High Court in two Full Bench judgments in the case in Ram Kumar and others v. State of U.P. and others, (2006) 24 LCD 59 and in the case in Feru v. State of U.P. and others, (2004) 96 RD 645, had reiterated the aforesaid proposition of law and held that no allocation of pond or fishery's right could be given by negotiation with individual persons and it must be given by public auction or tender.

23. In a recent judgment Centre for Public Interest Litigation and others v. Union of India and others, passed in Writ Petition (Civil) No. 423 of 2010 and Dr. Subramanian Swamy v. Union of India and others, passed in Writ Petition (Civil) No. 10 of 2011, commonly called as 2G case, Hon''ble Supreme Court deprecated the State action based on negotiation and not on open auction, to quote relevant portion.

In matters involving award of contracts or grant of licence or permission to use

public property, the invocation of first-come-first-served policy has inherently dangerous implications. Any person who has access to the power corridor at the highest or the lowest level may be able to obtain information from the Government files or the files of the agency/instrumentality of the State that a particular public property or asset is likely to be disposed of or a contract is likely to be awarded or a licence or permission is likely to be given, he would immediately make an application and would become entitled to stand first in the queue at the cost of all others who may have a better claim. This Court has repeatedly held that wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition. To put it differently, the State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants.

24. In view of above, there appears to be no room of doubt that the land allotted by the Housing Board to the extent of 57.80 acres without open auction or tender without due advertisement in the newspaper suffers from substantial illegality. There appears to be blatant abuse of power by the authorities of Housing Board under the garb of reservation to the cooperative housing societies. The housing board was not justified in its action to allot straightway the land to the cooperative housing societies without open public auction/tender and advertisement. The practice adopted by the Housing Board was unfair and it may not be ruled out that it could have been done for extraneous reasons or consideration. Government should look into it.

25. Article 14 of the Constitution of India is a positive concept and does not permit the Courts to extend parity of the state action which is patently unlawful, unfair, unjust and suffers from vice of arbitrariness.

26. In *State of Orissa and others v. Prasana Kumar Sahoo*, (2007) 15 SCC 129, Supreme Court held that there cannot be equality in illegality and the Court cannot direct for perpetuation of illegality. Mandamus may be issued only when there exists a legal right in the writ petitioner and the corresponding legal obligation in the State.

27. In *State of Karnataka and Another Vs. Sri R. Vivekananda Swamy*, , Hon''ble Supreme Court ruled that undue favour or relaxation shown to one does not give right of its extension to others. It may not be possible for an employee to enforce a purported right on the premise that another person had obtained all similar kind of treatment.

28. In *Punjab State Electricity Board and Others Vs. Gurmail Singh*, , Hon''ble Supreme Court held that Article 14 being a positive concept, constitutional scheme of equality cannot be applied in illegality.

29. In *Maharaj Krishan Bhatt and Another Vs. State of Jammu & Kashmir and Others*, , their Lordships had reiterated the principles that Articles 14 and 16 of

the Constitution does not warrant that illegality should be perpetuated by extending wrong decision in other cases.

Aforesaid proposition has been reiterated by Hon"ble Supreme Court in cases in General Manager, Uttaranchal Jal Sansthan Vs. Laxmi Devi and Others, ; State of Karnataka and Others Vs. Gadilingappa and Others, ; Bondu Ramaswamy Vs. Bangalore Development Authority and Others, ; Fuljit Kaur Vs. State of Punjab and Others, ; ITC Ltd. Vs. State of Uttar Pradesh and Others, .

30. Law with regard to positive and negative equality has been summarized by Hon"ble Supreme Court in a case in State of Orissa and Another Vs. Mamata Mohanty, . It shall be appropriate to reproduce the relevant portion:

Para 56 : "It is a settled legal proposition that Article 14 is not meant to perpetuate illegality and it does not envisage negative equality. Thus, even if some other similarly situated persons have been granted some benefit inadvertently or by mistake, such order does not confer any legal right on the petitioner to get the same relief, (vide Chandigarh Administrations. Jagjit Singh, Yogesh Kumar v. Government of NCT of Delhi, Anand Buttons Ltd. v. State of Haryana, K.K. Bhalla v. State of M.P. Krishan Bhatt v. State of Jammu & Kashmir, Upendra Narayan Singh (supra); and Union of India v. Kartick Chandra Mondal.

Para 57 : This principle also applies to judicial pronouncements. Once the Court comes to the conclusion that a wrong order has been passed, it 31 be-comes the solemn duty of the Court to rectify the mistake rather than perpetuate the same. While dealing with a similar issue, this Court in Hotel Balaji v. State of AP. observed as under:

12.....2....To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience. In this, we derive comfort and strength from the wise and inspiring words of Justice Bronson in Pierce v. Delameter at page 18:

a Judge ought to be wise enough to know that he is fallible and, therefore, ever ready to learn: great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead: and courageous enough to acknowledge his errors

(See also Ministry of Information & Broadcasting, In re, Nirmal Jeet Kaur v. State of M.P. and Mayuram Subramanian Srinivasan v. CBI.

31. Keeping in view the facts and circumstances of the case, it shall be appropriate for the State Government to amend the existing Government order, rules and regulations, if any, which permits the State or its instrumentality to allot land, plot or houses and other natural resources without open auction or open tender through due advertisement in the newspaper and appropriate circular may be issued and existing rules and regulations be amended accordingly to secure the public interest by the Government of Uttar Pradesh and its instrumentalities.

In view of above, it is not open to the State Government to allot land, plot and houses or natural resources without open auction or open tender with due advertisement in newspaper.

32. In the present case, earlier allotment made to the cooperative societies was in pursuance to the negotiation against the reserved quota of 25% that too without inviting applications through advertisement in newspaper or open auction or tender, hence suffer from vice of arbitrariness and hit by Article 14 of the Constitution.

However, the allottees are not the parties in the present case, hence adverse order may not be passed against such allottees. But there appears to be blatant abuse of power by the Avas Vikas. The allotment done in such a manner cannot extend the right to claim parity within the ambit of Article 14 of the Constitution (supra).

In view of settled proposition of law (supra), neither parity can be extended nor mandamus may be issued which may amount to perpetuate the illegality.

In view of above, we do not find any reason to interfere with the impugned advertisement. We direct the respondent to proceed with open auction/tender with due advertisement in the prominent newspapers for allotment of land for residential or commercial purpose as the case may be. The land reserved in pursuance to the interim order could be let out with due advertisement through open auction/ tender by inviting applications through widely circulated newspaper.

Subject to observation made here-in-above, the writ petition being devoid of merit, is hereby dismissed.