

(2013) 11 AHC CK 0105

Allahabad High Court (Lucknow Bench)

Case No: Misc. Bench No. 5265 of 2013

Sameer Ahmad

APPELLANT

Vs

Nagar Palika Parishad and
Others

RESPONDENT

Date of Decision: Nov. 19, 2013

Citation: (2014) 1 ALJ 328

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

Bench: Division Bench

Advocate: Sunil Sharma and Ruved Kamal Kidwai, for the Appellant; Satish Chandra Kashish, M.A. Khan and Madhur Kant Srivastava, for the Respondent

Final Decision: Allowed

Judgement

Devi Prasad Singh, J.

Whether a contract may be awarded (in the present case, for taxi stand) without inviting tender or open auction is the question cropped up for adjudication in the present writ petition filed under Article 226 of the Constitution of India. By an advertisement dated 22.3.2013 (Annexure No. 2), the respondent Nagar Palika Parishad, District Gonda has invited tenders for open auction of its taxi stand, three-wheeler stand and Public Toilet (Sulabh Shauchalaya) at Baraganon, Ladies Hospital and Sabji Mandi. For taxi stand, security amount fixed was Rs. 9 lacs whereas for three-wheeler, it has been fixed for Rs. 2 lacs. 30.3.2013 was the date scheduled for open public auction.

2. It appears that the petitioner and others had participated in open auction scheduled on 30.5.2013 along with others. The petitioner's bid was Rs. 77,51,000/-. The bid of one Rajesh Singh was Rs. 1 crore 23 lacs and being the highest bidder, the contract was awarded to him. The bid of the opposite party No. 3 Smt. Rabbul Nisha wife of Shri. Sabir Ali was Rs. 1 crore 22 lacs as the second highest bidder for Taxi stand. However, Shri. Rajesh Singh failed to deposit 50% amount of the auction money on the same day. In consequence thereof, the security amount of Rs. 9 lacs

was forfeited and fresh advertisement was made on 18.4.2013 (Annexure No. 3) scheduling the date of open auction as on 26th April, 2013 with same terms and conditions.

3. On 26.4.2013, it appears that no offer was received by the respondent Nagarpalika Parishad, hence again open auction failed. However, the petitioner has stated in para 6 of the writ petition that during the course of open auction, the respondent No. 2 informed the bidder to start the bid from Rs. 90 lacs onwards. None of the bidder was agreed to start from Rs. 90 lacs onward. Hence, auction failed. The petitioner submits that his offer was Rs. 77 lacs and odd in terms of earlier bid. While filing reply, the Executive Officer, Nagarpalika in para 19 of the counter-affidavit, has denied the petitioner's contention that the bidders were directed to start from Rs. 90 lacs but no reason has been assigned in para 19 of the counter-affidavit as to why and for what reason, the open auction was failed. While denying the allegation contained in para 6 of the writ petition, it was incumbent on the Nagarpalika Parishad to specify the grounds on which public auction was failed on 26.4.2013. In absence of reasonable explanation while filing counter-affidavit, the allegation contained in para 6 of the writ petition may be held to be true.

4. It appears that after failure of public auction, the respondent Nagarpalika Parishad has not notified for fresh auction; rather accepted the application moved by the opposite party No. 3 Rabbul Nisha and awarded the contract of taxi stand for an amount of Rs. 75,51,000/-. An application was moved by the opposite party No. 3 on 3.5.2013 for allotment of taxi stand up to 31.3.2014 which was accepted and accordingly, agreement was signed between the parties.

5. Smt. Rabbul Nisha also moved another application for allotment of three-wheeler stand, that too was awarded to her for an amount of Rs. 28,25,000/-. Rules were relaxed and the opposite party No. 3 was permitted to deposit 1/4th instead of 50%.

6. Awarding of contract in pursuance to the application moved by the opposite party No. 3 without any public notice for the purpose was noted by this Court while perusing the record on 7.11.2013. The observation made by this Court while perusing the record has been incorporated in the order sheet dated 7.11.2013 which is reproduced as under:

Mr. Madhur Kant Srivastava, learned counsel appearing for the Nagar Palika Parishad, Gonda has produced the record.

Record reveals that after failure of public auction, the private respondent Smt. Rabbul Nisha wife of Shri. Sabir Ali had moved an application on 3.5.2013 to let out the taxi stand for the period up to 31.3.2014 against an amount of Rs. 75,51,000/-. The application moved by the respondent No. 3 was accepted and agreement has been entered into. Another application was moved for three-wheeler stand by the respondent No. 3 Smt. Rabbul Nisha. That application too was accepted for an amount of Rs. 28,25,000/-. The record further reveals that the contract for taxi stand

and three-wheeler stand was granted to private respondent in pursuance to the application moved without inviting applications through publication for the purpose. Record also reveals that in pursuance to the application moved by the respondent No. 3, she was permitted to pay 1/4th of the amount while accepting the contract instead of 50%.

Mr. Srivastava has relied upon a case, reported in ([Chairman and Managing Director, SIPCOT, and Madras and others Vs. Contromix Pvt. Ltd. by its Director \(Finance\) Seetharaman, Madras and another](#)), by its Director (Finance) Seetharamain, Madras and another.

Since affidavits have been exchanged, with the consent of the parties' counsel, we have Heard the petitioner's counsel Mr. Sunil Sharma, Mr. Madhur Kant Srivastava for the Nagar Palika Parishad, Mohammad Arif Khan, learned Senior Counsel, assisted by Mohd. Asraf Khan for the respondent No. 3. Judgment reserved.

7. From the factual matrix on record, there appears to be no room of doubt that the contracts were awarded to the opposite party No. 3 without any advertisement and wide publicity.

8. The petitioner stated that an application was also moved by him with an offer of Rs. 77,00,000/- which has been refuted by Nagarpalika Parishad. It is stated that fake and forged letter has been annexed with the writ petition containing acknowledgment with regard to offer of Rs. 77,51,000/- (Annexure No. 4). The respondent Nagarpalika Parishad has set up a defence that the petitioner has not raised any voice during the course of auction and in absence of any bid for him, he has no locus to challenge the contract awarded to the opposite party No. 3. It is further stated by learned counsel for the Nagarpalika Parishad that the petitioner has got no right to raise grievance against the alleged illegality or irregularity since he himself has not applied for awarding of contract and the representation alleged to have been submitted is false and fabricated.

9. Objection with regard to the maintainability of writ petition, coupled with the right of the petitioner to impugn the contract does not seem to be sustainable for the reason that admittedly, the petitioner was bidder in the first auction and no reason has been assigned with regard to cancellation of second auction. Otherwise also, in case the auction could not be materialized of which the petitioner admittedly, was participant then it was not open for the Nagarpalika Parishad to accept the application moved by the respondent No. 3 without due publication of procedure adopted by it. After cancellation of public auction scheduled on 26.4.2013, it was incumbent on the Nagarpalika Parishad to readvertise the contract notifying the public tender or quotation with wide publicity so that all eligible persons could have moved applications quoting their offer for contractual assignment. It appears that behind the back of the petitioner and other co-bidders and under the veil of secrecy, the application of respondent No. 3 was accepted first

for taxi stand and thereafter for three-wheeler stand and contract was awarded for the period up to 26.4.2014. Such action on the part of Nagarpalika Parishad suffers from vice of arbitrariness and hit by Art. 14 of the Constitution of India. From the material on record, it appears that a collusive arrangement was made by the respondent No. 2 with the respondent No. 3 while awarding the contract for extraneous reasons and considerations.

10. By catena of judgments, Hon"ble Supreme Court ruled that the contractual right by the State and its instrumentalities should be awarded either by open public auction or tender inviting applications with wide publication in the newspaper vide [Ramana Dayaram Shetty Vs. International Airport Authority of India and Others](#), [Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another](#), [Fuljit Kaur Vs. State of Punjab and Others](#), [State of Orissa and Another Vs. Mamata Mohanty, Humanity and Another Vs. State of West Bengal and Others](#), [Subramanian Swamy Vs. A. Raja](#), .

11. While dealing with identical issue with regard to allotment of plot to Housing Societies deprecating the action of the U.P. Housing Board expressing opinion on behalf of the Division Bench of this Court, one of us (Hon"ble Devi Prasad Singh, J.) in a case, reported in [Unique Sahkari Avas Samiti Ltd Vs. State of U.P. And Others](#), , this Court observed as under:

23. In a recent judgment Centre for Public Interest Litigation and others v. Union of India and others, passed in [Centre for Public Interest Litigation and Others Vs. Union of India \(UOI\) and Others](#), 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 co-operative housing societies. The housing board was not justified in its action to allot straightway the land to the co-operative 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.

12. Learned counsel representing Nagarpalika Parishad has placed reliance on a case, reported in [Chairman and Managing Director, SIPCOT, and Madras and others Vs. Contromix Pvt. Ltd. by its Director \(Finance\) Seetharaman, Madras and another,](#) by its Director and submits that on account of failure of second public auction proceeding, it was, open for the Nagarpalika Parishad to award the contract of taxi stand as well three-wheeler stand on the basis of the request moved by the respondent No. 3. Argument advanced by the learned counsel seems to be mis-conceived and is an instance of incorrect interpretation of the judgment of Hon"ble Supreme Court in the case of SIPCOT (supra). Their Lordships observed as under:

The learned single Judge as well as the Division Bench of the High Court have held that the said sale was not conducted in accordance with the guidelines laid down by this Court in [Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others,](#) inasmuch as (i) the sale was not held by auction and was held by inviting tenders followed by negotiations; (ii) the price for which the properties were sold was low; and (iii) before accepting the offer of Rs. 38 lakhs made by respondent No. 2, no intimation was given to respondent No. 1 so as to enable it to make a higher offer.

13. A Full Bench of Allahabad High Court in a case, reported in (2004) 96 RD 645 Feru v. State of U.P and others; followed by another Full Bench, reported in [2005 (4) ESC (All) 2617 : (2006 (1) ALJ 376)] Ram Kumar and others v. State of U.P and others has held that the contract for fishery right of ponds belonging to Gram Samaj may not be awarded by negotiation in pursuance to Panchayat Raj Manual except by public auction or tender with wide publication in the newspaper. The provisions contained in the Manual to award fishery right by negotiation or inviting applications without advertisement was held to be arbitrary and violative of Article 14 of the Constitution of India.

14. From the plain reading of the judgment relied upon by the Nagarpalika Parishad itself, there seems to be no doubt that the contract could not have been awarded except by public auction or by inviting tenders with wide publication in the newspaper. In case the contract is not awarded by open public auction, then this

could have been done by inviting tender. Their Lordships held that sale by inviting tender is not ipso facto invalid subject to the condition that the endeavour should be made to give wide publicity to get maximum price. The sale or contract by tender is permissible subject to wide publication of the assignment. In absence of wide publication, contract awarded even through tender shall not be just and proper and hit by Art. 14 of the Constitution of India.

15. In the present case, admittedly, no publication was done while accepting the application moved by the opposite party No. 3 for two contractual assignments, i.e. taxi stand and three-wheeler stand. The argument of the respondents' counsel that the Nagarpalika Parishad has not been put in loss since the total amount of taxi and three-wheeler stand comes around Rs. 1 crore does not seem to be sustainable for the reason that in absence of competitive bid or competitive tender filed by contractors in response to the advertisement, it cannot be ascertained whether the Nagarpalika Parishad has been put into loss or not. However, keeping in view that everything was done behind the back under the veil of secrecy, inference may be drawn that Nagarpalika Parishad has acted for extraneous reasons and considerations. Such action on the part of the Nagarpalika Parishad, Gonda is deprecated.

16. In view of above, the writ petition deserves to be allowed with exemplary cost, keeping in view the fact borne out from the record, in [Salem Advocate Bar Association, Tamil Nadu Vs. Union of India \(UOI\)](#), . Relief is also further required to be modified to meet the ends of justice. Accordingly, the writ petition is allowed. A writ in the nature of certiorari is issued quashing the impugned order/contract dated 18.5.2013 awarding the contract of taxi stand with immediate effect as well as the order passed by the Nagarpalika Parishad with regard to three-wheeler stand forthwith. A writ of mandamus is issued directing the respondent No. 2 to advertise the contract for taxi stand as well as three-wheeler stand within two weeks for the remaining period of the financial year either through public auction or by tender and award the contract to eligible person.

It shall be open for the Nagarpalika Parishad to make interim arrangement to recover reasonable fee from its own staff at taxi stand as well as three-wheeler stand till fresh contract is awarded to eligible person in pursuance to the present judgment.

Cost is quantified to Rs. 2 lacs which shall be deposited in this Court within three weeks, out of which the petitioner shall be entitled to withdraw an amount of Rs. 1 lacs and the remaining Rs. 1 lac shall be remitted to the Mediation & Conciliation Centre, High Court, Lucknow Bench, Lucknow. In case the cost is not deposited as aforesaid, it shall be recovered as arrears of land revenue by the District Magistrate, Gonda. Registry to take follow-up action. The Director, Local Bodies or Nagarpalika Parishad as the case may be shall recover the cost from the officers/persons who have awarded contract to the respondent No. 3 without following due process of

law (supra).

The writ petition is allowed accordingly with costs.