Anil Kumar Srivastava vs State Of U.P. & Another on 20 August, 2004

Equivalent citations: AIR 2004 SUPREME COURT 4299, 2004 (8) SCC 671, 2004 AIR SCW 4815, 2004 ALL. L. J. 3247, 2004 (7) SLT 114, (2005) 27 ALLINDCAS 506 (SC), 2004 (4) COM LJ 576 SC, 2004 (3) LRI 734, 2004 (6) ACE 706, 2004 (2) HRR 516, (2004) 7 JT 35 (SC), 2004 (2) CTLJ 257, 2004 (8) SRJ 115, (2004) 4 COMLJ 576, 2004 HRR 2 516, (2004) 22 INDLD 270, (2004) 4 ALL WC 3037, (2005) 1 PUN LR 456, (2004) 7 SCALE 66, (2004) 7 SUPREME 446

Bench: Ashok Bhan, S.H. Kapadia

CASE NO.:
Appeal (civil) 5402 of 2004

PETITIONER:
Anil Kumar Srivastava

RESPONDENT:
State of U.P. & Another

DATE OF JUDGMENT: 20/08/2004

BENCH:
ASHOK BHAN & S.H. KAPADIA

JUDGMENT:

J U D G M E N T [Arising out of SLP (C) No.7790 OF 2004] WITH TRANSFERRED CASE No.54 OF 2004.

Anil Kumar Srivastava Petitioner

Versus

State of U.P. & Another Respondents

KAPADIA, J.

Leave granted in SLP.

Anil Kumar Srivastava claiming to be a public spirited citizen residing in Sector 14, Noida, U.P. moved Allahabad High Court in Civil Misc. Writ Petition No.10137 of 2004 [Transferred Case No.54

of 2004 herein] challenging the Scheme bearing No.2003-2004 (Commercial Hub) Sector 18 floated by New Okhla Industrial Development Authority (NOIDA) for construction of a commercial hub on a plot bearing no.M-3 in Sector 18, Noida as arbitrary and violative of norms contained in the Board Resolution dated 10.7.2003 and the precedents with regard to size and reserve price, resulting in the loss to the State exchequer of Rs.340 crores. In the writ petition, it is alleged that the impugned Scheme awards 54,320.18 sq. mtrs. of prime commercial land, without precedent, at 1/4th of the prevailing market price and by fixing the reserve price at abysmally low, throw away, price; that the said Scheme is, therefore, arbitrary and violative of Article 14 of the Constitution. In the writ petition, the petitioner prayed for setting aside the Scheme. Pending hearing and final disposal, the petitioner sought interim reliefs restraining NOIDA, respondent no.2 herein, from giving effect to the said Scheme. By impugned order dated 12.3.2004, the High Court refused the interim relief as prayed for. Aggrieved, the original petitioner came to this Court by special leave. Vide order dated 28.4.2004, this Court stayed the operation of the impugned Scheme. By order dated 9.7.2004, the Court presided by Hon'ble the Chief Justice, at the request of respondent nos.2 and 3 herein, directed Writ Petition no.10137 of 2004 pending in the Allahabad High Court to be transferred to this Court under Article 139A of the Constitution..

By order dated 23.7.2004, the Court presided by Hon'ble the Chief Justice, on the joint prayer made by all the counsel, directed the matter to be listed for final hearing and accordingly this matter has come for hearing.

As stated, the impugned Scheme is for development of plot no.M-3 admeasuring 54,320.18 sq. mtrs. in sector 18 by constructing thereon a commercial hub consisting of a shopping mall, multiplexes, showrooms, retail outlets, hotels, restaurants and offices with matching parking facility in order to decongest the said sector which has now become a centre for small enterprises. That shopping habits have changed resulting in a demand for shopping malls and entertainment centres, which require bigger plots. That the object of the said Scheme was integrated development of the sector. The salient features of the Scheme were : 30% ground cover; 150 floor area ratio (FAR) and provision for 2800 estimated car spaces (ECS). The reserve price was fixed at Rs.27,500/- per sq. mtr. The Scheme was kept open from 18.2.2004 up to 9.3.2004. It was widely advertised in Times of India, Hindustan Times, Economic Times, Business Standard and Amar Ujala. That nine reputed developers including MGF, Unitech, Sun City, Sahara India and Omex purchased the brochures. However, on the closing date i.e. 9.3.2004, only one tender of M/s DLF Universal Ltd., respondent no.3 herein, was received and evaluated by the technical committee on whose recommendation the financial tender was opened on 12.3.2004. Respondent no.3 quoted Rs.31,850/- per sq. mtr. in their financial tender, which was 15.81% higher than the reserve price of Rs.27,500/- per sq. mtr. Other developers like Unitech, Sahara India, Omex, MGF, Sun City etc. also purchased the bid documents but they abstained from bidding. Since respondent no.3 was the only bidder and since it had quoted the price which was higher than the reserve price, its tender was accepted vide letter dated 12.4.2004 (hereinafter referred to as "the allotment letter"). In the meantime, on 10.3.2004, the petitioner herein moved the Allahabad High Court as stated above.

By the allotment letter, respondent no.3 was informed that its bid stood accepted; that the tender price was Rs.31,850.00 per square metre; that the total premium was Rs.173,00,97,733.00; that

earnest money to be deposited was Rs.3 crores; that the allotment money to be deposited was Rs.43,25,24,433.25; that the balance allotment money to be deposited by 26.4.2004 was Rs.40,25,24,433.25 whereas balance premium amounting to Rs.129,75,73,299.75 had to be deposited by 10.7.2004. It may be clarified that earnest money of Rs.3 crores was adjustible against allotment money of Rs.43,25,24,433.25. Till date, respondent no.3 has deposited the earnest money of Rs.3 crores and Rs.40,25,24,433.25 on 23.4.2004. However, respondent no.3 has not deposited the balance premium payable on 10.7.2004 as the Scheme was stayed by this Court vide order dated 28.4.2004.

It is the case of the petitioner that respondent no.2 is the statutory authority under U.P. Industrial Area Development Act, 1976; that it is responsible for the development of the area in terms of the Master Plan for Noida; that it has framed Building Regulations w.e.f. 1.2.1986 containing guidelines of occupancy, building permits and floor area ratio. According to the petitioner, the reserve price of Rs.27,500/- per sq. mtr. in the present case for a plot admeasuring 54,320.18 sq. mtrs. was abysmally low, particularly in view of the fact that under the Board Resolution dated 10.7.2003, the reserve price of plots measuring 5001 or more square metres had to be fixed at 1= times the sector price which according to the petitioner was Rs.90,000/- per sq. mtr. In this connection, the petitioner has relied upon earlier Schemes of NOIDA for the year 2002 under which reserve price of plots admeasuring 6000 to 7000 sq. mtrs. in sector 18 was fixed at Rs.40,000/- to Rs.75,000/- [See: Annexure P1]. That for plots in same sector-18 admeasuring 60 sq. mtrs. to 90 sq. mtrs., the reserve price was fixed at Rs.1,90,600/- (See: Annexure P2). It has been further alleged that the tender price at the rate of Rs.31,850/- per sq. mtr. is also undervalued. According to the petitioner, the said rate is 1/4th of the prevailing market rate. That such low rates would result in unjust enrichment of the developer at the cost of the exchequer and consequently, the Scheme needs to be set aside as arbitrary and violative of Article 14 of the Constitution of India.

In reply, respondent no.2 has pointed out that the impugned Scheme was given wide publicity; that the development of the plot admeasuring 54320.18 sq. mtrs. became necessary to decongest sector-18 where car parking has become an acute problem; that decongestion could be achieved by constructing shopping malls with matching parking facility; that although the area of the plot in question is 54,320.18 sq. mtrs., the FAR is restricted to 150 and ground cover is restricted to 30% unlike the instances of plots submitted by the petitioner where for a smaller plots of 6000 to 7000 sq. mtrs., the FAR is 150 and for still smaller plots of 600 sq. mtrs, the FAR is 250 (See: Annexure P1). That by offering the said plot admeasuring 54,320.18 sq. mtrs, the Authority is saving on internal development for amenities, parking etc. That in the past, respondent no.2 invited bids for plots admeasuring 7000 sq. mtrs. with 30% ground cover and FAR of 150 with reserve price of Rs.40,000/- per sq. mtr., which failed. It is further pointed out, that, the reserve price is not understated as alleged. In this connection, it is pointed out that the developer has tendered the rate of Rs.31,850/- per sq. mtr. which is the rate higher than the rate of Rs.27,500/- per sq. mtr. That in addition to the reserve price, the tenderer has to provide for 2800 cars parking space (minimum) in the basement level. That if the cost of 2800 cars parking space is taken into account, it cannot be said that reserve price is understated. That in the past, higher reserve price(s) for comparatively smaller plots did not attract the developers. That the petitioner has confused the sector rate with circle rate. The circle rate is the notified rate. It is fixed by the Government for the guidance of the

Sub-Registrar. The circle rates are not fixed by respondent no.2. That under the Board Resolution dated 10.7.2003, the reserve price of commercial plots measuring 5001 sq. mtrs. and above is to be fixed at one and half times the sector rates. That under the resolution, the reserve price for commercial plot measuring 5001 sq. mtrs. and above should be fixed on the basis of average rate of adjoining sectors. In this connection, it is pointed out that sector 18 abuts sectors 17 and 27 (residential) and sector 16A (institutional); that average rate in these sectors is Rs.12000/- per sq. mtr. and on the basis of 1= times the average rate of these sectors, the reserve price came to Rs.18000/-. That even on the basis of the Highest Rate in sector-17, being Rs.15,700/- per sq. mtr., the reserve price comes to Rs.23,050/- per sq. mtr. In the circumstances, respondent no.2 has submitted that while fixing the reserve price in the present case at Rs.27,500/- per sq. mtr., it has complied with the principles embodied in the Board Resolution dated 10.7.2003. It is further pointed out that relatively smaller commercial plots in sector-18 sold in last six years indicate the prevailing price of Rs.22,500/- per sq. mtr. (including escalation of 15% per annum). Lastly, it has been pointed out that the impugned Scheme was kept open from 18.2.2004 to 9.3.2004; that it was widely advertised; that on the closing date, only one tender was received; that respondent no.3 quoted Rs.31,850/- per sq. mtr. in its financial tender which was 15.81% higher than the reserve price of Rs.27,500/- and in the circumstances, its tender was accepted. In the circumstances, respondent no.2 submitted that the reserve price was not understated and that the rate offered by the tenderer at Rs.31850/- per sq. mtr. cannot be said to be under valued as alleged. According to the petitioner, the current notified rate in sector 18 was Rs.90,000/- per sq. mtr. and consequently, the rate offered by the tenderer and accepted by respondent no.2 at Rs.31,850/- per sq. mtr. was abysmally low. In the counter, respondent no.2 has pointed out that there is no factual basis on which the petitioner has alleged that the prevailing market rate is Rs.90,000/- per sq. mtr. It is submitted that the petitioner has confused the sector rate with the circle rate. That in the absence of sale instances and valuation report, it cannot be alleged that the rate offered by respondent no.3 is understated/undervalued. In the circumstances, it is submitted that the petition has no merit.

In its counter, respondent no.3 the developer has pointed out that urban population today prefer shopping malls which are self contained in a closed building vis-`-vis traditional markets; that the planning Authorities encourage the construction of these malls as the administration is freed from maintaining and servicing traditional market places for which it incurs huge expenditure. As far as the impugned Scheme is concerned, it has been pointed that the developer is put under obligation to construct a shopping mall with matching car parking facilities in the basement and around the mall; that the cost of providing this facility has to be added to the reserve price; that under the impugned Scheme, NOIDA gets Rs.174 crores (approx.) within 90 days; that the reserve price of smaller plots with different FARs and ground cover cannot be relied upon for determining the reserve price under the impugned Scheme, which applies to the plot measuring 54,320.18 sq. mtrs. with 30% ground cover and FAR of 150. That in the earlier instances of sales of plots bearing nos.M-30, M-13, K-1A and K-1B, auctions had failed in the past. That on the contrary, in case of auction of two plots, L1 and L2 in sector-18, the reserve price was Rs.22,500/- per sq. mtr. based on actual sales of adjoining plots in last six years. That such reserve price of Rs.22,500/- per sq. mtr. was lower than the impugned reserve price of Rs.27,500/- per sq. mtr. in the present Scheme. In the circumstances, it has been urged in the counter filed on behalf of respondent no.3 that the reserve price of Rs.27,500/- per sq. mtr. has been fixed taking into account the previous experiences and the prices

prevailing in the adjoining sectors.

Mr. L. Nageshwar Rao, learned senior counsel appearing on behalf of the petitioner submitted that the reserve price fixed by respondent no.2 at the rate of Rs.27,500/- per sq. mtr. is contrary to clause 2 (e) of the Board Resolution dated 10.7.2003; that under the said clause, the reserve rate of commercial plots admeasuring 5001 sq. mtrs. or more was one and half times the sector rate; that the sector rate was Rs.90,000/- per sq. mtr.; that the reserve price of Rs.27,500/- per sq. mtr. for the plot admeasuring 54,320.18 sq. mtrs., without sub- division, was abysmally low and understated. That in the past, respondent no.2 had never invited tenders for such a large sized plot with such low reserve price. It was further urged that the impugned reserve price was not only contrary to the Board Resolution, it was also contrary to the past precedents, both in terms of area/size of the plot and the reserve price. In this connection, reliance was placed on annexures 'P1' and 'P2' to show that for plots admeasuring 6000/7000 sq. mtrs., the reserve price fixed was in the range of Rs.40,000/-/Rs.75,000/- per sq. mtr. It was submitted that transfer of the said plot admeasuring 54,320.18 sq. mtrs. at such a low reserve price of Rs.27,500/- per sq. mtr. would result in causing huge loss of Rs.340 crores to the State exchequer. It was next contended that even the tender price of Rs.31,850/- per sq. mtr. at which the offer of respondent no.3 has been accepted is ridiculously low particularly when the notified rate prevailing in sector 18 is Rs.90,000/- pr sq. mtr. to Rs.1,00,000/- per sq. mtr. Hence, it was submitted, that the reserve price has been fixed arbitrarily and in breach of clause 2(e) of the resolution dated 10.7.2003 as also in contravention of the precedents in relation to the area of the plot and the reserve price. It was submitted that the fixation of the impugned reserve price was arbitrary, unreasonable and violative of Article 14 of the Constitution.

On the above submissions, the central point which arises for determination is : whether the tender price of Rs.31,850/- per sq. mtr. is understated. In the present case, respondent no.2 invited offers for the plot admeasuring 54,320.18 sq. mtrs. for the shopping mall with 2800 ECS in order to decongest sector 18. Wide publicity was given. Several reputed developers bought tender documents. However, at the end of the day, there was only one bidder (respondent no.3) in the field. In the present case, malafides have been alleged, but not pressed. Therefore, the question before us is : whether respondent no.2's decision in accepting the bid of respondent no.3 was arbitrary, unreasonable and in violation of the Board Resolution dated 10.7.2003.

Before coming to the above challenge, we would like to examine the concepts of 'valuation' and 'upset/reserve price'. In the case of McManus v. Fortescue & another reported in [1907 Vol.II K.B. page 1] it has been held by Court of Appeal that in a sale by auction, subject to reserve, every offer/bid and its acceptance is conditional. That the public is informed by the fact, that the sale is subject to a reserve, that the auctioneer has agreed to sell for the amount which the bidder is prepared to give only in case that amount is equal to or higher than the reserve. That the reserve puts a limit on the authority of the auctioneer. He cannot accept a price below the upset/reserve price. That he could refuse the bid which is below the upset price.

The aforestated ruling explains the meaning of the term 'reserve price'. It indicates the object behind fixing the reserve price viz. to limit the authority of the auctioneer. In the present case, the board

resolution is meant to guide the officers of the second respondent. The resolution prescribes the guidelines for fixing the reserve price. The concept of reserve price is not synonymous with 'valuation of the property'. These two terms operate in different spheres. An invitation to tender is not an offer. It is an attempt to ascertain whether an offer can be obtained with a margin. [See: Pollock & Mulla on Indian Contract & Specific Relief Acts (2001) 12th Edition. Page 50].

Valuation is a question of fact. This Court is reluctant to interfere where valuation is based on relevant material. [See: Duncans Industries Ltd. v. State of U.P. & others reported in (2000) 1 SCC 633]. The difference between valuation and upset price has been explained in the case of B. Susila & another v. Saraswathi Ammal & others reported in [AIR 1970 Madras 357] in which it has been held that fixation of an upset price may be an indication of the probable price which the land may fetch from the point of view of intending bidders. However, notwithstanding the fixation of upset price and notwithstanding the fact that a bidder has offered an amount higher than the reserve/upset price, the sale is still open to challenge on the ground that the property has not fetched the proper price and that the sale be set aside. That the fixation of the reserve price does not affect the rights of the parties. Similarly, in the case Dr. A. U. Natarajan & another v. Indian Bank, Madras reported in [AIR 1981 Madras 151] it has been held that the expressions "value of a property" and "upset price" are not synonymous but have different meanings. That the term "upset price" means lowest selling price or reserve price. That unfortunately in many cases the word "value" has been used with reference to upset price. That the sale has to commence at the higher price and in the absence of bidders, the price will have to be progressively brought down till it reaches the upset price. That the upset price is fixed to facilitate the conduct of the sale. That fixation of upset price does not preclude the claimant from adducing proof that the land is sold for a low price.

Applying the above tests to the facts of this case, we find that there is no material on record to show that the tender price of Rs.31,850/- per sq. mtr. is a low price. The entire edifice of the petition is based on the challenge to the reserve price of Rs.27,500/- per sq. mtr. As stated above, fixation of the reserve price is to facilitate the conduct of the sale. It was open to the petitioner to challenge the tender price of Rs.31,850/- per sq. mtr. as understated, notwithstanding the fixation of the reserve price. No comparative sales instances, with similar parameters of ground cover of 30% and 150 FAR, have been placed before us. No figures of cost of 2800 ECS have been placed before us as such costs would increase the reserve price. On the other hand, we find that the reserve price has been fixed by taking into several factors. Firstly, in the past tenders invited for relatively smaller plots with higher reserve price had failed. It is important to bear in mind that tender process is an expensive exercise. To resort repeatedly to this exercise is a costly affair. Secondly, in the present case, the reserve price is fixed by taking into account the comparative offers/sales in the adjoining sectors. That the average of such sales has been taken into account while fixing the reserve price in terms of clause 4(c) of the Resolution dated 10.7.2003, which reads as under: "4(C) In developed sectors where tenders have been received earlier, fixation of rates is proposed to be on the basis of average price arrived at prior to the scheme of fixation of reserve price, on the basis of rate arrived on the above principle, whichever is more. In such a situation average rate is proposed to be fixed as per the category and user mentioned in the preceding paragraph."

Thirdly, the developer/tenderer is obliged to construct a matching car parking facility of 2800 ECS whose cost is required to be added to the reserve price of Rs.27,500/- per sq. mtr. Lastly, in the present case it has been submitted that under clause 2(e), reserve price had to be fixed at 1= times the sector rate which according to the petitioner was Rs.90,000/- per sq. mtr. Clause 2(e) reads as under: "2(e) Commercial Plots measuring One and a half times 5001 sq. metres or more of sector rates"

Reading of the said clause indicates that the figure of Rs.90,000/- is not mentioned. It is a figure alleged by the petitioner. As stated above, there is a difference between the circle rate and the sector rate. The petitioner has confused the two. The circle rate is notified by the Government for the guidance of the sub-registrar. They are notified for revenue purposes. There is nothing to show that Rs.90,000/- per sq. mtr. was the sector rate. In the present case, we are concerned with a larger plot of 54,320.18 sq. mtrs. with different variables of 30% ground cover and 150 FAR. Keeping in mind all these factors, the Authority has fixed the reserve price. In the present case, undue importance has been given to the fixation of the reserve price. As stated above, notwithstanding the reserve price, the petitioner could have brought before the Court material, if any, to show undervaluation. In the present case, the tender price is Rs.31,850/- per sq. mtr. It is higher than the reserve price. There is no material to show whether the tender price is understated. In the circumstances, there is no merit in the contention of the petitioner that the land is sold at abysmally low price.

In the case of Tata Cellular v. Union of India reported in [(1994) 6 SCC 651], it has been held, while discussing the scope of judicial review, that Courts do not sit in appeal; that the Courts merely review the manner in which the administrative decision was made; that the Court cannot substitute its own decision as it has no expertise to correct the decision. Applying the above test to the facts of this case, we find that tender invitation was given wide publicity; that although nine bidders bought the tender documents, only respondent no.3 offered its bid; that the financial committee has recommended its acceptance keeping in mind the prior experience and the terms and conditions of the Resolution dated 10.7.2003 in the matter of fixation of sector price and reserve price. Hence, there is no merit in the above contentions.

Mr. L. Nageshwar Rao, learned senior counsel for the petitioner submitted that under the impugned Scheme, two concessions have been given arbitrarily to benefit the developer at the cost of the State exchequer. In this connection, reliance is placed on clause 10(A)&(B) and clause 15 of the terms and conditions of the Scheme. For the sake of convenience, we quote herein below the aforestated clauses: "10. GROUND RENT/LEASE RENT:

In addition to tendered amount, the allottee/lessee shall have to pay yearly ground rent/lease rent in the manner indicated below: (A) The ground rent/lease rent shall be charged @ 2.5% p.a. of the total premium of the plot for the first 10 years from the

stipulated date of execution of lease deed. However, the ground rent/lease rent shall be charged @ Rs.1/- per sq. mtr. per year for the first three years from the stipulated date of execution of lease deed.

(B) The ground rent/lease rent shall be enhanced after expiry of 10 years from the stipulated date of execution of lease deed. The enhancement will be 50% of lease rent/ground rent last thus fixed.

OR The allottee has the option to pay 11 years lease rent @ 2.5% p.a. of the total premium as one time lease rent within first 10 years of allotment.

Thereafter, 11 times of the prevailing rate shall be payable as one time lease rent. In such case, the allottee has to clear outstanding of lease rent and interest first

15. TRANSFER:

The lessee can transfer the built-up premises over the plot with prior permission of the Authority subject to the rules and regulations for transfer and on payment of transfer charges prevailing at the time of such transfer. No transfer charges shall be applicable in case of transfer of built up commercial space during the first 2 years from the date of completion. Thereafter, transfer charges shall be payable on pro-rata basis as applicable. However, the purchaser shall be required to pay pro-rata lease rent as applicable. The sub-lessee shall be required to make the built up space functional with in one year from the date of sub-lease and submit the prescribed documents to the Authority in proof thereof. Thereafter, extension charges shall be payable, as applicable.

All the terms and conditions of the brochure/allotment/permission for grant of transfer and lease deed shall be applicable on the allottee/lessee/transferee."

As can be seen from the above two clauses, in addition to the tendered amount, the allottee is obliged to pay ground rent; that the ground rent is payable at 2.5% of the total premium of Rs.173 crores (approximately) during the first 10 years from the date of the lease. However, for first three years, concession is given in payment of rent to enable the developer to attract entrepreneurs to put up hotels, restaurants, multiplexes etc. So also for the first two years, transfer charges are not payable in cases of transfer of built up commercial spaces. We do not find any merit in the argument of the petitioner that these concessions/incentives are arbitrarily given as largesse to the tenderer. These concessions are a part of terms and conditions of the Scheme, which was kept open for all eligible bidders. Further, we do not have any figures to show the alleged loss to the exchequer. Further, when a Scheme is challenged, we have to look at it as an entire package. We have to see the tender price, the cost of putting up amenities like ECS, the cost-benefit ratio, the future projections in terms of increase in revenue, employment etc. None of these facts have been brought out in the petition. Hence, there is no merit in the contention that the above

concessions have been given arbitrarily to the developers.

For the foregoing reasons, we do not find any merit in the Civil Appeal No. 5402 of 2004, arising out of SLP (C) No.7790 of 2004, as well as in the Transferred Case No.54 of 2004 [Writ Petition No.10137 of 2004 of Allahabad High Court] and the same are accordingly dismissed, with no order as to costs. We direct respondent no.3 to pay respondent no.2 the balance 75% of the premium in terms of Item 12 of letter of allotment dated 12.4.2004 within one week from the date of pronouncement of this judgment.