
(2010) 03 AHC CK 0210
In the Allahabad High Court

Mahendra Nath Tiwari

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 12-03-2010

Acts Referred:

Citation : (2010) 4 AWC 3939

Hon'ble Judges : A.P. Sahi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

A.P. Sahi, J.—The petitioner has come up against the order dated 1.9.2008 passed by the District Magistrate, Allahabad whereby his representation for regular appointment as a Collection Amin under the U.P. Collection Amins Rules, 1974 has been rejected.

2. Apart from the writ petition, counter affidavit and the rejoinder affidavit a second counter affidavit, second supplementary counter affidavit and third supplementary counter affidavit have been filed on behalf of the respondents and the records have also been produced. A response to these affidavits have been filed by the petitioner captioned as counter affidavit, supplementary affidavit and supplementary rejoinder affidavit. After the supplementary rejoinder affidavit had been filed by the petitioner a clarification was again sought which was given through a written instructions by the Tahsildar dated 4.2.2010 which has been taken on record.

3. I have heard Sri C.B. Yadav learned senior counsel assisted by Sri Nishit Yadav for the petitioner and Sri B.N. Misra learned standing counsel on behalf of the respondents.

4. The facts as emerge from the pleadings are that the petitioner was engaged as a Seasonal Collection Amin in the year 1978 and he claims that he was temporarily appointed in 1989 and was given an adhoc appointment against a permanent vacancy in the year 1991. This appointment is stated to have been

terminated by the respondents against which the petitioner filed Writ Petition No. 31464 of 1991 and two interims orders were granted on the same date i.e. on 1.1.1991 whereby the communications and the consequential order of termination had been stayed.

5. The petitioner alleges that the termination order was not in writing and was oral, and as a consequence of the interim order passed on 1.11.1991 the petitioner continued in service till the writ petition was finally allowed on 19.7.2004. While allowing the writ petition the status of the petitioner was directed to be maintained as a seasonal collection amin and to decide his representation with regard to his claim of regular appointment in terms of the 1974 Rules.

6. Learned Counsel for the petitioner contends that inspite of the fact that the petitioner's claim was directed to be considered the same was not being decided as a result whereof he filed another writ petition being Writ Petition No. 21329 of 2007 which was disposed of on 7.7.2008. Both the aforesaid writ petitions had been disposed of after exchange of affidavits and copies of the counter affidavit have been filed on record. The District Magistrate has now proceeded to pass the impugned order on 1.9.2008 holding that the petitioner did not fulfil the necessary condition of 70% recovery as required under the rules and in view of the findings recorded therein, the petitioner's claim has been rejected with a further hope that if in future a vacancy is available for considering regularisation, then in that event if the petitioner is able to deliver 70% recovery, his claim could be reconsidered in accordance with rules.

7. Sri C.B. Yadav learned senior counsel has primarily assailed the findings and contends that the factual foundation of the order proceeds on erroneous facts to the extent of recovery made in the respective Fasals of two Fasli years. He contends that the records speak otherwise whereas the conclusion drawn by the District Magistrate is contrary to the same. In essence the argument is that the order of the District Magistrate is perverse and on account of such perversity, keeping in view the law laid down by the Full Bench decision in the case of Nanha v. D.D.C. and Ors. reported in 1975 AWC 1 the order deserves to be set aside. He further, relying on the decision in the case of Dinesh Kumar Asthana v. Collector, Azamgarh reported in 2007 (1) UPLBEC 867 contends, that low recovery beyond the control of the employee cannot be a ground to non-suit the petitioner. Relying upon the judgment of this Court in the case of Ram Saran Lal v. State of U.P. reported in 2008 (2) UPLBEC 63 he contends that an omission on the part of the Collection Amin beyond his control cannot amount to any misconduct or lack of efficiency. He further relying on the judgment in the case of Dharendra Singh v. Collector reported in 2008 (3) ADJ 165 contends that the same view has been reiterated in the said judgment. Learned Counsel relying on the judgment in the case of Mithlesh Kumar v. State of U.P. reported in 2008 (2) ESC 1332 explains that the 70% recovery has to be calculated amongst the Four Fasals and not Fasli years which judgment has been affirmed by the Division

Bench in the case of *Manbodh v. State of U.P.* reported in 2009 (6) ADJ 356.

8. Sri B.N. Misra learned standing counsel with the help of the records the affidavits filed on behalf of the respondents and the written instructions dated 4.2.2010 has contended that the petitioner has painted an incorrect picture and the factual foundation of the impugned order does not suffer from any infirmity. He further submits that the order itself makes it clear that in case the recovery is improved upon, the petitioner can be reconsidered in accordance with rules as and when occasion so arises with the availability of the vacancy under the 35% quota.

9. The controversy therefore now boils down to the factual foundation of the impugned order which has been indicated in relation to the Fasli years of 1413 to 1415 in respect of four Fasals.

10. Having perused the affidavits and the records which have been produced the order of the District Magistrate does not take notice of these facts which differentiate the main dues of recovery as arrears of land revenue and miscellaneous recovery. From the order it does not appear that the entire records which have been now placed before this Court, were placed before the District Magistrate and he had occasion to examine the facts as pointed out herein. The petitioner through his supplementary rejoinder affidavit and the supplementary affidavit has stated that the recovery in respect of the four Fasals was indicated to ascertain the extent and a major part of the said recovery had been withdrawn by the respondents themselves. It has further pointed out that certain recovery was withdrawn on account of exemption granted by the Central Government and announcement made by the Prime Minister and thirdly certain recovery could not be made that was entrusted to the petitioner on account of judicial intervention including orders passed in writ petitions filed before this Court. The respondents have tried to justify the conclusions arrived at by the District Magistrate but from the facts stated in the affidavit which have been brought on record it appears that the said facts relating to the actual calculation of main dues, miscellaneous dues and recovery which was beyond the control of the petitioner, have not been taken into account. The said facts have been supported through documents and have been brought on record. It is therefore clear that the aforesaid facts do not find mention in the impugned order. The impugned order also does not indicate that these records which have been pointed out in all the affidavits were perused by the District Magistrate.

11. Accordingly the impugned order proceeds on certain facts which do not indicate the consideration of the facts and figures as given on behalf of the petitioner and as sought to be relied on by the respondents. In such a situation the order impugned dated 1.9.2008 will have to be set aside for a proper calculation to the exact nature of recovery entrusted to the petitioner under the heading of Main dues and Miscellaneous dues. Thereafter the recovery which was withdrawn or exempted through judicial intervention has to be taken notice of and facts have to be assessed to ascertain that the said recovery were beyond

the control of the petitioner and had been correctly explained by him on the basis of the records which are available. The District Magistrate will have to make the calculation of 70% as desired under the rules after assessing each and every relevant fact that is available.

12. In my opinion the aforesaid exercise was not done and in view of the factual error, learned Counsel for the petitioner is correct in assailing that the impugned order suffers from vice of erroneous assumption of fact without assessing the entire records. This Court can judicially review such situations as held by the Apex Court in the case of Cholan Roadways Ltd. v. G. Thirunanasambandam. It has been observed that the adjudicating authority must pose unto itself correct questions and facts so as to arrive at a correct finding. See paragraph 34 of Cholan Roadways Limited Vs. G. Thirugnanasambandam,

13. Accordingly the impugned order dated 1.9.2008 is set aside. The respondent District Magistrate, Allahabad shall proceed to re-examine the entire facts relating to the objections raised by the petitioner and thereafter proceed to pass an appropriate order within a period of 3 months from the date of production of a certified copy of this order before him in the light of the observations made herein above.

14. The writ petition is allowed. No order as to costs.