

(1985) 03 DEL CK 0011

In the Delhi High Court

Case No : Regular Second Appeal No. 45/81

Municipal Corporation of Delhi

APPELLANT

Vs

Ravinder Kumar Gupta since Deceased Represented by his
LR"s

RESPONDENT

Date of Decision : 06-03-1985

Acts Referred:

Municipal Corporation Act, 1957 — Section 491, 95(1)

Citation : (1985) 28 DLT 176

Hon'ble Judges : S.B. Wad, J

Bench : Single Bench

Advocate : D.D. Chawla, for the Appellant; Kishan Kumar, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Wad, J.—This Second Appeal is filed against the/order of the Small Causes Court, Delhi, (Shri B.N. Chaturvedi) in R.C.A. No. 25 of 1980. Through the said judgment/decree, the judgment and decree passed by the Sub-Judge 1st Class (Shri S.L. Khanna) on 3-5-1976 was upheld and the appeal was dismissed. Three preliminary questions are raised by the respondent here. They are :

- (1) That the appeal was barred by limitation;
- (2) That the respondent had died on 26-12-1983 and his legal heirs were not brought on record within the prescribed time and the appeal had abated; and
- (3) That the appeal does not/raise any substantial question of law being a Second Appeal.

2. When the present appeal was filed application seeking exemption from filing the certified copy of the trial court's judgment was not filed. The the High Court Rules prescribe mandatorily that the certified copy should be filed Along with the appeal memo. On 23-3-1981 when the appeal was admitted this court directed that the certified copy of the judgment of the learned trial Court to be filed within

time, the certified copy of the trial court's judgment was applied for on 6-9-1980. The copy was ready on 2-2-1981. Therefore, when the matter was admitted in this court the certified copy was already ready. In fact, more than one and a half months had elapsed since then, but the appellant did not care to collect the copy and to file the same in the court before the matter was admitted by this court. In spite of the fact that the copy was ready on 2-2-1981, an exemption from filing the certified copy of the trial court's judgment was secured from this court. If it was disclosed to the court that the copy was ready on 2-2-1981, the court would not have passed the order. Even thereafter the certified copy was filed on 30-3-1981. Thus there is a delay of forty-five days and there is no application for condensation of delay. The appeal is, Therefore, patently beyond the period of limitation and is dismissed on that short ground.

3. The second ground of abatement is equally fatal. C.M. 624 of 1984 is an application filed on 27-4-1984 under Sections of the Limitation Act praying for the permission to move an application for bringing the legal heirs on record. As stated earlier, the respondent had died on 26-12-1983. The application merely prays for the permission of the court to file an application for bringing the legal heirs on record. The application is not for setting aside abatement. The application states :

"It was only when this letter was received by the counsel on 16th April, 1984 that the Counsel came to know about the misplacing of the previous letter. However, the counsel for Respondent has not informed the court."

The earlier part of the application states that when the appellant-Corporation came to know about the death of the Respondent they sent a letter to their Counsel for taking steps in regard to the bringing of the legal heirs of the respondent on record. The letter was received by the Clerk of the Counsel and was misplaced. This application was sought to be amended by a subsequent application which in fact made the matter worse because Along with that application the correspondence between the counsel and the Corporation is filed. The correspondence shows that the counsel had the knowledge before 16-12-1984 but no expeditious steps were taken in the matter. Thus instead of the application being moved within 90 days it was moved after 92 days. Thus there is a delay of two days. From the correspondence it is seen that the appellant-Department had taken all the steps and precautions to inform the Advocate about the date of death and bringing the legal heirs on record. The negligence is in the office of the Advocated. I would have, in such circumstances, condoned the delay of two days and set aside the abatement but there is no merit on any point in this appeal and I am, Therefore, not inclined to exercise my discretion in favor of the appellant. In fact, there is no application for setting aside the abatement also.

4. The counsel for the respondent has raised a plea by way of preliminary objection that the Second Appeal does not raise any substantial question of law. I do not find much force in this submission. The interpretation of Section 491 and

the powers of delegation, are raised by the counsel for the appellant. The Submission is to be accepted because the question is of sufficient importance for the Administration as well as its employees. This objection of the respondent is, Therefore, rejected.

5. On merits there does not appear to be any scope for different interpretation of Section 491, as argued by the counsel for the appellant. The proceedings against the respondent were initiated by the Deputy Commissioner and final order of dismissal was passed by him. The question is whether the Deputy Commissioner was competent in law to do so, particularly in the light of proviso (1) to Section 95(1) of the Act. The Full Bench of the Court in *The Management of Delhi Transport Undertaking v. Shri B.B.L. Hajelay and Anr.* 1972 SLR 299 has in detail considered the scope of power u/s 491 and its effect on proviso (1) to Section 95(1) of the Corporation Act. The Full Bench held that the powers given u/s 491 do not include the power of delegation to a subordinate authority to remove an employee appointed by a higher authority so as to wipe out the protection of proviso (1) to Section 95(1) of the Corporation Act. This judgment of the Full Bench was upheld by the Supreme Court in *The Management of Delhi Transport Undertaking v. Shri B.B.L. Hajelay and Anr.*, reported in 1972 SLR 787. It may be worthwhile to quote the observations of the Supreme Court in this regard :

"It is, Therefore, clear that a protection which is given to an employee by the statute cannot be nullified by rules and regulations authorised by the statute itself. In other words, any regulation made by the Corporation which would have authorised the Assistant General Manager to remove respondent No. 2 from service would have been inoperative qua respondent No. 2 as his appointing authority, was the General Manager (Transport). The question now is whether, if the Corporation itself by any regulation could not have destroyed the above protection given by the statute to respondent No. 2 it would be appropriate to say that the General Manager by an order delegating his functions to the Assistant General Manager under Sections 491 read with 504 of the Corporation Act could destroy the protection. Since the General Manager (Transport) is an officer of the Corporation and subordinate to the Corporation, it will amount to saying that what the Corporation could not do by a regulation could be done by an officer of the Corporation by merely delegating his functions to the Assistant General Manager. The position would look ridiculous. The true position in law is that while Sections 491 and 504 read together authorised the General Manager (Transport) to delegate his powers and functions to a subordinate, they did not authorise delegation of his rank. What is involved in matters of appointment and removal is the status and rank of the employee and the status and rank of the authority taking action. When the proviso to Sub-section (1) of Section 95 says that an officer and an employee shall not be dismissed by an authority subordinate to that by which he was appointed the subordination is of rank and not of functions. The proviso places an embargo on any subordinate of the appointing authority from removing or dismissing an employee from service and, Therefore, the High Court was right in holding in the present case that the

removal of respondent No. 2 by the Assistant General Manager (Transport) was illegal."

6. It may be noted that the Supreme Court found the argument on delegation ridiculous, when even under the statutory regulations this is not permitted by the Act. No regulations can be permitted so as to destroy the protection created by Section 95(1) of the Act itself. The court has further pointed out that there is difference between delegation of function and delegation in rank. What is important for the purposes of dismissal, removal etc. is the question of rank. The first appellate court was, Therefore, right in holding that the Deputy Commissioner was not competent to dismiss the respondent.

7. The counsel for the appellant, however, states that neither the judgment of the Supreme Court nor of the Full Bench are applicable in this case. He submits that when the respondent was appointed as a Cashier in the Slums Department on 6-9-1961 there was already a delegation in favor of the Deputy Commissioner to exercise all powers of the Commissioner u/s 491. This delegation was made on 4-3-1961. A copy of the delegation order is on record. It is Exhibit PW 4/4. It is then submitted that since the appellant could have been made Cashier by the Deputy Commissioner under the said delegation, he was competent to dismiss the respondent and there was no conflict with proviso (1) of Section 95(1) of the Act. This argument to my mind is totally misconceived. The respondent was originally working as a Peon. He was promoted as a Typist on 24-9-1960. His appointment as a Typist was approved by the Deputy Commissioner but the actual order was passed by the Assistant Commissioner. The Deputy Commissioner was not authorised on that date to make such an appointment because the delegation in his favor came subsequently, namely on 4-3-1961. The Respondent was then promoted as a Cashier on 6-9-1961. The said order is on record, and is marked as Ex. PW 4/2. This order was passed by the Assistant Commissioner, purporting to pass an order in his own right. It is so because there is not even the mention of Deputy Commissioner approving of the order. It must, Therefore, be taken on the face of the order itself that it is an order passed by the Assistant Commissioner. It has been held by this Court in *Hari Chand Jain v. The State*, Cr. Appeal No. 100/1967, decided on 23-12-1969, *Mukhtiar Singh v. N.N. Tandon*, CWP 237 of 1965, decided on 3-2-1972 and *Ram Chander Singh v. Municipal Corporation of Delhi and Ors.*, CWP 291/71, decided on 24-1-1972 that where the appointment is made by Assistant Commissioner of Municipal Corporation of Delhi, without delegation by the Commissioner in that regard, it is deemed to be an appointment made by the Commissioner himself. These judgments are based on interpretation of Section 92 of the Act under which the power of appointment is with the Commissioner. It is not a question as to whether the Deputy Commissioner could have made the promotion of the respondent. The question is that as a fact he had not made such an appointment. As the Supreme Court has pointed out the relevant question is not whether the functions have been delegated but the question is of the rank which cannot be delegated. The submission of the counsel for the appellant is,

Therefore, untenable in law and is rejected.

8. For the reasons stated above, the appeal is dismissed with costs.

9. It may be noted that the respondent had succeeded in two courts below. An amount of Rs. 90,317.45 p. by way of salary and allowances on the reinstatement of the respondent had fallen due by the time when the present appeal was admitted. The appellant was, Therefore, directed to deposit the said amount on 11-5-1982 in the trial court. The learned Judge of this Court who passed the said order also directed that the respondent should furnish a bank guarantee for the restitution of the said amount, if withdrawn by the respondent. The counsel for the legal heirs for the respondent now points out that due to adverse financial circumstances and in the absence of the employment it was not possible for the respondent to furnish the bank guarantee. The result is that in spite of the orders passed by the court on 11-5-1982, the legal heirs of the respondent could not get any benefit by the said orders. Unfortunately, thereafter on 26-12-1983 the respondent himself died. The dismissal order was passed in 1963 and after 22 years of litigation in the court the family remains high and dry. The cost in human sufferings can well be imagined I, Therefore, direct the appellant to work out all the dues towards salary, remuneration and other financial advantages available to the Corporation employees of the similar nature to be worked out and the payment be made to the legal heirs within three months from today. The legal heirs would also be entitled to the cost of Rs. 2,000/- in this appeal.