

(2006) 03 DEL CK 0106
In the Delhi High Court
Case No : Writ Petition (C) 289 of 2003

Sajjan Lal

APPELLANT

Vs

Commissioner of M.C.D. and Others

RESPONDENT

Date of Decision : 14-03-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 360
Penal Code, 1860 (IPC) — Section 304, 32, 323, 34

Citation : (2006) 110 FLR 38

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : G.D. Gupta and S.K. Gupta Adv, for the Appellant; Amita Gupta, for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—Issue Rule. Ms. Amita Gupta waives notice of rule. With consent of counsel, the Petition was heard for final disposal.

2. The Writ petitioner was working as a TGT at the relevant time in school managed and administered by the Municipal Corporation of Delhi. Whilst on duty, he was implicated for having committed offences u/s 304, read with Section 32 and 34 of IPC; an FIR was lodged in the year 1985. The provocation for this was an inter se fight amongst neighbours with regard to rights of passage. That it led to infliction of fatal injuries to person.

3. The Petitioner and two others (i.e. his brother and father) were arrayed as accused in the proceedings. This was duly intimated to the MCD which issued an order on 26.2.1986 placing the petitioner on deemed suspension. It is claimed that during the pendency of the criminal proceedings, order of suspension continued and the subsistence allowance was enhanced. The subsistence wages directed was 75% of salary and allowance.

4. The petitioner was convicted but for a lesser offence of having caused hurt u/s

323 of the Indian Penal Code. Another co-accused was however, convicted for culpable homicide not amounting to murder. No sentence was imposed upon the petitioner. He was placed on probation in terms of Section 360 of Cr.P.C read with provisions of the Probation of Offenders Act. A personal bond of Rs. 10,000/- was also furnished by the petitioner.

5. It is claimed that after the petitioner was convicted and placed on probation, he represented several times to the respondent MCD, on 26.8.1992, 26.7.1993, 31.8.1994, 18.6.1996, and 17.1.1997. Copies of those representations have been filed, with copies of registered post receipts, and A/D cards.

6. The petitioner was eventually reinstated in the services by the MCD and allowed to join duties on 1.7.1997. The order, reinstating him into services stated that a separate order determining the quantum of salary and allowances and the period to be treated would be issued separately.

7. By the order impugned in these proceedings, issued on 6.11.2001, the Deputy Commissioner of MCD (the competent authority), after considering the response of the petitioner to a show cause notice dated 15.5.2001, determined that the period of suspension was not to be treated as spent on duty. Consequently it was declared that the petitioner was a willful absentee, thus resulting in forfeiture of salary and allowance; as a result the petitioner was directed to refund the subsistence allowance already paid to him for the entire period, till the date of his reinstatement. The show cause notice which had been issued before the passing of the impugned order, relied upon an investigation report. The relevant portion of that investigation report reads as follows:-

WHEREAS the case of suspension of Sh. Sajjan Lal, Asstt. Teacher was considered for re-instatement by Review Committee and accordingly the re-instatement order in respect of Shri Sajjan Lal, AT was issued vide office order No. 659/SAP/Vig./86/R-256 dated 9.12.1987. But representation dated 6.1.1997 from Shri Sajjan Lal, Asstt. Teacher addressed to AEO/N.G. Zone was forwarded to the Vig. Deptt./MCD together with the photo copies of the judgment dated 25.5.1992 and 6.7.1992 announced by the Court of Sh. S.S. Bal, ASJ, Delhi with regard to re-instatement of Sh. Sajjan Lal, AT in service with other benefits.

4. WHEREAS subsequently the entire facts of the said case were placed before the Addl. Commissioner (Health and Education), the Disciplinary Authority who pleased to allow Shri Sajjan Lal, AT to resume his duty with immediate effect with reference to O.O. No. 659/SAP/Vig./86/R256 dated 9.12.1987 and it was also ordered that decision with regard to the payment for the period w.e.f. the date of his suspension to the date he resumed the duty would be taken separately after finalisation of the investigation pending against him.

5. WHEREAS the investigation report conducted by the Vig; Deptt./MCD together with the entire records of the case was placed before Dy. Cm./N.G. Zone, the Competent Authority who after examining the entire facts/records of the case passed the following orders vide dated 7.3.2001:

I have gone through the file. The crucial decision regarding treating of period of suspension as on duty or otherwise and consequently the payment of salary and allowances depends on the determination whether the official intentionally avoided presenting himself for duty or he was genuinely prevented from doing so on account of non-receipt of re-instatement orders. Having considered totality of facts and circumstances, I come to the conclusion that the intentionally avoiding of presenting himself for duty and is, Therefore, not entitled to any wages and allowances for the period from the date of suspension order till the revocation of orders. My decision is on account of reasons more than one which are briefly described as follows:

1. The decision of the Hon''ble Court whether the official/accused was allowed to go on probation of good conduct, was passed way back in 1992 and the official has not explained as to why he did not represent for his re-instatement immediately thereafter. He was pursuing his criminal matter and was well aware of the decision and has not expressed any inability or reasons for not applying for re-instatement orders issued in 1967 were intentionally avoided in a planned effort to claim afterwards.

2. It is strange that nowhere the records pertaining to this official is available. The Vigilance Deptt. Has also destroyed its record, the Zonal office of Education Deptt. also can not furnish anything to prove that re- instatement orders were served. However, at page 24/N, it is clearly mentioned that there is an evidence of copy thereof was received in the office of Director (PE). In the normal course, in the absence of any contrary evidence, it will be presumed that the orders so issued will be served on the official concerned. In this particular case, there is no evidence which rebuts this presumption. It is also strange that the official did not apply for raising his subsistence allowance day one 75% whereas he was so entitled to get it raised to 100% as per rules after a particular period. In the absence of any request for raising of subsistence allowance raises the presumption that the official was engaged in some other business or progression during this period and was perhaps not in a position to certify that he did not employ himself elsewhere. On this belated stage, it is not possible to verify these aspects but a strong presumption against the innocence of the official, is unavoidable.

I, Therefore, order that period of suspension shall not be treated as being spent on duty. It shall be treated as willful absence resulting in no payment of salary and allowances. The subsistence allowances already paid shall be recovered from the official as per rules.

8. The learned Senior Counsel for the petitioner, Mr. G.D. Gupta submits that the impugned order is arbitrary and was passed without consideration of the material facts. He has placed the considerable reliance on the representations made between the year 1992 and 1997 as also the copies of the AD card and receipts issued by the Post and Telegraph Department to say that at all relevant times the petitioner did everything possible to intimate and true state of facts. He has also

relied upon the circumstance that the petitioner was in fact paid subsistence allowance for the period which entailed the requirement of his having to furnish unemployment certificates, for each month during that period.

9. Learned counsel for the respondent on the other hand resisted the claim and submitted that the petitioner had willfully absented himself and did not take any steps to present the correct picture. It was submitted that the petitioner held back circumstances which led to his being released on probation; he was also aware of an earlier order reinstating him into service which was issued on 9.8.1987.

10. Learned counsel submitted that no record pertaining to the preliminary investigation was available with the MCD and there is a presumption that the petitioner did not inform department about his conviction in 1992 and soon thereafter.

11. Learned counsel for the respondent also justified the impugned order, by submitting that the Petitioner was aware that his suspension had been revoked in 1987 itself, and although there was no material at this stage to support the conclusion, there is every likelihood of his being received that order. Therefore, he was rightly treated as an absentee.

12. There is no dispute about the fact that the MCD took a decision upon the petitioner's representation of 7.4.1997 and eventually reinstated him into the services. The question Therefore, is whether the period between 6.7.1992 when the petitioner was sent on probation and eventually discharged for satisfactory conduct and the date of his reinstatement and 1.7.1997 has to be treated as period of willful absentee. The material on record discloses that the petitioner had made at least 4 representations. Copies of those representations are on record; The petitioner has also averred that they were sent by registered post and copies of the Regd. AD Card. The copies of receipts and AD Cards have been placed on record. The counter affidavit is strangely silent on all these aspects. Instead an averment that petitioner had not made any representation disclosing the true states of facts till 1997, has been made.

13. A number of opportunities were granted to the respondent to produce the record. Adjournments were granted on 7.9.2005, 4.10.2005, 6.12.2005 and 20.1.2006. Today also the counsel for respondent has not produced the record. In these circumstances the logical and only possible inference which can be drawn is that the petitioner's averment based upon the copies of the documentary evidence by way of representation remain un rebutted and unrefuted. No material was brought to my notice to show that the investigation said to be carried out (as shown in the show-cause notice) involved the petitioner in any manner at any stage or that he was granted any opportunity. In fact the show cause notice dated 15.5.2001 as well as the impugned order do not disclose that the petitioner was granted any hearing. They also did not consider representations furnished by the petitioner.

14. In the absence of the record, the position of the MCD that the Petitioner would be ineligible for the payments received by him till 1992, as he was re-instated in 1987, cannot be countenanced. The petitioner has placed on record a letter dated 4.4.1996 written by the Asstt. Education Officer which records the order placing him under suspension, and that The personal file and Service Book of delinquent official does not show any further progress or disposal.

The letter does not mention the revocation of suspension in 1987. This supports the argument that till the conviction in 1992, the petitioner was not served with an order of re-instatement.

15. In view of the foregoing discussion, I am of the opinion that the impugned order treating the petitioner for entire period between 1987 and 1997 as a willful absence is unsustainable. The impugned orders are, hereby quashed. The respondents are directed to pass a fresh speaking orders determining/fixing the petitioner's pay for the period between 6.7.1992 and 1.7.1997, in the light of the representations given between that period. The respondents are directed not to effect any recovery of amounts paid towards subsistence allowance for the period ending 6.7.1992.

16. The Writ petition is allowed to the extent indicated above. No costs.