

**RESERVED**

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,  
LUCKNOW  
(CIRCUIT BENCH, NAINITAL)**

**TRANSFERRED APPLICATION No. 4 of 2018**

Friday, this the 03<sup>rd</sup> day of May, 2019

**"Hon'ble Mr. Justice V.K. Shali, Member (J)  
Hon'ble Air Marshal BBP Sinha, Member (A)"**

Sita Thapa W/O Late Shri Shammi D/O late Kharak Bahadur,  
R/O Sadar Bazar, Landsdowne, Pauri Garhwal, District-Paudi  
Garhwal.

..... Petitioner

Ld. Counsel for the : **Shri Kishore Rai,**  
Petitioner **Advocate.**

Versus

1. Union of India through Secretary, Ministry of Defence,  
South Block, New Delhi.
2. Officer-in- charge, Records, Bureau of Sailors, Cheetah  
Camp, Mankhurd, Mumbai – 400088.
3. Logistics Officer-in-charge, Naval Pension Office, C/O INS  
Tanaji, Sion Trombay Road, Mankhurd, Mumbai –  
400088.
4. Principal Controller of Defence Accounts (Pension),  
Draupadi Ghat, G (3), Allahabad (Uttar Pradesh)–  
273008.
5. Defence Pension Disbursing Officer, Office of the DPDO,  
G.R.D. Complex, Kunraghat, Gorakhpur – 273001.

**.....Respondents**

Ld. Counsel for the : **Ms Pushpa Bhatt,**  
Respondents. Central Govt. Standing Counsel  
Counsel assisted by Lt Col Subodh  
Verma, OIC Legal Cell.

**ORDER****“Per Hon’ble Air Marshal BBP Sinha, Member (A)”**

1. Being aggrieved with denial of family pension, the petitioner had preferred Writ Petition bearing No. 394 (S/S) of 2018 in the Hon’ble High Court of Uttarakhand which has been transferred to this Tribunal in pursuance to powers conferred under Section 34 of the Armed Forces Tribunal Act, 2007 and re-numbered as T.A. No. 4 of 2018. The petitioner has sought the following reliefs:-

*(a) Issue a writ order or direction in the nature of mandamus directing the respondents to grant family pension to the petitioner.*

*(b) Issue any other writ order or direction which this Hon’ble Court may deem fit and proper in the circumstances of the case.*

*(c) Award the cost of the writ petition in favour of the petitioner.*

2. The brief facts of the case are that father of the petitioner No 4035496 late Rifleman Kharak Bahadur was enrolled in the Army (The Garhwal Rifles) on 18.09.1954 and was discharged from service in low medical category on 05.10.1970 under Rule 13 (3) III (i) of Army Rules 1954 and he was in receipt of disability pension vide PPO No D/2102/71. The soldier passed away on 20.09.1997 and thereafter family pension was sanctioned in favour of Smt Lila Devi (wife of the deceased soldier). Later, mother of the petitioner, who was in receipt of family pension, also expired on 08.01.2011. At the time of death of her mother petitioner was staying with her mother because her husband had become missing w.e.f. February

2006. Subsequently the petitioner filed a Civil Suit No 9 of 2014 before the Civil Judge (Junior Division) Landsdowne, Pauri Garhwal. The Civil Judge vide order dated 25.03.2015 declared petitioner's husband as 'missing presumed dead'. The petitioner thereafter put up her claim for family pension as a widowed daughter as per Govt policy on the matter. Her claim was forwarded by the Record Office but it was rejected by PCDA (P), Allahabad vide order dated 24.11.2015 on the ground that her husband has died on 25.03.2015 i.e. after her mother's death in 2011, hence she was not dependent on her mother during her life time. It is in this context that the petitioner has filed this petition for grant of family pension as widowed daughter.

3. Ld. Counsel for the petitioner submitted that the petitioner is entitled to receive family pension of her deceased parents as per Rule 54 (6) of the Central Civil Service Pension Rules, 1972 and letter dated 11.09.2013. The Ld. Counsel for the petitioner further submitted that the petitioner's husband was missing w.e.f. February 2006 and since then she had been staying with her mother. Subsequently as per permission of Evidence Act Section 108, her husband was declared 'missing presumed dead' by Civil Court vide order dated 25.03.2015. He submitted that the petitioner is entitled to receive family pension as a widowed daughter because she was dependent on

her mother from February 2006 after her husband went missing and her mother has supported her till her death in 2011.

4. On the other hand Ld. Counsel for the respondents submitted that para 2 of PCDA (P) Allahabad Circular No 123 dated 02.09.2014 provides that 'the family pension to a widowed/divorced daughter is payable provided she fulfils all eligibility conditions at the time of death/ineligibility of her parents and on the date her turn to receive family pension comes.' He further submitted that the petitioner's husband was declared 'missing presumed dead' vide order dated 25.03.2015 after demise of her parent i.e. her mother in 2011, therefore she was not fully dependent on her parents before their demise and hence she is not eligible for family pension. He pleaded for the O.A. to be dismissed.

5. We have heard Ld. Counsel for the parties at length and have perused the record in detail.

6. In the backdrop of the case as narrated above, the question which arises for determination is whether the petitioner was dependent on her mother or not at the time of her death in 2011 and is she eligible for family pension as a widowed daughter after her husband was declared 'missing presumed dead' by a Civil Court vide its judgment dated 25.03.2015.

7. We have given our anxious thoughts to the pleadings of both the parties and perused the records. We find that following facts are absolutely clear to us i.e.:-

(a) That the petitioner is the daughter of deceased soldier and is prima facie entitled to family pension as a widowed daughter as per Govt policy on the subject issued in 2004 and subsequently amended from time to time. Latest amendment letter being issued vide letter No G1/C/067/Vol-XIV/Tech O/o PCDA (P) Allahabad dated 02.09.2014.

(b) That as per the extant policy of 2004 amended from time to time the petitioner is eligible for family pension as a widowed daughter if she fulfils following conditions:-

(i) That the dependent child is not earning more than minimum pension plus DA as applicable.

(ii) That the child must meet the dependence and other conditions of the eligibility for family pension at the time of death of the Govt servant or his/her spouse.

8. In the above factual position the claim of the petitioner has been rejected by PCDA (P), Allahabad primarily on the following conditions:-

(a) That the last of petitioner's parents, i.e. her mother has expired in 2011.

(b) That as per Civil Court order dated 25.03.2015, the husband of the petitioner has been declared dead, hence the petitioner has become a widow in 2015 and could not have been dependent on her mother in 2011. Therefore she is not eligible for family pension.

9. In this context we have perused the judgment of Court of Civil Judge (Judicial) Lansdowne, Pauri Garhwal. Following aspects are clear from his judgment:-

(a) That the petitioner was married on 06.12.1992.

(b) That husband of the petitioner was a tailor and had gone from Lansdowne to Najibabad to buy tailoring related items in Feb 2006. However, despite extensive search he did not reach his family and is missing since Feb 2006.

(c) That the husband of the petitioner is missing, to be presumed dead.

(d) For convenience sake, operative portion of the judgment dated 25.03.2015 is excerpted below:-

“यह वाद बिन्दु संख्या-2 अनुतोष के संबंध में बनाया गया है चूंकि वादिनी के पति का वर्ष 2006 से लापता होना स्पष्ट है एवं ऐसी स्थिति में वादिनी के पति की मृत्यु की उपधारणा की जा सकती है तदनुसार वादिनी अनुतोष पाने की अधिकारी विदित होती है |

वादिनी का वाद स्वीकार किए जाने योग्य है |

वादिनी का वाद वास्ते घोषणात्मक डिक्री सव्यय स्वीकार की जाती है  
 एवं वादिनी के पति शम्मी पुत्र जुल्फीकार निवासी सदर बाजार लेन्सडौन जिला  
 पौड़ी की मृत्यु की उपधारणा की जाती है ।”

10. We have noticed that the Civil Court has accepted petitioner's husband to be missing from February 2006 and has presumed him to be dead. Thus legally the date of death has to be seven years after declaration of missing i.e. in February 2013, though the order has been signed on 25.03.2015.

11. Hon'ble Apex Court in the case of **LIC of India vs. Anuradha**, reported in (2004) 10 SCC 131, in para 12, 13 14 and 15 have observed as under:-

*“12. Neither Section 108 of Evidence Act nor logic, reason or sense permit a presumption or assumption being drawn or made that the person not heard of for seven years was dead on the date of his disappearance or soon after the date and time on which he was last seen. The only inference permissible to be drawn and based on the presumption is that the man was dead at the time when the question arose subject to a period of seven years absence and being unheard of having elapsed before that time. The presumption stands un-rebutted for failure of the contesting party to prove that such man was alive either on the date on which the dispute arose or at any time before that so as to break the period of seven years counted backwards from the date on which the question arose for determination. At what point of time the person was dead is not a matter of presumption but of evidence, factual or circumstantial, and the onus of proving that the death had taken place at any given point of time or date since the disappearance or within the period of seven years lies on the person who stakes the claim, the establishment of which will depend on proof of the date or time of death.*

*12. A presumption assists a party in discharging the burden of proof by taking advantage or presumption arising in his favour dispensing with the need of adducing evidence which may or may not be available. Phipson and Elliott have observed in 'Manual of the Law Evidence' (Eleventh Edition at p.77) that although there is almost invariably a logical connection between basic fact and presumed fact, in the case of most presumptions it is by no means intellectually compelling. In our opinion, a presumption of fact or law which has gained recognition in statute or by successive judicial pronouncements spread over the years cannot be stretched beyond the limits permitted by the statute or beyond the contemplation spelled out from the logic, reason and sense prevailing with the Judges, having written opinions valued as precedents, so as to draw such other inferences as are not contemplated.*

*14. On the basis of the above said authorities, we unhesitatingly arrive at a conclusion which we sum up in the following words. The law as to presumption of death remains the same whether in Common Law of England or in the statutory provisions contained in Sections 107 and 108 of the Indian Evidence Act, 1872. In the scheme of Evidence Act, though Sections 107 and 108 are drafted as two Sections, in effect, Section 108 is an exception to the rule*

*enacted in Section 107. The human life shown to be in existence, at a given point of time which according to Section 107 ought to be a point within 30 years calculated backwards from the date when the question arises, is presumed to continue to be living. The rule is subject to a proviso or exception as contained in Section 108. If the persons, who would have naturally and in the ordinary course of human affairs heard of the person in question, have not so heard of him for seven years, the presumption raised under Section 107 ceases to operate. Section 107 has the effect of shifting the burden of proving that the person is dead on him who affirms the fact. Section 108, subject to its applicability being attracted, has the effect of shifting the burden of proof back on the one who asserts the fact of that person being alive. The presumption raised under Section 108 is a limited presumption confined only to presuming the factum of death of the person whose life or death is in issue. Though it will be presumed that the person is dead but there is no presumption as to the date or time of death. There is no presumption as to the facts and circumstances under which the person may have died. The presumption as to death by reference to Section 108 would arise only on lapse of seven years and would not by applying any logic or reasoning be permitted to be raised on expiry of 06 years and 364 days or at any time short of it. An occasion for raising the presumption would arise only when the question is raised in a Court, Tribunal or before an authority who is called upon to decide as to whether a person is alive or dead. So long as the dispute is not raised before any forum and in any legal proceedings the occasion for raising the presumption does not arise.*

*15. If an issue may arise as to the date or time of death the same shall have to be determined on evidence-direct or circumstantial and not by assumption or presumption. The burden of proof would lay on the person who makes assertion of death having taken place at a given date or time in order to succeed in his claim. Rarely it may be permissible to proceed on premise that the death had occurred on any given date before which the period of seven years' absence was shown to have elapsed."*

12. Thus considering all issues and the fact that the petitioner was staying with her mother after her husband became missing in 2006, we are of the opinion that the petitioner was dependent on her mother before her death. As far as the date of death of the petitioner's husband is concerned, this is a death declared by Civil Court under Section 108 of Indian Evidence Act i.e. after seven years of missing of the husband and is to be presumed as 28 February 2013 i.e. 07 years after being missing.

13. The question which now arises is as to the eligibility of the petitioner for family pension as a widowed daughter in the



circumstances when her mother has expired in 2011 and her missing husband since 2006 has been declared dead by a Civil Court vide its judgment dated 25.03.2015. We have given our anxious thoughts on this issue and are of the opinion that the Govt order on the subject is benevolent in nature and extends family pension to widowed/divorced and unmarried daughters after expiry of both the parents. Thus in the peculiar circumstances of the case which involves missing presumed dead case after about 13 years of marriage and involves a mandatory seven years gap between missing date and declaration of death, the law has to be interpreted as per the spirit of the law. Thus considering all the facts of the case and in the interest of substantive justice, we are of the considered opinion that despite the date of death of petitioner's husband being 28 February 2013, the petitioner is to be considered as dependent on her mother since 2006 because her husband was missing from February 2006 and she was staying with her mother for support.

14. In view of the above stated position we are of the opinion that family pension of the petitioner cannot be denied merely on the ground that since her husband has been declared dead after her mother's death therefore she could not have been dependent on her mother at the time of her death. Thus if the petitioner is otherwise eligible for family pension as a widowed daughter in terms of income criteria etc, she cannot be denied

the same merely on the ground that her husband's declared death is after the date of death of her mother. We, however, would like to clarify that if otherwise found eligible, her family pension can start from the declared date of death of her husband i.e. 28 February 2013.

15. It is trite law that claim for pension is based on continuing wrong and the relief can be granted if such continuing wrong creates a continuing source of injury. In the case of ***Shiv Dass vs, Union of India & Others***, reported in 2007 (3) SLR 445 their Lordships of the Hon'ble Apex Court have held that if a petition for pension (family pension in this case) is filed beyond a reasonable period, the relief prayed for may be restricted to a reasonable period of three years. Since the present petition was filed on 08.03.2018, she is entitled to receive family pension, if otherwise found eligible, from three years prior to filing of the present petition.

16. In view of the above, we are of the view that the case is liable to be partly allowed, hence **partly allowed**. Impugned orders of PCDA (P) Allahabad are set aside. The petitioner is entitled to ordinary family pension w.e.f. 28.02.2013 if found to be eligible otherwise i.e. income criteria etc. but due to law of limitation, she will be entitled to receive arrears of ordinary family pension from three years prior to the date of filing of the petition. The date of filing of the petition is 26.03.2018. The

respondents are directed to re-consider her case for grant of ordinary family pension in light of this judgment within a period of four months from the date of receipt of a certified copy of this order.

No order as to costs.

**(Air Marshal BBP Sinha)**  
**Member (A)**

**(Justice VK Shali)**  
**Member (J)**

Dated: May 2019  
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