

RESERVED

E- Court No. 1

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW**

Original Application No. 195 of 2021

Friday, this the 24th day of September, 2021

Hon'ble Mr. Justice Umesh Chandra Srivastava (J)
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)

Smt Laxmi Kandari, W/o Missing Sohan Singh, Rank- Hav, No-4077653-A, R/o House No 149/1, Puri Stop Road, Society Area, Clement Town, Dehradun (U.K.) Presently residing at A-1144 Indra Nagar, Lucknow- 226016.

.... Applicant

Ld. Counsel for the: **Shri Parijaat Belaura, Advocate**
Applicant

Versus

1. Union of India, through Secretary, Ministry of Defence, New Delhi.
2. Chief of The Army Staff, Integrated Headquarters of the Ministry of Defence (Army), South Block, New Delhi.
3. Officer-in-Charge Records, Garhwal Rifles, Pin- 900400, C/o 56 APO.
4. The Principal Controller of Defence Account (Pension) Draupadi Ghat, Allahabad (U.P.)

..... Respondents

Ld. Counsel for the:
Respondents.

**Shri Amit Jaiswal,
Central Govt Counsel**

ORDER

“Per Hon’ble Mr. Justice Umesh Chandra Srivastava, Member (J)”

1. This Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

- (I). To set aside the dismissal order dated 08.08.2017 (after calling for records of dismissal order and Court of Inquiry Report) and declare applicant’s husband as missing.*
- (II). To grant family pension w.e.f.08.02.2015 and all retiral dues of her husband presuming him to dead (after six months of lodging FIR as provided in PCDA Circular No 538 dated 06.02.2015 (Annexure-12).*
- (III). Any other suitable relief this Hon’ble Court deems fit and proper may also be granted.*

2. Rejoinder affidavit filed by learned counsel for the applicant is taken on record.

3. Facts giving rise to Original Application in brief are that husband of the applicant was enrolled in the Indian Army on 28.06.1996. On 08.08.2014 he went on duty from his outliving accommodation but did not return back. Applicant informed about the missing of her husband to Commanding Officer 29 NCC Bn DAV College, Dehradun, Uttra Khand. After due search, a

complaint was lodged in Police Station Patel Nagar Dehradun, UK. A Court of inquiry was held and the applicant was declared deserter wef 08.08.2014 and part II order was published declaring him deserter. On 08.08.2015 applicant gave application for lodging FIR but the same was not lodged by the police. After passing of more than one and half year, whereabouts of her husband was not found out then on 13.08.2016 she applied for issuance of missing certificate before police Station and she was issued missing certificate dated 16.04.2016. Husband of the applicant was dismissed from service vide order dated 08.08.2017. The applicant, accordingly prayed that her husband may be treated as legally dead/ missing army personnel under Section 108 of the Indian Evidence Act, 1872 as also under the provisions of Army Orders, as he has not been heard of for 7 years and, accordingly, he may be deemed to have missing, making the applicant entitled for post retiral benefits, which have been rejected by the respondents, declaring her husband as deserter.

4. Learned counsel for the respondents submitted that husband of the applicant was posted with 29 UK Battalion NCC with effect from 16.10.2012 and was staying with his family in Dehradun in outliving accommodation. Husband of the applicant absented himself without leave with effect from 08.08.2014. Accordingly, matter was reported to civil authorities to apprehend

the individual. Neither the individual reported for duty nor he has been apprehended till date. Mr. Mohan Singh, brother of the Ex Hav Sohan Singh lodged a FIR at Police Station, Patelnagar, Dehradun about his missing brother. A court of inquiry was convened to ascertain the circumstances under which Ex Hav Sohan Singh absented himself without leave vide order dated 01.10.2014 and individual was declared deserter as he left for office from his house at around 0900h on 08.08.2014 but neither reported to the office nor did he attend the calls of any unit persons till date. Service documents of Ex Hav Sohan Singh were forwarded to Records, The Garhwal Rifles vide letter dated 26.03.2015. In the meantime, Smt Laxmi Kandari, wife of Ex Hav Sohan Singh asked for family pension to her.

5. Learned counsel for the respondents further submitted that respondents ordered a fresh court of inquiry to ascertain whether Ex Hav Sohan Singh was missing or a deserter. Help of civil administration was taken and SSP, Dehradun vide his letter dated 13.10.2016 affirmed that husband of the applicant left his house and has been in contact with his brother to convey his well being and he is hiding his presence due to some personal reasons. Based on the facts, Ex Hav Sohan Singh was again declared deserter. The outcome of court of inquiry was informed to the applicant Smt Laxmi Kandari. Ex Hav Sohan Singh was

dismissed from service with effect from 08.08.2017 under Rule 17 of Army Rule, 1954 and Section 20 (3) of Army Act, 1950 and applicant Smt Laxmi Kandari was informed. Now the applicant has filed application for setting aside the dismissal order and for grant of family pension to her. Learned counsel for the respondents submitted that contention of the applicant that her husband was missing since 08.08.2014 is a misleading attempt merely for grant of family pension and other terminal benefits to her whereas husband of the applicant absented himself without leave with intention not to rejoin in future. Disappearance of applicant's husband is not a case of missing but of desertion followed by dismissal, therefore applicant is not entitled to terminal benefits. Smt Laxmi Kandhari in her letter dated 20.03.2015 informed to President, Army Women Welfare Association that her married life was not good since her wedding. On 07.08.2014 in evening, father of the applicant took the applicant and her baby girl together to his own house quoting that life of Smt Laxmi Kandari was under threat. All the above incidents have taken place just one day prior to the day the husband of the applicant became a deserter. Husband of the applicant contacted his brother twice to assure about his well being on 09.08.2014 and 12.08.2014. His brother wrongly lodged FIR on 14.08.2014 stating his brother was missing since 08.08.2014. It is clear that any person can be treated as

missing whose presence has not been recognized or who has not been seen alive since long time. It is a case of desertion, therefore, case of the applicant cannot be dealt in terms of Govt of India, Min of def letter dated 03.06.1998 being applicable only for missing individuals.

6. We have heard learned counsel for the parties and perused the documents available on record.

7. The question crops up whether the provisions contained in Indian Evidence Act, 1872 shall be applicable to resolve the present controversy, overriding the Ministry of Defence's letter dated 23.03.1992. For convenience the letter dated 23.03.1992 issued by the Ministry of Defence, Government of India with regard to missing person is reproduced below :-

“ No. 12 (16)/86D(Pens/sers)

*Govt . of India
Ministry of Defence
New Delhi, the 23rd March, 1992.*

*To,
The Chief of the Army Staff
The Chief of the Naval Staff
The Chief of the Air Staff*

Sub : Grant of family pension and gratuity to the families etc. of armed Forces personnel/ pensioners who disappear suddenly and whose whereabouts are not know.

Sir,

I am directed to refer to this Ministry's letters of even number dated 3rd June 1988 and 20th March 1990 and to say that the guidelines contained in the succeeding paragraphs will regulate payment of the benefits granted under the above noted letters.

2. The date of disappearance of the serving Armed Forces personnel /pensioners will be reckoned from the date the First Information Report is lodged with the police by the family and the period of one year after which the benefits of family pension and gratuity are to be sanctioned, will be reckoned from this date. However, the benefits to be sanctioned to the family, etc. of the missing personnel will be based on and regulated by the emoluments drawn by him and the rules/orders applicable to him as on the last date he/she was on duty including authorised periods of leave. Family pension at normal/enhanced rates as may be applicable in individual cases, will be payable to the families of missing personnel. Family pension where sanctioned at pre- 1.1.1986 rates will be revised and consolidated w.e.f. 1.1.1986 in terms of the Govt of India letter No. 1 (4)/87/D(Pens/Sers) dt 27th July, 1987, as amended from time to time.

3. In the case of missing pensioners, the family pension at the rates indicated in the PPO will be payable and authorised by the pension Sanctioning. Necessary action to sanction the family pension as due, as provided in para 2 above.

4. Death gratuity will also be payable to the families, but not exceeding the amount which would have been payable as retirement gratuity if the person had retired. The difference between retirement gratuity and death gratuity shall be subsequently payable after the death is conclusively established or on the expiry of seven years period from the date of missing.

5. An indemnity bond will be obtained for the above purpose from the family members etc. in the formats enclosed as Appendix (A) (for missing personnel) and as Appendix 'B' (For missing pensioners) to this letter, which have been prepared by the Deptt of pension & pensioners Welfare in consultation with Deptt of Legal Affairs.

6. Cases already settled otherwise, than in accordance with this letter need not be re-opened, unless such a re-opening will be to the advantage of the beneficiaries.

7. This issues with the concurrence of Finance Division of this Ministry vide their U.O. No. 285/Pen of 1992.

8. Hindi version will follow.

(Based on Deptt. Of pension & pensioners
Welfare O.M. No. 1/17/86-P&PW(c) dt.
25.1.1991.

Sd/- xx xx xx
(DIWAN CHAND)
DESK OFFICER ”

8. There appears no doubt that in case the letter of Ministry of Defence is taken into account, then the applicant may not be entitled for post retiral dues. But keeping in view the statutory provisions, contained under Section 114 of the Indian Evidence Act read with Section 108, she shall be entitled for pension. Apart from Sections 14 and 15 and Section 23 of AFT Act, 2007 provides that the Tribunal shall also be guided by the principles of natural justice and has power to regulate its own procedure.

9. Section 108 of the Indian Evidence Act, 1872 is relevant for the adjudication of the present controversy, which provides that burden of proof that a person is alive, who has not been heard of for seven years shall be shifted to a person who affirms it. For convenience Section 108 of the Evidence Act is reproduced below:-

“108. Burden of proving that person is alive who has not been heard of for seven years.—1[Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is 2[shifted to] the person who affirms it.—1[Provided that when] the question is whether a man is alive or dead, and it is proved that he has

not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is 2[shifted to] the person who affirms it."

10. In the present case, according to the learned counsel for the applicant whereabouts of applicant's husband is not known that too when he was going from home to unit. Since the applicant was going from home to unit, burden shall be on the respondents to establish that the applicant's husband is alive. Further Govt of India, Min of Defence letter dated 03.06.1998 states that *'the family can apply to the concerned authority for grant of family pension and DCR Gratuity after one year from the date of declaration of disappearance of the service personnel in accordance with the procedure for sanction of family pension and DCR Gratuity. In case the disbursement of DCR Gratuity is not effected within 3 months of the date of applicant, the interest shall be paid in the rates applicable and responsibility for the delay fixed.'*

11. CDA (Pension), Allahabad Circular 538 dated 06.02.2015, states that "in the case of a missing Armed Forces Personnel/Pensioner/family pensioner, the family can apply for the grant of family pension, amount of salary due, leave encashment due and the amount of DSOP/AFPP Fund and gratuity (whatever has not already been received) to the IHQ/ Record Office

concerned, where the officers and JCOs/Ors in Army and equivalent in Navy and Air Force, had last served six month after lodging of police report. The family pension and/or retirement gratuity may be sanctioned by the respective Pension Sanctioning Authorities (PSAs) after observing the prescribed criteria.”

12. It is the Army/ respondents, who treated applicant’s husband on absent without leave and declared him deserter and after 3 years dismissed from service treating him alive, hence burden shall be upon the respondents to establish that applicant’s husband is alive. The failure on their part to discharge burden of proof, keeping in mind Section 108 of the Indian Evidence Act shall be fettered. Section 114 of Indian Evidence Act empowers the Courts to presume the existence of certain facts. For convenience Section 114 of Indian Evidence Act is reproduced below :-

“114. Court may presume existence of certain facts. —The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

However, such presumption shall be rebuttable vide *AIR 2005 SC 800, Shobha Hymavathi Devi vs. Sethi GangadharaSwamy & others*. Applicant’s husband was missing while going from home to unit. Since he did not turn up to home

even till date, it seems enough to draw a presumption under Section 108 Indian Evidence Act.

13. Hon'ble the Supreme Court in **Life Insurance Corporation of India vs. Anuradha** (Civil Appeal No. 2655 of 1999), decided on 26.03.2004 held that presumption as to death under Section 108 would arise only after lapse of 7 years. Accordingly, the presumption of death is subject to rebuttal by the party who claims the person alive.

14. We agree with and accept that in view of the provisions of Section 108 of Indian Evidence Act and PCDA (Pension), Allahabad, Circular NO 538 dated 06.02.2015 and earlier Circulars, legal declaration is not needed for grant of terminal benefits. Report of SSP, Dehradun and application regarding strained relationship to Army Women Welfare Organization only indicate that applicant and her husband were not in cordial terms. Again this cannot be a reason to deny terminal benefits. Applicant being not heard/seen by any one after 08.08.2014/14.08.2014 and even after FIR lodged by the applicant, soldier's missing gets affirmed as Civil Police as well as army authorities have failed to apprehend the husband of the applicant till date, resultantly, declaring the applicant deserter is not accepted and applicant is

entitled to family pension and other retiral dues from the date of filing of FIR of missing dated 08.08.2015.

15. In view of above, O.A. is **allowed**. The impugned order passed by the respondents dated 08.08.2017 is set aside. The respondents are directed to treat husband of the applicant Ex Hav Sohan Singh as a missing person and extend all service benefits including family pension to the applicant as admissible from the date of filing of FIR of missing i.e. 08.08.2015 in accordance with Pension and other Rules/Regulations in force. The applicant shall give an undertaking to the effect that all payments made to her will be recovered from the amount due to the person if missing person reappears and makes any claim. Let the necessary exercise be done and consequential benefits be provided to the applicant within four months from the date of receipt of a copy of this order; in default to pay interest at the rate of 8% per annum.

16. No order as to cost.

17. Pending applications, if any, stand disposed off.

(Vice Admiral Abhay Raghunath Karve) (Justice Umesh Chandra Srivastava)
Member (A) Member (J)

Dated: 24 September, 2021

Ukt/-