

RESERVED JUDGMENT
Court No.1(B)

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

Original Application No. 149 of 2013

Thursday, this the 29th day of June 2017

Hon'ble Mr. Justice D.P. Singh, Member (J)

Hon'ble Air Marshal Anil Chopra, Member (A)

Smt. Munni Devi
W/o Sri Than Singh (No. 2876876 Ex. NK/TS)
R/o Village- Ram Nagar,
Post -Kaila, District Etah
PIN- 207247

.....Applicant

Ld. Counsel for the Applicant : **Shri Ashok Kumar, Advocate**

Versus

1. Union of India through Secretary, Ministry of Defence, South Block, Delhi-110011.
2. Director General of Infantries-6 (Personnel), General Staff Branch, Army Headquarters, DHQ,PO, New Delhi-110011.
3. Officer Incharge, Records, Rajputana Rifles Regt, Delhi Cantt, PIN -110010.
4. Principal Controller of Defence Accounts (Pension), Draupadi Ghat, Allahabad (U.P.).

...Respondents

Ld. Counsel for the :
Respondents.

Shri D.K. Pandey
Central Govt. Counsel

ORDER**Hon'ble Air Marshal Anil Chopra (Member A)**

1. The instant Original Application has been filed on behalf of the applicant under Section 14 of the Armed Forces Tribunal Act, 2007 for grant of family pension. The applicant has prayed the following reliefs:-

“(i) This Hon'ble Court may graciously be pleased to direct the respondents to give the family pension and other balance arrear of pension (AFPP Fund & Credit Balance) to the applicant being legal heir/wife of Ex Nk/(TS) Than Singh who has been declared deserter from the respondents department.

(ii) This Hon'ble Court may further be pleased to pass such other and/or further order as deem fit, proper and necessary in the circumstances of this case.

(iii) Award costs to the applicant.

2. In brief, the facts of the case are that the applicant's husband Nk/TS Than Singh was enrolled in the Army on 19.08.1980. In November 1996, while applicant's husband was posted in field area, he was granted leave on account of sickness of his son but did not resume duty within time. A Court of Inquiry was held and he was declared deserter since 05.01.1997. Apprehension roll was issued and after ten years, he was dismissed from service with effect from 20.04.2007 as per rule. The applicant applied for family pension but it was denied by the respondents on the ground that applicant's husband

was a deserter, so she was not entitled the family pension. Being aggrieved, the applicant filed this original application.

3. We have heard Shri Ashok Kumar, Ld. Counsel for the applicant and Shri D.K. Pandey, Ld. Counsel for the respondents assisted by Maj Salen Xaxa, OIC Legal Cell and perused the documents available on record.

4. Learned counsel for the applicant submitted that the applicant's husband Nk/TS Than Singh was enrolled in the Army on 19.08.1980. While serving with 17 RAJ RIF, the husband of the applicant was granted leave on account of illness of his son and overstayed. Later on he tried to resume his duty but he was not permitted by the respondents. A Court of inquiry was held and he was declared deserter for Over Stayed Leave with effect from 05.01.1997 and as per policy, he was dismissed from service with effect from 20.04.2007. The police have searched everywhere but whereabouts of the husband of the applicant is not known. The applicant preferred the claim for grant of family pension which has been rejected by the respondents stating that husband of the applicant was declared deserter and was dismissed from service. Husband of the applicant had completed more than 16 years of service excluding alleged period of desertion and had thus qualified for service pension. The applicant submitted various representations for ventilating his grievances for the payment of family pension but the same was denied by the respondents.

5. **Per contra**, learned counsel for the respondents submitted that husband of the applicant is habitual offender of over staying leave for

which he was summarily tried for five times during his service. He was again declared deserter being over staying leave with effect from 05.01.1997. Thereafter, neither he reported to the Battalion/nor other military unit nor apprehended by the Civil Police. He was declared deserter from field area and after 10 years from the date of desertion, he was dismissed from service under the provision of Army Rule 20 (3) with effect from 20.04.2007. Accordingly, final settlement of account of the individual was carried out. He was having Rs 21,111/- with debit balance and AFPP Fund balance of Rs 66,900/-. Balance amount of AFPP Fund Rs 45,789/- after deducting the debit balance, was remitted to the bankers of the individual. He submitted that since husband of the applicant was declared a deserter, he forfeited his whole service prior to desertion in terms of provision laid down in Para 123 (a) (i) of Pension Regulations for the Army 1961 (Part-I) which clearly states that **whole of prior service of a deserter shall be forfeited towards pension**, the husband of the applicant is not entitled for any type of pension even after having 16 years and 139 days of qualifying service. Therefore, the applicant is also not entitled for family pension as her husband was not in receipt of any type of pension as per provisions laid down in Para 123 (a) (i) of Pension Regulations for the Army 1961 (Part-I).

6. We have perused documents and heard arguments of both the learned counsels.

7. Learned counsel for the applicant submitted that keeping in view the provisions contained in Section 108 of the Evidence Act, after

lapse of seven years, the applicant's husband in the instant case should be deemed to be dead, thus making him entitled for payment of pensionary benefits. Section 108 of the Indian Evidence Act, 1872 is relevant for the adjudication of the present controversy and burden to proof that a person is alive, who has not been heard for seven years shall be shifted to a person who affirms it. Section 108 of the Evidence Act is quoted below:-

“108. Burden of providing 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 providing that he is alive is shifted to the person who affirms it.{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.”

8. In the present case, according to the learned counsel for the applicant whereabouts of petitioner's husband is not known. Since the applicant was missing, burden shall be on the respondents to establish that the applicant's husband is alive, more so since the applicant had informed the respondents that her husband is not traceable/missing. If applicant's husband was alive, he would have contacted the applicant, his relatives or friends.

9. It is the respondents, who treated applicant's husband as deserter and subsequently after waiting for stipulated period under the rule, dismissed him from service. His whereabouts have not been traced out and this fact was informed by the applicant to the Army and this has not been taken into account in the Court of Inquiry as also while declaring him a deserter, hence burden shall be upon the respondents to establish

that applicant's husband is alive and a deserter. The failure on their part to discharge burden of proof, keeping in mind Section 108 of the Indian Evidence Act shall be total. 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.”

10. However, such presumption shall be rebuttable by the decision in a case reported in **Sobha Hymavathi Devi vs. Setti Gangadhara Swamy & ors** (AIR 2005 SC 800). Since applicant's husband is missing and he did not turn up to his native place even till date, it seems enough to draw a presumption under Section 108 read with Section 114 of the Indian Evidence Act.

11. The Orissa High Court in **Parikhit Muduli and others vs. Champa Devi and others**, reported in AIR 1967, Orisa, 70 held that the presumption under Section 108 of the Indian Evidence Act is available at the time when the party approaches the Court for necessary relief. There cannot be any presumption as to actual date of death and this fact has to be proved like other fact. Same view has been taken by the Calcutta High Court in **Narki vs. Lal Sahu**, reported in 1990 ILR (37) Cal 103 and Andhra Pradesh High Court in **Kottapalli Venkateswaralu vs. Kottapalli Capayya and others**, reported in AIR 1957 AP 380. It has been held in the above cases that the death can be presumed to have been occurred on the date when the suit was filed. It may be held that the person is not alive by the date of institution of suit but the presumption cannot be that he or she is dead on the date.

12. In **Subhash Ramchandra Wadekar – vs- Union of India**, AIR 1993 BOM 64, it was held “Where the presumption of death after

seven years absence applies, the person will be presumed to have died by the end of that period. Section 108 of the Indian Evidence Act enacts law of rebuttable presumption in case of a person who has not been heard of more than 7 years”.

13. In case a person is not heard for 7 years, then the burden of proof that he or she is alive shall be on the person who says that he or she is alive. The presumption under Section 108 of the Evidence Act will be that he is dead but it shall be rebuttable presumption.

14. 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.

15. Apart from above, the provisions contained in Section 108 of the Indian Evidence Act create a fiction of law, according to which under Section 108 of Indian Evidence Act, a person shall be deemed to be dead after 7 years in case his or her whereabouts are not known but shall be rebuttable. However, the applicant preferred the Original Application (supra) in the Tribunal on 06.12.2012, accordingly, the applicant may claim benefits in the settled proposition of law (supra) on account of presumptive death of her husband from the said date as surviving heirs on the deceased Army Personnel.

16. It has been held in **Indira K. vs. Union of India & Ors**, reported in **OP No. 18590 of 1999 (K)** that even though under the Army Act a person can be said to be a deserter under Section 106 when he is found missing and can also be dismissed for desertion, the situation changes when the presumption of death of such a person becomes available under Section 108 of the Evidence Act. In other words, if a person is declared a deserter and dismissed from service

and is not traced out in seven years, then Section 108 of the Evidence Act takes over and all consequential actions would follow. In other words, presumption of death thereafter supercedes the finding of the applicant's husband being a deserter and the consequential order of dismissal from service.

17. In **State of Bombay vs. Pandurang Vinayak**, AIR 1953 SC 244L: Hon'ble Supreme Court held that, when a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion. (para 5). In **Bengal Immunity Co. Ltd. vs. State of Bihar**, AIR 1955 SC 661: The Hon'ble Court held that, legal fictions are created only for some definite purpose and it is to be limited to the purpose for which it was created and should not be extended beyond that legitimate field. In **CIT vs. S. Teja Singh**, AIR 1959 SC 352 : Hon'ble Supreme Court held that, it is a rule of interpretation well settled that in construing the scope of legal fiction it would be proper and even necessary to assume all those facts on which alone the fiction can operate. (para 6). In **CIT vs. Shakuntala**, AIR 1966 SC 719: Hon'ble Supreme Court held that the fiction created by the legislature must be restricted by the plain terms of statute. The principle that a legal fiction must be carried to its logical conclusion does not require the court to travel beyond the terms of the section or give the expression a meaning which it does not obviously bear. (para 6). In **Boucher Pierre Andre vs. Supdt. Central Jail**, AIR 1975 SC 164: Hon'ble Supreme Court held that, where a legal fiction is created, full effect must be given to it and it should be carried to its logical conclusion. In **Cambay Electric Supply Industrial Co. vs. CIT**, AIR 1978 SC 1099: Hon'ble Supreme Court held that legal fictions are created for a definite purpose and they should be limited to the purpose for which they were created and should not be extended beyond the

legitimate field.(para 8) In **State of Maharashtra vs. Narayan Rao**, (1985) 2 SCC 321: Hon'ble Supreme Court held that, a legal fiction should ordinarily be carried out to its logical conclusion and to carry out the purposes for which it is created but it cannot be carried beyond that. In **Harish Tandon vs. ADM**, (1995) 1 SCC 537: Hon'ble Supreme Court held that, when a statute creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, the court has to examine and ascertain as to for what purpose and between what persons such a statutory fiction is to be resorted to. Thereafter full effect has to be given to such statutory fiction and it has to be carried to its logical conclusion. In **Prafulla Kumar Das and Ors. vs. State of Orissa**, JT (2003) 9 SC 477: Hon'ble Supreme Court held that, the purpose and object of creating legal fiction in the statute is well-known, when a legal fiction is created, it must be given full effect. (par 39). In **State of W.B. vs. Sadan K. Bormal**, (2004) 6 SCC 59: Hon'ble Supreme Court held that so far as interpretation of legal fiction is concerned, it is trite that the court must ascertain the purpose for which the fiction is created and having done so must assume all those facts and consequences which are incidental or inevitable corollaries to giving effect to the fiction. (para 25). In **State of A.P. vs. Pensioner's Association**, (2005) 3 SCC 161: Hon'ble Supreme Court held that if the provision itself provides a limitation to operation of legal fiction created by it, consequences flowing from the legal fiction have to be understood in the light of limitations imposed. (para 28 & 30).

18. From the decisions quoted above, it is apparently clear that on the expiry of seven years the person missing shall be presumed to be dead though the date on which he actually died cannot be ascertained. In the light of the fact that there has been no word of the applicant's husband since 2003 till today and due to the fact that presumption of death of the applicant's husband is a deserter and his order of dismissal

is found to be superseded by the presumption of law laid down under Section 108 of the Evidence Act as there can be no question of a dead person being a deserter or being dismissed from service.

19. Keeping in view the discussions made herein above, coupled with law laid down by different Courts (supra), the applicant deems to be entitled for family pension from the date of filing of the Original Application in the Tribunal i.e. 06.12.2012. The Original Application was filed on 06.12.2012 in the Tribunal and still the husband of the applicant is not traceable and his whereabouts are not known from the year 2003 the applicant shall be deemed to be not alive. The applicant seems to be entitled for family pension, including the pensionary benefits in accordance with the rules from the day, she approached the Tribunal. Accordingly, the Original Application deserves to be allowed.

20. In view of what has been stated above, the Original Application is **allowed**. The impugned order passed by the respondents is hereby set aside. The respondents are directed to pay family pension to the applicant from 06.12.2012, expeditiously, say within a period of four months from the date of receipt of a certified copy of this order. The applicant shall also be entitled to all consequential benefits in accordance with rules. In case the respondents fail to give effect to this order within the stipulated time, they will have to pay interest @ 9% on the amount accrued from due date till the date of actual payment.

21. No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

(Justice D.P. Singh)
Member (J)

Dated : June, 2017

UKT/-