

Court No. 1 (List B)
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW

Transferred Application No. 1093 of 2010

Tuesday this the 21st day of February, 2017

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Lt Gen Gyan Bhushan, Member (A)

Smt. Prasandi Devi wife of No. 1242290
L/NK Late Sri Kishan
R/o Village P.O. – Isaypur
Tehsil – Sikandrabad
District - Bulandshar

..... **Petitioner**

By Legal Practitioner : Shri Dharmendra Kumar Singh &
Shri R Chandra,
Ld. Counsel for the Petitioner.

Vs.

1. Union of India through its Secretary,
Ministry of Defence, New Delhi.
2. Air Chief Marshal, Indian Air Force, 23, Akabar Road, New
Delhi.
3. The Officer in Charge Records, Defence Security Corps
(Records) Hill Road, Cannanore (Kerala).
4. Chief Controller of Defence (Pension), Allahabad.
5. Rasha Suraksha Corps Abhilekh, Defence Security Corps
Records, Mill Road, Cannanore Through Record Officer.

..... **Respondents**

By Legal Practitioner : Shri Adesh Kumar Gupta,
Ld.Counsel for the respondents.

ORDER

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

1. Being aggrieved by the alleged dismissal of her husband Late L/Nk Sri Kishan by the respondents, who is admittedly missing/absent without leave since 17th April 1980 from the active service, the petitioner has preferred Writ Petition bearing no.54478 of 2005 in the Hon'ble High Court of Judicature at Allahabad which has been transferred to this Tribunal and renumbered as T.A. No. 1093 of 2010 in pursuance of the provisions contained in Section 34 of the Armed Forces Tribunal Act, 2007 and now processed for hearing after exchange of affidavits.

2. The petitioner has prayed the following reliefs :

“ (i) A writ of certiorari quashing order dated 16/17/June 2005 passed by Respondent No.5 (Annexure No.7).

(ii) A writ of Mandamus commanding the Respondents to sanction 'Family Pension' to the Petitioner as early as possible.

(iii) A writ of Mandamus commanding the Respondents to pay arrears of family pension since 18/04/1980 till the date of payment of family pension.

(iv) Award, costs of the petition to the petitioner.”

3. We have heard Shri R. Chandra, learned counsel for the petitioner and Shri Adesh Kumar Gupta, learned counsel for the respondents and perused the record.

4. The husband of the petitioner Late L/Nk Sri Kishan was enrolled in the Indian Army on 9th June 1967 and was discharged from service on 2nd September 1970 under Rule 13 (3) Item III (iv) of Army Rules, 1954 and subsequently was enrolled in DSC on 11th December 1971. It is alleged that the husband of the petitioner L/Nk Late Sri Kishan remained absent without leave from 17th April 1980 and was declared a deserter after Court of Inquiry was held. Since he was declared a deserter, he was dismissed from service

under Section 20 of the Army Act w.e.f. 26th October 1983 as per Policy on the subject.

5. Admittedly, it was reported by the petitioner that Late L/Nk Sri Kishan had not returned to his home and this fact was communicated to the respondents. It is stated that since the petitioner's husband did not render qualifying service of 15 years, under the eligibility rules laid down in Rule 132 of the Pension Regulations for the Army Part-I (1961) and was dismissed from service, as such he was not entitled for service pension.

6. The petitioner submitted various representations for ventilating his grievances for the payment of regular pension and the last one is of 30th May 2005, in response to which the petitioner was informed vide letter dated 16th June 2005 with regard to ineligibility of her husband to receive pension. The decision of the respondents dated 16th June 2005 has been impugned in the present Transferred Application.

7. It has been argued by the learned counsel for the respondents that since the petitioner's husband was declared a deserter w.e.f. 17th April 1980 and after waiting for stipulated period under the rule, he was dismissed from service w.e.f. 26th October 1983. While opposing the petitioner's claim, it has been submitted by the learned counsel for the respondents that since the husband of the petitioner was dismissed from service, she is not entitled for pensionary benefits. On the other hand, learned counsel for the petitioner submitted that Late L/Nk Sri Kishan, husband of the applicant had not come to his home and was not traceable/missing. This fact was communicated to the Army/respondents, but it has not been taken into account in the Court of Inquiry and he has been declared a deserter. The petitioner had informed the Police as also approached the Army personally as well as by submitting numerous applications that her husband had not come home and is missing, but no action was taken by the Army and in a routine way, he was subsequently dismissed from service.

8. Learned counsel for the petitioner submitted that keeping in view of the provisions contained in Section 108 of the Evidence Act, after lapse of

seven years, the petitioner's husband in the instant case should be deemed to be dead, thus making him entitled for payment of pensionary benefits.

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 petitioner whereabouts of petitioner's husband are not known. He was missing from active Army duty. Since the petitioner was on active Army duty, burden shall be on the respondents to establish that the petitioner's husband is alive, more so since the petitioner had informed the respondents that her husband has not come home and is not traceable/missing.

11. It is the Army/ respondents, who treated petitioner's husband as missing person/ absent without leave, subsequently declared him deserter and 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 petitioner 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 petitioner'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.”

12. 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). Petitioner’s husband is missing while on active Army duty. Since 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.

13. 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.

14. 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.

15. 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.

16. 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 petitioner preferred the writ petition (supra) in the High Court on 05th August 2005. Accordingly, the petitioner 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.

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. Keeping in view the discussions made herein above, coupled with law laid down by different Courts (supra), the petitioner deems to be entitled for service pension from the date of filing of the writ petition in the Hon'ble High Court of Judicature at Allahabad, which has been transferred to the Tribunal. The Writ Petition was filed on 05th August 2005 in the Hon'ble High Court of Judicature at Allahabad and still the husband of the petitioner is not traceable and his whereabouts are not known from 17th April 1980

when he was serving in the DSC and later on dismissed on 26th October 1983, the petitioner shall be deemed to be not alive. The petitioner seems to be entitled for service pension, including the pensionary benefits in accordance with the rules from the day, she approached the High Court. Accordingly, the Transferred Application deserves to be allowed.

19. In view of what has been stated above, the Transferred Application No.1093 of 2010 is **allowed**. The impugned order dated 16/17.06.2005 is hereby set aside. The respondents are directed to pay retiral benefits/pension from 05.08.2005 to the petitioner, expeditiously, say within a period of four months from the date of receipt of a certified copy of this order. The petitioner shall also be entitled to all consequential benefits in accordance with rules. The petitioner shall also be entitled for interest @9% per annum w.e.f. 05.08.2005, the date of filing of writ petition in the High Court.

20. No order as to costs.

(Lt Gen Gyan Bhushan)
Member (A)

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

Date : February, 2017

PKG