

RESERVED
Court No.1

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

ORIGINAL APPLICATION NO. 139 OF 2017

Friday this the 18th day of January, 2019

Hon'ble Mr. Justice S.V.S. Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)

Smt Sharda Subba,
W/o No. 9422049 Lance Naik Gam Bir Subba,
C/o Shri Janak Rai,
Quarter No. 46, 14 Farlang, Race Course,
Post Office – Dilkusha, Lucknow Cantt,
Lucknow (U.P.).

..... Applicant

Ld. Counsel for the Applicant : **Shri R. Chandra,**
Advocate

Versus

1. Union of India, through the Secretary,
Ministry of Defence, Government of India,
New Delhi.
2. Chief of the Army Staff,
Army Headquarters,
DHQ Post Office, New Delhi.
3. The Officer-In-Charge,
11 Gorkha Rifles Records,
C/o 56 APO.
4. The Commanding Officer,
2/11 Gorkha Regiment,
C/o 56 APO.

..... Respondents

Ld. Counsel for the Respondents : **Shri Amit Jaiswal,**
Central Govt Counsel.

ORDER

“Per Hon’ble Mr. Justice S.V.S. Rathore, Member (J)”

1. The instant Original Application has been filed on behalf of the applicant under Section 14 of the Armed Forces Tribunal Act, 2007, whereby the applicant has sought following reliefs:-

- I) The Hon’ble Tribunal may kindly be pleased to direct the respondents to quash the order of dismissal dated 15/09/2007 (Copy of which has not been supplied to the applicant).*
- II) After quashing the order of dismissal, the respondents may be directed to pay all retiral dues to the applicant including family pension, gratuity, Provident fund and arrears with interest at the rate of 24% per annum. They may also be directed to pay suitable compensation for loss of the husband of the applicant.*
- III) Any other appropriate order or direction which this Hon’ble Tribunal may deem just and proper in the nature and circumstances of the case including cost of the litigation.”*

2. In brief, the admitted facts are that the applicant’s husband Lance Naik Gem Bir Subba was serving with 2/11 Gorkha Regiment. The husband of the applicant went missing since 04th February 2004. Thereafter apprehension roll was issued and he was declared deserter. After expiry of the period of three years, when the applicant’s husband did not resume his duty, he was dismissed from service. The applicant then approached the respondents for settlement of claims and on compassionate ground, the balance of the amount of the husband of the applicant was paid. She approached the unit of the applicant and thereafter a final settlement of the account in respect of her husband was carried out.

3. On 27th May 2005 a declaration certificate duly countersigned by OC Depot Coy 11 GRRC and a certificate issued by member of Cantonment Board, Garhi Cantonment Dehradun (UP) dated 11th May 2005 was received from Lnk Sher Bahadur Rai of 2/11 GR who was also posted at 11 GRRC, Lucknow that his wife Smt. Kamala Rai daughter of Sri Jit Bahadur Rai had

eloped with the applicant's husband. On 22nd February 2005 the applicant made a request for payment of some money on compassionate ground and, therefore, a sum of Rs.9998/- on account of credit balance of her deserter husband was paid to her. On 23rd August 2012, an appeal for family pension, gratuity, AFPP Fund and for release of all other benefits of her deserter husband was sent by the applicant.

4. The claim of the applicant is that since the husband of the applicant was missing since 2004, therefore, after lapse of seven years' period, in view of Section 108 of the Indian Evidence Act, her husband must be presumed to be dead, therefore, the applicant was entitled for the benefits because the respondents have utterly failed to bring on record any evidence that the husband of the applicant was alive.

5. Learned counsel for the applicant, in support of his claim, has placed reliance on the pronouncement of this Tribunal in the case of **Smt Prasandi Devi vs. Union of India & others** (T.A.No.1093 of 2010) decided on 21st February 2017.

6. On behalf of the respondents, it is submitted that the applicant's husband was a deserter and was dismissed from service and, therefore, the applicant is not entitled to any post retiral benefits. It has also been argued that in view of Policy in force dealing with the matters of Army personnel, who are missing, the applicant has not followed the procedure which under the said policy, she was required to follow.

7. Admittedly, in this case the applicant submitted his claim in the year 2012, however, no Court of Inquiry was conducted in the matter.

8. At this stage, we would like to reproduce the Policy, which deals with such matters, which is reproduced as under :

“No.12(16)/86/D(Pen/Sers

Government of India/Bharat Sarkar
Ministry of Defence/Raksha Mantralaya
New Delhi, Dated 3rd June, 1998

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

Subject RELEASE OF DCRG, LEAVE ENCASHMENT AND FAMILY PENSION
 IN RESPECT OF ARMED FORCES PERSONNEL WHO ARE MISSING

Sir,

A number of cases have been referred to this Ministry for grant of terminal and other pensionary benefits to the families of service personnel who have suddenly disappeared while operational and non-operational service and whose whereabouts are not known. At present all such cases are considered on merits. In the normal course unless a period of 7 years has elapsed from the date of disappearance of the employee, he cannot be deemed to be dead and therefore the retirement benefits cannot be paid to the family. This principle is based on Section 108 of the Indian Evidence Act which provides that when the question is whether the man is alive or dead and it is proved that he had not been heard of for 7 years by those who would naturally have heard of him had he been alive, the burden of proving that he is alive is shifted to the person who affirms it. This has resulted in 13 T.A No. 119 of 2012 great hardship and distress to the families who have to wait for 7 years before any terminal benefits could be paid to them.

2. The President is therefore pleased to decide that when a member of the Indian Armed Forces is declared missing while in service the family will be paid the following benefits subject to adjustment of outstanding dues in respect of the missing personnel, if any:-

(a) Immediately after the date of declaration of disappearance The amount of salary due, leave encashment due and DSOP/AFPP Fund amount subject to nomination made by the missing personnel.

b) After the lapse of one year from the date of declaration of disappearance/presumption of death Family pension/DCRG etc. as admissible in normal conditions.

3. The above benefits may be sanctioned after observing following formalities:-

(i) The family must lodge a report with the concerned police station and obtain a report that the employee has not been traced after all efforts had been made by the police.

(underlined by us)

(ii) The claimant will be required to furnish an indemnity bond with two solvent sureties to the effect that all payments thus made will be recovered from the amount due to the person if he/she reappears and makes any claims.

4. 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 application, the interest shall be paid at the rates applicable and responsibility for the delay fixed.

5. In the case of officers, the respective Branch/Dte at Service HQrs and in the case of JCOs/OR and equivalent in Navy and Air Force, their respective Records Offices will process such cases with CDA (P)/PAO/CDA (P)/CDA (Navy)/CDA (Air Force).

6. The provisions of this letter take effect from 29th August, 1986. 14 T.A No. 119 of 2012.

7. This issues with the concurrence of the Finance Division of this Ministry vide their U.O No. 802-Pen of 1988.

Yours faithfully,
Sd/- xx xx
(Y. K. TALWAR)
DESK OFFICER”

Para2(b) of the said circular clearly states that after the lapse of one year from the date of declaration of disappearance/presumption of dead family pension will be paid as admissible in normal condition thereby cutting the period of seven years to one year only.”

9. Thus, it is clear that in order to get the benefits of such policy, the applicant was under obligation to lodge an FIR regarding the missing of her husband and to obtain the report of the police, but she has not taken any such steps, which she was required to do. Since no FIR was lodged in this case and there was no report of the police that the husband of the applicant has not been heard of for the last seven years, therefore, the respondents have not conducted any Court of Inquiry.

10. Section 108 of the Indian Evidence Act, 1872 on which learned counsel for the applicant has placed reliance, reads as under :

“Section 108 in The Indian Evidence Act, 1872

108. Burden of proving that person is alive who has not been heard of for seven years.—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 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 [shifted to] the person who affirms it.”

11. Thus, Section 108 of the Indian Evidence Act, 1872 deals with the burden of proof, only which says that if a person is not heard of for seven years by the persons, who would naturally have heard of him if he had been alive, the burden of proving was on the party, who affirms that he is alive. Since in the instant case, the applicant himself has not lodged any report regarding the missing of her husband at any point of time, therefore, no enquiry was conducted. In the peculiar facts and circumstances of this case,

we cannot hold that the respondents were at fault because the part which the applicant was required to do under the policy, has not been completed by the applicant herself.

12. Hon'ble Apex Court in the case of **LIC of India vs. Anuradha** (2004) 10 SCC 131 has held that the presumption under Section 108 cannot be extended to a death concided with time when said persons went missing. Thus, by this presumption under Section 108 of the Indian Evidence Act, 1872, it cannot be held that a person died on a particular date or within a particular period. At this stage, we would also like to reproduce Section 107 of the Indian Evidence Act, 1872, which reads as under :

“107. Burden of proving death of person known to have been alive within thirty years.—When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.”

13. Thus, a perusal of the aforesaid section shows that the burden of proving that a person is dead, who was alive within thirty years, the burden of proving that he is dead is on the person who affirms it. Admittedly, in this case, the husband of the applicant was alive in 2004, therefore, he was very much alive within a period of 30 years, so the applicant is claiming the post retiral dues of her husband. Therefore, it was for her to prove that her husband was dead. The presumption of Section 108 of the Indian Evidence Act, 1872 cannot solely come for the rescue because as per the policy, she has not fulfilled the conditions, which have been laid down in the policy covering the issue. It is very surprising that the wife, whose husband is not heard of for the last six or seven years, has not considered to lodge the FIR at least claiming that her husband is dead or to make a request to investigate and trace out her husband, nor any such representation, letter or request was made to the Army authorities at any point of time. The only thing, in which the applicant was interested, is to receive the post retiral dues.

14. Apart from it, there is a certificate of another person, which was issued in the year 2005, that the husband of the applicant has eloped with his wife. The said certificate is hereby reproduced as under :

“DECLARATION CERTIFICATE (ELOPTION)”

I, No. 9421192X Lnk Sher Bahadur Rai hereby certify that I have married Smt. Kamala Rai daughter of Shri Jit Bahadur on 15 Mar 1998 and she has eloped with No. 9422049 Rfn Gem Bir Subba of 2/11 GR on 04 Feb 2004.

Sd/- x x x x x x
(Signature of the individual)”

15. Thus, on 27th May 2005, Lnk Sher Bahadur Rai of 2/11 GR has certified that his wife Smt. Kamala Rai daughter of Sri Jit Bahadur Rai had eloped with the applicant’s husband w.e.f. 04th February 2004, but it does not certify that after 04th February 2004, the applicant’s husband or his wife was seen alive by any person. Therefore, in the peculiar facts and circumstances of the case, since the applicant herself has not lodged any FIR and no Court of Inquiry has been conducted in this connection, therefore, we cannot extend the benefits of the case law relied upon by the learned counsel for the applicant.

16. In the interest of justice, we are of the view that this O.A. may be disposed of with the following directions:

(i) The applicant is directed to lodge an FIR and after the report of the police in this case to raise her claim before the respondents and the respondents shall conduct a Court of Inquiry regarding the missing of the applicant. The Court of Inquiry shall enquire on the point whether the applicant’s husband is alive or not. Enquiry Officer shall examine the salary account of the missing soldier or any other financial transaction done to ensure whether the same has been operated by the applicant’s husband after his elopement.

(ii) The statement of Lnk Sher Bahadur Rai of 2/11 GR shall be recorded on the point whether his wife was seen alive by any person. If the wife of Lnk Sher Bahadur Rai of 2/11 GR is alive, her statement should also be recorded during the said Court of Inquiry.

(iii) The statements of relatives of the husband of the applicant and some old/responsible person of the village of the applicant shall also be recorded to find out whether the applicant's husband has visited the village after the date of his desertion and the Court of Inquiry shall give a specific report on the point and it shall be open to the applicant to move a fresh claim after the report of the Court of Inquiry, which shall be conducted only after lodging of the FIR. The police report based on the FIR shall also be considered by the Court of Inquiry in arriving at its findings.

17. With the aforesaid directions, this O.A. stands **disposed of** finally.

No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

(Justice S.V.S. Rathore)
Member (J)

Dated : January , 2019.
PKG