FORM NO – 21

(See Rule 102 (1)

ARMED FORCES TRIBUNAL, KOLKATA BENCH

APPLICATION NO : TA 36 OF 2011

THIS 30TH DAY OF APRIL, 2014

CORAM : Hon'ble Mr. Justice Raghunath Ray, Member (Judicial)
Hon'ble Lt. Gen. K.P.D. Samanta, Member (Administrative)

1. Smt. Syda Khatoon @ Smt. Sayda Khatoon @ Smt. Sayeeda Khatoon W/o late S.M.Khalil,

2. Amna Khatoon D/o late S.M.Khalil,

Both resident of Village Bindaul, P.S. Bihta, Dist. Patna at present resident of Vill. Abgilla, P.S. and PO Sahar, Dist. Bhojpur,

…….. Petitioners

-VS –

1. Union of India through the Secretary, Ministry of Home, New Delhi

2. The Home Secretary, Ministry of Home, Govt. of India, New Delhi

3. The Officer-in-Charge, ASC, Records (MT), Bangalore-560007

4. Major Office Commanding 298(1) Sup. PL. ASC Danapur Cantt.

5. The State of Bihar through the Collector, Bhojpur

6. The Collector, Bhojpur

7. The Collector, Patna

8. The Director, Animal Husbandry Department.

Govt. of Bihar, Patna

…… Respondents

For the petitioner : Ms. Prabha Mishra, Advocate
Mr. Girijeshwar Mishra, Advocate
For the respondents : Mr. S.K.Bhattacharyya, Advocate

O R D E R

Per Justice Raghunath Ray, Member (Judicial)

Genesis

This writ petition bearing No. CWJC 6907 of 2006 was initially filed before the Hon'ble Patna High Court by two applicants, who are mother and daughter by relation, claiming arrears of family pension in respect of the husband of applicant No.1 and father of applicant No.2, S.M. Khalil, since deceased, an ex-Soldier of the Indian Army. The said Writ Petition was subsequently transferred to this Tribunal by operation of Section 34 of Armed Forces Tribunal Act, 2007 and has been renumbered as TA No.36 of 2011.

Facts :

2. Briefly stated, the case of the applicants is that the husband of Applicant No.1, late S.N. Khalil was enrolled in the Indian Army as a Sepoy on 14-2-1962 and was invalidated out of service on medical ground on 16-10-1969. Subsequent to his discharge on invalidment, the respondent authorities sanctioned him disability pension and also service element of pension. It is averred that after the invalidation from Army Service, the husband of applicant No. 1 joined the Animal Husbandry Department of Government of Bihar on 8-5-1970 as Driver. On 8-9-80 he was posted at Itahari within the Bhojpur District. The said husband of the applicant No.1 went missing with effect from 10-10-1980 and could not be traced subsequently in spite of best efforts by the family members. The applicant No.1, thereafter, made a prayer to the respondent authorities to grant her family pension on the ground that her husband could not be traced for more than 7 years and should be presumed to be dead. Accordingly, Army Respondent granted her family pension with effect from 25-1-1993 i.e.

from the date of lodging FIR with regard to missing of her husband. Such family pension is still being received by applicant No. 1. She has, therefore, prayed for inter alia the grant of arrears of family pension w.e.f. 1st October, 1980 to 24th January 1993 in the instant TA.

Contention of Parties :

3. The applicants made a prayer to the respondent authorities for grant of arrears of family pension from the date of presumed death, i.e. from 10th October 1980, i.e. the date since when the applicant No.1's husband went missing. Since she has been receiving family pension on and from 25.1.1993, arrears of family pension should be paid up to 24-01-93. In response to such demand, the respondent authorities by a letter dated 11th November, 1997 (annexue-3) intimated that her prayer for arrears of pension would be considered only on production of a decree/declaration from a competent Court of Law for presumption of death of her husband under Section 108 of Indian Evidence Act.

4. Accordingly, the applicants filed a Title Suit before the Court of Ld. Sub Judge II, Arrah, Dist. Bhojpur being T.S. No.82 of 1998 which was ultimately decreed in favour of the applicant. The applicants are entitled to the arrears of family pension for the period from October 1980 to 24-1-93, i.e. 146 months and 24 days amounting to Rs1,77,936/- from the Army Authorities as also a total consolidated amount of Rs 50,000/- from the Government of Bihar (respondent) towards arrears of salary in terms of the decree passed by the Ld. Civil Court. No payment was, however, made to the applicants by the Army Authorities in obedience to the ibid decree. It appears that the Army respondents preferred an appeal against the judgement and decree of the Ld. Sub Judge before the Hon'ble Patna High Court being FA No.86 of 2003, which was ultimately dismissed on 4-7-2011 on the ground of

limitation. In the meantime, the instant Writ Petition was filed before the Hon'ble Patna High Court in the year 2006 praying for the arrears of pension as already indicated earlier.

5. The UOI respondents 1 to 4 have filed a counter affidavit before the Hon'ble Patna High Court in which they have stated that the husband of the Applicant No.1 was enrolled in the Army on 14-2-1962 and was invalidated out on 16-10-1969 due to disability of "Neurotic Depression (300)". After his invalidation he was granted disability pension vide PPO No.2559 of 1970 with effect from 16-10-1969. However, on subsequent review of his medical condition, the degree of disability was found to be less than 20% and, therefore, disability pension was stopped. However, he was granted service element of pension with effect from 18-4-1975 for life vide PPO No.12941/71.

6. It has further been averred that after his discharge from army service the ex soldier was employed in the Government of Bihar. While he was in service with the Govt. of Bihar he went missing and on his presumed death the widow of the ex soldier i.e. applicant No. 1 herein might have received family pension from the Government of Bihar and other terminal benefits. As per Regulation 219(1) of Pension Regulations for the Army only one family pension is admissible. Therefore, the applicant was not entitled to get arrears as claimed. It is further stated that against the judgement and decree of Ld. Sub Judge passed in T.S. No.82 of 1992 dt. 24.9.02, the respondents preferred an appeal before the Hon'ble High Court and, therefore, no action could be taken on the decree as passed by the Ld. Sub Judge in view of pendency of the appeal. So far as grant of family pension from 25-1-1993 is concerned, it is contended that as per Circular of the Ministry of Defence dated 23-3-1992 such family pension is admissible from the date of lodgement of FIR with the police and according to the respondents, since the FIR about her husband's sudden

disappearance was lodged on 25-1-1993, she had been granted family pension from that date only.

7. In their rejoinder affidavit to the counter affidavit filed by the respondents 1 to 4 before this Tribunal after its transfer, it is reiterated by the applicants that the applicant No.1 is being entitled to get arrears of family pension, inasmuch as F.A. No.8/2003 had already been dismissed by the Hon'ble High Court vide order dated 04-07-2011 being time barred. The certified copies of order dated 05-05-2011 and 04-07-2011 have also been annexed as Annexure 'A' to the Affidavit in their Rejoinder. The applicants also filed an MA being MA 13 of 2012 praying for amendment of the prayer portion, which was granted vide our order dated 28-3-2012 and accordingly the prayer portion of the writ petition was amended and now the prayer is limited to grant of arrears of family pension from October 1980 to 24-1-1993 with interest. However, they have not claimed any relief from the Government of Bihar, who are respondents 5 to 8 in the Writ Petition.

Arguments :

8. We have heard Ms. Prabha Mishra, ld. adv. along with Mr. Girijeshwar Mishra, ld. advocate for the applicants and Mr. S.K.Bhattacharyya, ld. adv. on behalf of respondents 1 to 4. Both sides have filed a separate written notes of arguments. None, however, appeared on behalf of the respondents 5 to 8. We have also perused various documents, Annexures, the relevant Govt. of India circulars as also the original records that have been produced by the contesting respondents.

9. In course of her argument it is forcefully argued by Ms. Mishra that the judgement and decree passed by the ld. Sub-Judge, Arrah, Dist. Bhojpur, in Title Suit No.

82/98 dt. 24.09.02 (annexure-A5) remains operative since the First Appeal No. 86 of 2003 preferred by the UOI against this judgement and decree stood dismissed being barred by limitation by the Hon'ble Patna High Court vide order dt. 5.5.11. She has also referred to a communication from ASC Record, Bangalore dt. 11.11.97 (Exh 3) vide which they assured that arrears of family pension would be paid once a declaration from the competent court of law with regard to the presumption of her husband's death u/s 108 of Indian Evidence Act could be made available to them. Accordingly, all documents including the civil Court's judgement and decree as asked for, were submitted by the applicant to the ASC Centre, Bangalore. Despite all these, nothing has been done by the respondents. Mrs. Mishra concludes her argument by contending that there was absolutely no reason for the respondents to withhold arrears of family pension to the applicant. In this context she has referred to a ruling of the Single Bench of Kerala High Court reported in **2005(3) KLT 1071 (Indira Vs Union of India)** and also another unreported Judgement of the Division Bench, Delhi High Court passed on 14th March, 2008. It is further submitted by her that the applicant No.1 is presently in receipt of only one family pension which is from the Army i.e. ordinary family pension with effect from 25.1.1993 whereas her prayer is that she should be paid such family pension from the month of October , 1980 i.e. the probable time when her husband disappeared. In other words, her prayer is limited to payment of arrears of family pension for the period October 1980 to 24.1.93, i.e. the preceding date of grant of family pension to the applicant No.1.

10. Mr. Bhattacharyya, ld. adv. for the respondents has vehemently disputed the submissions of Mrs. Mishra, ld. Counsel of the applicant mainly on the following grounds :-

i) This Tribunal cannot be converted to an execution court for execution of the decree of the Ld. Subordinate Judge, Arrah, Bhojpur dated 24-09-2002.

ii) The ld. Sub-Judge has in the decree, ordered for payment of arrears of family pension etc. both from the Indian Army and arrears of salary from the Bihar State Govt. authorities. It is contended by Mr. Bhattacharyya that both Bihar Govt. and Army are distinct and separate juristic entities and, therefore, the applicant cannot get family pension from both the organisations. Unless the Bihar Govt., who is a party, comes forward to say that they are not paying any family pension, Indian Army is not in a position to make any such payment from 1980 as claimed because after invalidating out from Army, the husband of the applicant was employed under Bihar Govt and went missing in 1980 therefrom.

iii) It is also submitted by Mr. Bhattacharyya that family pension is being paid to the applicant No.1 on and from 25-1-1993 i.e. the date of filing FIR which is as per policy of the Army.

iv) Since the Kolkata Bench of the Armed Forces Tribunal was established on 23rd day of November, 2009 vide notification No SRO 18(E) published in the Gazette of India on the 18th day of November 2009, solemn orders dated 05.05.11 and 04.07.11 passed by the Hon'ble Patna High Court in FA No.86 of 2003 are without jurisdiction in view of statutory provisions of Section 34 of the Armed Forces Tribunal Act, 2007. According to him, with the coming into force of the Armed Forces Tribunal Act, 2007 since 15th day of June 2008 vide SRO No. 14(E) dated 13th day of June 2008, the Hon'ble Patna High Court did not have the jurisdiction to adjudicate/dismiss the FA No. 86 of 2003. In such a situation orders passed by the High Court are nullity in the eye of law since being passed by a Court not having jurisdiction by law. According to him, this Tribunal is, however, legally empowered to invoke the jurisdiction vested in it and request for the records

pertaining to FA 86 of 2003 treating the order of dismissal to be not in existence and decide the FA 86 of 2003 on merits after hearing all the parties.

v) Relying upon a ruling of the Hon'ble Apex Court reported In AIR 2004 SC 2070 (LIC of India –vs- Anuradha)it is forcefully argued by Mr. Bhattacharyya that payment of family pension can arise only on or after the date of decree being the 24th day of September 2002 and no arrears are permissible since 1980 under the existing law.

11. Ms. Mishra in her reply has submitted that the Bihar Govt. in terms of the decree have already paid Rs. 50000/- towards arrears of salary of her husband. She also invites our attention to the averments of the petitioner that the family pension was never sanctioned to the petitioner No.1 by the Bihar Govt and as such the question of getting any family pension for the said Govt does not arise at all at any point of time. She further submits that it is also not correct that she had claimed any family pension from the Govt of Bihar.

Discussion/Views

12. We have paid our earnest consideration to the rival contentions. There is no dispute that the husband of the applicant No.1 was enrolled as a Sepoy in the Indian Army on 14-2-1962 and invalidated out on medical ground on 16-10-1969. After his discharge on invalidment he was granted disability pension with effect from 16-10-1969. Subsequently disability was reassessed by the Review Medical Board as less than 20% and, therefore, disability pension was stopped. However, he was granted service element of pension w.e.f. 18-4-1975. It is submitted by the applicant No.1 that subsequent to his discharge from Indian Army, her husband S.M. Khalil since diseased joined the Animal Husbandry Department under Govt. of Bihar on 8-5-1970. However, from the judgement and decree of

the Ld. Sub Judge, Arrah, Bhojpur, it appears that there was a dispute regarding the actual period of service rendered by her husband under Bihar Govt. From para 4 of the Judgement dated 24-9-2002 passed by the Ld. Sub Judge, it appears that on behalf of the Bihar Government, (Defendant No.6 in the said Title Suit) it was stated that the husband of the applicant No.1 S.M. Khalil was appointed in the year 1978 under the Government of Bihar and he was not on duty for the period from 8-5-1970 to 15-3-1978. It was also stated that he was deputed by the Regional Director, Central Range, Patna as per Memo dated 11-8-1980 at Buxer. But since the service book of Md. Khalil was not available his salary could not be paid for the period he rendered service under the Government of Bihar. Therefore, the Ld. Sub Judge directed for payment of lump sum amount of Rs. 50,000/- by the Government of Bihar towards the arrears of salary etc. It is admitted by the applicant during the course of hearing that such payment was made by the Government of Bihar and she has produced a letter dated 14-11-2005 in that regard.

13. Now the question arises as to whether the applicant No.1 is entitled to get arrears of pension from the month of October, 1980 to 24-01-93. Admittedly her husband suddenly disappeared in the month of October 1980. Since her family pension was sanctioned w.e.f. 25-1-1993, her claim of arrears of pension is limited upto 24-01-1993. It appears that the Ld. Sub Judge, Arrah had already allowed such claim of arrears of family pension in terms of the decree dated 24-09-02 (Annexure A5).

14. Mr. Bhattacharyya's, argument that when the Ld. Sub Judge had already decreed the suit in favour of the applicants, they should have moved the appropriate forum for execution of the said decree and cannot come before this Tribunal for its execution does not appear to be a meritorious one. We are also unable to accept his contention that the

instant OA is not maintainable on that score. It appears that this Writ Petition originally filed before the Hon'ble Patna High Court has been transferred to this Tribunal under Section 34 of the AFT Act vide order dated 09-03-2011 passed by the Single Bench of the Hon'ble Patna High Court. In the Writ Petition the applicants made a prayer for the grant of arrears of family pension together with statutory interest etc. During the pendency of the Writ Petition the respondents contested the same by filing counter affidavit but no objection was raised with regard to its maintainability at the first available opportunity on this specific ground, such objection is now being raised at this belated stage from the Bar. It is, however, to be noted that the Army Respondents filed an appeal against the Judgement and Decree passed by the Ld. Sub Judge, Arrah vide FA No. 86 of 2003 which ultimately stood dismissed on 4-7-2011 being barred by limitation. The certified copies of the relevant orders of the Hon'ble High Court have also been brought on record. Such being the position, the judgement and decree passed by the Ld. Sub Judge has now attained finality since the respondents have not challenged such order of dismissal of appeal passed by the Hon'ble Patna High Court on 04-07-2008 before the Hon'ble Apex Court. Under such circumstances, the relief claimed by the applicant No.1 in this Writ Petition can be adjudicated on merit since admittedly the decree holders did not apply before the Court which passed the decree for its execution and as such no execution proceeding is pending before the Court of Ld. Sub Judge, Arrah for execution of the decree in question against the Judgement-debtors. That apart, the claim of family pension by the dependent widow of the deceased pensioner exclusively relates to service matter as envisaged under section 3(o) of the AFT Act, 2007. We also do not find much force in Mr. Bhattacharyya's argument that order of dismissal passed by the Hon'ble High Court, Patna on 04-07-2011 in F.A. No.86 of 2003 was without jurisdiction for the simple reason that a plain reading of Section 34 of AFT

Act, 2007 establishes that it speaks about transfer of pending cases which include every suit or other proceeding pending before any Court including High Court or other authorities immediately before the date of establishment of Tribunal under this Act and as such transfer of any pending appeal from the High Court, to the Tribunal has not been mandated. Similarly, Section 35 of AFT Act, 2007 relates to the provision for filing of certain appeals before the Tribunal after its establishment. Mr. Bhattacharyya's argument on that score, therefore, fails.

15. Another facet of Mr. Bhattacharyya's argument is that two family pensions are not admissible in terms of Para 219 (i) of the Pension Regulations for the Army 1961 which is extracted as under:

> *" Conditions of eligibility for a family pension –*
>
> *219- A relative specified in Regulation 216 shall be eligible for the grant of family pension, provided :*
>
> *General*
>
> *(i) he or she is not in receipt of another pension from Government"*
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> ** ** ** ** **

16. It was emphatically submitted by the Ld. Counsel for the applicants that the applicant No. 1 was not sanctioned any other kind of family pension from any other authority. The Ld. Counsel for the respondents has also not been able to produce any evidence in support of his contention that the re-employed soldier of Indian Army was in receipt of pension from the Bihar Govt and for that matter the applicant No.1 is in receipt of family pension on that account from the Government of Bihar. However, from the judgement of the Ld. Sub Judge, Arrah we find that no such plea was set up by the Bihar Government respondents/defendant in that regard during trial. Rather, they asserted

before the Ld. Trial Court that even the arrears of salary could not be paid to the deceased husband of applicant No.1 for want of service record. Evidence was led to the effect that the husband of the applicant No. 1 was appointed only in 1978 and, therefore, he hardly rendered two years of service at the time of his disappearance in the year 1980. The question of sanction of pension to S.M. Khalil since deceased who admittedly could not render any pensionable service to the Animal Husbandry Department of Govt of Bihar does not arise at all. Such being the factual and legal position, reference to the circular dated 11-4-2001 issued by the Ministry of Personnel, PG and Pensions Department of Pension and Pensioners' Welfare, Government of India allowing military pensioner to draw pensionery benefits in Civil Service is of no use. The unreported decision of the Principal Bench, AFT passed on 29-09-2010 in **OA No.141/2010 (Smt Om Bali vs Vs Union of India)** cited on behalf of the applicants to show that there is no bar in receiving pension from the Military Service and the Civil Service is also of no avail in the facts and circumstances of the present case.

17. That apart, the respondents themselves granted ordinary family pension to the applicant No. 1 w.e.f 25-01-1993. If there was any doubt that the applicant was already in receipt of family pension from the Government of Bihar, then such family pension would not have been granted by the respondents themselves in favour of the applicant No.1. The Sr. Record Officer, ASC, Bangalore vide letter dated 11th November 1997 (Annex A3), informed her that she should produce a decree/declaration from a Court of Law regarding presumption of death of her husband in order to enable them to grant arrears of family pension. In such view of the matter, Mr. Bhattacharyya's argument on that score is devoid of any merit.

18. Referring to para 2 of the Defence Ministry circular dated 23rd March 1992, it is argued by Mr. Bhattacharyya, Ld. Advocate that failure to lodge an FIR in the local PS by the widow of the deceased has disentitled her to get family pension on and from the date of her husband's disappearance. For better appreciation of this facet of Mr. Bhattacharyya's contention para 2 of the afore-mentioned circular of the Defence Ministry is reproduced as under:-

> "2. The date of disappearance of the serving armed forces personnel/pensioner will be reckoned from the date the First Information Report is lodged with the policy 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. ….."

19. According to Mr. Bhattacharyya, since the FIR was lodged with the police by the applicant No.1 on 25.1.93 (annexure-1 to the counter affidavit), family pension was sanctioned from the said date. Therefore, as per the above circular, no arrears of family pension are payable to the applicant prior to 25-01-1993. Such argument is of no consequence for the simple reason that in the present case the moot question arises for our consideration and determination is whether the benefit of family pension can be extended to the widow of a Defence pensioner in view of presumptive death under section 108 of Evidence Act fortified by a decree of Civil Court passed on the basis of both oral and documentary evidence adduced by the parties before the Ld. Trial Court. In that context of the matter it is to be examined as to whether presumption can be drawn regarding the time of death of a person who has not been heard for more than 7 years or it can be inferred on the basis of evidence actual or circumstantial.

20. The presumption of death of a person who went on missing can, therefore, be drawn after the expiry of seven years. In the present case disappearance of the defence pensioner was also within the knowledge of his family members as also military authorities since there was no

drawal of pension by the pensioner since October, 1980. In fact, whenever anything appears which suggests the probability of a person being dead, the presumption of death comes into play. However, no presumption can be drawn as to the exact time of death of a person who has not been heard for seven years. It is contextually relevant to point out that Sections 107 and 108 of Evidence Act deals with the question of burden of proof to be discharged where question arises as to whether a man is alive or dead. For better appreciation of the onus of proof, it would be useful to reproduce Sections 107 and 108 as under :

> "S. 107. 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.
>
> S.108. 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."

21. A close reading of those two afore-quoted Sections together reveal that Section 107 deals with the presumption of continuation of life, whereas Section 108 deals with the presumption of death. Section 108 has been enacted as proviso to Section 107 by specifying that when a person had continuously not been heard of for 7 years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive shifts on the person who asserts that he is alive. In fact, the presumption of continuance of life under Section 107 ceases on expiration of 7 years from the period when the person in question was last heard of. In other words, the presumption under Section 108 will apply when the question is whether the person was alive or dead and not where the question whether the person was alive or dead on a particular date. In this context for better appreciation of the connotation of presumption of death it would be extremely useful and

convenient to refer to the oft-quoted Ruling of the Privy Council reported in **AIR 1926 PC 9 (Lal Chand Marwari v. Mahant Ramrup Gir)** wherein it has been held as under :

> "It is constantly assumed that, where the period of disappearance exceeds seven years, death which may not be presumed at any time during the period of seven years, may be presumed to have taken place at its close. This is not correct. The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or even four periods of seven years. Probably the true rule would be less liable to be missed, and would itself stated more accurately, if, instead of speaking of a person who had not been heard of for seven years, it describes the period of disappearance as one of not less than seven years. If a person has not been heard of for seven years, there is a presumption of law that he is dead; but at what time within that period he died is not a matter of presumption but of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential".
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> (Emphasis supplied)

22. The principle of law as laid down by the Hon'ble Privy Council have uniformly been reiterated by the Hon'ble Apex Court in plethora of judicial pronouncements. In this context we may refer to two rulings of the Hon'ble Apex Court reported in **AIR 2004 SC 2070 (LICI – Appellant v. Anuradha – Respondent)** and **AIR 2002 SC 606 (Darshan Singh & Others – Appellant v. Gujjar Singh (dead) by L.Rs & Others – Respondents)**.

In paragraph 5 of Darshan Singh case (supra) it is held as follows :-

> "5. ……..there is no presumption of exact time of death under Section 108 of the Evidence Act and the date of death has to be established on evidence by person who claims a right for establishment of which that fact is essential……."

Similarly in Anuradha's case (supra) in paragraph 14 of the said judgement it is observed inter alia as follows :

> "14……The presumption raised under Section 108 is a limited presumption confined only to presuming the factum of death of the person who's 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 6 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".
>
> (Emphasis is ours)

In paragraph 15 of the Judgement it is held as under :

> "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".
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> (Emphasis supplied)

23. It is, therefore, abundantly clear that the time within the period of 7 years of a person who died is not a matter of presumption, but of evidence and the onus of proving that the death took place at any time within 7 years lies upon the person who claims his right in establishment of the factum of death or who claims a right of establishment of which the factum of death is essential. It is an admitted position of law that once the rule of presumption is invoked on the ground that a man has not been heard of for 7 years, the beneficiary is entitled to ask for the relief on the footing that he is dead. It is also settled position of law that there cannot be any presumption as to the actual date of death and this has to be proved like any other facts. It has further been held by some of the High Courts that there is also no presumption that on the close of 7 years death has occurred and in such a situation it was held that where there is a dispute in a suit as to the date of death of a person not heard of for 7 years in absence of any evidence of either side, the Court should draw a presumption that he was dead on the date of the suit. In this context we may refer to a decision of the Madras High Court reported in **AIR 1965 Mad 440 (Huseinny J Bhaghat and another vs. LICI)**. The paragraph 6 of the said judgement reads as under :

> "(6) Indisputably, S. 108, itself is founded upon the principles of English common law, which have been tersely stated in Halsbury's Laws of England, Simonds Edn. Vol. 15 S. 624, page 345. As the authoritative treatise states:
>
> "There is no legal presumption either that the person concerned was alive up to the end of the period of not less than 7 years, or that he died at any particular point of time during such period, the only presumption being that he was dead at the time the question arose if he

> has been beard of during the proceeding 7 years. If it is necessary to establish that a person died at any particular date within the period of 7 years, this must be proved as a fact by evidence raising that inference; for example, that when last heard of he was in bad health, or exposed to unusual perils, or had failed to apply for a periodical payment upon which he was dependant for support."
>
> I do not think that it can be at all doubted that the above passage, the substance of which is also reflected in our enactment, namely, S. 108 of the Indian Evidence Act, justifies the restricted declaration which the courts below have granted, unless the last part of the passage extracted above is brought in to aid the plaintiffs in obtaining the wider declaration they actually seek. For the shifting of the onus itself relates only to the point of time at which the question arose after the lapse of 7 years, during which the party presumed to be dead has not been heard of. That can only be the date of the institution of the suit, and, on that date when the defendant-Corporation did not discharge the burden, it must be presumed that the young man was dead. There is no legal presumption that he died at any earlier point of time, or even that he was alive up to any particular date; any such inference can only be based on the strength of the facts in the individual case."

(Emphasis supplied)

24. In the light of the afore-cited judicial pronouncements, we are now to analyse evidence and circumstances on record in order to ascertain as to whether the widow of S.M. Khalil, since deceased the present applicant No.1 before us has succeeded in discharging the onus cast upon her to presume the factum of death of her husband at the material point of time. Admittedly, her husband was a Defence Pensioner. It is also not in dispute that he had disappeared since October, 1980 and his whereabouts were not known for 7 years. It is also an admitted position that she had been sanctioned family pension on the legal presumption of her husband's death on and from 25-1-1993 even though her husband was admittedly paid pension upto the month of September 1980 and, thereafter, there was no drawal of pension by the defence pensioner after his sudden disappearance. When his widow insisted for arrears of family pension she was asked by the Pension sanctioning authority to bring a Civil Court Decree establishing the factum of her husband's death. She was sanctioned family pension only with effect from 25-1-1993 on the pretext of her failure to lodge FIR as per Defence Ministry's Circular dated 23-3-1992 which has already been quoted in paragraph 18 of this Judgement. It would be evident from the

opening words of Rule 2 of the said Circular that the date of disappearance of serving Armed Force Personnel/Pensioner will be reckoned from the date when the First Information Report is lodged. The said circular is quite silent about the Presumption of civil death or the Civil Court's decree confirming physical or presumptive death of Armed Force Personnel/pensioner etc.

25. We are unable to comprehend as to how and why lodgement of FIR has been made a precondition for the grant of family pension of Serving Armed Force personnel/pensioner who could not draw pension from a particular period of time because of his sudden disappearance whenever Pension Regulations indicate that family pension is admissible to the dependent in the event of death of the pensioner. It is also contextually relevant to mention that lodgement of FIR is necessitated whenever commission of a cognizable offence is reported. In other words, FIR is required to be registered u/s 154 Cr.P.C. whenever any foul play is suspected as cause of death/disappearance of the individual otherwise information of disappearance of an individual is required to be diarised in the local P.S. which is known in popular parlance as "Missing Diary". The copy of the relevant G.D. entry together with its number is also normally handed over to the informant. In the present case also the petitioner No.1 lodged a belated GD entry No.815/93 dated 25-1-1993 with Bihta P.S. It is quite evident that the respondent Army Authorities acted upon the aforementioned GD entry without insisting on registration of an FIR as per para 2 of the MOD circular under reference. In our view they have done so rightly. It strains our reason when we find that the entitlement to family pension has been curtailed or denied to the wretched widow who became a helpless victim of unwarranted procedural wrangle between her and the Army Authorities even though such disappearance of her husband was known to her as also Army Authorities from the very date when her husband failed to draw

pension. Her mental agonies have thus been compounded further since her right to get family pension as per Army Pension Regulations from the date of non-drawal of pension has grossly been denied to her on the pretext of her failure to lodge any FIR in the Police station. In our considered opinion, the purported circular as sought to have been relied upon by the respondents for rejection of the legitimate right of the widow to get family pension which accrued about more than 12 years ago for no fault of her own, in fact, has prompted the Army Authorities to exercise their discretion arbitrarily.

26. At any rate, we are now to proceed to examine the legal evidence together with other relevant materials and attending circumstances on record to find out the justifiability of the petitioner's claim for family pension on and from the date of her husband's disappearance. It is to be noted that under Section 108 of Indian Evidence Act the burden of proving, that the person is alive, rests with the person who asserts it and it cannot be disputed that such question itself, however, emerges in the legal proceeding. In the present case the unfortunate widow had to file a Title Suit No.82 of 1998 before the Ld 2nd Sub Judge, Bhojpur, Arrah praying for a declaration that her husband presumably died since he had not been heard by concerned person and family members for more than 7 years as provided under Section 108 and under Section 86 of Mohamedan Law. Her claim for arrears of family pension is mainly based on her husband's disappearance leading to non-drawal of pension by him for the month of October, 1980 and onwards.

27. On consideration of evidence of PWs and DWs together with relevant documents presented by either of the sides in the shape of exhibits in the said suit and after hearing the Plaintiff Petitioners and Defendant respondents, the Ld Trial Court decreed the suit to the effect that the Plaintiff was entitled to get arrears of pension from the month of October 1980 to 24th January 1993, i.e. 146 month and 26 days @ Rs1213/- per month

amounting to Rs1,77,936/- in total from the Army Authorities represented by Respondents 2 and 3 in the suit. She was further entitled to arrears of salary to the tune of Rs50,000/- from the Animal Husbandry Deptt of Govt of Bihar represented by respondents 4,5 & 6 in the suit. It is also recited in the said decree that the cause of action for the Suit arose while the husband of the plaintiff No.1 became traceless and started making massive search to ascertain the whereabouts.

28. Admittedly the respondents approached the Hon'ble Patna High Court by filing first Appeal No.86 of 2003 against the Plaintiff Petitioner but such appeal was ultimately dismissed being barred by limitation vide Order dated 4-7-2011. As stated earlier the Bihar Government had already paid arrears of salary amounting to Rs50,000/- in total to the decree holder, the plaintiff petitioners in terms of the aforementioned decree (Annexure 6 to the TA).

29. We are, however, not impressed by Mr.Bhattacharjee's argument that this Tribunal cannot and should not execute the decree of a Trial Court and as such the plaintiff petitioner's claim for arrears of family pension cannot be acceded to by this Tribunal. We have very meticulously taken into consideration Mr.Bhattacharyya's objection with reference to materials and circumstances on record as have been made available to us for consideration of her claim in its proper perspective in this TA. In order to ensure an effective adjudication of the relevant issues pertaining to the grant of relief in respect of arrears of family pension from the month of October, 1980 to 24th January, 1993, we have taken into consideration the averments of the petition coupled with annexures which have been made part of the petition as also exhibits and evidence adduced by both parties before the Ld. Trial Court coupled with rival submissions of parties in the light of judicial pronouncements. In the process of such consideration, we have meticulously analysed the

Civil Court's judgement and decree (Annexure 4 & 5 to the petition) which are undoubtedly important and relevant factors in the decision making process and weighing them in the scale of reasonableness, we have endeavoured to arrive at a just decision in this case. In fact, the T.S. No.82 of 1998 was instituted as insisted upon obtaining a decree from civil court on the part of military authorities. Their assurance to grant arrears of family pension on receipt of decree, however went in vain ultimately despite sincerest efforts by the unfortunate widow to persuade the Respondents to release arrears of family pension in her favour. In such a situation both oral and documentary evidence which was considered by the Civil Court in the aforementioned suit have also been placed before this Tribunal in the shape of annexure for its consideration in the instant TA No.36 of 2011. Ex. 2 appears to be a pension Book wherefrom it is evident that the husband of the Plaintiff petitioner S.M. Khalil since deceased received last pension for the month of October, 1980 on 10-10-80 and, thereafter, he disappeared. This piece of evidence was not controverted by the Defendant respondents either before the Ld Trial Court or before this Tribunal. It is further evident from the testimony of DW2 J. Narayan, Military Personnel from Danapur Cantt. Outpost given before the Ld Trial Court that since 1993 his Department had been paying pension in this case and the arrears of family pension would be paid after the Trial Court's decree. The Corroborative testimony of PWs and DWs adduced by the parties unhesitatingly led the Trial Court to pass a decree with the declaration that the Defendant No. 1, S.M. Khalil, the husband of Plaintiff No.1 died because he had not been heard of by any concerned person as per requirement of Section 108 of Evidence Act as also under Section 86 of the Mohamedan Law and further the plaintiffs are entitled to obtain all the benefits as claimed in the plaint. Pausing for a moment it can safely be concluded that irrespective of this decree passed by the competent Civil Court, the respondents Army Authorities proceeded

to sanction family pension on the footing that there was a legal presumption of civil death of the husband of the widow. It is beyond our comprehension as to how the date of such death/disappearance is correlative with the registration of FIR by the dependent of the defence pensioner whose whereabouts were not known for a pretty long time. In fact, there was actually no registration of FIR in the PS as per requirement of para 2 of the M.O.D. Govt of India circular (R/1). The widow simply lodged the GD Entry No.815/93 on 21-5-93 in Bihta P.S. (Annexure I) diarizing disappearance of her husband as averred in para 12 of the Writ Petition. Be that as it may, the fact remains that such erroneous and insensible approach by the respondent Army Authorities has caused immense sufferings to the unfortunate widow and the daughter of the deceased soldier. These two dependents were subjected to terrible experiences due to several mental agony and acute financial distress because of sad disappearance/demise of the deceased soldier as also stubborn denial of family pension to the dependents for more than a decade. Such arbitrary exercise of discretion by the Army Authorities in denying the legitimate claim of family pension to the widow is absolutely detrimental to the canon of natural justice and principles of equity and fairness. In fact, our judicial conscience is rudely shocked to visualize the Respondent Military Authorities' constant refusal to act upon the Civil Court's decree entitling her to arrears of family pension w.e.f. 1st October, 1980 to 24th January, 1993. They have, thus sought to ignore the binding effect of the Civil Court's decree upon the parties in view of dismissal of 1st Appeal No.83 of 2003 by the Hon'ble Patna High Court being barred by limitation.

30. As already discussed earlier by placing reliance upon a wide range of judicial pronouncements which include the rulings of the Hon'ble Privy Council, Hon'ble Apex Court and other High Courts, we have already observed that there is no legal presumption

either that the person concerned was alive upto the end of the period of not less than 7 years, or that he died at any particular point of time during such period, the only presumption being that he was dead at the time the question arose, if he has not been heard of during the preceding 7 years. We are, therefore, to hold that if it is necessary to establish that a person died at any particular date within the period of 7 years, this must be proved as a fact by evidence raising that inference. There are circumstances like deteriorating health condition when last heard of, or exposed to unusual perils, or had failed to apply for a periodical payment upon which he was dependant for support etc. which may lead the courts to draw such inference of death.

31. The respondents have, however, arbitrarily fixed a date for grant of family pension to the widow without adhering to the established principles of legal norms enunciated in the judicial pronouncements discussed herein before. Such arbitrary fixation of date for grant of family pension as per the respondent's whim on the pretext of inordinate delay in lodgement of FIR by the widow can neither stand the test of judicial scrutiny nor conform to the standard of reasonableness. On the contrary, against such factual backdrop the rejection of her prayer for family pension for a long period of 12 years appears to be harsh, illogical and inhumane whereby bare sustenance of life wasdenied to the widow and the daughter of the deceased soldier who served the nation for a considerable period of time before being invalidated out of service on medical ground. Such indifferent and insensitive attitude of a benevolent employer towards the hapless dependents of a defence pensioner is undoubtedly distressing and disturbing for the Army Personnel in general as also for the wretched dependents of the Defence Pensioner since deceased in particular.

32. As a matter of fact, on a close analysis of evidence and surrounding circumstances on record the only reasonable inference which can be drawn is that the time of death

coincided with the time when the defence pensioner Khalil went on missing immediately after drawal of pension for the month of September 1980. Having regard to the peculiar and exceptional nature of the instant case, it would be permissible to proceed on the premise that death of the petitioner's husband had occurred on any given date and time before the expiry of the said period of seven years. In this context we may refer to a ruling of the Kerala High Court reported in 2005 (3) KLT 1071 (supra) and relied upon by Mrs Mishra, the learned counsel for the applicants. It is held therein as under :

> "…….Consequently the family members can claim all benefits as if the man is dead on the date of his missing. Since it is admitted that the petitioner's husband has not surfaced and could not be traced after 5.10.1995 inspite of effort to trace him by the Police at the request by the Army , the presumption of his death as on 5.10.1995 is available under Section 108 of the Evidence Act. Since petitioner's husband was admittedly sick and had undergone major surgery, the possibility of his death could not be ruled out. It is regularly reported in newspapers and media that many dead bodies surfacing here and there are all buried without anybody identifying such bodies. Going by the statement of the respondents petitioner's husband should have been on his way from Bangalore to Military Hospital on the date of missing that is 5.10.1995……."

Fortified with the afore-quoted ruling of the Kerala High Court it can safely be concluded in the present case that apart from the presumption of Khalil's death the telling circumstances do not suggest anything else indicating continuity of his life even in its remotest and rarest possibility. More so, whenever he was admittedly invalidated out of military service because of his Neurotic Depression (300) and consequent upon his deteriorating health condition, the probability of his death could not be ruled out. We, therefore, do not find any cogent and convincing ground to deny her legitimate entitlement to family pension w.e.f. 1st October 1980 to 24-1-1993.

Findings

33. Viewed in the light of foregoing analysis and discussion, we cannot but hold that the plaintiff petitioner No.1 has discharged the onus cast upon her and presumption of death of her husband at the material point of time can easily be inferred from direct and circumstantial evidence adduced in Title Suit No.82 of 1998 to the satisfaction of the Ld. Trial Court, whereas the defendant respondent Army Authorities utterly failed to rebut the presumption of death by bringing tangible evidence and circumstances on record that the husband of the plaintiff petitioner No.1 was alive at the material point of time as per legal requirement of Sections 107 & 108 of the Indian Evidence Act.

34. It is further held that by any stretch of imagination the registration of FIR in terms of para 2 of MOD Circular can be regarded as a statutory requirement for grant of family pension to the wretched widow of a defence pensioner who suddenly disappeared after drawal of monthly pension for the month of September, 1980. It is highly irregular and impracticable to reckon the date of registration of FIR as the date of disappearance of the Armed Forces Personnel/Pensioner. Such reckoning is bound to lead to irreconcilable situation as is evident in the present case. Even though the pensioner, admittedly disappeared in the year 1980 and his whereabouts were not known for about a decade the relevant G.D. had been lodged in the year 1993 only. In our considered view the petitioner No.1 cannot, therefore, be doubly condemned because of (i) sudden disappearance of her husband leading to non-drawal of monthly pension and raising presumption of death of her husband as also (ii) the denial of family pension for a long period of 12 years. We feel constrained to opine that it is highly inequitable and unjust to the petitioner No.1 to deny her legitimate right to get family pension without any legally valid reason.

35. On a meticulous consideration of factual and legal aspects involved in this case and dissected in preceding paragraphs with utmost circumspection, we are to opine that the crux of the matter is as to on which date the death of S.M. Khalil since deceased is to be presumed. Presumption of death under section 108 of the Evidence Act is to be inferred from the individual's long unexplained absence usually after 7 years. Such inference, however, tantamounts to physical death in the eye of law solely for the purpose of giving the benefits to the legal heirs, legal representatives and the dependents of the deceased. As already discussed earlier it is not a matter of presumption but of evidence at what point of time within the period of 7 years an individual died. It is reiterated that the onus of proving that the death occurred at any particular time within the period of 7 years lies upon the person who claims a right to the establishment of which the fact of death is essential. In fact, once the rule of presumption is invoked on the footing that a man has not been heard for 7 years, the beneficiary or the claimant is entitled to relief on the presumption that he is dead even though there is no direct evidence of the fact that he met with physical death. In such view of the matter we are to hold that, as and when the presumption of death is available under section 108 of the Evidence Act the whole factual scenario changes and the presumption of death supersedes the stipulation of registration of FIR with the Police as per para 2 of MOD Circular dated 15th February, 2011 (Annexure R2). Resultantly, the claim of the petitioner No.1 to get arrears of family pension w.e.f. 1-10- 1980 to 24-1-1993 becomes legally tenable.

36. Another most importantly important aspect is that the MOD's circular dated 23rd March 1992 (Annexure R/Supp 1) and the subsequent Circular issued by the Department of Ex-Servicemen's Welfare dated 15th February, 2011 (Annexure R2) are shockingly

inadequate to meet various contingencies arising out of varieties of situations and circumstances faced by the Army Personnel/Pensioners and their dependents in connection with the sanction of family pension. In that context of the matter, it is to be borne in mind that expression death unequivocally means physical death of an individual but there are other legal expressions connoting death as for example, presumptive death, notional death, fictional death and civil death etc. That apart, Civil Court's decree declaring death of army personnel/pensioner is also equally admissible as per legal requirement for the claim of family pension etc. in favour of the eligible dependents of pensioners.

37. But unfortunately, the date of lodgement of FIR has been made the sole criterion/pre-condition for grant of family pension without taking into consideration other contingencies. There may be tragic circumstances establishing that a person lost his life in road, water or air accident or in any other form of accident resulting from outbreak of fire or disastrous natural calamities like flood and earthquake etc. or the like and in most of such cases the dead bodies could not be recovered. In such tragic cases the registration of FIR by the dependents of the victim may not be warranted. In fact, the registration of FIR is a mandatory requirement u/s 154 Cr.P.C by the informant in the local P.S. in case of commission of cognizable offences whereas GD Entries are lodged for diarizing general information about disappearance of any individual by their dependents. It is, therefore, highly inappropriate, irrational and devoid of sound logic to insist upon registration of FIR in all cases. Positive steps in right direction should be taken by the appropriate authorities to ameliorate the untold sufferings and hardships faced by a good number of dependents of defence Pensioners in receiving their legitimate claim for family pension within the shortest possible period of time. We are, therefore, of the considered view that sanction of family

pension and gratuity to dependent and eligible family members of Armed Forces personnel/pensioners who disappear suddenly and whose whereabouts are not known should not be subjected to the registration of FIR only. Rather, other legally valid documents, e.g., Civil Court's decree, and the relevant GD Entries as also presumption of death in terms of Section 108 of Indian Evidence Act etc. should also be equally taken into consideration in this regard. The Secretary, Department of Ex-Servicemen Welfare, MOD, GOI may give thoughtful consideration to this aspect of the matter for moving the Government of India to ensure suitable modification in the MOD Circular No.1(1)/2010/D(Pen/Pol) dated 15th February, 2011 to protect the interest of Armed Force Personnel/Pensioners in future in the light of our observations made hereinbefore.

38. It is, therefore, held that the Petitioner No.1 is entitled to get arrears of family pension w.e.f 1st October 1980 to 24th January, 1993, , i.e. the date immediately preceding the day of grant of family pension, together with other pensionery benefits admissible to her as per extant Pension regulations.

Decision

39 In view of our findings recorded in preceding paragraphs the claim of Petitioner No.1, the widow of defence pensioner in respect of arrears of family pension w.e.f. 1st October, 1980 to 24th January, 1993 stands admitted. Accordingly, T.A. 36 of 2011 is allowed on contest but in the facts and circumstances of the case without cost with the direction upon the Respondent Nos 1,3 & 4 as under :

i) Arrears of family pension be sanctioned w.e.f. 1st October 1980 to 24th January, 1993 in favour of the Petitioner No.1 as admissible under the

relevant provisions of the Pension Regulations for the Army and relevant Policy letters issued by the MOD from time to time.

ii) Total arrears of family pension be worked out as per her entitlement in terms of the direction (i) above.

iii) Arrears of Pension together with Dearness Relief etc. if any so worked out shall be paid to the Petitioner No.1 within a period of 90 days.

iv) In default of payment of arrears of family pension within the stipulated period of time, the Petitioner No.1 shall be entitled to interest @9% per annum till the date of actual payment.

40. Let the envelope containing Xerox copies of Policy letters and some other documents received from ASC, Records (South) be returned to OIC Legal Cell on proper receipt

41. Let a plain copy of the order duly countersigned by the Tribunal Officer be furnished to both sides on observance of usual formalities.

(HON'BLE LT. GEN. K.P.D.SAMANTA)
MEMBER(ADMINISTRATIVE)

(JUSTICE RAGHUNATH RAY)
MEMBER(JUDICIAL)