

SEE RULE 102 (1)
ARMED FORCES TRIBUNAL, KOLKATA BENCH
O.A. No. 64 of 2015
THIS DAY 9th MARCH, 2016

CORAM

HON'BLE JUSTICE N. K. AGARWAL, MEMBER (JUDICIAL)

HON'BLE LT GEN GAUTAM MOORTHY, MEMBER (ADMINISTRATIVE)

APPLICANT(S)

Smt. Urmila Devi, wife of No 14470397Y
Late NK Gopal Prasad, residing at Village
and Post office-Narayanpur, Via-Amnour,
Teh and Dist-Saran (Chapra), State-Bihar.

Versus

RESPONDENT(S)

1. **Union of India**
Through Secretary
Ministry of Defence
Cabinet Secretariat,
South Block,
New Delhi- 110 011.
2. **The Chief of Army Staff**
Integrated Headquarters,
Ministry of Defence(Army),
South Block,
New Delhi- 110 011.
3. **Public Information Officer,**
Artillery Records,
Nasik Road Camp,
APS Pin-908802.
4. **Chief Public Information Officer,**
Principal Controller of Defence
Accounts (Pensions), Draupadi Ghat,
Allahabad-211014.
5. Pension Control of Defence Account,
(PCDA) Pension Cell,
Allahabad-211001, Utter Pradesh.

For the Applicant(s) : Mr. Pratik Majumdar.

For the Respondent(s) : Mr. S.K. Bhattacharyya.

ORDER

PER HON'BLE JUSTICE N. K. AGARWAL, MEMBER (JUDICIAL)

1. The applicant is the wife of late NK Gopal Prasad. Late NK Gopal Prasad was enrolled in the Indian Army and went missing on 8.10.1994 from Sundarbani in the district of Jammu & Kashmir while he was on duty in that field area. The respondents declared him as a deserter and consequently neither any pensionary benefit nor family pension was granted to the applicant. The applicant then filed Writ Petition under Article 226 of the Constitution of India being registration No. CWJC 8457 of 2008, before the Hon'ble High Court of Judicature at Patna. The above writ petition was transferred to this Tribunal vide order dated 5.1.2011 and was registered in this Bench as TA 13 of 2011.

2. This Tribunal vide the order dated 12.12.2011 disposed of the application directing the OIC, Records, to hold appropriate inquiry in respect of the claim of the applicant through the Sub-Area Commander, Danapur, and to take a decision regarding admissibility of family pension and other benefits in favour of the applicant.

3. In pursuance thereof, inquiry was held and having found the husband of the applicant not a deserter declared him as missing and presumed dead. However, taking into consideration the date of filing of FIR by the applicant on 14.2.2007, he was granted family pension with effect from 15.8.2007. Accordingly, pension payment order was issued and the applicant is getting the pension.

4. Feeling aggrieved with the date from which the family pension is being paid to the applicant, the instant application has been preferred by the applicant under section 14 of the AFT Act.

5. The applicant's case in nutshell is that the letter dated 1.3.2012 (annexure P-3) clearly states that the applicant's husband is missing and presumed dead with effect from 8.10.1994 and hence, the respondent authorities should have assessed and released family pension in favour of the applicant from 8.10.1994 and not from 15.8.2007 as the death of her

husband has been confirmed by the respondent authorities with effect from 8.10.1994.

6. Per contra by filing affidavit-in-opposition the respondents have opposed the claim of the applicant. According to them, as per Govt. of India, Ministry of Defence various letters/policy decisions the family pension in normal condition will only be admissible to the family of a missing person after a lapse of six months from the date of lodging of police report. Since the police report has been lodged by the applicant on 14.2.2007 i.e. after a lapse of 13 years, so calculating six months thereafter the pension has been granted to the applicant with effect from 15.8.2007 and the application filed by the applicant is devoid of merit.

7. Referring to sections 107 and 108 of the Indian Evidence Act, Mr. S.K. Bhattacharyya, learned counsel appearing for the respondents, would submit that as per the aforesaid provisions when the question is, whether a man is alive or dead, and it is shown that he was alive within 30 years, the burden of proving that he is dead is on the person who affirms it. Earlier, the applicant's husband absented himself without leave on 8.10.1994. An Apprehension Roll was issued to the Superintendent of Police, District : Chapra as the husband of the applicant neither rejoined nor he was apprehended by the police till completion of 30 days of his absence. He was then declared as a deserter with effect from 8.10.94 by the Court of Inquiry (COI) under the statutory provisions of section 106 of the Army Act, 1950 and after completion of 10 years from the date of desertion, the applicant's husband was dismissed from field area. However, a fresh inquiry was held pursuant to the order passed by this Bench and on that basis he was declared missing and presumed dead and, accordingly, the family pension was granted in favour of the applicant with effect from 15.8.2007 as per the policy decision taken by the respondents from time to time. It was further contended by Mr. Bhattacharyya that the claim of the applicant for grant of family pension w.e.f. 8.10.1994 is liable to be dismissed.

8. We have heard the learned counsel appearing for the parties at length and perused the records including the original COI records produced by the respondents.

9. If a service person deserts while in service, he is liable to be declared so under section 106 of the Army Act and can be dismissed from service for that reason. On the other hand, if a service person is missing while in service and is not found alive for a period of seven years from the date he was missing, section 108 of the Evidence Act entitles to draw presumption of death for all purposes after seven years from the date, a person is not heard of or missing.

Burden of proving under section 107 of the Evidence Act that a person is dead is on the person who affirms it whereas under section 108 burden of proving that he is alive is shifted to the person who affirms it.

10. In the normal course unless a period of seven years has lapsed from the date of disappearance of the employee, he cannot be deemed to be dead and, therefore, till then the retirement benefits cannot be paid to the family. This has resulted in great hardship and distress to the families who have to wait for seven years before any terminal benefit could be paid to them. In order to remove the aforesaid hardship the Govt. of India has issued a circular dated 3.6.1988 as a special policy to deal with the missing persons. The above circular reads 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.

(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.

11. As per the proceeding of COI the same was assembled to declare the applicant's husband Gopal Prasad as missing and presumed dead with effect from 8.10.1994. Further, it has been held by the COI that the applicant's husband be declared as missing and presumed dead. The Officer Commanding agreed with the opinion of the Court and recommended that the applicant's husband be declared missing and presumed dead. All actions to change the occurrence of deserter to missing and presumed dead to be initiated. The front page of Court of Inquiry is as follows:

"In Lieu of IAFD-931

PROCEEDINGS OF a : Court of Inquiry

assembled at : 1861 Lt Regt

on the : 25 Feb 09 and subsequent days

by the order of : Col Vikas Goswami, CO 1861 Lt Regt
 for the purpose of : To declare No 14470397Y
 NK (Dismissed) Gopal Prasad as “Missing
 and Presumed Dead “ wef 08 Oct 94

PRESIDING OFFICER

SS-40348X CAPT D MUTHU RAJAN

MEMBERS

JC-269097L SUB(GD) INDERPAL SINGH

JC-NYA-!4384183Y NB SUB (OPR) NN CHAKRABORTY

The C of I having assembled pursuant to order to declare No 14470397Y NK (Dismissed) Gopal Prasad as “Missing and Presumed Dead” wef 08 Oct 94.

The findings and opinion of the Court as well as the recommendation of Officer Commanding and also the directions of Commander are set out below :

“ FINDINGS OF THE COURT ”

“1. No. 14470397Y Nk(Cook) (Dismissed/deserter) Gopal Prasad was enrolled in the Army on 30 Oct 1980. He was posted to 1861 Lt Regt on 02 Feb 1982. No 14470397Y Nk (Cook) (Dismissed/deserter) Gopal Prasad absented himself without leave from unit with effect from 08 Oct 1994, when the unit was in Sunderbani (J&K) (Field Area) under HQ 10 Infantry Divison.

(Apprehension roll attached as per appx ‘A’)

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2. No. 14470397Y Nk (Cook)(Dismissed /deserter) Gopal Prasad was neither apprehended by the Police nor did he report back to the unit, consequently a unit court of Inquiry was held on 07 Nov 1994 and No 14470397Y Nk (Cook) (Dismissed/deserter) Gopal Prasad was declared deserter vide 1861 Light Regiment letter Part II Order No O/1861 LR/02277/94 dated 18 Dec 94.

(Court of Inquiry attached as appx ‘B’)

3. Smt Urmila Devi. Next of Kin of No. 14470397Y Nk(Cook) (Dismissed/deserter) Gopal Prasad lodged an FIR on 14 Feb 2007 with Police

Inspector-in-charge-Taraiya, Bihar regarding her husband No. 14470397Y Nk(Cook) (Dismissed/deserter) Gopal Prasad being missing.. The inspector-in-charge of Police station-Taraiya, investigated the case and was not able to trace out whereabouts of the individual No. 14470397Y Nk(Cook) (Dismissed/deserter) Gopal Prasad till date.

(Photocopy of FIR and investigation report of Taraiya Police Station (Bihar) attached as appcs ‘C’ and ‘D’)

4. No.-15138375K L/Nk(OpR) RK Jha of RHQ Tp/1861 Light Regiment was detailed by the Regiment to laise with Superintendent of Police Dist – Chhapra,

Bihar to investigate whereabouts of No 14470397Y Nk(Cook) (Dismissed/deserter) Gopal Prasad.

(Witness No 1,2 and 3)

5. Shri Chandrakant Kumar Singh, Head of Panchyat village, Narayanpur in his written statement had said that No 14470397Y Nk(Cook) (Dismissed/deserter) Gopal Prasad had not visited the village and his family members since last Oct 1994 and there is no news of his whereabouts.

(Photocopy attached as appx E and Witness No 1).

6. On investigation with the people of village – Narayanpur, the Inspector Biswas Bhajan in charge of Police station Taraiya, in his final investigation report has written that No. 14470397Y Nk(Cook) (Dismissed/deserter) Gopal Prasad is not traceable and there is no news of his whereabouts.

(Final investigation report att as per Appx 'F' and witness 1,2&3).

Presiding Officer xxxxxxxx
(SS-40348X Capt D Muthu Rajan)

Members xxxxxxxx
(JC-2690971 Sub(GD) Inderpal Singh)

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(JC-NYA 143841831 Nb Sub(OpR) NN Chakraborty)

OPINION OF THE COURT

1. The court is of the opinion that No 14470397Y Nk (Cook) (Dismissed/deserter) Gopal Prasad, who was declared deserter vide 1861 Lt Regt Part II Order No 0/1861LR/0227/97 dt 12 Oct 94, while the unit was serving in Sunderbani (J&K) (Field Area) Under Headquarters 10 Infantry Division, has been missing since then.

2. Despite all efforts, by the Army as well as by civil authorities, there has been no trace of intimation regarding whereabouts of the indl, No 14470397Y Nk (Cook) (Dismissed/deserter)Gopal Prasad till date.

3. Hence, the court is of the opinion that No. 14470397Y Nk (Cook) (Dismissed/deserter)Gopal Prasad be declared as "MISSING AND PRESUMED DEAD".

Presiding Officer xxxxxxxx
(SS-40348X Capt D Muthu Rajan)

Members xxxxxxxx
(JC-269097L Sub(GD) Inderpal Singh)

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(JC-NYA 14384183Y Nb Sub(OpR) NN Chakraborty)

RECOMMENDATION OF OFFG CO ON C OF I PROCEEDINGS IN REPECT OF NO 14470397Y NK(DISMISSED DESERTER) GOPAL PRASAD OF 1861 LIGHT REGIMENT AS 'MISSING AND PRESUMED DEAD'

1. I agree with the opinion of the court.

2. I recommend that No 14470397Y NK (Dismissed Deserter) Gopal Prasad be declared as 'Missing and Presumed dead'. All actions to change the occurrence of 'Deserter' to 'Missing and Presumed dead' to be initiated.

Station : C/o 56 APO

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Station : 15 May 2009

(V K Verma)
Lt Col
Offg CO

**DIRECTIONS OF COMMANDER 15 CORPS ARTILLERY BRIGADE ON C
OF I IN REPECT OF NO 14470397Y NK (DISMISSED DESERTER)
GOPALPRASAD OF 1861 LIGHT REGIMENT WHO IS MISSING AND
PRESUMED DEAD**

Under the provision of Govt. of India, Min of Defence letter No A/01831/ORG 3 (RR&C)/(K)/11420/D (AG-1) dt 14 Sep 64 reproduced in Apps 'O' to SAO 8/S/85 I direct that No 14470397Y Nk (Dismissed Deserter) Gopal Prasad of 1861 Light Regiment to be declared as 'Missing and presumed dead'. All actions to change the occurrence of 'Deserter' to Missing 'Presumed dead' shall be accordingly initiated.

Station : c/o 56 APO

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Date : 27 Jul 2009

Md Mushtaq Hussain
Brigadier
Commander
15 Corps Artillery Brigade"

12. Reverting to the facts of the case, the deceased soldier went missing on 8.10.1994 and the Court of Inquiry was convened. On the basis of the report of the COI an order has been passed declaring him as deserter which was subsequently followed by the order of dismissal after ten years. However, pursuant to the order of this Tribunal COI was reconvened for the purpose of declaring him missing and presumed dead with effect from 8.10.1994. Pursuant to the findings of COI order of desertion as well as dismissal of late soldier has been substituted by the order of missing and presumed dead. However, reckoning date remains the same, i.e. 8.10.1994. Therefore, the applicant's husband should have been paid the amount of family pension with effect from 8.10.1994 and not from the date, i.e. after six months from the date of filing of FIR.

13. The policy decision has been taken by the Govt. of India with the pious purpose so that the legal heirs and representatives of soldier should not wait for payment of pension for a statutory period of seven years as envisaged under section 107 read with section 108 of the Evidence Act. It is not meant to delay such payment. In the instant case also, only the order of desertion followed by dismissal was substituted by the order of missing and presumed dead. In

such a situation if a family pension is not paid with effect from such date, i.e. 8.10.1994 it may cost the responsibility upon the respondents to pay salary till the legal heirs and representatives were not paid pension. The date of missing has already been reckoned by the respondents as 8.10.1994 and, therefore, according to policy decision they are required to pay family pension to the applicant from that date only and not from any other date.

14. For the reasons mentioned above, the application deserves to be and is hereby allowed. The respondents are directed to pay retiral benefits as well as the entire arrears of family pension calculating the same from 8.10.1994 till 14.8.2007 and pay the same to the applicant within a period of three months from the date of receipt a copy of this order. In default, the respondents shall be liable to pay interest at the rate 12% per annum from the date of this order.

15. With the above, the application is disposed of accordingly without any order as to costs.

16. Let the original records be returned back to the respondents after observing usual formalities.

17. Let a plain copy of this order, duly countersigned by the Tribunal Officer of this Bench, be given to the parties after observance of usual formalities.

(LT GEN GAUTAM MOORTHY)
Member (Administrative)

(JUSTICE N. K. AGARWAL)
Member (Judicial)