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HIGH COURT OF DELHI : NEW DELHI

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Judgment reserved on: 07.08.2007
Judgment delivered on: 14.03.2008

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W.P. (C) No. 8013/2003

Smt. Banarasi

...Petitioner

Through: Mr. U. Srivastava with Mr. M. K.
Gaur, Advocates

versus

Government of NCT of Delhi & Ors

...Respondent

Through: Ms. Pratima Gupta, Advocate for
respondent no.1.
Ms. Seema Singh, S.I. P.S.Delhi
Cantt. For the State.

CORAM:

HON'BLE MR. JUSTICE A.K.SIKRI
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may
be allowed to see the judgment?
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported
in the Digest? Yes

VIPIN SANGHI, J.

1. One Bhagwan Singh was a constable in Delhi Police. He was posted in New Delhi Zone/ PCR. On 24.7.1996 he was detailed for duty at PCR Van V-25 from 8 a.m. to 8 p.m. However he did not report for duty and was marked absent. Since then there has been no trace of him. Notice for absence was sent at his residential address directing him to resume duty, which was followed by registered notice. It was received back undelivered with the report that the addressee was not available at the address. Another notice sent through special

messenger at the residence of his parents at Sikar, Rajasthan was refused by the mother of the said Bhagwan Singh as he was not found at his residence. Yet another notice was sent and again he was not found and his brother received the same.

2. On account of his continuous absence disciplinary proceedings were initiated against Shri Bhagwan Singh. Notices issued to Bhagwan Singh in the enquiry proceedings were either received back, or were delivered to the family members of Shri Bhagwan Singh and never upon him. Since he was not found on any of those occasions, the enquiry proceedings were undertaken *ex parte* and they culminated in a report which held that he willfully and unauthorizedly absented himself from duty. The disciplinary authority, that is, the Additional Deputy Commissioner of Police agreeing with the findings of the enquiry officer dismissed him from service on 26.5.1998.

3. The petitioner, who is the wife of Shri Bhagwan Singh, preferred a departmental appeal against the dismissal of her husband Bhagwan Singh. The said departmental appeal was also dismissed by the Additional Commissioner of Police on 14.9.1999.

4. The petitioner filed Original Application No.2471/2000 under Section 19 of the Central Administrative Tribunal Act before the Principal Bench of Central Administrative Tribunal, New Delhi (hereinafter referred to as the Tribunal) seeking pensionary benefits. This OA was disposed of by the Tribunal on 10.8.2001 with the following directions:

“4. In the result, although the applicant has failed to make any claim for family pension in absence of challenge to the dismissal order which cannot be adjudicated by a Single Bench. The applicant is accorded liberty to challenge the same before the appropriate Bench in accordance with rules. However, the respondents are directed, in case applicant makes a representation under Rule 41 of the Pension Rules, to consider the same within a period of four weeks from the date of receipt of a copy of this order. The respondents shall dispose of the same keeping in view of the indigent conditions of the family and the circumstances of the family and the circumstances within 8 weeks thereafter. The OA is disposed of accordingly.”

5. Thereafter the petitioner filed OA No.2194/2002 to challenge the orders passed by the disciplinary authority and the appellate authority whereby Shri Bhagwan Singh was dismissed from service. The Tribunal has dismissed the aforesaid OA and consequently the petitioner has filed the present petition to challenge the order passed by the Tribunal in OA No.2194/2002 dated 29.4.2003.

6. The challenge to the departmental proceedings and penalty was primarily based on the argument that Shri Bhagwan Singh has not been served in the enquiry proceedings, and consequently the proceedings were bad. The Tribunal, however, did not agree with this contention. The Tribunal held that since the delinquent Shri Bhagwan Singh had been dismissed on account of his unauthorized absence, which fact is not in dispute, the question of grant of pensionary benefits does not arise.

7. Learned counsel for the petitioner submitted before us

that the admitted position is that Shri Bhagwan Singh went missing with effect from 24.7.1996 and since then he has neither been seen nor heard of by anyone, even though more than seven years have gone by. Even the elder brother of the petitioner Shri Amar Singh had lodged a missing person report on 10.4.1997 in P.S. Mandir Marg, New Delhi vide DD No.9A. He gave the address in Ajmer where the family of Shri Bhagwan Singh was residing and also stated that Shri Bhagwan Singh had neither visited his family nor sent any money since 24.7.1996. Another missing persons report was lodged with the missing persons squad, P.S. Kotwali, Darya Ganj, New Delhi along with a photograph vide report No.1820/A/MPS/96 dated 14.4.1997 which was telecast on Doordarshan. An application was also made on 12.7.1997 to lodge a complaint regarding Shri Bhagwan Singh going missing and seeking an enquiry into the matter, with the Police Station Mandir Marg, New Delhi.

8. The husband of the petitioner was living in police barracks of Delhi Cant. Police Station while his family was in Ajmer. The status report dated 22.12.2006 filed by the respondents in this Court also confirms that as per the report of the D.C.P., New Delhi District vide office memo dated 31.7.1997, Shri Bhagwan Singh was residing in Police Barracks as aforesaid. This is also stated in the DD No.9A. This means that the husband of the petitioner was under the care of the respondents, when he went missing.

9. Even though the said Shri Bhagwan Singh was a member

of respondent police force, no effort appears to have been made by the respondents to ascertain whether Shri Bhagwan Singh was in fact alive at the relevant time. Even though the address of the family of Shri Bhagwan Singh at Ajmer was furnished by Shri Amar Singh on 10.4.1997, and by the petitioner in her statutory appeal, no efforts seem to have been made to make any enquiry to trace out Shri Bhagwan Singh. No doubt the service record of Shri Bhagwan Singh shows that he was in the habit of remaining absent, inasmuch as, there were 20 occasions cited in the enquiry report between the year 1990 to January, 1996 when he had remained unauthorizedly absent. However, a perusal of the enquiry report shows that even in the said enquiry proceedings none of the witnesses stated that they had seen Shri Bhagwan Singh alive.

10. Merely because the officer who had visited the address at Sikar to serve notice upon Shri Bhagwan Singh had stated that he was informed by the mother of Shri Bhagwan Singh that he had gone to Ajmer to attend to his ailing children, it cannot lead to a reasonable inference that he was alive at that point of time. Even though the rules of evidence do not apply to departmental enquiries, and it is not for this Court to assess the weight of the evidence produced in a departmental enquiry, it is open to us in judicial review to appreciate, whether there was any evidence or material at all before the enquiry officer to come to his findings or not.

11. The scope of enquiry in judicial review of a

departmental enquiry is well established, and we may only quote a short passage from ***Bank of India V. Degala Suryanarayana***, 1999 SCC (L & S) 1036 to refresh ourselves. The Supreme Court held:

“Strict rules of evidence are not applicable to departmental enquiry proceedings. The only requirement of law is that the allegation against the delinquent officer must be established by such evidence acting upon which a reasonable person acting reasonably and with objectivity may arrive at a finding upholding the gravamen of the charge against the delinquent officer. Mere conjecture or surmises cannot sustain the finding of guilt even in departmental enquiry proceedings. The court exercising the jurisdiction of judicial review would not interfere with the findings of fact arrived at in the departmental enquiry proceedings excepting in a case of mala fides or perversity i.e where there is no evidence to support a finding or where a finding is such that no man acting reasonably and with objectivity could have arrived at that finding. The court cannot embark upon reappreciating the evidence or weighing the same like an appellate authority. So long as there is some evidence to support the conclusion arrived at by the departmental authority, the same has to be sustained. In *Union of India V. H.C.Goel* the Constitution Bench has held:

“[T]he High Court can and must enquire whether there is any evidence at all in support of the impugned conclusion. In other words, if the whole of the evidence led in the enquiry is accepted as true, does the conclusion follow that the charge in question is proved against the respondent? This approach will avoid weighing the evidence. It will take the evidence as it stands and only examine whether on that evidence legally the impugned conclusion follows or not.”

12. Such far fetched statements, which are in themselves hearsay, attributed to the mother of Shri Bhagwan Singh, which are

also hearsay and are also not based on any other corroborative material, could not, in our opinion, be used to conclude about the existence of Shri Bhagwan Singh on the relevant date. No man acting reasonably and with objectivity could have arrived at a finding that Shri Bhagwan Singh was in existence at the relevant time. We may also state that at the time when the enquiry was held, as not much time had passed since the disappearance of Shri Bhagwan Singh, presumably it did not even cross the mind of the Enquiry Officer or the Disciplinary Authority that he may not be alive. No enquiry into this possibility was held. Consequently, while his absence cannot be disputed and it is a matter of fact, it remains a mystery whether the same was willful or not. It could be said to be willful only if Shri Bhagwan Singh was shown to have been alive at the relevant time. then, possibly it could be assumed that he was in a position to attend to his duties and he knowingly and deliberately did not report for duty. However, in case he was already dead, there is no question of his absence being willful.

13. Section 107 read with Section 108 of the Indian Evidence Act, 1872 states that when a question arises whether a person 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 shifts upon the person who affirms it. Consequently on the expiry of the seven years period from the date Shri Bhagwan Singh went missing on 24.7.1996,

the burden of proving that he was alive rested on the respondent, while prior to the expiry of seven years, the burden would have been on the persons who may have wanted to assert his death.

14. In ***LIC of India vs. Anuradha***, (2004) 10 SCC 131, the Supreme Court held that the presumption under Section 108 of the Indian Evidence Act cannot be extended to a presumption as to the time of death by presuming that the time of death coincide with the time when the said person went missing. The Supreme Court held that there is neither a presumption as to the date or the time of death nor as to facts and circumstances of death of a person under Section 107 and 108 of the Evidence Act. The only inference that is permissible to be drawn on the presumption is that such person was dead at the time when the question arose, subject to the said period of seven years having elapsed. Question of time of death is a question of evidence, factual or circumstantial and is not a matter of presumption. The onus of proving the time of death rests on the person who stakes the claim, establishment of which will depend on proof of date or time of death. However, the Supreme Court also observed that rarely it would be permissible to proceed on the premise that death had occurred on any given date before the expiry of the said period of 7 years.

15. Considering the fact that Shri Bhagwan Singh was not living with his family and was living in police barracks from he went missing and is unheard of since then, we are of the view that the facts of this case are exceptional and rare and, therefore, circumstantially, it

can fairly be inferred that Shri Bhagwan Singh was dead when he went missing or within a reasonable time thereafter.

16. If an employee, who is residing in accommodation provided by the employer, away from his family suddenly goes missing and is thereafter neither seen or heard of, either by his employers, colleagues or his family members, the responsibility of answering the question about his whereabouts lies, at least in the first instance, with the employer and not the family members of the missing person. In this case, the situation is even more grave, inasmuch as the employer happens to be the Police Force which is even otherwise responsible to trace out the missing persons once it is reported to it that a person is missing.

17. The Respondents have also relied upon ***Union of India vs. Geetha Devi***, (2002) 10 SCC 166 wherein the Supreme Court held that where the services of an employee had been terminated under rule 5 of the CCS(Temporary Services) Rule, 1965 after unauthorized absence for about 2 years, his wife could not claim relief of compassionate appointment, arrears of salary, family pension, etc. on the ground of presumption of her husband's death during his employment as he had remained missing after more than 7 years. This decision does not apply in the peculiar facts of this case, since, as aforesaid, in the present case the husband of the Petitioner was living in the police barracks and not with his family, when he suddenly went missing.

18. Our attention has also been drawn to another decision of Patna High Court in **Arti Devi @ Arti Pandey Vs. Union of India and others**, 2003 (3) Administrative Total Judgments 126. In that case, the husband of the Petitioner was an employee of the Central Reserve Police Force who proceeded on leave and was not traceable thereafter. He was declared as deserter and dismissed after inquiry and on that basis the claim for family pension and other retiral benefits were denied to the Petitioner. The High Court in the facts of that case directed that the Petitioner may produce evidence and satisfy the authority to discharge the onus upon her under Section 108 of the Evidence Act, whereupon the authorities were required to discharge their onus and to proceed and conclude the matter.

19. We have considered the respective submissions thoughtfully. It is not in dispute that the husband of the petitioner went missing, which was treated as absent from duty. On this basis, disciplinary proceedings were initiated against Sh.Bhagwan Singh, husband of the petitioner. As his whereabouts could not be found, ex parte inquiry was held and he was dismissed from service. Normally, on the charge of absence from duty, such an action could be taken by the respondents. To that extent there may not be any quarrel. However, in the present case, what is to be borne in mind is that it is not a case where Sh.Bhagwan Singh started absenting from duty, though he was very much available. It is a case where whereabouts of Sh.Bhagwan Singh right from the date of his absence could not be

known to any person in this world, including his family members. In the process, more than seven years passed and therefore, presumption under Section 108 of the Indian Evidence Act to the effect that Sh.Bhagwan Singh is not alive came into effect. In such a scenario, it cannot be said that absence of Sh.Bhagwan Singh from service was willful. When he is presumed dead, maybe such a presumption arises after the expiry of seven years from the date he was not seen, it can reasonably be presumed that absence from service by Sh.Bhagwan Singh was not intentional.

20. We are, therefore, of the view that the claim of the petitioner made in the original application could not have been rejected while placing the entire responsibility of proving the demise of her husband, at the time when he was accused of remaining willfully and unauthorizedly absent, upon her shoulders. In view of the fact that Shri Bhagwan Singh was not residing with his family and was living away from his family in police barracks, when he went missing from the place of duty under the control of the respondents and did not go back to his own house and his whereabouts could not even be traced, the charge of absence from duty, coupled with the fact that Sh.Bhagwan Singh has not been seen for all these years, cannot be treated as sustained in the facts and circumstances of this case. In fact, it was for the respondents to trace out the whereabouts of Sh.Bhagwan Singh if he was alive at the relevant time. The petitioner being a lay person cannot be fasten with this responsibility, who

claims not to have seen her husband from the time when he went missing while on duty in Delhi.

21. In case the husband of the petitioner was dead when he went missing in 1996, it would be highly inequitable and unjust to the petitioner to deny her family pension. She would be doubly condemned. Firstly because of the death of her husband, and secondly because of the denial of family pension.

22. Accordingly, we set aside the judgment of the Tribunal and allow this writ petition. The punishment of dismissal passed by the respondent against Sh.Bhagwan Singh is also set aside on the premises that Sh.Bhagwan Singh was dead and punishment of dismissal would not be appropriate. As a consequence, the petitioner shall be entitled to family pension and such other benefits as may be admissible to her under the rules. The arrears of pension and terminal benefits be paid to the petitioner within two months from today. The petitioner shall also continue to get the family pension regularly in future as per law.

VIPIN SANGHI
JUDGE

A.K. SIKRI
JUDGE

March 14, 2008
aj/P.K. BABBAR