

GAHC010097192009



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/4202/2009

SMTI DAMARI KUMARI CHETRY
W/O. LATE DOL BAHADUR CHETRY, R/O. VILLAGE- BARBHOGIA, P.O.-
BARSOLA, P.S. DHEKIAJULI, DISTRICT SONITPUR, ASSAM.

VERSUS

THE UNION OF INDIA and ORS
REPRESENTED BY- THE SECRETARY, TO THE GOVERNMENT OF INDIA,
MINISTRY OF HOME AFFAIRS, GRIHA MANTRALAYA, NEW DELHI.

2:THE DIRECTOR

SUBSIDIARY INTELLIGENCE BUREAU
MINISTRY OF HOME AFFAIRS
GOVERNMENT OF INDIA
NEW DELHI.

3:THE JOINT DIRECTOR

SUBSIDIARY INTELLIGENCE BUREAU
MINISTRY OF HOME AFFAIRS
GOVERNMENT OF INDIA
CHIMPU
ITANAGAR
ARUNACHAL PRADESH.

4:THE ASSISTANT CENTRAL INTELLIGENCE OFFICER

S.I.B. SUBSIDIARY INTELLIGENCE BUREAU
MINISTRY OF HOME AFFAIRS
M.H.A.
GOVERNMENT OF INDIA

TEZPUR
DISTRICT- SONITPUR
ASSAM

Advocate for the Petitioner : MS.R BEGUM

Advocate for the Respondent :

**BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM**

ORDER

Date : 18/07/2023

1. Heard Mr. S.C. Biswas, learned counsel appearing for the writ petitioner. Also heard Ms. B. Sarma, learned CGC, appearing for the respondents.
2. The elder son of the writ petitioner, viz. Joy Chetry was appointed as Security Assistant/G under the Subsidiary Intelligence Bureau (SIB) on compassionate ground vide appointment order dated 10/01/1989. Pursuant to the order of appointment, Joy Chetry had joined service on 03/02/1989. During the course of his service, Joy Chetry was posted at Kokrajhar. On 31/07/1998, Joy Chetry was entrusted with the work of delivering official dak (mail) from Kokrajhar to Rangia FCP Deosiri. However, after he had left for Rangia on 31/07/1998, Joy Chetry went missing. In other words, since 31/07/1998, the whereabouts of Joy Chetry has not been known to any person including his family members or his employers. In the meantime, by the order dated 14/05/1999, Joy Chetry has been dismissed from service on the ground of unauthorized absence from duty. Aggrieved thereby, his mother has approached this Court by filing the present writ petition.
3. It is the case of the writ petitioner that since she was residing with her younger son at Sonitpur, she did not have any knowledge about the fact that her elder son Joy Chetry had gone missing while on duty. It was only on 26/08/1998, upon receipt of a memorandum issued by the respondent authorities directing Joy Chetry to resume duty, that she came to know about the fact that her elder son had gone missing. Thereafter, several rounds of enquiries were made by her pertaining to her missing son, pursuant where to, FIR was also lodged with the Police. However, despite all efforts to trace out Joy Chetry, he has remained untraceable till today. Notwithstanding the same, the respondent authorities had initiated a departmental proceeding against Joy Chetry by submitting charge sheet dated 29/05/1997, where-after, the elder son of the petitioner, viz. Joy Chetry was

dismissed from service with immediate effect.

4. Assailing the order dated 14/05/1999, Mr. Biswas has argued that the impugned order has been passed against a dead person and, therefore, the same is *non est* in the eyes of law. Contending that the whereabouts of Joy Chetry, not having been known by the family members for more than 7(seven) years since 31/07/1998, he is liable to be declared as "presumed dead" as per section 108 of the Indian Evidence Act, 1872. Under the circumstances, the impugned order dated 14/05/1999 is liable to be set aside and a direction to be issued to the respondents to disburse the service benefits payable on account of Joy Chetry to his mother i.e. the writ petitioner and also pass an order for appointment of the younger son of the petitioner on compassionate ground.

5. In support of his above arguments, Mr. Biswas has relied upon a decision of this Court rendered in the case of ***Rekhamoni Deka Das Vs. The State of Assam and others [WP(C) 5665/2020]*** and another decision of the High Court of Judicature of Jammu & Kashmir rendered in the case of ***Madhu Devi Vs. Union of India and others [OWP No. 1440/2017]***.

6. Responding to the above arguments, Ms. Sarma, learned CGC, on the other hand, has contended that Joy Chetry was a habitual absentee during the period of his service and the departmental proceeding initiated against him, which had culminated in the order dated 14/05/1999, was pertaining to the period of absence from duty prior to the date on which he had gone missing. According to Ms. Sarma, since the charge sheet was submitted against Joy Chetry on 29/05/1997 i.e. before he went missing, the proceedings cannot be said to have been vitiated, more so, when notice of the proceeding was sent to the writ petitioner by the authorities which fact is apparent from the pleadings in the writ petition. Ms. Sarma has, however, fairly submitted that ever since 31/07/1998, the whereabouts of the petitioner's son Joy Chetry is not known to the employer as well as the family members of that person.

7. I have considered the submissions made by learned counsel for both the sides and have also carefully gone through the materials available on record.

8. It is the admitted position of fact that on 31/07/1998, the elder son of the petitioner, viz. Joy Chetry, who was serving under the respondents, had left Kokrajhar for Rangia for delivering official dak and since then, he went missing. It is well known that around the time when the petitioner's son went missing, the entire area of Kokrajhar including the then Rangia Sub-Division was under a turmoil due to violent activities undertaken by the extremists. During that period, several officials serving under various sensitive Government departments were either abducted or killed by the extremists. It is also an established fact that the son of the petitioner went missing on 31/07/1998

when he went to Rangia in discharge of his official duty. Since 31/07/1998 he has not been heard of being alive by his family members.

9. Section 108 of the Indian Evidence Act, 1872 deals with burden of proving that a person is alive who has not been heard of for 7(seven) years. Section 108 of the Indian Evidence Act, 1872, is extracted herein below for ready reference :-

“108. Burden of proving that person is alive who has not been heard of for seven years.—1[Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is 2[shifted to] the person who affirms it.—1[Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is 2[shifted to] the person who affirms it.”

10. From a plain reading of the provisions of section 108 of the Indian Evidence Act, it is apparent that since the family members of Joy Chetry including the writ petitioner had not heard of him of being alive since 31/07/1998 for a continuous period of seven years, Joy Chetry would have to be declared to be presumed dead.

11. Law is well settled that if any one claims that a missing person is still alive, it would be upon him to prove the said fact. In the case of **Rekhamoni Deka Das (Supra)**, this Court has observed that since the missing person i.e. the husband of the petitioner therein was not heard to be alive for a continuous period of 7(seven) years, by invoking the provisions of section 108 of the Evidence Act, he could be declared to be presumed dead.

12. In a decision of the High Court of Judicature of Madrass rendered in the case of **N. Pankajam Vs. State of Tamil Nadu [Writ Petition No. 5480, decided on 30/06/2006]**, in a somewhat similar fact situation, it was held that once it is established that the petitioner's husband has not been heard of for about seven years with effect from a particular date and the same is not in dispute, it is to be presumed that the husband of the petitioner is dead as per section 108 of the Indian Evidence Act.

13. Relying upon the decision in the case of **N. Pankajam (Supra)**, a similar view has been taken in the case of **Madhu Devi(Supra)** whereby, it was held that the husband of the petitioner could be presumed to be dead. On such declaration, the order issued by the authorities declaring the

husband of the petitioner as a 'Deserter' and consequently dismissing him from service, was quashed.

14. Having regard to the facts and circumstances of the case and the decisions cited above, this Court is of the opinion that the son of the petitioner, viz. Joy Chetry would have to be declared as "presumed dead" under section 108 of the Indian Evidence Act, 1872 since no one has either seen him alive or heard about him being alive for more than 7 (seven) continuous years. Such declaration, obviously would date back to 31/07/1998, which is the last time he was seen and / or known to be alive. If that be so, the impugned order dated 14/05/1999 was evidently passed against a dead person. The order dated 14/05/1999, having been passed against a dead person, would be *non est* in the eyes of law and therefore, would be liable to be declared so by this Court. As such, notwithstanding the fact that the allegations contained in the charge sheet pertains to the period prior to the date on which Joy Chetry had gone missing i.e. prior to 31/07/1998, the impugned order dated 14/05/1999 having been issued against a person presumed to be dead would be unsustainable in the eyes of law.

15. The order dated 14/05/1999 is accordingly set aside.

16. The respondents are directed to examine the claim of the petitioner regarding payment of service benefits on account of her son Joy Chetry, and take appropriate action in the matter provided, a proper application on that behalf is submitted by her within six weeks from today, by enclosing a certified copy of this order.

17. If any such representation /application as permitted by this Court, is submitted by the petitioner, the same be dealt with in accordance with law and the grievance of the petitioner be redressed, as expeditiously as possible, but not later than 3 (three) months from the date of receipt of such application/representation.

18. With the above observation, the writ petition stands disposed of.

There shall be no order as to costs.

JUDGE

sukhamay

Comparing Assistant