

GAHC010108802018



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

Case No. : WP(C)/3559/2018

RUPALI HAZARIKA
W/O- SRI BABUL HAZARIKA, R/O- VILL- BEZGAON, P.O- NAKHANA 785664,
P.S- GAURISAGAR, DIST- SIVASAGAR, ASSAM

VERSUS

THE OIL INDIA LTD. AND 3 ORS.
A GOVT INDIA ENTERPRISE WITH ITS OFFICE AT DULIAJAN 786602, DIST-
DIBRUGARH, ASSAM

2:THE GENERAL MANAGER (E)
OIL INDIA LIMITED
A GOVT OF INDIA ENTERPRISE
WITH ITS OFFICE AT DULIAJAN 786602
DIST- DIBRUGARH
ASSAM

3:THE HEAD TECHNICAL SERVICES (D)
OIL INDIA LIMITED
A GOVT OF INDIA ENTERPRISE WITH ITS OFFICE AT DULIAJAN 786602
DIST- DIBRUGARH
ASSAM

4:THE DEPUTY GENERAL MANAGER (MECHANICAL)
OIL INDIA LIMITED
A GOVT OF INDIA ENTERPRISE WITH ITS OFFICE AT DULIAJAN 786602
DIST- DIBRUGARH
ASSA

Advocate for the Petitioner : MR. A K MAHESWARI

Advocate for the Respondent : SC, O I L

**BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA**

ORDER

Date : 09-11-2023

Heard Mr. A.K. Maheswari, learned counsel for the petitioner. Also heard Mr. A. Sarma, learned counsel for the respondent Oil India Limited.

2. This writ petition is filed by the petitioner whose husband was working as a Mazdoor under the respondent Oil India Limited. The late husband of the petitioner was initially appointed on temporary basis for twelve months. After completion of the temporary service of twelve months, the petitioner was confirmed as Mazdoor on 11.07.1985. The Registration number allotted to the late husband of the petitioner is 9/8929. During the course of his service while the late husband of the petitioner was serving as Assistant Operator (Mechanical) in the Mechanical Engineer Section at Manabhum (Arunachal Pradesh), the late husband of the petitioner suffered severe head injury on 03.08.1983. Initially the petitioner was given treatment in the Oil India Limited hospital, thereafter he was shifted to a private hospital and he had undergo surgical proceeding. He was discharged from hospital on 31.08.2003. Because of the injury sustained by the late husband of the petitioner, he suffered from some mental health ailment. Although the petitioner was treated in various hospitals, he did not fully recover from the ailment. Thereafter on 09.04.2015 the husband of the petitioner was found missing from his residence and since then, his whereabouts were not known by the family member including the petitioner. The salary of the husband of the petitioner was not released w.e.f. January, 2006 because of his absence. Subsequently, the family pension, gratuity and other retirement benefits which are payable to the late husband of the petitioner or the present petitioner in the absence of the husband of the petitioner have not yet been released. The petitioner being the legal heir and wife, approached the authorities by filing several representations. The representations did not evoke any response. Subsequently, the petitioner approached this Court praying for appropriate order or direction.

3. Mr. A.K. Maheswari, learned counsel for the petitioner submits that under the provision of Rule 108 of the Evidence Act, the petitioner was last seen by the family member on 05.04.2015 and since

then he was missing and his whereabouts were not known by the family member.

4. An FIR in this regard was also lodged by the petitioner on 09.04.2015. As such, in terms of Section 108 of the Evidence Act, there is a presumption which is to be brought that a person who was missing for seven years is to be presumed to be death and accordingly, the family pension and other benefits payable to the petitioner ought to be released by the respondent authorities.

5. In support of his contentions, learned counsel for the petitioner has relied on the following judgments:-

1. 2006 (3) GLJ 691 (Smt. Anju Mahajan Vs. APDCL)
2. 2006 (1) GLJ 505 (Amrana Begum Mazumder Vs. State of Assam)
3. 2007 (3) GLJ 632 (Smt. Geeta Dey Vs. State of Assam).

6. Per-contra Mr. A. Sarma, learned standing counsel for the Oil India Limited submits that there has to be a declaration that that the husband of the petitioner is presumed to be dead for the presumption to be applied under Section 108 of the Evidence Act. But no such declaration was furnished before the respondent authorities and therefore, there is no question of release of pay and benefits as prayed for by the petitioner.

7. Mr. A. Sarma, learned counsel for the respondent Oil India Company has also relied upon the judgment of the Hon'ble Apex Court rendered in Chief Regional Manager, United India Insurance Company Limited –vs- Siraj Uddin Khan reported in (2019) 7 SCC 564.

8. Mr. A. Sarma, learned counsel has referred to Section 108 of the Evidence Act and submits that under the provisions of the Act itself, the petitioner has to prove that the person has not been heard of for seven years.

In the rejoinder, however, the learned counsel for the petitioner submits that a police report has been received pursuant to the FIR filed and the same is enclosed to the additional affidavit filed by the

petitioner. As per the police report dated 04.01.2023, the husband of the petitioner has been missing since 05.05.2015 and during enquiry the authorities could not trace out the same person.

9. Heard the learned counsel for the parties. Pleadings on record have been carefully perused. Judgments cited at the Bar have also been noted.

10. The short case before this court is that the husband of the petitioner has been missing since 05.05.2015 and as per provisions of Section 108 of the Evidence Act, since he has been missing for seven years he will have to be presumed to be dead. The burden of proving that such a person is alive and who has not been heard for seven years, is on the person who makes such a claim.

11. Section 108 of the Evidence Act, 1872 is as follows:--

*“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.”*

12. The provisions of Sections 107 and 108 of the Indian Evidence Act, 1872 deals with the presumption of continuation of life and the presumption of death respectively. The Apex Court in N. Jayalakshmi Ammal and Ors. Vs. R Gopala Pathar and Anr, reported in 1995 Supp (1) SCC 27 was considering these provisions in the context of that case. The Apex Court referred to the Principle summarized in Sir John Woodroffs and Amir Ali's Law of Evidence 15th Edition at Page-672-673 which is extracted as under:

“The principle of Section 107 is that when once a state of things is shown to exist, there is in law a presumption of its continuance for a period for which such state of things ordinarily lasts. This section is merely a deduction from this presumption. If a person is shown to have been alive within thirty years of the date on which the question whether he is alive or dead arises, there is a presumption of his being alive, and the burden of proving that he is dead lies on him who asserts that he is dead. But this presumption is rebutted, if it is shown that he has not been heard of for seven years by those who if he had been alive, would naturally have heard of him; and, on such proof being given the burden of proving that he is still alive, is, under Section 108, upon those who assert that he is alive. The presumption under Section 108 is as to the fact of death at the time the question was raised and not at any particular antecedent time. There is no presumption also to the cause and circumstances of the

death.

Section 107 deals with the presumption of continuation of life, whereas Section 108 deals with the presumption of death. Section 108 enacts a proviso to Section 107 by specifying that when a person was continuously absent for seven years and he was not heard by his friends and neighbours he may be presumed to have died and the burden of proving that he is alive shifts on the person that he is alive. The presumption of continuance of life under Section 107 ceases at the expiration of seven years from the period when the person in question was last heard of. The presumption under Section 107 will apply when the question is whether a person was alive or dead and not where the question is whether the person was alive or dead on a particular date.”

13. The Apex Court also referred to the law on the point as summarized in M. Monir's Principles and Digest of the Law of Evidence, Vol. 2, 7th Edn. at page 1145. The principle summarized was reproduced as under:

“The only presumption enjoined by Section 108 of the Evidence Act being that a person who has not been heard of for seven years or more is dead at the time the question is raised, there can be no presumption of his being dead or alive at any particular time of the period for which he has not been heard of. There is neither any presumption of his being alive for a period of seven years from the time he was last heard of; nor any presumption of his having died immediately after his disappearance, nor any presumption of his being alive or dead at any particular time antecedent to the suit or proceeding in which the question of his being dead or alive arises. The result, therefore, is that where nothing more is shown than that a person has not been heard of for seven years or more, the party, on whom the burden of proving him to be alive or dead at any particular time during the period he has not been heard of lies, will fail.” (emphasis supplied)

14. While examining this issue the Apex Court had also referred to the other treatises like Sarkar on Evidence and Halsbury’s Laws of England on this aspect. Referring to various Judgments including the Judgments of the privy council, the Apex Court held on the facts of that case that presumption of death after seven years can be drawn under Section 108 Evidence Act but that presumption does not apply to the date on which the person died. That is a fact which is required to be proved.

15. Again in LIC of India Vs. Anuradha, reported in (2004) 10 SCC 131, the Apex Court held that the presumption raised under Section 108 is a limited presumption confined only to presuming the factum of death of the person whose life or death is an issue and though it will be presumed that the person is dead there will be no presumption as to the date or the time of death. There is no presumption as to the facts and circumstances under which the person may have died. The only inference permissible to be drawn and based on the presumption is that man was dead at that time when the question arose subject to a period of seven years absence and the unheard of having elapsed before that time. At what point

the person was dead is not a matter of presumption but of evidence, factual or circumstantial and the onus of proving that death had taken place at any given point in time or date since the disappearance or within the period of seven years lies on the person who stakes the claim. It was held that rarely may it be permissible to proceed on the premise that death had occurred on any given date before the period of seven years absence were shown to have elapsed.

16. In *Rejia Khatun* (Supra), a Co-ordinate Bench of this Court was considering the case of the petitioner therein who had applied for pensionary benefit in respect of her husband who had subsequently expired. In *Rejia Khatun* (Supra), the husband of the petitioner therein was the headmaster of a school at the relevant point in time and because of his conviction by trial Court, he was discharged from his service. The husband of the petitioner was convicted in a criminal case by the Sessions Judge, Nagaon. Being aggrieved, the husband of the petitioner along with other accused persons preferred criminal appeal which was pending before this Court at the relevant point in time. However, during the pendency of the appeal, the husband of the petitioner expired and the appeal was abated in so far as the husband of the petitioner therein was concerned. This Court upon perusal of the relevant materials came to a finding that under the Provisions of Assam (Discipline and Appeal) Rules, 1964 read with FR 52, there is no provision to discharge an employee. Pursuant to any enquiry being conducted, the employee may be found to be guilty as charged and appropriate punishment be imposed as prescribed under the Rules unless the employee was found to be not guilty as charged. The term “discharge” is not prescribed as a punishment under Rule 7 of the Assam (Discipline and Appeal) Rules, 1964. As such, once a person is not dismissed or removed from service, he is entitled for all benefits like pension, gratuity etc on his retirement or death. This Court held that discharge is not a ground to deny the pensionary benefits to a person who has in the meantime expired as unless the person is dismissed from service, he will be deemed to be in regular service under the appropriate Rules.

17. The Coordinate benches of this Court have consistently followed the law laid down by the Apex Court and in *Rejia Khatun* (supra). In the judgments rendered in *Smti Anju Mahajan* (supra), *Amrana Begum Mazumder* (supra) and *Smti. Geeta Dey* (supra) and which are relied upon by the petitioner, this Court has interpreted the provisions of Section 108 of the Evidence Act in the light of the Apex Court judgments discussed above.

18. The judgments of the Apex Court as well as that of the Coordinate Benches while examining the provisions of Section 108 of the Evidence Act have authoritatively held that presumption may be drawn under Section 108 about the death of the person after seven years from the date the said person is shown missing. When the person died or under what circumstance he died, is a matter of fact and on which no presumption can be drawn. However, it is made clear that once the person who would have ordinarily heard from the person who is stated to be missing namely the family member like the petitioner and no contrary proof or evidence has been placed before the Court or are in the custody of the respondents to displace the claim of the petitioner, this Court has no option but to hold that the benefit of presumption under Section 108 of the Evidence Act must be held to be available to the petitioner under the law. The learned counsel for the petitioner has relied upon the principle laid down by the Apex Court to draw up presumption under Section 108 Evidence Act.

19. In the facts of this case, the respondents have not controverted the claim of the petitioner that her husband went missing since 09.04.2015 or that they have evidence to the contrary to show that the claim of the petitioner is false. In the peculiar facts of this case as discussed and upon due consideration of the judgments discussed, this Court is of the considered view that the benefit of presumption under Section 108 Evidence Act cannot be denied to the petitioner.

20. In that view of the matter, the respondents are directed to forthwith release the family pension, gratuity and other retirement benefits to the petitioner. In so far as the claim of arrear salary of the husband of the petitioner is concerned, the petitioner will approach the respondent authority by filing a representation and which will thereafter be considered by the respondents as per provision of law. The respondents after giving an opportunity of hearing the petitioner, will thereafter pass a speaking order within a period of 4 (four) weeks from the date of receipt of any such representations as may be filed by the petitioner as permitted by this Court. The respondent will ensure that a copy of such order is furnished upon the petitioner.

21. In view of the discussions made above, and the question of claim of arrear salary vis-a-vis, the principle 'no work no pay' is left open to be decided in an appropriate case if the need arises. The

judgment of the Apex Court in Siraj Uddin Khan(supra) relied upon by the respondent is in support of his contention of 'no work no pay' in respect of claim for arrear salary and which issue having been left open, the applicability of the law laid down by the Apex Court in the facts of the case need not be addressed at this stage since the question has been left open to be decided by the authorities.

The entire amounts relating to family pension, gratuity & other retirement benefits as may be payable are directed to be released forthwith in the Account Number which is furnished in the affidavit submitted by the petitioner and available in the Court record which is as under:-

Account No.10966515350 IFS Code SBIN0000182

22. The prayer for grant of interest is also declined in view of the discussions above.

Writ petition accordingly stands disposed of. Costs easy.

JUDGE

Comparing Assistant