

GAHC010167222023



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

Case No. : WP(C)/4562/2023

BAIJAYANTI BORDOLOI
W/O- LT. SOMET CH. BORDOLOI, VILLAGE- NEW DEURI-GAON, P.O.
DUMAIBAGIDAPARA, P.S. KACHUA, DIST.- NAGAON, ASSAM, PIN- 782428

VERSUS

UNION OF INDIA AND 2 ORS
REPRESENTED BY THE SECRETARY TO THE GOVT. OF INDIA, HOME
DEPTT., NEW DELHI- 11001

2:THE DIRECTOR GENERAL OF POLICE
ASSAM RIFLES
SHILLONG
MEGHALAYA- 793001

3:THE COMMANDANT
10TH ASSAM RIFLES
C/O 99 APO DIST.- PAPUMPARE
ITANAGAR
ARUNACHAL PRADESH
PIN- 79112

Advocate for the Petitioner : MR. R M CHOUDHURY

Advocate for the Respondent : DY.S.G.I.

**BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA**

ORDER

16.05.2024

Heard Mr. R.M. Choudhury, learned counsel for the petitioner. Also heard Mr. B. Chakravarty, learned Central Government Counsel for the respondents.

2] The writ petition is filed by the petitioner, namely, Smti Baijayanti Bordoloi, widow of one late Somet Chandra Bordoloi, who was employed as Habilder/CO No. 103636 under the Assam Rifles. The petitioner's late husband applied for and was granted casual leave from 04.05.2020 to 24.07.2001. The projected case of the petitioner is that her husband suffered from medical ailments, due to tuberculosis and was therefore not in a position to resume his duties. The authorities were duly informed and subsequently, the petitioner's husband upon recovering from his illness proceeded to resume his duties, but the authority concerned refused to allow him to rejoin his duties.

3] Being aggrieved, a writ petition was filed by the husband of the writ petitioner being WP(C) No.3565/2002 seeking a direction from this Court to permit him to rejoin his duties. The petitioner's husband, however, expired during the pendency of the writ petition and the wife/the petitioner herein was substituted as legal heir of late Somet Chandra Bordoloi, the petitioner in WP(C) No.3565/2002. However, a Co-ordinate Bench of this Court was of the view that

since the writ petition was filed for issuing a direction to the respondents to permit the husband of the petitioner to rejoin in his duties and since the husband of the petitioner had expired during the pendency of the writ petition, the writ petition was closed, giving liberty to the present petitioner to approach this Court again for any financial benefits that may be entitled to the present petitioner. Subsequently, the petitioner came to know that the petitioner's late husband was declared as a deserter and was also dismissed from service vide order dated 31.08.2005. Being aggrieved, both these orders were assailed by filing 2 (two) separate petitions, namely WP(C) No.5759/2010 and WP(C) No. 2907/ 2009 and also seeking consequential service benefits.

4] The primary grounds urged in the writ petitions were that the orders of desertion and dismissal from service were issued after the demise of her late husband. Both these writ petitions were heard and disposed of by order dated 03.12.2015. This Court by said Judgement and Order dated 03.12.2015 allowed both the writ petitions and the order dated 31.08.2005, whereby the late husband of the petitioner was declared as a deserter and was dismissed from service, was set aside and quashed. By the same order, the Coordinate Bench of this Court directed that the late husband of the petitioner to be treated in service till his death i.e. on 19.08.2004 and accordingly, the period from 04.05.2000 to 19.08.2004 was directed to be regularized by the authority

concerned. It was further held that the present petitioner, being the widow of late Somet Chandra Bordoloi, shall be entitled to all consequential benefits due to her late husband and all such benefits were directed to be released within a period of 3 (three) months from the date of receipt of certified copy of the order.

5] Pursuant to the Judgment and Order dated 03.12.2015, the respondents being aggrieved, preferred the writ appeal being WA. No.138/2017. This writ appeal came to be dismissed by order dated 15.05.2017. The Division Bench of this Court had dismissed the appeal preferred by the respondents and upheld the findings of the learned Single Judge. Since the financial benefits due to the petitioner were not released, the petitioner preferred contempt petition being Cont.Cas(C) No.376/2016 before this Court. During the pendency of the contempt petition, it was submitted that family pension, death gratuity and cost awarded by the Court have been released. However, the arrear salary payable to the late husband of the writ petitioner was not released on the principal of "no work no pay". The Contempt Court upon such submissions, accordingly closed the Contempt Petition with the observation that whether the direction to regularize the service of the petitioner's husband for the above period would also include the direction to pay salary for the period is a matter which will require adjudication in view of the stand of "No work, no pay" taken by the

respondents. While closing the contempt petition liberty was granted to the writ petitioner to file separate writ petition agitating her grievances.

6] The present writ petition has been filed by the petitioner praying for release of the arrear salary payable to the writ petitioner in view of the specific and categorical direction given by the judgment and order dated 03.12.2015 passed in WP(C) No.5759/2010 and WP(C) No.2907/2009 by the Coordinate Bench of this Court directing that the petitioner would be entitled to all consequential benefits due to her late husband and such direction of the Coordinate Bench would and must necessarily include the arrear salary payable to the late husband of the writ petitioner.

7] Learned counsel for the petitioner has strenuously urged that since the Coordinate Bench arrived at a conclusive finding that the order of declaring the writ petitioner as a deserter, as well as the order of dismissal him from service is contrary to law and the same having been interfered with, and the period between 04.05.2000 to 19.08.2004, namely, till the death of the husband of the petitioner was directed to be regularized; the petitioner is entitled to get the arrear salary of the late husband of the petitioner for that period. The plea of "*No Work No Pay*" as raised by the respondents will not be applicable, and the respondents may be directed to release the arrear salary. Learned counsel for

the petitioner has relied upon the judgment of *Krushnakant B. Parmar vs. Union of India & Another* reported in (2012) 3 SCC 178 and *Hindustan Paper Corporation Ltd & Anr. Vs Ranjit Kumar Dev & Anr.* reported in (2014) 1 GLR 730 in supporting his contentions.

8] The learned CGC for the respondents on the other hand strongly objects the submissions of the writ petitioner.

9] Learned CGC for the respondents submits that the grant of arrear salary where the order of dismissal from service is interfered with cannot operate automatically as a rule of the thumb. It has to be decided in the facts and circumstances of each and every case. The learned CGC submits that the husband of the petitioner was not in service from 04.05.2000 till the date of his death i.e.19.08.2004. Therefore, where the petitioner did not attend to his duties, mere setting aside of the order of dismissal from service along with the order of being declared with a deserter, will not automatically entail release of arrears salary alone. He submits that for release of arrear salary, there has to be a specific direction by the learned Single Judge to that effect which was not rendered notwithstanding the directions contained in the Judgement and Order dated 03.12.2015. In support of his contentions, the learned CGC relies upon following judgments of the Apex Court :

(i) *General Manager, Haryana Roadway vs. Rudhan Singh*, (2005) 5 SCC 591

(ii) *Srujit Ghosh vs.*

Chairman and Managing Director, United Commercial Bank 1995 (2) SCC 474

(iii) *Suman V. Jain (Dr. Mrs.) vs.*

Marwadi Sammelan Through its Secretary and Ors., 2024 AIR (SC) 1334

(iv) *Sukshiri Kumar Tripathi vs.*

Jagadguri Ram Bhadracharya Handicapped University & Anr. 2022 (8) SCC 760

(v) *Union of India vs. R. Kathik,* 2020 (2) SCC 82

(VI) *Virendra Kumar, General Manager, Northern Railways,*

New Delhi vs. Avinash Chandra Chadha 1990 (3) SCC 472

10] Learned CGC for the respondent submits that the judgments referred to by the Apex Court has laid down the law that interference with the order of dismissal automatically does not entail to release of arrear salary, inasmuch as, there has to be a specific direction and a finding by the competent Court towards the direction for release of arrear salary. In that view of the matter, since the respondents have already released the pension, gratuity and cost awarded to the writ petitioner, no further claim towards arrear salary is payable to the writ petitioner and therefore, the claim of the writ petitioner is not maintainable in law and the same should be dismissed.

11] Learned counsel for the parties have been heard and the pleadings in

records have been carefully perused. Judgments cited by both the parties have also been carefully noted.

12] Before this Court proceeds to address the issue, it is necessary to carefully peruse the Judgment and Order dated 03.12.2015 passed in WP(C) No. 5759 of 2010 and WP(C) No 2907 of 2009. Learned Single Judge after a detailed discussion of the facts and circumstances, had disposed of the writ petition with the following directions:

“....

20. Coming to the facts of the instant case, it is the pleaded case of the petitioner and earlier that of her husband that he had suffered from tuberculosis. Tuberculosis is still considered to be a serious ailment in the rural areas of the country and carries with it some kind of social stigma. These factors were apparently not taken into consideration while declaring petitioner's husband as deserter. Moreover, the fact that petitioner's had approached this Court in the year 2002 seeking a direction to the respondents to allow rejoining of duty would go to show that there was no abandonment of duty with intention of never returning.

21. Not to speak of desertion, even in case of unauthorized absence from duty or over-stay of leave, the Hon'ble Supreme Court in Krushnakant B. Parmar Vs. Union of India and another, reported in (2012) 3 SCC 178, has held that such unauthorized absence from duty or over-stay of leave will not amount to misconduct if it cannot be proved that absence is willful. If the absence is the result of compelling circumstances, such absence cannot be held to be willful. In the present case, petitioner's husband could not rejoin duty as he was inflicted with tuberculosis. Ultimately, he died on 19.08.2004. In a perverse way, this only buttresses the claim of the petitioner and earlier that of her husband that his absence from duty was not willful and deliberate. In the impugned order dated 31.08. 2005, it is stated that petitioner's husband had neither been apprehended nor

he had surrendered and was still absent. When he had expired, there was no question of being apprehended or surrendering. Dismissing a dead person, that too retrospectively, is clearly untenable and reflects lack of empathy for a dead soldier who had put in about 20 years of service prior to his leave. 22. That being the position, declaration of petitioner's husband as deserter was certainly not justified. Furthermore, dismissing the petitioner's husband from service when he had already expired has virtually amounted to rubbing salt to the wound. Such an order besides being wholly unacceptable also suffers from patent illegality for the reasons indicated above as well as on the ground of retrospectively.

23. In view of the above, both declaration of petitioner's husband Samet Chandra Bordoloi as deserter and his dismissal from service vide order, dated 31.08.2005, are set aside and quashed. He shall be treated to have been in service till his death on 19.08.2004. The period from 04.05.2000 till 19.08.2004 shall be regularized by the authority. Consequently, Smt. Baijayanti Bordoloi widow of Samet Chandra Bordoloi shall be entitled to all consequential benefits due to Late Samet Chandra Bordoloi. All such benefits shall be released to her within a period of three months from the date of receipt of a certified copy of this order. 24. For the pain and agony that a hapless widow had to undergo while pursuing the litigation for all these years, Court is of the view that cost of Rs.25,00 0/- should be paid to her by the respondents along with the service benefits within the period as indicated above.

25. Writ petition is allowed in the above terms.

13] The appeal preferred by the respondents also came to be dismissed by the Division Bench of this Court vide Judgment and Order dated 03.12.2015 passed in WA. No.138/2017 and accordingly, the Judgment and Order dated 03.12.2015 passed in WP(C) No.5759/2010 and WP(C) No.2907/2009 attained finality. The Appellate Court while dismissing the appeal held that the Appellate Court is in complete agreement with the view taken by the learned Single Judge and that the appellants, namely the respondents herein, must immediately

release all consequential service benefits earned by the late husband of the present petitioner and the appeal was dismissed summarily.

14] The various judgments which are cited by the learned counsel for the parties have been carefully noted. In the judgments which are cited by the respondents, there are specific orders where the Court had held that arrear salary is not payable. There is no quarrel with the proposition that interference with the order of dismissal or removal from service will not automatically entail grant of arrear salary. It is a trite law that grant of arrear pay and salary upon interference with the order of removal or dismissal is not to be followed as a Rule.

15] In the attending facts and circumstances of the case, it is seen that the petitioner had claimed to have approached the Authority for resumption of his duties after recovery from his ailments on 01.08.2001. The authorities having rejected the petitioner's husband claim for resumption of his duties, the writ petition being WP(C) No.3565/2002 was filed by the husband of the petitioner and during the pendency of which he expired. The Coordinate Bench upon perusal of the grounds and reasons stated in the Judgment and order dated 03.12.2015 passed in WP© No.5759/2010 and WP(C) No.2907/2009 had categorically arrived at the finding that the order declaring the late husband of

the petitioner as a deserter as well as his order for dismissal from service are contrary to the provisions of law as well as the law laid down by the Apex Court. Therefore, the same was set aside and quashed. The learned Single Judge relying on the judgment of *Krushnakant B. Parmar* (supra) held that all such unauthorized absence from duty or overstay of Leave will not amount to misconduct, if it cannot be proved that the absence was willful. There is a categorical finding by the Coordinate Bench that the late husband of the petitioner could not rejoin his duties as he was inflicted with tuberculosis and ultimately he expired on 19.08.2004. The Coordinate Bench therefore returned the finding that the order of desertion as well as the order of dismissal from service passed by the respondent authorities against the late husband of the petitioner pursuant to his expiry is clearly untenable and therefore, the same was also interfered with set aside and quashed.

16] From the findings of the learned Single Judge, it is evident that the Court had come to a conclusion and a finding that the absence of the late husband of the petitioner was not willful and therefore, this aspect ought to have been consciously considered by the respondent authorities prior to dismissal of the late husband of the writ petitioner. The Coordinate Bench having arrived with the finding that absence of the late husband of the writ petitioner from service or his failure to rejoin his duties being not willful, then the only inference that

can be brought is that no fault can be saddled on the late husband of the writ petitioner to have purposefully and willfully neglected to stay away from performing his duties. The period for which the late husband of the writ petitioner could not render his services, as is evident from the judgment of the Court, is because of the medical ailments suffered by the late husband of the writ petitioner, and thereafter, because of the order dated 31.08.2005, passed by the respondent Authorities declaring the late husband of the petitioner as a deserter and as well as subsequent dismissal from service.

17] Under such circumstances, this Court has to arrive at a finding that the failure of the husband of the writ petitioner to resume his duties was because of the reasons and findings arrived at by the Coordinate Bench in its Judgment and Order dated 03.12.2015. No fault can be attributed on the late husband of the writ petitioner for not rendering services for the period in question. Consequently, this court is of the view that late husband of the writ petitioner ought to have been granted his arrear salaries, and that having not been done, the present petitioner is entitled to her claim of arrear salary of her late husband. However, having said that, there is one aspect of the matter which cannot be ignored, it is the statement of the writ petitioner that her husband reported for joining in duties on 01.08.2001 and having not been permitted to join the same duty, the earlier writ petition being WP(C) No.3565/2002 was filed

and during the pendency of writ petition, the husband of the writ petitioner died. Accordingly, the present writ petition stands allowed.

18] The petitioner is therefore entitled for the arrear salary of her late husband with effect from 01.08.2001 till the date of his death. The arrear salary as directed shall be quantified and released to the writ petitioner within a period of 3 (three) months from the date of receipt of a certified copy of this order.

19] With the above observations and directions, the writ petition stands disposed of.

JUDGE

Comparing Assistant