

**IN THE HIGH COURT OF JUDICATURE AT HYDERBAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADERSH**

WRIT PETITION No.34859 of 2016

Between:

Union of India, represented by its Secretary,
to the Government of India, Ministry of Finance,
Department of Revenue, New Delhi and 3 others

.....Petitioners

And:

Polimetla Mary Sarojini and another

..... Respondents

JUDGMENT PRONOUNCED ON : 31-01-2017

**HON'BLE SRI JUSTICE : V. RAMASUBRAMANIAN
AND**

HON'BLE SRI JUSTICE : G. SHYAM PRASAD

1. Whether Reporters of local Newspapers may be allowed to see the Judgments? : YES/NO
2. Whether the copies of judgment may be marked to Law Reporters/ Journals? : YES/NO
3. Whether their Ladyship/Lordship wish to see the fair copy of the judgment? : YES/NO

***THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN**

AND

THE HON'BLE SRI JUSTICE G. SHYAM PRASAD

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to the Government of India, Ministry of Finance,
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.... Petitioner

AND

Polimetla Mary Sarojini and another

.... Respondents

! Counsel for petitioners: Sri B. Narayana Reddy, Asst. Solicitor
General of India

^ Counsel for respondent: Sri S. Seshagiri,

< Gist:

> Head Note:

? Cases referred:

1) 2006 (3) MLJ 702

2) 2016 (1) CTC 698

**HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE G.SHYAM PRASAD**

Writ Petition No.34859 of 2016

Order: (per V.Ramasubramanian, J.)

The Union of India has come up with the above writ petition challenging an order of the Central Administrative Tribunal, Hyderabad Bench, directing the payment of pensionary benefits and the family pension together with all consequential benefits to the 1st respondent herein, whose husband became untraceable and in respect of whom a presumption of death in terms of Section 108 of the Evidence Act was raised.

2. We have heard Mr. B.Narayana Reddy, learned Assistant Solicitor General of India for the petitioners and Mr. S.Seshagiri, learned counsel for the 1st respondent.

3. The 1st respondent's husband was employed as a Gestetner Operator in the office of the Assistant Collector of Central Excise, Eluru Division, Eluru. It appears that from 07-10-1992, he went on earned leave for 3 days. But upon the expiry of the leave, he did not report for duty on 10-10-1992.

4. The 1st respondent lodged a police complaint on 04-9-1994 and a First Information Report was registered in Crime No.104/1994 for "man missing".

5. After nearly 3 years, the Sub Inspector of Police, Eluru, filed a final report on 06-12-1997 declaring that the

1st respondent's husband is not traceable. On the basis of the said report and after the expiry of 7 years from the date he went missing, the 1st respondent gave a representation dated 16-12-1999 for the sanction of family pension.

6. When the 1st respondent appeared with all necessary documents before the concerned authority, the 1st respondent was informed that her husband had already been imposed with a penalty of removal from service, by an order dated 10-01-1997 for unauthorised absence. After informing the 1st respondent about the removal from service of her husband, the competent authority rejected the claim of the 1st respondent for payment of family pension by letters dated 06-10-2003 and 12-6-2014. By the order dated 12-6-2014, the Commissioner of Customs, Central Excise and Service Tax informed the 1st respondent that since her husband was removed from service for unauthorised absence, the pensionary benefits were forfeited in terms of Rule 41 of CCS (Pension) Rules, 1972.

7. Challenging the said order dated 12-6-2014 and a consequential order dated 07-11-2014, the 1st respondent filed O.A.No.1468 of 2014 on the file of the Central Administrative Tribunal, Hyderabad. The Tribunal allowed the application on the ground that under Section 108 of the Evidence Act, the 1st respondent's husband should be presumed to be dead from the date he went missing and that therefore the order of dismissal passed against a dead person

is a nullity. Aggrieved by the said order, the Union of India has come up with the present writ petition.

8. The main contention of the Union of India is that till the expiry of the period of 7 years from the date a person went missing, no presumption of death would arise and that if such an employee is dismissed or removed from service, even before the statutory time limit for the raising of the presumption, the question of payment of family pension or any other pensionary benefit would not arise.

9. But the response of the learned counsel for the 1st respondent is that the issue is squarely covered by various circulars of the Government of India and that therefore the Union of India cannot shirk its responsibility to pay family pension.

10. We have carefully considered the above submissions. The controversy that arises for resolution in this case is as to whether a penalty of removal from service, imposed within a couple of years for unauthorised absence, would get annulled, by a presumption of death that arises later in point of time by virtue of section 108. If the first respondent's husband is presumed to be dead from the date he went missing, then the penalty of removal from service would have no effect as it was passed as against a dead person. But if the date of death cannot be presumed and if section 108 raises only a presumption of death and not a

presumption of date of death, then the penalty does not get annulled.

11. In order to appreciate this issue, it is necessary to understand the scheme of sections 107 and 108 the Indian Evidence Act, 1872. These sections are found in Part-III of the Act which deals with burden of proof. Interestingly, the expression 'presumption' is not used in either of these 2 sections, though it is used in other sections that form part of the same Chapter. The Evidence Act itself is divided into three parts with 11 Chapters. Part-I containing Chapters I and II, comprises of provisions relating to interpretation of words and phrases and provisions relating to relevancy of facts. Part-II contains Chapters III to VI, which contain provisions relating to oral evidence, documentary evidence etc. Sections 101 to 114A form part of Chapter VII, which is contained in Part-III of the Act. They speak mainly of the burden of proof. Sections 101 to 111 speak only about burden of proof. Sections 112 and 113 speak about proof of legitimacy about birth during marriage and proof of cession of territory respectively. It is only Sections 111A, 113A, 113B, 114 and 114A which contain the expression 'presumption'. Sections 107 and 108 read as follows:

Section 107: - Burden of proving death of person known to have been alive within thirty years.- When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

Section 108:- Burden of proving that person is alive who has not been heard of for seven years.- (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 (shifted to) the person who affirms it.

12. If we have a careful look at Sections 107 and 108, it could be seen that both are something like mirror images of each other. Under Section 107, the burden of proving that a person is dead, when it is shown that he was alive within 30 years, is on the person who affirms it. But the burden of proof so cast under Section 107 upon the person affirming death, is whittled down under Section 108 by enabling the person who affirms the death of another to prove that such a person has not been heard of for seven years by those who would naturally have heard of him. Once a person affirming the death of another is able to prove that the other person has not been heard of for seven years, then the burden of proving that the other person is alive, shifts to the person who affirms it. In simple terms, section 107 raises a presumption of life while section 108 raises the presumption of death.

13. ***The burden of proof oscillates like a pendulum from the person, who asserts death, to the person who asserts life.*** To put it differently, the burden of proof cast under Section 107 upon the person asserting death of another becomes lighter under Section 108. While a person asserting death of another is obliged to prove positively under Section 107 that the other person is dead, he is given an option or gateway under Section 108 to prove instead, that

the other person has not been heard of for seven years. In other words, ***the requirement under Section 107 is to prove the factum of death. The requirement under Section 108 is to prove a fact that would lead to a presumption of such a fact.*** The presumption under Section 108, as in the case of every other presumption, is rebuttable, since a person asserting life is entitled under Section 108 to show that the person presumed to be dead was actually alive.

14. Though the provisions of sections 107 and 108 are very clear as to the rising of presumption, these sections do not throw any light upon the date on which a person can be presumed to be dead. In other words, ***the doubt or dilemma that arises in cases of this nature is as to the date of death of the person in respect of whom the presumption is raised.*** The moment it is established that a person has not been heard of for 7 years, the presumption of death arises. ***But the presumption under the Act is confined only to the factum of death and not to the actual date of death.***

15. Since the Statute confines itself only to the factum of death and leaves it largely to the imagination of the courts to find out from the evidence on record, the actual date of death, some courts have taken the view that the person must be taken to be dead with effect from the date on which he is not heard of. But some courts have taken the view that in the absence of any evidence to the contrary, the date of death could be fixed only from the expiry of the period of 7 years.

16. In *Ram Singh Vs. Board of Revenue, U.P. Allahabad*, AIR 1964 All. 310, a Single judge of the Allahabad High Court held that all that one can presume under Section 108 is that the person concerned is dead but one cannot fix the time of his death under the provisions of said section. The court further held that Section 108 is not exhaustive on the question of presumption as regards the death of a person and hence the Court may in the circumstances of each case make suitable presumption even regarding the time of death. The court said:

"Section 108, however, is not exhaustive on the question of presumption as regards death of a person. The Court may make a suitable presumption in accordance with the circumstances of each case :-

- (1) Suppose a man sails in a ship, and the ship sinks. Thereafter the man is never seen alive. Under such circumstances, it is reasonable to assume that the person died in the ship wreck.
- (2) When a person goes for pilgrimage he or she ordinarily returns home in six months or in a year. In the present case, Smt. Rukmini left for Gangasagar Yatra 17 years ago. Since then she has not been heard of. It is reasonable to assume that, she died in some accident or of some disease during the journey or at Gangasagar."

17. The aforesaid view was followed by the Bombay High Court in *Subhash Ramchandra Wadekar Vs. Union of India*, AIR 1993 Bombay 64, in which a Single Judge of the Bombay High Court held that if section 108 of Indian Evidence Act is to be interpreted literally, it would have to be held that law presumes the death of a person unheard of for seven years but is silent in respect of the date of presumed death. It was further held that the date of presumed death must be proved

by the party concerned as a fact by leading reliable evidence. The Court formulated two propositions viz. (1) Ordinarily a person unheard of for the statutory period shall be presumed to be dead on expiry of seven years and not earlier. (2) Section 108 of Indian Evidence Act, 1872 is not exhaustive. It is permissible for the court to raise a suitable presumption regarding the date of presumed death depending upon the attendant circumstances and other reliable material on record. In other words no rule of universal applicability can be spelt out regarding presumed date of death. The court indicated that proposition No.1 must operate subject to proposition No. 2.

18. In *Indira -vs- Union of India* 2005 (3) KLT 1071, a Single judge of the Kerala High Court held that even though under the Army Act, a person can be said to be a deserter when he is found missing and can also be dismissed for desertion, the situation changes when the presumption of death of such a person becomes available under Section 108 of the Evidence Act. In other words, if a person is declared a deserter and dismissed from service and is not traced out within seven years, then Section 108 of the Evidence Act takes over and all consequences would follow. In other words, presumption of death was held to supersede the finding of desertion.

19. The aforesaid view was reiterated by the division bench of the Bombay High Court in *Smt. Bhanumati Dayaram*

Mhatre V. Life Insurance Corporation of India, AIR 2008

Bombay 196, wherein the question for consideration before the court was as to whether a person would be presumed to have died on the date he went missing or on the date when the period of 7 years expired from the date of his missing. While interpreting the provisions of Sections 3, 107 and 108 of Evidence Act in para 4 and 5 of its decision, the High Court observed as under:-

"4. Section 108 of the Act is in the nature of exception to the rule contained in Section 107 of the Act and states that when a person has not been heard of for 7 years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who asserts that the person is alive. In other words, if a person has not been heard of for a period of more than 7 years by the persons who would naturally have heard of him if he had been alive, then a presumption arises of his death. Though Section 108 of the Act raises a presumption of death of a person if he has not been heard of for a period of 7 years by the persons who would naturally have heard of him, it raises no presumption as to the date of his death. The date of his death, if disputed, must be proved as any other fact.

5. Section 3 of the Evidence Act prescribes the standard of proof by defining the word "proved" as follows: "Proved-- A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists." If the test of preponderance of probability laid down by Section 3 of the Act is applied, that is to say a fact is said to be proved if the court considers its existence to be so probable that a prudent man ought, under the circumstances of the particular case, to act upon certain supposition that it exists, then it would have to be held that Kushal has died on 13th November 1995 or soon thereafter. If he was alive after 13th November 1995, there was no reason for him not to contact his immediate family members. It is not the case that Kushal left the house in distress or he was under some disability which prevented him from returning home or even contacting his family members. Nor is it shown that Kushal was missing in such circumstances or could be at such place wherefrom he could not even contact his parents or close family members. Considering the fact that Kushal was not under any distress or disability nor was he in the situation wherefrom he could not contact his family members coupled with the fact that he has not contacted his family members at all since 13th

November 1995 and has been declared to be dead by the declaratory decree of the competent court makes us, as men of ordinary prudence, believe that Kushal must have died on 13th November 1995 or soon thereafter."

20. In *Zishan Khan -vs- District Inspector of Schools, Varanasi & Ors.*, 2012 (92) ALR 154, a Single judge of the Allahabad High Court held as follows:

“(1) Ordinarily, a person not heard of for the statutory period shall be presumed to be dead on expiry of seven years and not earlier; (ii) Section 108 of the Indian Evidence Act, 1872 is not exhaustive. It is permissible for the Court to raise a suitable presumption regarding the date of presumed death depending upon the attending circumstances and other reliable material on record. In other words, no Rule of universal applicability can be spelt out regarding presumption of death. “

21. Thus various courts have come to the conclusion that depending upon the circumstances of each case, it would be open to the court to fix the date of death. But the reasoning given by many courts to come to such a conclusion appear to be one sided and made without reference to the perspectives of persons upon whom claims may be lodged on the basis of presumed date of death.

22. Take for instance the case on hand, where a person was removed from service for unauthorised absence. If such a person is presumed to be dead due to the operation of Section 108 of the Evidence Act, with retrospective effect from the date he went missing, then any order of removal from service passed after the date of his presumed death would be a nullity. But if he is taken to be dead only with effect from the date on which a valid presumption could arise i.e. after the

expiry of 7 years from the date he went missing, then the order of removal from service cannot be treated as a nullity.

23. ***When a person is not seen for quite some time, it may be a case of “man missing” for people at home. But for the office where he is working, it will only be a case of unauthorised absence.*** The employer is entitled to take disciplinary action against every employee who absents himself unauthorisedly. At that stage, the employer cannot be expected to anticipate that the employee will not come back for 7 years so as to arrest the raising of the presumption under Section 108.

24. The employer's right to take disciplinary action and impose a penalty of removal or dismissal, within the period of 7 years is not taken away by Section 108. Therefore, an order of removal or dismissal passed before the date on which the presumption under Section 108 arises, cannot become a nullity *post facto*.

25. In *N.Pankajam Vs. State of Tamil Nadu*¹ on which the Central Administrative Tribunal placed reliance, a learned Judge of the Madras High Court held that ***by virtue of the presumption under Section 108 of the Evidence Act, a person who is not heard of for 7 years should be treated as dead, from the date he became untraceable.*** But a Division Bench of the Madras High Court disagreed with the said view, in *The Managing Director, State Express Transport*

¹ 2006 (3) MLJ 702

*Corporation Tamil Nadu Limited Vs. E.Tamilaras*². The distinction between Sections 107 and 108 of the Evidence Act were brought out in the said decision of the Division Bench, to which one of us (VRS, J.) was a party. Paragraphs 11 to 16 of the said decision read as follows:

“11. While there can be no dispute about the presumption available under Section 108 of the Indian Evidence Act, 1872, what is important is to see the date on which such presumption arises. As per Section 108 of the Indian Evidence Act, 1872, whenever a question arises 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, burden of proving that he is alive, is shifted to the person, who affirms it.

12. What is provided in Section 108 of the Indian Evidence Act, 1872, is only a presumption. Section 108 of the Indian Evidence Act, 1872 cannot be read in isolation. It should be read along with Section 107 of the Indian Evidence Act, 1872. Under Section 107 of the Indian Evidence Act, 1872, whenever a question arises as to whether a man is alive or dead and it shown that he was alive within thirty years, the burden of proving that he is dead is on the person, who affirms it.

13. Thus, Section 108 is an exception to Section 107. If Section 107, provides the rule, Section 108, provides the exception. Once it is established that a person was alive within 30 years, the burden of proving that he is dead is on the person, who affirms it. This is the rule under Section 107. But, if it is proved that such a person, despite being alive within 30 years, 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 shifted to the person, who affirms that he is alive.

14. Therefore, it follows as a corollary that for the application of Section 107, the outer limit of the period of prescription is 30 years. Similarly, for the Application of

² 2016 (1) CTC 698

Section 108, the minimum period of time limit statutorily prescribed for the presumption to arise is seven years.

15. This is why the presumption as to death cannot be raised before the expiry of seven years. It cannot be raised even if the period of seven years falls short by one or two days. In *LIC of India v. Anuradha*, MANU/SC/0285/2004 : 2004 (3) CTC 281 (SC) : AIR 2004 SC 2070, the Supreme Court held that the presumption as to death by reference to Section 108 would arise only on the expiry of seven years and would not by applying any logic or reasoning be permitted to be raised on the expiry of 6 years and 364 days or at any time short of it. More over, the Court pointed out that an occasion for raising the presumption would arise only when the question is raised in a Court, Tribunal or before an Authority, who is called upon to decide as to whether the person is alive or dead. So long as the dispute is not raised before any forum and in any legal proceedings, the occasion for raising the presumption does not arise.

16. Therefore, the expiry of the full period of seven years is essential to raise the presumption under Section 108. This takes us to the next question as to what exactly could be taken as the date of death.”

26. After pointing out the distinction between Sections 107 and 108 of the Evidence Act, the Division Bench of the Madras High Court then took up for consideration in *The Managing Director, State Express Transport Corporation Tamil Nadu Limited Vs. E.Tamilarasi*, the next question as to what exactly could be taken to be the date of death. Inviting a reference to the decision of the Supreme Court in *N.Jayalakshmi Ammal v. Gopala Pathar* (AIR 1995 SC 995), wherein the Supreme Court quoted a passage from Sarkar on Evidence to the effect that though a presumption of death arises after 7 years, the exact time of death is not

a matter of presumption, it was pointed out by the Division Bench of the Madras High Court that ***the burden lies upon the person who asserts a particular date as the date of death, to prove the same.*** In paragraphs 19 to 21 of its decision, the Division Bench of the Madras High Court held as follows:

“19. As a matter of fact, there is an inherent danger in presuming that the date from which a person went missing could be taken to be the date of death. If it is so taken, many claims that could be made by his Legal Heirs would become barred by time, despite the fact that the very presumption of death could be raised only after seven years from the date on which he was last heard of.

20. In *LIC of India v. Anuradha*, MANU/ SC/ 0285/2004 : 2004 (3) CTC 281 (SC), which we have cited earlier, the Supreme Court extracted the following passage from Halsbury's Laws of England, after pointing out that there is no difference between the English Law and the Indian Law on the subject. Where the presumption of death after seven years' absence applies, the person will be presumed to have died by the end of that period, where the presumption does not apply, or is displaced by evidence, the issue will be decided on the facts of the particular case. In some old cases, where neither the evidence nor the incidence of the burden of proof was decisive, the Court made the best order it could in the circumstances. Where the question to be decided, for the purposes affecting the title to property, is which of two persons died first, a Statutory Rule may apply. The question whether a person was alive or dead at a given date will be decided on all the evidence available at the date of the hearing.

21. Therefore, it is impossible to think that a person can be presumed to be dead from the date on which he went missing. Unless a period of seven years expire from the date of his missing, the very occasion for the raising of the presumption does not arise. Therefore, the learned Judge was not correct in thinking that the Respondent's

husband should be presumed to be dead from May 1999 onwards.”

27. Therefore, the consequences of holding a person to be deemed to be dead from the date on which he went missing, are disastrous. The Statute merely raises a presumption and indicates the circumstances under which the presumption would arise. Such a presumption cannot relate back. Even historically, the presumption was never considered to relate back, in any of the legal regimes including the common law regime. This can be demonstrated by tracing the origin of this rule of evidence both from the common law regime and from the statutory regime of India and the other parts of the world.

ORIGIN OF THE RULE IN OTHER COUNTRIES (England, Ireland, Scotland, Australia and U.S.A.)

28. *The precise origin of this rule in the western world is difficult to predict. It appears that the necessity for this rule was felt for the first time, when sailors who went on long voyages on the seas, returned home after several years, only to find their wives remarried to other men.* This led to complaints of bigamy. Therefore, this rule was first set out in statutory form in Section 1 of the **(English) Bigamy Act of 1603**, which provided a defence to a charge of bigamy if either of those who were charged, marry a second time when the first spouse had been beyond the seas

for seven years or those whose spouse had been absent for seven years although not beyond the seas.

29. This seven year rule under the English Bigamy Act of 1603 was later incorporated in the **English Cestui Que Vie Act, 1666**. It was later adopted in the **Life Estates Act, 1695 by the Irish Parliament**.

30. As could be seen from history of this Rule in England and Ireland, the rule was primarily intended to address questions relating to family life and properties of sailors, who are not heard of for a continuous period of time.

31. In **Australia** there is no generally applicable legislation for missing persons, but the Courts apply the common law presumption of death. In a leading decision in *Axon v. Axon* (1937 (59) CLLAW 395) the High Court of Australia held “if, at the time when the issue of whether a man is alive or dead must be judicially determined, at least seven years have elapsed since he was last seen or heard of by those who in the circumstances of the case would according to the common course of affairs be likely to have received communication from him or to have learnt of his whereabouts, were he living, then in the absence of evidence to the contrary it should be found that he was dead”.

32. **Scotland** enacted its own law under the title **Presumption of Death (Scotland) Act, 1977** which provides for a declaration of presumed death, if a person who is missing has not been known to be alive for a period of at least

seven years. In Ireland, a law was enacted under the **Presumption of Death (Ireland) Act, 2009** almost on similar lines as in Scotland.

33. In **England, the Presumption of Death Act, 2013** was passed providing under Section 2 that when an application is made, the Court must make a declaration of death, if it is satisfied that a missing person has died or has not been known to be alive for a period of at least 7 years. ***Interestingly under Section 2(2) of the Presumption of Death Act, 2013 (England), the declaration issued by the Court should include a finding as to the date and time of the missing person's death.*** Section 2 of the English Act could be usefully extracted as follows:

Section 2 of the Presumption of Death Act, 2013 (England):
Making declaration;

(1) On an application under section 1, the court must make the declaration if it is satisfied that the missing person—

(a) has died, or

(b) has not been known to be alive for a period of at least 7 years.

(2) ***It must include in the declaration a finding as to the date and time of the missing person's death.***

(3) ***Where the court—***

(a) is satisfied that the missing person has died, but

(b) is uncertain at which moment during a period the missing person died, the finding must be that the missing person is presumed to have died at the end of that period.

(4) ***Where the court—***

(a) is satisfied that the missing person has not been known to be alive for a period of at least 7 years, but

(b) is not satisfied that the missing person has died, the finding must be that the missing person is presumed to have died at the end of the period of 7 years beginning with

the day after the day on which he or she was last known to be alive.

34. In U.S.A., 38 Code deals with the rule relating to presumption of death. It reads as follows:

38 U.S. Code S. 108: Seven year absence- presumption of death.

(a) No State law providing for presumption of death shall be applicable to claims for benefits under laws administered by the Secretary.

(b) If evidence satisfactory to the Secretary is submitted establishing the continued and unexplained absence of any individual from that individual's home and family for seven or more years, and establishing that after diligent search no evidence of that individual's existence after the date of disappearance has been found or received, ***the death of such individual as of the date of the expiration of such period shall be considered as sufficiently proved.***

ORIGIN OF THE RULE IN ANCIENT INDIA:

35. It is interesting to note that while the western world realised a necessity for this rule of presumption only in the early 17th century when its sailors set on long voyages, the Indian Law Makers appears to have adopted this presumption at least a 1000 years before the Western Law makers could conceive of the same. References to this presumption could be found in the Smritis of Manu, Narada, Gautama and Vasistha. The Rules found in these smritis are as follows:

“Naradasmriti Chapter 12 - Relations between men and women – [98-102]

A brahmana woman should wait eight years for a husband who has gone away; but if she has no children, she should wait only four years before going to another man. A ksatriya woman should wait for six years, three years if she has no children. A vaisya woman should wait four years if she has children, two years if she does not. There is no waiting period for a sudra woman. She commits no breach of righteousness, especially if she has no children. The normal thing, however, is to wait a year. These rules to women whose husbands have gone away and not been seen. If the husband is still alive and has been heard of, these waiting periods should be

doubled. Prajapati creatures so that they might have offspring; therefore if a woman goes to another man under these circumstances there is no sin entailed.

Manusmriti; Chapter 9 – [76]

If the man has gone away on a journey to fulfil some duty, (she) should wait for him for eight years; (if he has gone) for learning or fame, six; for pleasure, three years.

Gautama – Chapter 18 – [15 and 17]

15. (A wife must) wait for 6 years, if her husband has disappeared. If he is heard of, she shall go to him.
17. (The wife) of a brahmana (who has gone to a foreign country) for the purpose of studying (must wait) twelve years.

Vasistha – Chapter 17 – [78]

78. In this manner a wife of the Brahmana caste who has issue (shall wait) five years, and one who has no issue, four years; a wife of the ksatriya caste who has issue, five years, and one who has no issue, three years; a wife of the vaisya caste who has issue, four years, and one who has no issue two years; a wife of the shudra caste who has issue, three years and one who has no issue, one year.”

Though the above rules found in various smritis appear to be discriminatory and may not be acceptable in an egalitarian society governed by Constitutional values and morality, the fact remains that these law makers could perceive of a presumption of death several centuries ago.

PRESUMPTION AND INFERENCE:

36. Thus it is clear that both in England and elsewhere, the date of expiry of 7 years from the time a person went missing, is taken to be the date of death also, unless any other date is proved by the party asserting, to be the date of death. ***But the moment a party is able to prove a particular date as the date of death, then the question of presumption itself would not arise.*** The decisions of various Courts holding that in certain circumstances a

person must be presumed to be dead from the date he went missing or within a few days thereafter, are based upon a flawed logic. ***The Evidence Act allows of only one presumption. But by holding that a person must be presumed to be dead from the time he went missing, some Courts have raised a second presumption, which is not traceable to the Evidence Act.*** A distinction exists between a presumed fact and an inferred one. ***Many times the confusion occurs due to the use of the “presumption” as a synonym for inference.***

37. As we have pointed out earlier, there is a distinction between a presumption of fact and an inference. Section 108 of the Evidence Act admits of only one presumption namely the presumption of death of a person not heard of for 7 years by those who would normally have heard of him. Since it is a rebuttable presumption and the rebuttal can take place at any time, the law does not stipulate any date as the date on which a person may be presumed to be dead. There is huge difference between the presumption as to death and presumption as to date of death. Since the law does not prescribe any presumption as to date of death, the same may have to be proved. An inference cannot take the place on proof or presumption.

38. As a matter of fact an interesting case came up before the Succession Court in Hancock, of the State of OHIO in the U.S.A. A person by name Donald Eugene Miller went

missing from August 1986, leaving his wife and two children in the lurch. His wife Robin Miller filed a petition in the Succession Court in 1994 for a declaration that her husband should be presumed to be dead. After ordering the publication of notices in the local newspapers for 4 consecutive weeks, the Court issued a decree on 31-05-1994 declaring that Donald Eugene Miller should be presumed to be dead and that his minor children should be granted benefits under the Social Security Scheme of the Government. After 19 years of such a declaration, Donald Eugene Miller surfaced and applied for a driving licence. But the Transport Department rejected the application on the ground that no driving licence could be issued to a person who is dead as per law. Therefore, he filed a petition on 15-07-2013 in the very same Succession Court seeking to set aside the decree of the declaration of presumed death. But unfortunately his wife opposed the petition on the ground that the same was barred by limitation as it was not filed within a period of 3 years from the date of decree. The Court accepted the defence taken by the wife and dismissed the petition filed by Mr. Miller.

39. Therefore, what lies in the realm of presumption, which can be rebutted at any time, cannot be enlarged by way of interpretations, however well intended they are. Hence, we hold that the Tribunal was wrong in presuming the death of the respondent's husband to have taken place from the time he went missing. Once this presumption goes, it follows as a

corollary that the penalty of removal from service passed by the petitioners cannot be stated to be illegal.

GOVERNMENT ORDERS ON THE SUBJECT:

40. But the conclusion that we have come to in the preceding paragraph would not take us to our destination. Admittedly, there are executive instructions in the form of Government of India's decisions issued under Rule 54 of the CCS (Pension) Rules. Since these decisions are issued under the statutory rules, they are binding upon the Departments. One of the decisions of the Government of India could be found in Circular Letter No.4-52/86-Pen., dated 3-3-1989. The circular reads as follows:

“Payment of retirement gratuity and family pension to the family, in case an official's whereabouts are not known:-

1. A number of cases are referred to this Department for grant of family pension to the eligible family members of employees who have suddenly disappeared and whose whereabouts are not known. At present, all such cases are considered on merits in this department. In the normal course, unless a period of 7 years has elapsed since the date of disappearance of the employee, he cannot be deemed to be dead and 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 main is alive or dead and it is proved that he has not been heard of for 7 years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

2. The matter has been under consideration of the Government for some time as withholding of the benefits due to the family has been causing a great deal of hardship. It has been decided that (i) when an employee disappears leaving his family, the family can be paid in the first instance the amount of salary due, leave encashment due and the amount of GPF having regard to the nomination made by the employee, (ii) after the elapse of a period of one year, other benefits like retirement or death gratuity/family pension may also be granted to the family subject to the fulfilment of conditions prescribed in the succeeding paragraphs.

3. The above benefits may be sanctioned by the Administrative Ministry Department after observing the 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) An Indemnity Bond should be taken from the nominee/dependents of the employee that all payments will be adjusted against the payments due to the employee in case he appears on the scene and makes any claim.

4. The Head of Office will assess all Government dues outstanding against the Government servant and effect their recovery in accordance with Rule 71 of CCS (Pension) Rules, 1972, and other instructions in force for effecting recovery of Government dues.

5. The family can apply to the Head of the Office of the Government servant for grant of family pension and death/retirement gratuity, after one year from the date of disappearance of the Government servant in accordance with the prescribed procedure for sanction of family pension and death/retirement gratuity. In case the disbursement of death/retirement gratuity is not effected within three months of the date of application, the interest shall be paid at the rates applicable and responsibility for the delay fixed.

NOTE:- The above orders regulate genuine cases of disappearance under normal circumstances and not the cases in which officials disappear after committing frauds, etc. In latter type of cases, the family pension needs to be sanctioned only on the Government employee being acquired by the Court of Law or after the conclusion of the disciplinary proceedings, etc., as the case may be.”

41. The above circular clinches the issue with respect to the claim of the respondent. Therefore, irrespective of our decision on the purport of Section 108 of the Evidence Act, 1872, the respondent is entitled to all the benefits as per the aforesaid decision of the Government of India under the Circular Letter No.4-52/86-Pen., dated 3-3-1989.

42. Hence, the writ petition is disposed of modifying the order of the Tribunal and directing the petitioners to grant all the benefits applicable to the respondent under the Circular

Letter No.4-52/86-Pen., dated 3-3-1989 within a period of four (4) weeks.

43. As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed. No costs.

V.RAMASUBRAMANIAN, J

G.SHYAM PRASAD, J

Date: 31st January, 2017

Ak/Ksn

Note: L.R. copy to be marked.

B.O./Ksn

