

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.12.2018

CORAM

THE HONOURABLE MR.JUSTICE M.M.SUNDRESH
and
THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

W.A.No.1304 of 2013

N.Mohana

... Appellant

-vs-

1.The Executive Engineer,
Agricultural Engineering Department,
Coimbatore - 9.

2.The Chief Engineer,
Agricultural Engineering Department,
487, Anna Salai, Nandhanam,
Chennai - 35.

3.The Assistant Executive Engineer,
Agricultural Engineering Department,
Pollachi.

4.The District Collector,
Coimbatore.

5.The Tahsildar,
Madurai South Taluk, Madurai.

.... Respondents

Writ Appeal filed under Clause 15 of the Letters Patent against the order dated 09.09.2011 made in W.P.No.19814 of 2011.

Prayer in WP No.19814/2011 : Writ Petition filed under Article 226 of the Constitution of India praying to issue writ of certiorarified mandamus or any other writ or direction or order in the nature of a writ calling for the records relating to the proceedings No.C/4822/97 dated 20.10.99 on the file of the 1st respondent and quash the same and further directing the respondents to disburse the family pension and death benefits of the petitioners husband K.Sreenivasan and to return the mortgaged title documents.

For Appellant : Mr.V.S.Jagadeesan

For Respondents : Ms.A.Sri Jayanthi,
Spl. Govt. Pleader

JUDGMENT

[Judgment of the Court was delivered by M.M.SUNDRESH,J.]

The appellant is the wife of the employee, against whom, an order of dismissal was passed in the year 1999 on the premise that he was absented from duty from the year 1994. The learned single Judge dismissed the writ petition on two grounds. It was held that if the appellant's husband was missing, it is for the appellant to approach the Civil Court and get a decree by placing reliance upon Section 108 of the Indian Evidence Act. Secondly, it has been stated that the order of dismissal has been challenged belatedly. Challenging the same, the present writ appeal has been filed.

2.Learned counsel appearing for the appellant would submit that it is a case of desertion. Even according to the respondents, the employee did not report for duty from 1994 onwards. Though the report of the Superintendent of Police that he was alive, it further stated that he was mentally unstable and not traceable. The appellant was having a minor female child to take care at the relevant point of time. Her husband has neither challenged the order of dismissal nor made any attempt to receive the benefits, if any. To buttress his submission, learned counsel has made reliance upon the decision of the Division Bench in The Managing Director, State Express Transport Corporation & Others Vs. E.Tamilarasi (2016-3 L.W. 139), wherein in paragraphs 23 to 29, it has been held as under:

23. Having cleared the said aspect, what is now to be considered is as to whether the dismissal order is valid or not. Fortunately, the respondent has challenged the order of dismissal. The dismissal order has been passed in disciplinary proceedings taken exparte. The reason for non-appearance of the respondent's husband before the disciplinary authority is the factum of his missing. Once it is established that he has not been heard of for seven years from May 1999, it was impossible for him to participate in the enquiry. Therefore, the

punishment by itself, cannot stand unless the presumption under Section 108 of the Indian Evidence Act, 1872 is rebutted by the employer.

24. As a matter of fact, the Government itself had taken note of the contingencies of this nature and amended the Tamil Nadu Pension Rules, 1978, by G.O.Ms.No.540, Finance (Pension), dated 05.07.1995. Rule 49-A inserted by way of amendment, reads as follows:

"49-A. Benefits to the family of a disappearing Government servant.- When a Government servant disappears leaving his family, the family of such Government servant shall be entitled immediately for the payment of dues of salary leave encashment. General Provident Fund and Special Family Pension-cum-Gratuity and after lapse of a period of two years of such disappearance, for the payment of dues of Death-cum-Retirement Gratuity and Family Pension in accordance with the nomination made by such Government Servant, subject to the following conditions, namely,-

(i) a complaint must have been lodged with the police station concerned and a report obtained that the Government servant has not been traced despite all efforts made by the police; and

(ii) An indemnity bond must have been executed by the nominee or dependents of such Government servant to the effect that all payments shall be adjusted against the payment due to the such Government servant in case he appears later and makes any claim."

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25. A careful look at Rule 49-A would show that if a Government servant disappears leaving his family, the family of such Government servant shall be entitled immediately for the payment of dues of salary, leave encashment, General Provident Fund and Special Family Pension-cum-Gratuity. After a lapse of a period of two years of such disappearance, the family will also be entitled to the payment of dues

of Death-cum-Retirement Gratuity and Family Pension in accordance with the nomination made by such Government Servant.

26. But, the above payments are subject to two conditions namely, (i) a complaint had been lodged with the police and a report obtained and (ii) an indemnity bond had been executed by the nominee to the effect that all payments shall be adjusted against the payments due to such Government servant, in case, he surfaces later.

27. Therefore, Rule 49-A of the Tamil Nadu Pension Rules, 1978, provides a relief which is larger in nature than the consequences that flow out of Section 108 of the Indian Evidence Act, 1872.

28. But, we do not know whether the provision similar to Rule 49-A of the Tamil Nadu Pension Rules, is available in the Rules relating to Transport Corporation employees. In any case, the logic behind under Rule 49-A is of universal application.

29. Therefore, we are of the considered view that the benefits granted by the learned Judge are in tune with the benefits that would flow out of the presumption under Section 108 of the Indian Evidence Act, 1872. The only correction that is required in the order of the learned Judge is that the date of death cannot be fixed as May, 1999.

3. Learned Special Government Pleader, on instructions, submitted that the claim is belated and there is no clear finding with respect to the non-availability of the husband of the appellant.

4. Even according to the respondents, the employee did not turn up from the year 1994 onwards. The order of dismissal was passed exparte. Even the Superintendent of Police has stated that whereabouts are not known. Therefore, it is not the case of the respondents that the husband of the appellant was and is alive. It is the specific case of the appellant that her husband was not traceable for quite some time and in any case, more than seven years, as mandated under Section 108 of the Indian

Evidence Act. Once the aforesaid position is not disputed, the onus shifts to the person who claims the other as alive. We are not even having the abovesaid situation in the case on hand. In the judgment referred supra, the scope of Rule 49A of The Tamil Nadu Pension Rules was taken into consideration. The question of delay and laches will have to be seen on the facts of each case. The appellant merely seeks to step into the shoes of her husband and only for the purpose of getting the pensionary benefits apart from any other. Therefore, we are of the view that considering the peculiar facts of the case and in the light of the judgment referred supra, the respondents will have to be directed to pay the pensionary benefits by treating that the appellant's husband was in service till 11.05.1994. For the purpose of claiming any other incidental benefits also, the order or dismissal shall not stand. These benefits must have accrued in favour of the husband of the appellant on or before 11.05.1994.

5. Accordingly, the writ appeal stands disposed of. The respondents are directed to comply with the order aforesaid within a period of twelve weeks from the date of receipt of a copy of this order. No costs.

Sd/-
Assistant Registrar (CS-IV)

//True copy//

Sub Assistant Registrar

mmi

To

- सत्यमेव जयते
1. The Executive Engineer,
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Madurai South Taluk, Madurai.

+1cc to Mr.V.S.Jagadeesan, Advocate SR.No.84644

+1cc to Government Pleader SR.No.85114

W.A.No.1304 of 2013

MG (CO)
GMY (08/01/2019)



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