

HONOURABLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION No.12586 of 2011

Date: 19.01.2018

Between :

D.Vijaya Kumari w/o. late D.Jagga Rao,
Aged 56 years, Occu: Household, R/o.Suryapet,
Nalgonda District, presently residing at MIG 99,
KPHB Colony, First Floor, Balajinagar,
Near Prerana Hospital, Kukatpally, Hyderabad.

.... Petitioner

And

Chairman & Managing Director, Central Power
Distribution Company of A.P. Ltd.,
Opp: Singareni Bhavan, Red Hills, Hyderabad
and others.

.... Respondents



This Court made the following :

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ORDER:

Husband of the petitioner while working as Additional Assistant Engineer in Suryapet was transferred to Nizamabad on 12.03.1980. On allegation that husband of the petitioner did not report to duty in Nizamabad, by order dated 22.09.1980, he was placed under suspension. It appears, subsistence allowance was paid from 22.09.1980 till June, 1984 and thereafter it was not paid on the ground that husband did not claim the subsistence allowance. By order dated 19.07.1988, the competent authority declared husband of petitioner as deemed to have resigned from service as he was unauthorisedly absent, by invoking provision in Regulation 28(3) of A.P.S.E.B. Service Regulations. According to petitioner, whereabouts of her husband were not known and all efforts to trace him were futile. As she was having young children and requires support, she went to her sister's place and lived there for long time with fond hope that her husband would come back. Petitioner is illiterate and did not know what legal steps were required to be taken to trace her husband. After her son attained majority, he filed complaint in Eluru Rural Police Station on 03.08.1995, registered as Crime Number 65 of 1995. On 13.09.1995, Police reported as not traceable.

2. On advice, petitioner represented for provision of terminal benefits and family pension. Alleging that representation is not acted upon and terminal benefits are not paid, petitioner earlier filed W.P.No.8306 of 2005. By the time, writ petition was taken up for consideration, the competent authority passed orders on

29.12.2008 rejecting claim of petitioner. In view of the orders passed on 29.12.2008, W.P.No.8306 of 2005 was disposed of as infructuous, granting liberty to petitioner to work out remedies as available in law. Challenging order dated 19.07.1988 holding Mr.Jagge Rao as deemed to have resigned, order in Memo dt.25.02.2005 and letter dated 29.12.2008, this writ petition is filed.

3. To complete the narration of facts, record would disclose that on 25.02.2005 also an order was passed rejecting request of petitioner for payment of family pension. It was stated that as early as on 19.07.1988 order was passed holding husband of petitioner deemed to have resigned from service and, therefore, family is not entitled to terminal benefits and family pension. Challenging order dated 19.07.1988 holding Mr.Jagge Rao as deemed to have resigned, order in Memo dt.25.02.2005 and letter dated 29.12.2008, this writ petition is filed.

4. Heard Sri J R Manohar Rao, learned counsel for petitioner, and Sri R.Vinod Reddy, learned standing counsel for respondents.

5. Learned counsel for petitioner submitted that as husband of petitioner was missing for more than 7 years, it is deemed that her husband died and, therefore, question of passing orders on 19.07.1988 holding that husband of petitioner was deemed to have resigned and subsequent orders rejecting request of petitioner for provision of terminal benefits and family pension is *ex facie* illegal and, therefore, same is liable to be set aside and that petitioner is entitled to all consequential benefits.

6. Learned counsel would further submit fact that from 22.09.1980 to June, 1984, subsistence allowance was paid, would show that petitioner husband was reporting to the competent authority. As he was under suspension from 22.09.1980, it cannot be said that husband of petitioner was unauthorisedly absent as person on suspension is not required to work. His suspension was not revoked till the alleged order of 19.07.1988. Therefore, merely because petitioner did not receive subsistence allowance after June, 1984 cannot be a ground to hold that husband of the petitioner was unauthorisely absent to invoke provision under Regulation 28(3) of the Service Regulations. He further submitted that Regulation 28(3) is held to be illegal by Division Bench of this Court in W.A.No.898 of 1995 and, therefore, said provision cannot be invoked to terminate the service of regular employee and only by way of disciplinary action in accordance with Discipline Regulations, person can be removed/ dismissed from service. He further submits that as evident from the material on record, disciplinary proceedings were initiated and once disciplinary proceedings were already set in motion, no order holding husband of petitioner as deemed to have resigned can be passed as part of disciplinary action and, therefore, on that ground also, the order is vitiated. At any rate, husband is deemed as dead before 19.07.1988 and, therefore, no order under Regulation 29(3) can be passed against a dead person.

7. Per contra, learned standing counsel would contend that Mr. Jagga Rao was unauthorisedly absent from duties for a long time and his whereabouts were not known. There was grave allegation of demanding bribe to do official favour and only to escape the

disciplinary action he went missing. Disciplinary proceedings on grave allegation of corruption could not be finalized as he was not traceable. Notices published in daily newspapers were not responded. Thus, Board had no option but to hold that Mr. Jagga Rao was deemed to have resigned from service. He would submit that power to hold that employee is deemed to have resigned is traceable to Reg.28 (3). He would submit that in the facts of this case said decision was validly made. He further submitted, there were serious allegations of intimidation of farmers not to depose against him on the issue of collection of money from farmers to issue bonds but purchasing bonds in the name of father-in-law crimes were registered. Only to escape prosecution and disciplinary action he went missing. He further submitted that the claim of petitioner is hit by delay and laches. The order holding Mr.Jagga Rao as deemed to have resigned was made on 19.07.1988. For the first time, issue was raised after 17 years by filing W P No.8306 of 2005. Since, notices were published in daily newspapers petitioner cannot claim no knowledge of such orders. Further, petitioner never contact the respondent at any time earlier to filing of WP No.8306 of 2005. According to learned standing counsel employee is still alive.

8. Employer passed order on 19.07.1988 holding Mr. Jagga Rao as deemed to have resigned from service by invoking provision in Reg. 28(3). Employer held him unauthorizedly absent from September, 1980. At any rate after June, 1984, when he last received subsistence allowance he was not traceable. The report of Police dated 8.11.1995 certify that Mr. Jagga Rao could not be traced. Thus, he was presumed to have died. It appears,

petitioner made a claim for the first time in the year 2003 i.e., 8 years later.

9. In the above factual background, following issues arise for consideration :

- 1) Whether order dated 19.07.19788 holding that Mr Jagga Rao was deemed to have resigned under Regulation 28(3) is violated in view of certificate issued by Police holding that Mr. Jagga Rao could not be traced ?
- 2) Whether order dated 19.07.1988 holding Mr. Jagga Rao as deemed to have resigned is valid and legal ?

POINT No.1:

10. In W.P.No.34859 of 2016, Division Bench of this Court reviewed precedent decisions on issue of presumption of death.

10.1. In the said case, 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. The 1st respondent lodged a police complaint on 04-9-1994 as man missing. 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 was 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. The first respondent was informed that her husband was imposed with penalty of removal

from service, by order dated 10-01-1997 for his unauthorised absence. The first respondent was informed 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.

10.2. The Division Bench examined 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 of IPC. 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.

10.3. On analysis of relevant provisions and precedent decisions, the Division Bench held,

“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.

.....

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.”

11. In the case on hand, employee was unauthorisedly absent for long time. He was placed under suspension by order dated 22.09.1980. He received subsistence allowance till June, 1984. Thereafter, his whereabouts were not known. As he did not respond to notices to participate in disciplinary enquiry and notice against invoking Reg. 28(3), order was passed on 19.07.1988 holding him deemed to have resigned.

More than seven years later complaint was lodged with police alleging “man missing”. On 13.09.1995, police report that he could not be traced. Thus, by the time decision was made there was not even a trace of reporting of ‘man missing’. Even after report of police dated 8.11.1995 employer was not appraised. For the first time, only in the year 2003 a request for settlement of terminal benefits was made. No proof was shown to employer nor material is placed before this Court a particular date of death. Date of death cannot be presumed from retrospective date when Mr. Jagga Rao went missing. As held by the Division Bench the decision of competent authority holding that employee, by his conduct, deemed to have resigned cannot be nullified on the presumption of death of Mr. Jagga Rao.

POINT NO.2:

12. It is next contended that Reg. 28(3), which was invoked is held as unconstitutional by this Court in WA No.898 of 1995 and therefore order dated 19.7.1988 is not sustainable.

13. The Regulation 28(3) of the Regulations reads as under:

“... Any employee of the Board who remained unauthorisedly absent from duty for a continuous period of one year shall be deemed to have resigned from service from the date of absence and shall automatically cease to be in Board Employment.”

14. In WA No.898 of 1995, following the decision of this Court in **Chief Engineer, APSEB v. K.Naga Hema**¹, in paragraph Nos.23 & 24, the Division Bench held as under:

“... This Court in CHIEF ENGINEER, APSEB vs. K. NAGA HEMA has referred to the judgment of the Supreme Court and the principles upon which one cannot but hold that in case there is an allegation that someone has absented himself from work without sanction of leave, is alleged of committing a misconduct and any provision which shall provide for automatic cessation of service on account of unauthorised absence, would not be valid. Since such an allegation is an allegation of misconduct, enquiry into the allegations in accordance with law and a decision accordingly to punish for the alleged delinquency will be necessary.

Although learned single Judge has not decided the issue and has left the matter open observing that it is a fit case for the writ petitioner – appellant to raise industrial dispute since it is not in dispute that the respondent – Board is a ‘State’ under Article 12 of the Constitution of India and Regulation 28 (3) of the Service Regulations of the respondent – Board provides for automatic cessation, which alone has been invoked, we have to hold, following the above pronouncement of the Court, that the Regulation providing for automatic cessation is invalid and that for the alleged misconduct action can be taken against the writ petitioner – appellant strictly in accordance with law. He must, for the reasons aforementioned, be served with a memo of charges and afforded opportunity of being heard and after enquiry is concluded, it is decided by the competent authority whether to punish him and if to punish him, what would be the quantum of punishment.”

15. When disciplinary proceedings are initiated and power of disciplinary action is exercised by the competent authority, as a quasi-judicial authority he can impose punishment as prescribed

¹ 1998 (1) ALD 304

in the Service Regulations, but cannot impose a punishment which is not prescribed in the Service Regulations.

16. Thus, to appreciate the contention of learned counsel for petitioner, it is necessary to examine the nature of proceedings taken against Mr. Jagga Rao.

17. It appears, against husband of petitioner, it was alleged that he was collecting amounts from farmers towards debentures floated by APSEB, but debentures were purchased in the name of his father-in-law. Based on preliminary enquiry, by order dated 12.3.1980, D.Jagga Rao was transferred to Nizamabad. Since he did not report to duty at place of posting, by order dated 22.9.1980, he was placed under suspension. It is pertinent to note that as per report of Superintending Engineer, Khammam dated 15.11.1980, whereabouts of Jagga Rao were not known and family members have also vacated the quarter in Suryapet earlier occupied by them.

18. It is interesting to note that as per report of Deputy General of Police (intelligence) all the officers transferred out did not report at places of posting but were intimidating Ryots not to depose against them. Crime No.111 of 1980 was registered in Suryapet P.S., under Sections 363 and 344 of IPC against D.Jagga Rao and he was surrendered on 29.5.1980.

19. On the issue of sale of rural debentures, Cr.No.1/RC/HR/81 was registered u/Ss 120(B) and 409 of IPC r/w Section 5 (2) r/w Section 5(1)(c) of Prevention of Corruption Act, 1947 against

petitioner and three others. On 28.4.1984, the Director, ACB, submitted final report suggesting departmental action.

20. According to respondents, soon after ACB filed final report, Sri Jagga Rao went missing. He was paid subsistence allowance only till June, 1984. Thereafter, his whereabouts were not known. He did not claim subsistence allowance after June, 1984. Family members have not informed whereabouts of Mr. Jagga Rao.

21. Record discloses that by order of Member Secretary dated 23/25.7.1985, Enquiry Officer was appointed to enquire into allegations levelled against Mr. Jagga Rao. Enquiry Officer framed two charges vide Memo dated 11.11.1986. The sum and substance of the allegation in two charges is demand and acceptance of illegal gratification from prospective consumers for laying L.T line for Agricultural purposes. This charge memo could not be served on Mr. Jagga Rao as his whereabouts were not known. On 27.4.1987, notification was published in the Daily Newspaper directing him to appear before Enquiry Officer. He did not appear and he was not traceable. The same was reported to the competent authority.

22. In view of long unauthorized absence and employee whereabouts were not known revised charge sheet was drawn vide Memo of Enquiry Officer dated 1.5.1987. In charge three, it was alleged that in view of long unauthorized absence why it should not be held as deemed to have resigned from service as envisaged in Reg. 28(3) of the Service Regulations.

23. Since, whereabouts of Jagga Rao were not known for 7 years and he did not respond to paper notification also, Enquiry Officer has not recorded findings on charges 1 and 2 and suggested to take further course as per Reg. 28(3) and as per procedure envisaged in Board Memo No.DP/DM(A)/E.5/252/82, dated 19.8.1983. Be it noted, enquiry officer has not recorded findings of guilt, *ex parte*.

24. On due consideration of suggestions given by enquiry officer and on due verification of fact of long unauthorized absence, the Member Secretary has come to provisional conclusion that Mr. Jagga Rao has deemed to have resigned as per Reg. 28(3). Accordingly, show-cause notice was published in the Deccan Chronical daily newspaper dated 21.1.1988 calling upon Mr. Jagga Rao to submit his explanation. No explanation was filed in response to said notice. Therefore, member secretary passed orders holding that Mr. Jagga Rao is deemed to have resigned from service and ceased to be in the Boards' employment from 20.9.1980. This order was published in Daily Newspaper dt.5.8.1988. Thus, by 5.8.1988, the issue of Mr. Jagga Rao ceasing to be in employment has become final. It is thus clear that disciplinary action as originally envisaged was abandoned since Mr. Jagga Rao was not responding to notices and power under Reg. 28(3) was invoked. It is appropriate to note at this stage that though charge of unauthorized absence was also incorporated in the revised charge memo dated 1.5.1987, on a careful reading of report of enquiry officer, it is clear that he has abandoned conducting of enquiry and instead suggested summary action under Regulation 28(3). This suggestion of enquiry officer was

accepted and process under Regulation 28(3) was set in motion. Thus, it is safe to conclude that order holding him as deemed to have resigned is as per Reg. 28(3) and is not as a measure of disciplinary action.

25. Even otherwise, the order holding that Mr. Jagga Rao deemed to have resigned was made on 19.07.1988. Seven years later complaint was lodged with Police alleging Mr. Jagga Rao was missing. In the year 2003, eight years after report of Police that Mr. Jagga Rao could not be traced, representation was made for settlement of family pension as if Mr. Jagga Rao was continued in service, whereas he was declared to have resigned long ago. As held by Division Bench, noted above, no presumption of deemed death can be made retrospectively. It appears, no information was furnished to employer about missing of Mr Jagga Rao even after Police report dated 13.09.1995. A Writ Petition was instituted for the first time in the year 2005. Having regard to these facts, it is also safe to hold that petitioner was not diligent in prosecuting the grievance, assuming one subsists.

26. By placing reliance on the decision of Division Bench in W.P.No.34859 of 2016, it is also contended that petitioner is entitled to family pension one year after the date of missing. In support of said contention, reliance is also placed on G.O.Ms.No.41 Finance & Planning (FW.PEN.I) Department, dated 08.02.1994. Learned counsel therefore submitted that even otherwise petitioner is entitled to family pension.

27. In response, learned standing counsel submitted that provisions of G.O.Ms.No.41 are applicable only in case of

disappearance of an employee in normal circumstances and not in case where official disappears after committing fraud etc. If any crime is registered, only in the event of employee being acquitted, such benefits can be extended. He would submit that the documents on record would disclose that crime was registered against Jagga Rao and that he was unauthorizedly absent for long time and such absence was deliberate and wilful only to avoid disciplinary action. He would submit that record would disclose that he threatened the farmers not to depose against him on the allegation of misusing of farmers' contribution towards rural debentures, intimidated them and there was also an allegation of illegal confinement. Disciplinary proceedings were also initiated against him, but could not be concluded as he was not responding to the notices. Learned standing counsel would therefore submit that having regard to these facts, petitioner is not entitled to the benefit of scheme notified vide G.O.Ms.No.41.

28. I have carefully considered the scope of G.O.Ms.No.41. As seen from paragraph 4 (b)(6), scheme envisages that a person is entitled to family pension if the employee disappears in the normal circumstances and had not committed any fraud. As noted above, crimes were registered against him and disciplinary action was initiated and they were pending when he went missing. Disciplinary proceedings could not be completed since employee was not responding; the enquiry officer reported the same to the disciplinary authority and suggested for taking action under Regulation 28(3). Accordingly, further steps were taken and final order was passed holding him as deemed to have resigned. According to employer, he was missing since September, 1980. At

any rate he was not traceable after June, 1984. The scheme intends to elevate suffering of family members on account of sudden disappearance of employee in the normal circumstances. As the scheme carves out exception to normal rule, it must receive strict construction. Having regard to clause 4 (b)(6) and facts noted above, the disappearance of Mr. Jagga Rao cannot be said as in normal circumstances. Thus, merely on the ground of man missing, it is not automatic for wife of the employee to claim family pension under the scheme.

29. Further, once a person is held deemed to have resigned, no benefits accrue to the person or to his family members. Such declaration was made about 15 years earlier to claim was made for the first time to grant family pension. Thus, on this ground also, family pension cannot be claimed. Thus, petitioner is not entitled to this benefit also.

30. Thus, there is no merit in the claim of petitioner. Petitioner is not entitled to any relief. Writ Petition is liable to be dismissed. It is accordingly dismissed. There shall be no order as to costs.

Miscellaneous petitions if any pending in this writ petition shall stand closed.

JUSTICE P.NAVEEN RAO

Date: 19.01.2018
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