

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP No.4666 of 2016

Date of decision: 2.5.2019

Lachhami Devi

...Petitioner

Versus

Central Warehousing Corporation and others

...Respondents

CORAM: HON'BLE MR.JUSTICE G.S.SANDHAWALIA

Present: Mr. Amandeep Saini, Advocate for the petitioner.

Mr. Baldev Singh Badhran, Advocate for
respondents no.1 to 3.

G.S.SANDHAWALIA, J. (Oral)

The present petition filed under Articles 226/227 of the Constitution of India by the wife of missing employee seeks quashing of order dated 19.4.2006 (Annexure P/5) whereby service of the employee was terminated illegally having been passed against a dead person. Similar relief for quashing of calculation sheet dated 19.4.2012 (Annexure P/7) whereby an outstanding of ₹ 6,24,559/- has been shown against House Building Advance, HHG, Conveyance allowance apart from interest on the said benefits advanced to the employee is also sought. Resultantly, a writ in the nature of mandamus directing the respondents to grant the death-cum-retiral benefits of the deceased employee including CPF, pension, gratuity, leave encashment, ex-gratia compassionate appointment along with interest is also prayed for.

Counsel for the petitioner at the out set is not in a position to press the claim of compassionate appointment keeping in view the fact that the person had gone missing since the year 2004 and no effort was made at

that point of time for the said relief. In view of the settled position of law as laid down in **Umesh Kumar Nagpal Vs. State of Haryana 1994(4) SCC 138** such relief cannot be claimed at a belated stage.

Qua remaining relief as such defence of the respondent Corporation is that service of the employee had been dispensed with on account of removal order passed on 19.4.2006 (Annexure P/5). The same was in spite of the fact that they had been informed of the said development that the employee had gone missing in the month of March, 2004 and information had been received vide letter dated 7.4.2004 (Annexure P/4). However, in spite of the said information enquiry proceedings had been continued and after that order of removal had been passed. Share of CPF of the employee amounting to ₹ 12,574/- and ₹ 2,72,067/- employer's share was stated to be adjusted against the loans taken by the employee. It was further defence of the respondent Corporation that a sum of ₹ 7,58,018/- was recoverable from the husband of the petitioner on account of HBA, Household goods advance and conveyance advance with interest calculated upto 31.12.2016.

In order to appreciate whether the impugned orders are justified or not, brief reference to the facts necessarily have to be made.

The petitioner's husband was appointed as Chowkdar on 14.7.1982 with the respondent Corporation and thereafter promoted as Warehouse Assistant Grade II on 7.2.1986. He is stated to have gone missing with effect from 23/24.3.2004 and at point of time had over 20 years of service. After a week, DDR No.10 dated 30.3.2004 was also got recorded with the Police qua this aspect which would be clear from the certificate dated 17.6.2011(Annexure P/3) given by the officials of the

Police Station, Kurali District SAS Nagar. As mentioned above, vide communication (Annexure P/4) information regarding missing of the employee was given to the respondent which was also admitted by the respondent that on 7.4.2004 information had been received that employee as such was missing and the police had been informed and therefore information was sought from the employer also about his presence, if any.

However, the employer chose as such to issue public notice and departmentally proceed against the husband of the petitioner and an exparte enquiry proceedings report dated 15.2.2006 was received in which it was held that there was charge of unauthorised absence. Thereafter, public notice also was issued in the month of March, 2006 and order of removal was passed on 19.4.2006 (Annexure P/5). A sum of ₹ 7180.68 paise being cost of publication was also ordered to be recovered from the employee. Vide letter dated 19.4.2012 (Annexure P/7), a principal amount of ₹ 1,71,600/- as against outstanding House Building Advance, ₹ 11,500/- as against the Household Goods Allowance, ₹ 23,520/- as against the conveyance allowance was calculated. Resultantly, interest upon the aforesaid three amounts was calculated at ₹ 3,87,764/-, ₹ 8,677/- and ₹ 2,14,498/- respectively was calculated and total of the amount being ₹ 6,24,559/- was sought to be outstanding.

It is the case of the petitioner that for the CPF dues a sum of ₹ 1,25,514/- had been deposited whereas employer's share was ₹ 2,72,067/- as per communication dated 8.5.2012 (Annexure P/6). Resultantly, a sum of ₹ 3,97,581/- was also payable which was never paid to the petitioner in the year 2004. If the same had been adjusted against the principal amount of the advance taken at that point of time, interest element could have been cut

out and the amount would not swelled to ₹ 6,24,559/-.

On account of the husband of the petitioner going missing, a civil suit for declaration against the general public regarding revenue entries for purpose of benefit of the family and also regarding service benefits was filed on 15.5.2012. However, during the proceedings claim for service benefits was withdrawn which would be clear from the judgment dated 14.1.2014 (Annexure P/8). This was done apparently because the employer was not party. The Additional Civil Judge (Senior Division), Balachaur came to the conclusion that plaintiffs including the petitioner herein were the only class-I surviving heirs of Harbans Lal and decreed the suit. Thus it was accepted that the civil death of employee had taken place as he had not been heard for more than seven years by anybody in the world. In such circumstances, legal notice dated 12.8.2015 (Annexure P/9) claiming the relief had been served upon the respondent-Corporation. Thereafter, the present writ petition came to be filed.

Counsel for the petitioner has placed reliance upon the judgment of a Coordinate Bench in **Deepak Kumar Sharma Vs. State of Punjab and another** 2014(2) RSJ 640 to submit that the matter is squarely covered against the employer.

Counsel for the respondents on the other hand has sought to justify the said defence on the ground that even before the Civil Court claim against the Corporation had been withdrawn and therefore, the petitioner would be bound by the statement of the counsel.

The matter would not detain this Court for much time regarding concession given by the counsel. The claim as such for the service benefit is subject matter before this Court. The dispute in the suit was only qua the

civil death of the employee and the finding as such had been recorded that husband of the petitioner is no longer surviving. It is not disputed that the said suit was against the general public. In such circumstances, declaration of civil death of husband of the petitioner had not been objected to at any stage by the general public including the Corporation and had become final.

Admittedly, the employee had 21 years of service at the time he went missing in March, 2004. It is not that the respondent-Corporation was not aware of the fact that the employee had gone missing as per defence in the written statement. In such circumstances it would have been appropriate for them to hold back the enquiry proceedings and as such proceeding ahead with the enquiry against a person on the ground of unauthorised absence who had gone missing in spite of having received notice of the said fact could not be justified and the same could not be construed to be fair and reasonable. In **Deepak Kumar Sharma's case** (supra) the employee had been dismissed from service in spite of employer having come to know about the said fact. It was accordingly held that enquiry proceedings should have been kept pending and conducting enquiry against a dead person could not be construed to be fair and reasonable. The Civil Suit had also been filed in the said case and declaration had also been obtained. Resultantly, order of dismissal was converted into an order of compulsorily retirement and retiral benefits were ordered to be granted to the legal heirs. Relevant paras read as under:-

7. The facts of the case are glaring in nature. The respondent-authorities have continued with the enquiry proceedings against an employee who had gone missing and whose whereabouts were not known. This was inspite of repeated requests having been made by his legal heir i.e. the present petitioner to keep such enquiry proceedings in

abeyance. Clearly, the departmental proceedings having been conducted without there having been any association from the side of the delinquent, under the facts and circumstances of the present case, cannot be construed to be fair and reasonable. The respondent-authorities having been repeatedly put to notice that the delinquent had gone missing, a prudent and appropriate course of action would have been to suspend the enquiry proceedings. The impugned order of dismissal which has been passed as a consequence of such departmental proceedings has to be held to be bad in law.

ii) This Court cannot proceed oblivious of the fact that during the pendency of the present writ petition, a suit filed by the legal heirs of delinquent Sat Narain stands decreed and Sat Narain has been declared dead on account of having been proved that he has not been heard alive for the last more than seven years. On this count alone, the order of dismissal dated 30.9.2010, Annexure P10, cannot sustain.

8. Under normal circumstances, the order of dismissal having been set aside, the matter would have been remanded back to the respondent-authorities/competent authorities for passing of an order afresh. However, in the peculiar facts and circumstances of the instant case, while quashing the order of dismissal dated 30.9.2010, Annexure P10, I am of considered view that the ends of justice would be met upon the father of the petitioner to be treated as compulsorily retired from service w.e.f. the date of order of dismissal passed on 30.9.2010, in other words, from a date prior to the date of declaration by the Civil Court as regards his death. Consequently, the admissible retiral/pensionary benefits be released to the legal heirs of deceased Sat Narain within a period of three months from the date of receipt of a certified copy of this order. No benefit of salary, however, for the period in question i.e. 3.4.2004 till 30.9.2010 shall be given.

9. Petition allowed in the aforesaid terms.”

In the present case, the petitioner is even on the better footing

in as much as the employee was removed from service which though is a

major penalty under Regulation 59(ix) of the Central Warehousing (Staff) Regulations, 1986. The said Regulation provides removal from service which shall not be a disqualification for future employment under the Corporation. In contrast, the order of dismissal passed in **Deepak Kumar Sharma's case** supra had disqualification for his employment in Government service in future. In the present case, the petitioner is on better pedestal as husband of the petitioner had been removed from service but not dismissed. Therefore, husband of the petitioner cannot be denied retiral benefits for the long service rendered by him.

However an objection has been raised that in case of removal from service, employer's share of CPF is not payable. Resultantly, the order of removal dated 19.4.2006 (Annexure P/5) is modified and the same is converted into order of compulsorily retirement.

Accordingly, a direction is issued in the nature of Mandamus to the respondent-Corporation to grant the admissible retiral benefits of Mr. Harbans Lal, deceased/missing employee. The respondent-Corporation firstly shall adjust a sum of ₹ 3,97,581/- which had become due from the date the employee went missing i.e. from 23.3.2004 in view of retrospective presumption under Section 108 of the Indian Evidence Act, 1872. Reliance can be placed upon **Indira Vs. Union of India 2005(3) CivCC 494** a judgment of the Kerala High Court regarding this aspect.

In the said case an Army personnel had gone missing and therefore presumption of death was held to be from the date he went missing. Relevant part reads as under:-

“Since petitioner's husband had almost completed his normal tenure by virtue of his serious medical problem, he would have got exemption from two years reserved service,

there was no need for his deserting the Army as he was otherwise eligible for release with all the benefits within a couple of months from the alleged date of desertion. Moreover if he wanted to desert, there was no need for him to report for rejoining duty at Bangalore on 4.10.1995. section 106 of the Army Act of course does not require evidence of any conscious overt act of keeping out of service to declare a missing person a deserter. There may be cases where the missing person may be dead or permanently disabled mentally or physically which may not come to the notice of tile Army or the family. Even in such cases also, the Army may be justified in declaring him a deserter but the position will continue only until expiry of seven years from the date of missing of the person when presumption of death is available under Section 108 of the Evidence Act. Therefore, as and when presumption of death is available under Section 108 of the Evidence Act, the whole position changes and the presumption of death supersedes the declaration of the person a deserter under section 106 of the Army Act. Consequently the family members can claim all benefits as if the man is dead on the date of his missing. Since it is admitted that the petitioner's husband has not surfaced and could not be traced after 5.10.1995 inspire of effort to trace him by the Police at the request of the Army, the presumption of his death as on 5.10.1995 is available under Section 108 of the Evidence Act. Since petitioner's husband was admittedly sick and had undergone major surgery, the possibility of his death could not be ruled out. It is regularly reported in newspapers and media that many dead bodies surfacing here and there are all buried without anybody identifying such bodies. Going by the statement of the respondents petitioner's husband should have been on his way from Bangalore to Military Hospital on the date of missing that is. 5.10.1995. Apart from the presumption of death, the circumstances do not suggest any chance of petitioner's husband deserting the Army towards the end of his career.

In the circumstances, O.P. is disposed of directing the

respondents to grant all benefits to the petitioner and other family members treating as if petitioner's husband Mr. M. Radhakrishnan died in service on 5.10.1995. The respondents shall grant the benefits such as release of retirement benefits, grant of pension, appointment on compassionate grounds etc., within a period of four months from the date of production of copy of this judgment by the petitioner. The petitioner and family members will make required application along with copy of this judgment before the concerned authority for compliance of the judgment without any delay.”

The petitioner will be granted the benefit of outstanding as CPF from 23.3.2004 on the said amount which the Corporation had retained. The same will then be adjusted against the outstanding amount on account of advances taken under different heads as what was due on 23.3.2004 and right to calculate the interest on the advances in question would only be till that date. After adjusting the said amount whatever due if any shall be paid to the petitioner. The amount of gratuity and leave encashment will be calculated and whatever is in excess due be paid to the petitioner along with interest @ 8% per annum from the said date. The said exercise shall be completed within two months from the date of receipt of a certified copy of this order.

Resultantly, the present writ petition is allowed.

May 02, 2019
Pka

(G.S.SANDHAWALIA)
Judge

Whether speaking/reasoned
Whether reportable:

Yes/No
Yes/No