**HIGH COURT OF JAMMU AND KASHMIR**
**AT JAMMU**
**(THROUGH VIRTUAL MODE)**

OWP No. 1440/2017

Reserved on 17.12.2020
Pronounced on 24 .12.2020

Madhu Devi .....petitioner(s)

Through :- Mr. Aseem Sawhney Advocate

V/s

Union of India and others .....Respondent(s)

Through : Mr. Vishal Sharma ASGI

**Coram: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE**

# JUDGEMENT

1 The petitioner has filed the instant writ petition seeking declaration that her husband namely Asha Ram, HC/GD No.861330131 be declared as dead in terms of Section 108 of India Evidence Act. A Writ of Certiorari to quash the order of respondents whereby the missing husband of the petitioner has been declared as 'deserter' has also been sought.

2 Briefly stated the case of the petitioner is that her husband was serving as Head Constable in 16 Battalion CRPF and was last posted at Civil Lines Mathua, UP. The Group Centre of the said Battalion is stated to be at Ban Talab, Jammu where the husband of the petitioner was putting up in a residential quarter allotted to him. In June 2010, the petitioner got a phone call from the Company Commander of the Unit informing her that her husband had gone to fetch some vegetables, but did not return back. The petitioner tried to contact her husband, but was unable to do so, whereafter, she informed

respondent No.3 about the same. The respondents also began a search for the petitioner's husband, but could not ascertain his whereabouts. The salary of husband of the petitioner was stopped and the burden of rearing children comprising two sons and a daughter fell upon the shoulders of the petitioner.

3 In June 2010, a communication was received by the petitioner from respondents No.3 informing her that her husband is absent from duty and that he should report for duty, else warrants of arrest would be issued against him. The petitioner responded to the said communication vide letter dated 12.06.2010 informing respondent No.3 that she has no knowledge about the whereabouts of her husband and requested respondent No.2 to inform her about the whereabouts of her husband at the earliest. On 09.11.2010, the petitioner addressed another communication to respondent No.2 requesting him to make all out efforts to locate her husband, but, instead of locating him, the respondents leveled the charge of desertion of the Unit against the husband of the petitioner.

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4 In the above circumstances, the petitioner was left with no option, but to approach this Court by filing a petition bearing HC(W) No. 53/2011 whereby she sought a Writ of Habeas Corpus directing the respondents herein as well as the State of UP to produce her husband, namely Asha Ram before this Court. Various status reports were called from the concerned police in the aforesaid petition to indicate the whereabouts of the petitioner's husband, but it was reported that he could not be traced. It is the contention of the petitioner that her husband has not been heard of by the family for the last more than seven years and even the respondents have been unable to trace him despite making all out efforts including issuance of notices in the Print and Electronic Media. On this ground, it is urged by the petitioner that her husband be declared as

dead and the order of the respondents whereby he has been declared as 'deserter' be quashed.

5 The respondents have resisted the petition by filing objections thereto. In their objections, the respondents have submitted that on 03.06.2010 when the husband of the petitioner was posted in 16 Bn of CRPF at FCI Campus, Ganeshra (Mathura), he went to the market to purchase vegetables etc., for the Mess, but did not return to Campus. The search parties were sent out to trace him in local area, Bus Stand and Railway Station, but to no avail. FIR came to be lodged in this regard with Highway Police Station, Mathura on 04.06.2010 and a letter was also addressed to SP District Chamoli (Uttrakhand), but the petitioner's husband could not be traced. It is further averred in the objections that on 10.06.2010, a warrant of arrest was issued against the petitioner's husband in accordance with the standing procedure, but in spite of this, he could not be traced. A Court of Enquiry was also conducted and petitioner's husband was declared as deserter from CRPF w.e.f 03.06.2010 in terms of order dated 06.09.2010. A Departmental Enquiry was ordered against the petitioner's husband under Section 11(1) of CRPF Act, 1979 read with Rule 27 of CRPF Rules, 1955 and, on the basis of the said Departmental Enquiry, charges were found established against the petitioner's husband. Consequently, in terms of order dated 31.03.2011, punishment of dismissal from service was imposed upon the petitioner's husband.

6 I have heard learned counsel for the parties and perused the record of the case.

7 It is an admitted case of the parties that the petitioner's husband is missing from 03.06.2010. FIR has been registered in this regard with Highway Police Station, Mathura. The respondents wrote a communication to the

petitioner in June 2010 informing her that her husband was missing w.e.f 03.06.2010 and she was asked to direct her husband to report for duty. The petitioner has placed on record a letter dated 12.06.2010 whereby she had responded to letter dated 04.06.2010 of respondents informing them that her husband had not come to home and she had made a further request to the respondents to trace out her husband as at the time when he went missing, he was on duty in the CRPF Unit at Mathura. Again on 09.12.2010, the petitioner addressed another communication to the Director General of CRPF making a similar request. The petitioner also filed a Habeas Corpus Petition bearing HCP(W) No. 53/2011 before this Court. The record of the said petition is connected to the instant case and a perusal thereof shows that from time to time, the Court has sought status reports from the respondents with regard to whereabouts of the petitioner's husband. All these status reports reveal that the respondents herein as well as the UP Police have made all out efforts to trace out the husband of the petitioner for all these years, but without any success.

8 From the aforesaid sequence of events, it is established that the petitioner's husband has remained untraceable and his whereabouts are not known since 03.06.2010. Section 108 of Indian Evidence Act casts burden of proving that a person is alive, who has not been heard of for seven years upon the person who affirms it. The provision reads as under:

> *"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 "*

9 Here the petitioner has placed on record material to show that her husband could not be traced for more than seven years i.e., w.e.f 03.06.2010. The respondents are also not in a position to state that the petitioner's husband is alive. In fact, the respondents have not disputed that the petitioner's husband has remained untraceable. Therefore, it is to be presumed that petitioner's husband is dead as per Section 108 of Indian Evidence Act.

10 The question remains as to whether the respondents could have, on the basis of an enquiry, declared petitioner's husband as 'deserter' in the circumstances as narrated hereinbefore.

11 The word 'desert' has been defined in Oxford English Dictionary to mean: (i) callous or treacherously abandon ;(ii) leave (a place), causing it to appear empty; and (iii) illegaly run away from the military service.

12 In the context of the present case, the word 'desert' would mean illegally run away from the military service. A person, whose whereabouts are unknown and who has not been heard of for the last more than 10 years, cannot be stated to have illegally run away from his service. As already noted, having regard to the facts of the instant case, the petitioner's husband is presumed to be dead because his whereabouts have remained unknown for the last more than seven years, as such, by no stretch of imagination, he can be held guilty of having deserted the service of CRPF. It is a case where the petitioner's husband was not available at all for joining the duties, as such, he could not report for duty. The action of the respondents in declaring the petitioner's husband as 'deserter' and thereafter handing down the punishment of dismissal to him, is unsustainable in law.

13 In my aforesaid view I am supported by the judgment of Madras High Court in **N. Pankajam vs. State of Tamil Nadu (Writ petition No.5480,**

**decided on 30.06.2006)**. In the said case, the High Court of Madras has, in somewhat similar circumstances, observed as under:

> "17. *Here the petitioner has established that the petitioner's husband has not been heard for over 7 years from 19.05.1987 and the same is not disputed and therefore, it is to be presumed that the petitioner's husband is dead as per Section 108 of Indian Evidence Act.*
>
> *18. In view of the said finding, the action of the second respondent in removing the name of the petitioner's husband from the roll of the Corporation is illegal, since the petitioner's husband cannot be treated as an absentee. As he was not available, he could not report for duty. The contention of the second respondent that the petitioner's husband having been removed from the roll, the petitioner is not entitled to get retirement benefits and her son cannot be given compassionate appointment are unsustainable.*
>
> *19. The petitioner's husband having been presumed to be dead on 19.0 5.1987, the second respondent is bound to sanction the retirement benefits and other benefits, which are legally available to the person who die while in service. The claim of petitioner's son namely, Rajesh, for compassionate appointment is bound to be considered by the second respondent as per the rules. The petitioner is entitled to get sanction of pension and other benefits, as her husband is to be treated as dead from 19.05.1987".*

14 Thus, applying the aforesaid ratio to the present case, the petitioner's husband is presumed to be dead on 03.06.2010. Consequently, the orders of the respondents in declaring him as 'deserter' and thereafter dismissing him from the service become unsustainable in law.

15 For what has been discussed hereinbefore, the writ petition is allowed and the petitioner's husband, namely Asha Ram is presumed to be dead. The orders of the respondents whereby the petitioner's husband has been declared

as ‘deserter’ and has been dismissed from service, are quashed. The respondents are directed to release all the service/pensionary benefits of the petitioner’s husband in favour of the rightful claimant(s) in accordance with the applicable rules.

With the aforesaid observations, this petition stands disposed of.

**(Sanjay Dhar)**
**Judge**

Jammu
24 .12.2019
Sanjeev PS

Whether order is speaking: Yes
Whether order is reportable:Yes

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SANJEEV KUMAR UPPAL
2020.12.28 11:00
I attest to the accuracy and
integrity of this document