

IN THE HIGH COURT AT CALCUTTA

(Civil Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Subrata Talukdar

And

The Hon'ble Justice Supratim Bhattacharya

MAT 250 of 2021

With

CAN 2 of 2021

Eastern Coalfields Limited

-Vs-

Nitu Devi and Ors.

For the Appellant : Mr. Manik Das

For the Respondents : Mr. Supriyo Chattopadhyay
Ms. Anasuya Bhattacharya

Heard On : 03.11.2022

Delivered On : 22.12.2022

Supratim Bhattacharya, J. :- Under challenge in this appeal is the Judgment and Order dated 21.12.2020 passed in the writ petition being WPA No. 9612 of 2020.

The respondent No.5, i.e. the Eastern Coal Fields Ltd., is the appellant in this instant appeal and Smt. Nitu Devi, the writ petitioner and the Union of India, General Manager, Eastern Coal Fields Ltd., Manager Eastern Coal Fields Ltd. and the Dy. Manager Eastern Coal Fields Ltd., being the respondents No. 1, 2, 3 and 4 in the writ petition, are the respondents in this appeal.

The issue before the Hon'ble Single Bench was as to whether the writ petitioner, being the wife of Ram Kumar Mahato who has been declared dead by a competent Civil Court, is entitled to be appointed in the Eastern Coal Fields Ltd. as an employee on compassionate ground.

The Learned Counsel appearing on behalf of the respondent No.1/ writ petitioner placed his argument stating that husband of the respondent No.1 has been missing on and from 25.03.2005 and after the expiry of 7 years from the date of his missing report, the respondent No. 1/ writ petitioner filed a case before the Learned

Civil Judge Jr. Divn., 2nd Court at Asansol, praying for a declaration of death of her husband along with other consequential reliefs. It has further been submitted that the appellant namely, Eastern Coal Fields Ltd., was a party in the said case. He has further submitted that the Ld. Judge passed an order in favour of the respondent no.1/ writ petitioner and declared her husband to be dead, in consequence of which the appellant Eastern Coal Fields Ltd. disbursed all the benefits entitled to the writ petitioner but denied the appointment of the respondent no.1/ writ petitioner on compassionate ground.

Ld. Counsel has emphasized upon the point that the Eastern Coal Fields Ltd. did not prefer any appeal before any higher forum against the/Order of the Learned Civil Judge. On the contrary the appellant disbursed the dues which the heirs of the Ram Kumar Mahato were entitled and as such the appellants complied with part of the order passed by the Ld. Civil Judge but defied the order of appointment on compassionate ground for which the respondent No.1/ writ petitioner has been compelled to prefer a petition before the Hon'ble Court.

Ld. Counsel for the respondent relied upon several judgements reported *In Re: 1999 1) SCC 273; 1998 (9) SCC 138; AIR 1996 SC 2252; AIR 1991 SC 2219; 2011 Supreme (Bombay) 140; AIR 1992 SC 711; 2005 SC (ALL) 372; 2002 SC (ALL) 390; 2013 SC (MAD) 2772.*

The writ petitioner has argued that she is entitled to be appointed as an employee of the Eastern Coal Fields Ltd. on compassionate ground as her husband namely, Ram Kumar Mahato, has been declared dead by a competent Court. On behalf of the writ petitioner it was stated that the said petitioner couldn't have applied for the declaration of death of her husband prior to the expiry of 7 years of his missing in terms of Section 108 of the Indian Evidence Act 1872. It has further been submitted that immediately after the declaration of death of her husband, the writ petitioner has applied for releasing the monetary benefits along with the prayer for employment. It has also been argued that there were no laches on the part of the writ petitioner as regards to the prayer for appointment on compassionate ground along with all other service benefits.

The writ petitioner/respondent to this appeal had filed the suit praying for declaration of death of her husband in the year 2013 as

because her husband is missing since the year 2005 as such she had to wait 7 years prior to filing the suit for declaration of death of her husband. It has also been argued that during the year 2017 the suit was decreed in her favour and soon thereafter she has claimed for the benefits along with employment on compassionate ground.

The writ petitioner has relied upon the Judgment by the Madurai Bench of the Madras High Court in the matter of *P. Venkatesan alias Thirumaran vs. The Commissioner of Municipal Administration 'Ezhilagam' and another* reported in 2013 0 Supreme (Madras 2772), wherein the Hon'ble Court was of the opinion that as the prayer for compassionate appointment was not sought on the natural death of the employee but was sought on the civil/ legal / presumptive death the contention as to not having applied for appointment on compassionate ground within 3 years of death will not arise.

It has further been argued on behalf of the writ petitioner that disciplinary proceeding was initiated by the employer against her husband on the ground that the said employee is having unauthorized leave and on no other ground of moral turpitude or for any illegal act. It has further been stated that her husband was

ultimately dismissed from service on the sole ground of unauthorized leave. In this regard it has been submitted that since her husband was found missing since March 2005, the question does not arise of his joining his place of work which is the ground of filing the suit praying for declaration of civil death.

The Learned Counsel appearing on behalf of the appellant namely, Eastern Coal Fields Ltd (ECL), during his exhaustive arguments submitted that the husband of the respondent No.1/writ petitioner namely Ram Kumar Mahato was employed as underground loader at Dabor Collierie Salanpur area, Eastern Coal Fields Ltd. in the district of Paschim Burdwan, West Bengal. The said Ram Kumar Mahato attended his place of work lastly on the 25th day of March 2005 and since then he had not attended his place of work. The letter of dismissal dated 08/09. 05.2009 was communicated *vide* letter dated 12.05.2009 to the recorded address of the said Ram Kumar Mahato and the said letter was received by the respondent No.1/writ petitioner.

It has further been stated that the respondent no.1/ writ petitioner filed a Title Suit being Title Suit No. 45/2013 in the Court of the Learned Civil Judge Jr. Divn. 2nd Court, Asansol praying for

declaration of death of the said Ram Kumar Mahato. It has further been stated that the death certificate of Ram Kumar Mahato was issued thereafter by the appropriate authority in the State of Bihar. It has also been submitted that thereafter terminal benefit was sought for but for the first time in her letter dated 05.01.2020 the respondent No.1/ writ petitioner prayed for appointment on compassionate ground after about more than 15 years of the missing of the said Ram Kumar Mahato.

It has further been submitted that thereafter the respondent No.1/writ petitioner during the month of October 2020 filed the writ petition praying, *inter alia*, for quashing the order of rejection of the prayer for appointment on compassionate ground. The learned Counsel during his elaborate argument stressed upon the point that Section 108 of the Indian Evidence Act 1872 does not have any retrospective effect. It has been argued that the declaration of death made by the Learned Civil Judge is based on presumption laid down under Section 108 of the Indian Evidence Act.

It has also been submitted that by no means it can be said that the person who has been declared dead by a Civil Court was dead on the date when he was last seen or heard of. It has further

been stressed that under Section 108 of the Indian Evidence Act there is only presumption of death and no mention of date of death. The learned Counsel has stressed upon the point that where there is no date of death it can be presumed that the said Ram Kumar Mahato died much latter and not during the year 2005. It has also been submitted that the said Ram Kumar Mahato was terminated on the ground of unauthorized absence and this termination does not entitle the said writ petitioner to get appointment on compassionate ground.

The Learned Counsel has also emphasized upon the point that question of appointment on compassionate ground cannot arise as the writ petitioner's husband was dismissed from service prior to declaration of his death by the Civil Court and even prior to the lapse of the statutory period of 7 years as has been laid down under Section 108 of the Indian Evidence Act 1872. Relying on a judgment of the Hon'ble Apex Court reported in *2004 (2) Supreme page 709* Learned Counsel submits that the law postulates that the presumption raised under Section 108 of the Indian Evidence Act, 1872, is a limited presumption presuming the factum of death of

person who's life or death was in issue but there is no presumption as to the date or time of death.

Elaborating on the above, the learned Counsel has submitted that the said Ram Kumar Mahato was alive at the time of his termination from service. The Learned Counsel has also cited the following judgments being an unreported judgment passed by the High Court of Judicature at Madras dated 14.02.2008 passed in Writ Petition no. 22441 of 2005 and another unreported judgment passed by a Hon'ble Division Bench of the High Court of Judicature of Hyderabad passed in Writ Petition no. 34859 of 2016.

In this context the learned counsel relied upon a judgment of the Hon'ble Apex Court reported in *In Re: (2002) 10 Supreme Court Cases 166*. The Learned Counsel also relied upon an unreported judgment passed by an Hon'ble Single Bench of the Madurai Bench of the Madras High Court dated 05.08.2014 in connection with *W.P (MD) 5128 of 2010* and *MP (MD) 3 of 2010*. The learned Counsel has also relied upon an unreported Judgment of the Hon'ble Apex Court passed in *Civil Appeal No. 897 of 2021* (arising out of *Special Leave Petition (C) No. 10514 of 2020*).

The appellant/ ECL has submitted that as per National Coal Wages Agreement (for short, *NEWA*), employment on compassionate ground can be offered if the person concerned remains in the payroll of the company and as the petitioner's husband was terminated from service and his name was struck off the rolls, so the petitioner is not entitled to be considered far less to get employment on compassionate ground. It has also been argued that as the husband of the writ petitioner was terminated from service way back in the year 2009 the claim for compensation in the year 2020 does not survive being placed so late and as such cannot be accepted by the authority. It has further been submitted that the writ petitioner was all along aware about the fact that her husband has been terminated from service since long but she chose to sit tight over the matter and had not challenged the termination before any court of law and as long as the order of termination remains valid there is no scope for providing employment to the writ petitioner who happens to be the widow of the deceased employee.

On behalf of the respondents during the time of hearing of the writ application an unreported order dated August 5, 2014 passed by the Hon'ble Madras High Court in *WP (MD) No. 5128 of 2010* and

MP (MD) No. 3 of 2010 in the matter of *M.G. Lalitha Pearson and another Vs. the Union of India and others* wherein under similar circumstances an Hon'ble Single Bench of the said Court was of the opinion that as the service of the petitioner stood terminated prior to the date of declaration of civil death, it is not open for the petitioner to claim any employment on compassionate ground, except the terminal benefits and thus the said Court upheld the rejection of the claim of the petitioner of appointment on compassionate ground.

The Hon'ble Single Bench in the said judgment has discussed that the husband of the petitioner went missing on and from March 2005 and the disciplinary proceeding was initiated in the month of May 2005, the petitioner lodged a General Diary reporting the missing of her husband during the month of June 2005 and immediately by a letter dated June 13, 2005 intimated the respondents that her husband was not traceable. The show-cause notice which was issued in the name of the husband of the petitioner was also replied by the petitioner intimating that the employee is still untraceable.

The petitioner had also filed several representations before the authority to bring to their knowledge that her husband was missing, in spite of that the employer terminated the service of her husband on the sole ground of unauthorized absence. After 7 years of missing of her husband the petitioner approached the Civil Court for declaration of his death and ultimately the said declaration was allowed by the judgment delivered on June 17, 2017.

It has also been discussed in the judgment passed in the writ petition by the Hon'ble Single Bench that an issue was framed by the Ld. Trial Court "as to whether the plaintiff is entitled to receive all the dues standing in the name of Ram Kumar Mahato and employment on dependent quota". In the judgement of the Learned Trial Court it has been opined that the petitioner, who is one of the successors of the deceased employee, was entitled to get employment on compassionate ground subject to the compliance of the rules and regulations of the defendant company and also subject to the no objection of the other dependants of the said deceased. The said suit was disposed of being decreed in favour of the writ petitioner.

It has further been stated that the Chairman-cum-Managing Director of the Eastern Coal Fields Ltd., who was a defendant in the suit, chose not to file appeal against the same and accepted the order of the Ld. Trial Court regarding entitlement of the petitioner to get employment on compassionate ground. In this aspect it has been stated that not being challenged before any higher forum, the judgment passed by the Ld. Trial Court has attained finality.

It has further been stated that death benefits which the petitioner was entitled to receive has since been paid, i.e. a part of the order passed by the Learned Trial Court has been complied with but her prayer for employment stands rejected on the ground that the company does not provide employment on compassionate ground in case of deemed death.

It has also been discussed that the Ld. Trial Court has declared the employee to be dead and the said death has to be treated as a civil death. There is no explanation to the effect as to why employment cannot be provided in case of declaration of civil death. A family which deals with natural death of the bread earner is no different from a family where civil death of the bread earner is declared by the Court, both the families pass through similar

financial crunch. As there is a provision for providing employment on compassionate ground in case of natural death, there is no reason as to why the same benefit will not be provided/ extended to the dependents of the family where order of declaration has been passed in their favour by a competent court of law.

It has also been stated that the time period for making application for compassionate appointment will not be the same in case of natural death and on the other hand in case of death declared by a civil court. An application for declaration of civil death cannot be filed prior to expiry of 7 years from the date of missing of the said person since it takes a considerable period for disposal of the said suit, declaring the death of the said person who had been missing for at least 7 years. Rejecting the prayer of the writ petitioner on the ground that more than 15 years have lapsed since the person went missing is not an appropriate ground for rejection.

The contention of the respondents that the wife had not challenged the order of termination even though she knew the same, has not impressed this Court because the said person was not traceable, had it been the fact that the person was available and in spite of that he was not reporting on duty, then only the question

of unauthorized absence could have arisen and as the person was missing at the relevant point of time and subsequently declared dead by the competent court, the ground for termination on unauthorized absence is not tenable.

It has further been mentioned that there is no intentional laches or delay on the part of the petitioner in approaching the authority praying for employment, on the contrary it appears that the petitioner all along proceeded with her claim diligently and in accordance with law.

The Hon'ble Single Bench has further stated that providing employment on compassionate ground can never be claimed as a matter of right and the same is granted strictly in accordance with the provisions of the scheme, to tide over the immediate financial need of the family due to the untimely death of the bread earner. The scheme of the company contains the provision for providing employment on compassionate ground which is liable to be extended in case of death declared by the civil court.

Discussing the aforementioned aspects, the Hon'ble Single Bench has directed to assess the financial condition of the writ

petitioner and a decision whether employment is required to be provided to her on compassionate ground is to be assessed and after that if it appears that the financial condition of the petitioner is such that the family will not survive but for the employment of the petitioner then necessary steps have to be taken by the said authority as regards to appointment of the petitioner on compassionate ground.

The crux of this appeal is as to whether the order passed by the Hon'ble Single Bench in the Writ Petition being No. 9612 of 2020 is in accordance with law or not. In this aspect it is to be mentioned that there is no controversy as regards to the fact of lastly attending the place of work which also is the date of missing of Ram Kumar Mahato that is 25.03.2005, thereafter disciplinary proceedings was started against the aforesaid employee and ultimately the said employee was terminated by the appellant on the sole ground of unauthorized absence and to this effect is the letter of dismissal dated 08/09. 05.2009 which was communicated vide letter dated 12.05.2009.

Thereafter during the year 2013 a Title Suit being Title Suit No. 45 of 2013 was filed in the Court of the Learned Civil Judge, Jr.

Divn. 2nd Court, Asansol praying for declaration of death of the said employee namely Ram Kumar Mahato and also other consequential reliefs. The said suit was decreed on 17th June 2017 declaring the said Ram Kumar Mahato dead and further declaring that the respondent no.1/ writ petitioner/ plaintiff is entitled to get her share in the monetary benefits standing to the credit of the said Ram Kumar Mahato and is entitled to get employment on compassionate ground subject to the compliance of the rules and regulations of the company. The aforesaid suit was contested by the Eastern Coal Fields Ltd. and no appeal has been preferred by the appellant against the order passed by the Ld. Civil Judge declaring the death of Ram Kumar Mahato. The appellant partly complied with the order of the Ld. Civil Judge by disbursing the dues to the legal heirs of Ram Kumar Mahato but did not comply the order of appointment of the respondent no.1/ writ petitioner on compassionate ground.

Now the appellant has come up with a point that as the employee namely Ram Kumar Mahato was terminated from service as a result of disciplinary proceedings and as the employee was not in the payroll of the said company at the time of his death so his

legal heirs are not entitled to any appointment on compassionate ground. It has also been submitted that respondent No.1 has prayed for appointment after long gap of 15 years so she is not entitled for appointment on compassionate ground.

On the one hand the appellant has relied on the fact that at the time of death of the said Ram Kumar Mahato he was not in the payroll of the company and has also emphasized upon the fact that at the time of termination of his service he was alive, on the other hand it has been stated that the order of termination against the said Ram Kumar Mahato was passed during the lifetime of the said Ram Kumar Mahato and it was not passed in respect of a dead person so it is fact that the appellant is at a dilemma as to the actual date and time of death of the said Ram Kumar Mahato.

In the above context, this Court is persuaded to put forth the discussion of the Hon'ble Apex Court reported in *In Re: 2004 (2) Supreme 709*, which has been cited on behalf of the appellant wherein it has been stated as follows:

“Paragraph 14... The law as to presumption of death remains the same whether in common law of England or in the statutory provisions contained in Sections 107 and

108 of the Indian Evidence Act 1872. In the scheme of Evidence Act, though Sections 107 and 108 are drafted as two sections, in effect, Section 108 is an exception to the rule enacted in Section 107. The human life shown to be in existence, at a given point of time which according to Section 107 ought to be a point within 30 years calculated backwards from the date when the question arises is presumed to continue to be living. The rule is subject to a proviso or exception as contained in Section 108. If the persons, who would have naturally and in the ordinary course of human affairs heard of the person in question, have not so heard of him for 7 years, the presumption raised under Section 107 cease to operate. Section 107 has the effect of shifting the burden of proving that the person is dead on him who affirms the fact. Section 108, subject to its applicability being attracted, has the effect of shifting the burden of proof back on the one who asserts the fact of that person being alive. The presumption raised under Section 108 is a limited presumption confined only to presuming the factum of death of the person whose life or death is in issue. “

So from the above discussion of the Hon'ble Apex Court it reveals that Section 108 has the effect of shifting of burden of proof back on the one who asserts the fact of that person being alive. In this instant case it is the appellant that is the employer on whom

burden lies of proving that the said Ram Kumar Mahato was alive on the date of his termination from service and had not expired earlier, which the appellant has not proved or is said to have failed to prove, as the appellant was a party in the suit in which the death of the said Ram Kumar Mahato was declared dead.

In the light of the above discussion it is crystal clear that Ram Kumar Mahato is missing since the month of March 2005 and has expired but no exact date of death can be ascertained. As such the respondent No.1, being the wife of Ram Kumar Mahato, is entitled to appointment on compassionate ground as the said Ram Kumar Mahato was terminated from service solely on the ground of unauthorized absence and not on any ground of moral turpitude. Furthermore, the declaration of death by the Learned Civil Court in the suit where ECL was a party, must be treated to be of binding effect.

As such this Court finds no laches in the order and Judgment dated 21.12.2020 passed by the Hon'ble Single Bench and the same stands affirmed.

MAT 250 of 2021 with **CAN 2 of 2021** stands accordingly **dismissed.**

Parties shall be entitled to act on the basis of a server copy of the Judgment and Order placed on the official website of the Court.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

I agree.

(Subrata Talukdar, J.)

(Supratim Bhattacharya, J.)

Later:-

Learned Counsel for the appellant prays for stay of the Judgement and Order.

The prayer is considered and refused.

I agree.

(Subrata Talukdar, J.)

(Supratim Bhattacharya, J.)