



W.P.No.29070 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.11.2023

CORAM:

THE HONOURABLE MR.JUSTICE M.S.RAMESH

W.P.No.29070 of 2023

Mrs.R.Pushpa

...Petitioner

-Vs-

1. The Chennai Port Trust,
Represented by its Chairman,
Rajaji Road,
Chennai-600 001.

2. Revenue Divisional Officer,
Thirupermbuputhur,
6/114, Pattnoolchathram,
Sriperumbudur-602 105.

3. The Inspector of Police,
T-14, Mangadu Police Station,
Mangadu, Ambattur District,
Chennai-600 122.

...Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Mandamus directing the 1st respondent to disburse the terminal benefits in favour of the petitioner in view of the civil death of her husband Tindal, Traffic Department in the Chennai Port Trust (IBM No.58209)



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with effect from 04.08.2020 in tune with presumption under Section 108 of the Evidence Act, 1872 by considering the representation dated 22.08.2023 within a time period,

For Petitioner : Mr.B.Leelesh Sundaram

For Respondents : Mr.S.Haja Mohideen Gisthi
Standing Counsel
For R.1
Mr.V.Manoharan
Additional Government Pleader
For R.2 and R.3

ORDER

Heard Mr.B.Leelesh Sundaram, learned Senior counsel for the petitioner, Mr.S.Haja Mohideen Gisthi, learned Standing Counsel for the first respondent and Mr.V.Manoharan learned Additional Government Pleader for respondents 2 and 3.

2. The petitioner is the wife of one G.Ravi, who was employed as a Tindal in Traffic Department of the first respondent Port Trust. Her husband had gone missing from 04.08.2013 onwards and in spite of her complaint made on 08.08.2013, which is registered in Cr.No.1472 of 2013 under the caption



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“man missing”, he could not be traced till date. H.C.P No.520 of 2014 was also filed and the same was closed on 21.08.2014 recording the statement of the concerned Investigating Officer that inspite of all possible steps to trace her husband having been taken, he could not be traced. In this background, seven years have lapsed and the petitioner's husband could not be traced. The petitioner has now presumed her husband to be dead, as provided under Section 108 of the Indian Evidence Act, 1872. In the meantime, the third respondent police has also given a “ Non Traceable Certificate” on 28.12.2020. The petitioner now seeks for disbursement of the terminal benefits to the petitioner on the ground of “ presumption of civil death” of her husband. The fact that the petitioner is the wife of G.Ravi, is not in dispute.

3. Mr.S.Haja Mohideen Gisthi, learned Standing Counsel for the first respondent submits that out of the Death cum Retirement Gratuity benefits payable to the petitioner, a portion of the family pension arrears was paid to the petitioner in the month of June 2016 itself. According to him, the other benefits would be paid to the petitioner, after the death of her husband is conclusively established.



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4. It is the case of the petitioner that her husband went missing on 04.08.2013 and more than seven years have lapsed. Section 108 of the Indian Evidence Act provides that when a question as to whether a man is alive or dead arises 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.

5. In this case, such a burden would shift on the first respondent to establish that the petitioner's husband is alive. The entitlement of legal heir of an employee, who is declared with a civil death, had come up for consideration before an Hon'ble Division Bench in the case of ***N.Mohana vs The Executive Engineer, Agricultural Engineering Department and others passed in W.A.No.1304 of 2013 dated 07.12.2018.*** This Court, while upholding the aforesaid proposition, held as under:

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



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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 above said 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



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dismissal shall not stand. These benefits must have accrued in favour of the husband of the appellant on or before 11.05.1994.”

6. In the aforesaid decision, reliance has also been placed on another decision of the Division Bench of this Court in the case of ***The Managing Director, State Express Transport Corporation & Others vs E.Tamilarasi*** reported in **2016 (3) Law Weekly 139**, wherein it has been held as follows:-

“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 ex parte. 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.



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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



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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."

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



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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.”



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7. Thus, when the petitioner had taken all the required procedures to trace her husband by giving a complaint on 08.08.2013, which was registered as Cr.No. 1472 of 2013 and a Non Traceable Certificate was also issued by the third respondent on 28.12.2020 and thereafter, the petitioner had filed Habeas Corpus Petition in HCP No.520 of 2014, in which, the fact that the petitioner's husband had gone missing and the efforts taken by the third respondent to trace him was recorded and closed on on 21.08.2014, this Court is of the view that the petitioner's husband could be presumed to have been dead on the date when he had gone missing, i.e., on 04.08.2013. Since more than seven years have lapsed from that date, the presumption under Section 108 of the Evidence Act would be applicable to the case of the petitioner and thereby she would be entitled to receive the Death-cum-Retirement Gratuity benefits, including the pensionary benefits.

8. Accordingly, the petitioner's husband G.Ravi is hereby presumed to be dead, since he has not been heard of for more than seven years and the first respondent have also failed to prove that he is alive.



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9. In the light of the above finding, there shall be a direction to the first respondent herein to pass appropriate orders disbursing the Death-cum-Retirement Gratuity of the petitioner's late husband G.Ravi together with pensionary benefits, after deducting any amount that might have been paid to the petitioner towards the Death-cum-Retirement Gratuity, within a period of four weeks from the date of receipt of a copy of this order.

10. With the above direction, the writ petition is allowed. No costs.

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Index:Yes
Internet:Yes
sr

To

1. The Chennai Port Trust,
Represented by its Chairman,
Rajaji Road,
Chennai-600 001.
2. Revenue Divisional Officer,
Thirupermbuputhur,
6/114, Pattnoolchathram,
Sriperumbudur-602 105.

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M.S.RAMESH,J.

sr

3. The Inspector of Police,
T-14, Mangadu Police Station,
Mangadu, Ambattur District,
Chennai-600 122.

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