
(2005) 03 KL CK 0061
In the High Court Of Kerala
Case No : O.P. No. 18590 of 1999 (K)

Indira, K.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 18-03-2005

Acts Referred:

Army Act, 1950 — Section 106
Evidence Act, 1872 — Section 108

Citation : (2005) 2 KLJ 611 : (2005) 3 KLT 1071

Hon'ble Judges : C.N. Ramachandran Nair, J

Bench : Single Bench

Advocate : Shaji Thomas Porkkattil, for the Appellant; P. Muraleedharan, ACG Standing Counsel, for the Respondent

Judgement

C.N. Ramachandran Nair, J.—The Petitioner is the wife of one Mr. M. Radhakrishnan who while in the service of the Army as a Sepoy was found missing from 5-10-1995 onwards. The Army declared him a deserter u/s 106 of the Army Act and after waiting for three years, on 5-11-1998 the said Mr. Radhakrishnan was dismissed from service. The dismissal is communicated to his wife namely, the Petitioner. While counsel for the Petitioner contended that Petitioner's husband is missing while he was in service and by virtue of Section 108 of the Indian Evidence Act, 1872 there is a presumption of death after seven years from the date of missing and therefore, Petitioner's husband should be taken to have died in service and all consequential benefits should be given to his family, the Additional Central Government Standing Counsel appearing for the Respondents contended that since Petitioner's husband was declared as a deserter and was dismissed from service, no benefits including pension are available to the family members.

2. The Petitioner's husband joined service in the Army as a Sepoy on 24-10-1979. His tenure of colour service was 17 years and he had to serve another two years under reserved service. However, if the service person

becomes sick and is declared low medical category, he is not bound to complete the two years of reserved service. It is conceded by Respondents that the Petitioner's husband turned sick and he was admitted in the Military Hospital, Jabalpur on 22-3-1995. Since Petitioner's husband had to undergo major surgery, he was sent to Base Hospital, Lucknow and was admitted there on 25-3-1995. The Petitioner has produced Ext. P-1 letter written by Petitioner's husband to their daughter stating that he had to go to Lucknow for a surgery which is a position conceded by the Respondents. The A.C.G.S.C. appearing for the Respondents submitted that the medical records at Lucknow Hospital pertaining to Petitioner's husband are not traceable and therefore, the exact date of admission, the date of surgery and the time he spent in the hospital are not available. However, it is admitted that the Petitioner's husband underwent surgery and thereafter reported at the Army Unit at Bangalore on 4-10-1995 wherefrom he was advised to go to Jabalpur and attend the Medical Board for considering his medical fitness after surgery. According to the Respondents, Petitioner's husband though was to report at the Military Hospital, Jabalpur, for examination by Medical Board, he never reached there. After reporting at Army Office at Bangalore on 4-10-1995, Petitioner's husband was not heard of and is treated missing from 5-10-1995 onwards. The Army conducted enquiry u/s 106 of the Army Act, first declared the Petitioner's husband absent and later declared him a deserter and then reported the matter to the Police who could not trace him so far. The tenure of Petitioner's husband would have been over on 28-2-1996 if he was declared low medical category and in any case his service would have been over with another two years reserved service i.e. by 28-2-1998. However, strangely the Army dismissed him from service only with effect from 5-11-1998. If a service person deserts while in service, he is liable to be declared so u/s 106 of the Army Act and can be dismissed from service for that reason. However, the question is whether in this case the presumption of death of Petitioner's husband is available u/s 108 of the Evidence Act and if so, what are the consequences. There is no conflict between Section 106 of the Army Act and Section 108 of the Evidence Act. While the Army is entitled to declare a person who absents from service a deserter, Section 108 of the Evidence Act entitles to draw a presumption of death for all purposes after 7 years from the date, a person is not heard of or missing. The Petitioner's husband is not heard of for the last nine and a half years is a fact which cannot be denied by anyone including the Respondents. Even though Army reported to Police that Petitioner's husband deserted the Army and he should be apprehended, the Police have not so far been able to trace the Petitioner's husband. Even though an Army person found missing while in service can be declared a deserter u/s 106 of the Army Act and can also be dismissed from service for desertion, the position changes as and when presumption of death of such person is available u/s 108 of the Evidence Act. In other words, if a person declared a deserter and dismissed from service does not surface or is not traced in seven years, then Section 108 of the Evidence Act takes over the situation and all consequences will follow. In this particular case it is admitted that the Petitioner's husband after surgery and

treatment reported at the Army Unit at Bangalore on 4-10-1995 and was requested to proceed to the Military Hospital, Jabalpur for examination by Medical Board for considering whether he has become low medical category for release from service. It is also on record and admitted by the Respondents that Petitioner's husband was admitted in the Army Hospital at Jabalpur on 22-3-1995 and was referred to the Base Hospital at Lucknow where he underwent major surgery. Since the records of the Army Hospital at Lucknow could not be traced by Respondents, the date of release of Petitioner's husband from Hospital after surgery is not known. However the Army has no case that he was missing at any time before he reported at the Army Office at Bangalore on 4-10-1995. The Respondents have also no case that Petitioner's husband was on leave from 4-10-1995 onwards i.e. after he reported at the Army Unit at Bangalore. Since Petitioner's husband admittedly reported for rejoining duty after treatment at Bangalore on 4-10-1995 wherefrom he was referred to Medical Board at Jabalpur, this Court has to only assume that Petitioner's husband was missing while in service from 5-10-1995 onwards. It is to be noted that Petitioner's husband after joining service on 24-10-1979 served the Army for 16 years and became sick only towards the end of his service as his service would have been over after 17 years on 28-2-1996. The details furnished go to show that Petitioner's husband was admitted in the Military Hospital, Jabalpur and was sent for major operation for the Backbone at the Base Hospital, Lucknow where he is said to have undergone surgery. He was also referred to Medical Board for considering his eligibility to declare as a low medical category. In the normal course Petitioner's husband would have been declared a low medical category and would have been released from service after full tenure i.e. on 28-2-1996 which is a matter of only four months from the date of his missing i.e. on 5-10-1995. Desertion is a conscious act by somebody who has otherwise no escape from the Army. Even though desertion can be presumed when a serving person is found missing, every case of missing of a service person need not be a case of desertion. Since Petitioner's husband had almost completed his normal tenure and 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 the 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 u/s 108 of the Evidence Act. Therefore, as and when presumption of death is available u/s 108 of the Evidence Act, the whole position changes and the presumption of death supersedes the declaration of the person a deserter u/s

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 in spite of effort to trace him by the Police at the request by the Army, the presumption of his death as on 5-10-1995 is available u/s 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.