
(2015) 01 KL CK 0131

In the High Court Of Kerala

Case No : Writ Petition(C). No. 26734 of 2013 (N)

Jyothi Daniel and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 28-01-2015

Acts Referred:

Evidence Act, 1872 — Section 108

Citation : (2015) 01 KL CK 0131

Hon'ble Judges : A.M. Shaffique, J.

Bench : Single Bench

Advocate : V. Philip Mathew and Gibi C. George, for the Appellant; N. Nagaresh, Assistant Solicitor General, Advocates for the Respondent

Final Decision : Disposed off

Judgement

A.M. Shaffique, J.—Petitioners have approached this Court seeking the following reliefs:

"i) Issue appropriate writ or order declaring that petitioners are entitled to get enhanced family pension and all service benefits (including Insurance amount and DCRG) related to the service of Mr. C.S. Daniel in Border Security Force, who is missing from 03/03/2004.

ii) Issue a writ of mandamus or any other appropriate writ, order or direction commanding respondents 1 to 5 to grant enhanced family pension and all service benefits (including Insurance amount and DCRG) to the petitioners by treating that first petitioner's husband Mr. Daniel C.S. died in service while working in BSF on 03/03/2004.

iii) Issue a writ of mandamus or any other appropriate writ, order or direction commanding respondents to release Sale deed No. 6998 dated 03-01-1992 of Pathanapuram Sub Registrar office in respect of property situated in survey 140/1-3 Thalavoor village, Pathanapuram Taluk, Kollam District, which was obtained from first petitioner's husband Mr. Daniel C.S. to the petitioners."

2. The facts involved in the writ petition is not disputed. 1st petitioner's husband Mr. C.S. Daniel was found missing while serving in the Border Security Force. Petitioners are the legal heirs of Sri. Daniel. As per the rules relating to retirement gratuity and family pension, the legal heirs of a missing person is also entitled for such benefits. Accordingly, the petitioners applied for payment of family pension which was being paid regularly. However, when the petitioners sought for payment of enhanced family pension, the respondents have taken a stand that the petitioners have to produce a non-traceable report by the police that the husband of the 1st petitioner was missing for the last seven years and is presumed to be dead in terms of Section 108 of the Evidence Act 1872.

3. Though the petitioners had filed a civil suit as O.S. No. 3/2012 before the Munsiff Court, Punalur, the same came to be dismissed for not impleading the respondents herein. Ext. P11 is the said judgment wherein the operative portion of the judgment reads as under:

"From the averments in the plaint, it can be seen that the military personnel, i.e. Commandant of BSF denied or interested to deny the right of the plaintiffs as legal heirs of C.S. Daniel and directed them to get a declaration from a court of law stating that the plaintiffs are legal heirs of C.S. Daniel and are entitled to get family pension from the department. Hence it is the military personnel who have denied the legal character or right of the plaintiffs. In the given case they are not arrayed as defendants. Since no such contentions are raised against the defendants who are made parties to the suit, it can be seen that the reliefs sought for cannot be granted against the defendants. Hence a decree, as sought for by the parties, cannot be given against the defendants arrayed in this suit as per law. Hence the suit is to be dismissed." 4. The Learned counsel for the petitioners relies upon Ext. P12 rules to contend that such certification from a court of law is not required.

5. Counter affidavit has been filed on behalf of the respondents indicating the details of pension and other dues payable to the petitioners and the enhanced pension which is payable. But, according to them, the enhanced pension is payable only if the documents, as requested by them, have been submitted.

6. Heard the Learned counsel for the petitioner as well as the learned ASGI.

7. The short question to be considered in this writ petition is whether, for the purpose of granting enhanced pension, there is an obligation on the part of the petitioners to produce any decree from a court of law stating that 1st petitioner's husband is presumed to be dead.

8. Ext. P12 contains the rules relating to payment of gratuity and family pension to the family in case official's whereabouts are not known. Rule 12 (3, 4 and 5) reads as under:

"12. Payment of retirement gratuity and family pension to the family in case an official's/pensioner's whereabouts are not known - further instructions -

1. xxxx

2. xxxx

3. The date of disappearance of the employee/pensioner will be reckoned from the date the First Information Report is lodged with the Police, and the period of one year after which the benefits of family pension and gratuity are to be sanctioned will also be reckoned from this date. However, the benefits to be sanctioned to the family, etc., of the missing employee will be based on and regulated by the emoluments drawn by him and the rules/orders applicable to him as on the last date he/she was on duty including authorized periods of leave. "Family pension at normal/enhanced rates, as may be applicable in individual cases, will be payable to the families of missing employees." Family pension where sanctioned at pre-1-1-1986 rates will be revised and consolidated, w.e.f. 1-1-1986 in terms of O.M. No. 2/1/87-PIC I, dated 16-4-1987 (not printed) as amended from time to time.

4. In the case of missing pensioners, the family pension at the rates indicated in the PPO will be payable and may be authorized by the Head of the Office concerned. Where the PPO does not contain this information, the Head of Office will take necessary action to sanction the family pension as due, as provided in para. 3 above."

5. Death gratuity will also be payable to the families, but not exceeding the amount which would have been payable as retirement gratuity if the person had retired. The difference between retirement gratuity and death gratuity shall be, subsequently, payable after the death is conclusively established or on the expiry of seven years period from the date of missing."

9. The learned counsel for the petitioners also submits that 1st petitioner's husband had produced sale deed of the property for the purpose of availing loan from the BSF and the sale deed has not been released to the petitioners so far.

10. The learned ASGI submits that since the death of the employee is not established, there is no obligation on the part of the Department to pay enhanced pension. But, on a perusal of sub rule 5 of Rule 12, it is clear that the difference between retirement gratuity and death gratuity shall be subsequently payable after the death is conclusively established or on the expiry of seven years period from the date of missing. The words "or on the expiry of seven years period from the date of missing" clearly imposes a duty on the part of the Department to presume that a person is dead after it is found that he is missing for the last seven years. This exactly is the presumption that can be drawn in terms of Section 108 of the Evidence Act. When the Rule itself is clear that full pension and other benefits has to be given after the expiry of seven years period from the date of missing, the contention that orders should be obtained from the Court of law has no significance.

11. Respondents, in fact, stated in paragraph 7 of the Counter affidavit as under:

"7. As per remarks of Inspector General BSF Tripura on the Court of Inquiry (COI) conducted for establishing facts of missing of individual, No. 80309116 HC Daniel C S was declared missing and it was held by Inspector General BSF Tripura that financial/pensionary benefits as admissible to be released to the NOK under rule 54(9) of CCS (Pension) Rule 1972 after observing/fulfilling the formalities/conditions enumerated therein. Accordingly, in compliance to remarks of Inspector General BSF on the Court of Inquiry, a messenger was sent to home town of NOK on 15 June 2005 to get the signature and photographs and corresponding proofs of death etc of said HC from his wife i.e. Petitioner No. 1. On receipt of pension papers and other connected documents from NOK, claim was preferred with Pay and Account Division, BSF, New Delhi on 17/07/2005." 12. Having regard to the aforesaid view taken by me, I am of the view that the petitioners are entitled for the relief, as sought for. As far as the claim for release of the title deed is concerned, the same will be subject to appropriation of the amounts, if any, payable by the deceased from the outstanding amounts due to the legal heirs of the deceased. After adjusting such payments and on settlement of the liability alone, the title deed can be released.

In the result, this writ petition is disposed of as under:

- "i) There will be a direction to respondents 1 to 5 to grant the petitioner enhanced family pension and all service benefits including arrears taking into consideration the fact that the husband of the 1st petitioner has been missing for the last seven years and is presumed to be dead.
- ii) This shall be done within a period of one month from the date of receipt of a copy of this judgment.
- iii) The title deed is to be released only after settlement of all the liabilities."