

(1997) 12 AHC CK 0121

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 33396 of 1996

Ravi Shankar Tewari

APPELLANT

Vs

Police Maha-Nideshak and Others

RESPONDENT

Date of Decision : 11-12-1997

Acts Referred:

Evidence Act, 1872 — Section 107, 108

Uttar Pradesh Recruitment of Dependents of Government Servant (Dying-In-Harness)

Rules, 1974 — Rule 2, 3

Citation : (1998) 2 UPLBEC 1183

Hon'ble Judges : O.P. Garg, J

Bench : Single Bench

Advocate : A.K. Tewari, for the Appellant;

Final Decision : Dismissed

Judgement

O.P. Garg, J.—By means of this writ petition, under Article 226 of the Constitution, it is prayed that the order dated 20.8.1996, Annexure-8 to the writ petition, be quashed and the respondents be directed to appoint the petitioner under the U.P. Recruitment of Dependents of Government Servants (Dying in Harness) Rules, 1974 (hereinafter referred to as "the Rules of 1974").

2. Heard Sri A.K. Tewari, learned Counsel for the petitioner as well as learned Standing Counsel on behalf of the respondents.

3. Sri Ganga Prasad Tewari, employed as Constable (No. 1809) in Civil Police, was posted at South Malaka Police Station, Kotwali, district Allahabad. He was found missing from 16.10.1985 onwards. His family members were informed of the said fact on 23.12.1985. Retiral benefits were allowed to the family of Sri Ganga Prasad Tewari in the year 1991 treating him to be dead. The petitioner, who is son of Sri Ganga Prasad Tewari applied for appointment under the Rules of 1974 on compassionate ground. It is alleged that since Ganga Prasad Tewari, father of the petitioner has not been seen alive since 16.10.1985, after the expiry of period of seven years a presumption has to be drawn in view of the

provisions of Section 108 of the Evidence Act that he has died and therefore, treating him to be dead, the petitioner is entitled to be appointed under the Rules of 1974 as one of the dependents of late Ganga Prasad Tewari. The petitioner made a number of representations, time and again, to the respondents, but they were not attended to. It was only on 6.2.1996 that the respondent No. 4 required the petitioner to file certain documents and to complete the formalities. The petitioner was medically examined and he was physically found fit. All the requisite formalities were compiled but no appointment was forthcoming. Therefore, the petitioner made a representation again on 6.8.1996 in reply to which the impugned order dated 20.8.1996 was passed intimating the petitioner that there is no provision under the Rules of 1974 and the Government Orders for appointment of a dependant of an employee who was found missing and was not physically dead.

4. A counter-affidavit has been filed by the respondents, in which the preliminary plea taken is that the petitioner is not entitled to the benefit of Rules of 1974 as Ganga Prasad Tewari did not meet with his death but was found missing.

5. The moot point for consideration and determination in the present petition is whether the benefits of Rules of 1974 can be extended to the dependants of a person who was found missing and was not seen alive during the past seven years by those who in the ordinary course would have seen him, meaning thereby, whether in the case of presumptive civil death u/s 108 of the Evidence Act, the benefit of Rules of 1974 can be extended to the dependant of the employee whose death is to be presumed after lapse of a period of seven years from the date he was missing. All other questions are ancillary in nature as the petitioner would swim or sink with the finding on the point, mentioned above.

6. It is an indubitable fact that Ganga Prasad Tewari, father of the petitioner was found missing right from 10.10.1985 onwards from South Malaka Police Station, Kotwali, Allahabad where he was last posted as a Constable. There is no evidence of the fact that he met with physical death. Section 108 of the Evidence Act provides as follows:-

"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."

Section 107 of the Evidence Act deals with the presumption of the continuance of life while Section 108 raises a presumption of death if the person has not been heard of for seven years. The effect of these two provisions in the Evidence Act is that the presumption of life prevails until displaced by the proof of actual death or proof of facts raising the presumption of death and, in the latter case presumption of death prevails till actual existence of life is proved. While initially the presumption of life exists over the whole period of 30 years when the same is

displaced the presumption of death exists over the whole period of "unheard of. Any way, in view of categorical pronouncement of their Lordships of the Privy Council in *Lal Chand Marwari v. Ramrup Gir*, AIR 1926 P.C. 9, there is no confusion, as it has been held :

"It is constantly assumed that, where the period of disappearance exceeds seven years, death which may not be presumed at any time during the period of seven years, may be presumed to have taken place at its close. This is not correct. The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or even four periods of seven years. Probably the true rule would be less liable to be missed, and would itself stated more accurately, if, instead of speaking of a person who had not been heard of for seven years, it describes the period of disappearance as one of not less than seven years. If a person has not been heard of for seven years, there is a presumption of law that he is dead: but at what time within that period he died is not a matter of presumption but of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential."

7. In the instant case, there is no dispute about the fact that Ganga Prasad Tewari was found missing right from 16.10.1985 onwards and that since then, he has not been seen alive or heard of for the last 7 years by those who would have naturally "heard of " him if he would have been alive, a presumption about the death of Ganga Prasad Tewari in the circumstances may be raised in view of the provisions of Section 108 of the Evidence Act. It was for this reason that the Department has released all the dues in favour of the family members of Ganga Prasad Tewari treating him to be fictionally dead as a presumption of his civil death has arisen.

8. Now the moot point for consideration is as to on which date the death of Ganga Prasad Tewari is to be presumed as the presumption of civil death or fictional death u/s 108 of the Evidence Act tantamounts to physical death in the eyes of law for giving the benefits to the heirs/legal representatives and dependants of the deceased. At what time within the period of seven years, a person has died, is not a matter of presumption, but of evidence and the onus of proving that the death took place at any particular time within seven years lies upon the person who claims a right to the establishment of which that fact is essential. Once the rule of presumption is invoked on the ground that a man has not been heard of for 7 years the beneficiary or the claimant is entitled to ask for the relief on the footing that he is dead. In *Parikhit Muduli and Others Vs. Champa Dei and Others*, , it has been held that the presumption u/s 108 of the Evidence Act is available at the point of time when the party approaches the Court for necessary relief. There cannot be any presumption as to the actual date of death and this fact has to be proved like any other fact. In some cases, it was observed that there is also no presumption that on the close of 7 years, death has occurred. In this connection, a reference may be made to *Mukunda Behera*

and Others Vs. Subarna Bewa and Another, and AIR 1953 T.C.114, Rama Bhai v. Saraswati, in which it was held that where there is a dispute in a suit as to the date of death of a person not heard of for seven years, in the absence of any evidence of either side, the Court should draw a presumption that he was dead on the date of the suit. The same view has also been taken by the Calcutta High Court in a case reported in ILR 1910 (37) Cal 103, Narki v. Lal Sahu and the Andhra Pradesh High Court in AIR 1957 And 380, Kottapalli Ven Kateswarlu v. Kottapalli Capayya and Ors., in which it was ruled that death can be presumed to have occurred on the date on which the suit was filed. It may be presumed that the man is not alive by the date of the institution of the suit; but the presumption cannot be that he is dead on that date. To the same effect are the observations made in AIR 1958 Mad 463, Life Insurance Corporation v. Shashi Ammal, and Sarju Kairi and Others Vs. Panchananda Sarma and Another,

9. Learned Counsel for the petitioner maintained that the death of the petitioner shall be presumed as having taken place on 16.10.1985 itself or within a few days thereafter as a dead body was found lying in a dustbin, which was said to be that of Ganga Prasad Tewari. This submission of the learned Counsel does not find support from any evidence, whatsoever. Mere bald statement of the learned Counsel cannot be accepted in the absence of any concrete evidence. There is no evidence worth the same on record to indicate that the alleged recovery of the dead body from the dustbin was that of Ganga Prasad Tewari. If this would have been a fact, the question of application of the provisions of Section 108 of the Evidence Act would not have arisen. As pointed out above, the provisions applicable only in those cases where a person missing was not heard of within a period of seven years from the date from which he was missing" learned Counsel for the petitioner cannot be allowed to traverse beyond the pleadings. In the alternative, the learned Counsel for the petitioner submitted that the death of Ganga Prasad Tewari be presumed to have taken place on 16.10.1985 on which date, he was missing. In support of his contention, the learned Counsel for the petitioner placed reliance of Subhash Ramchandra Wadekar Vs. Union of India, , Ram Singh Vs. Board of Revenue and Others, , Tadepalli Ram Rathnam Vs. Kantheti Varadarajulu and Others, , Tadepalli Ram Rathnam v. Kantheti Varadarajlu and Ors. and AIR 1988 76, Ker. Vareed v. Sukumari and Ors.

I have carefully studied all these five rulings and find that in. none of these rulings it has been mentioned that there shall be a presumption about the death of missing person on the date from which he was missing. From the rulings relied upon by the learned Counsel for the petitioner as well as other rulings mentioned above, it follows that ordinarily, a missing person is presumed to be dead on expiry of seven years period and not earlier.

10. The legal position which has crystallised is that the time of the death of a missing person is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within 7 years lies upon a person who claims a right to the establishment of which that fact is essential.

As said above, there is no evidence to indicate the precise time on which Ganga Prasad Tewari may be taken to have died. The presumption of his death would arise, in the absence of any evidence to the contrary, only after the expiry of the statutory period of seven years, i.e., in October, 1992. The date of birth of Ganga Prasad Tewari was 17.6.1929 and in the ordinary course, if he had not disappeared on 18.10.1985, he would have retired from service on attaining the age of superannuation i.e. on 30.6.1987, meaning thereby that he stood retired prior to the date on which his civil or fictional death has to be presumed after the expiry of seven years period. Since the presumptive death of Sri Tewari occurred in the year 1992 and he would have stood superannuated in the year 1987, it cannot be said that he died in harness. The dependants of Sri Tewari, or for that matter, the petitioner, cannot take advantage of the provisions of Rules of 1974.

11. There is yet another aspect of the matter. The expression "death", which implies physical cessation of life in a human being, as occurring in the Rules of 1974, has to be interpreted in such a manner as would accentuate the purpose and object of the Rule making body. Section 108 of the Evidence Act has been engrafted with an avowed object of raising presumption about the fictional death if the said fact is called into question for resolving the disputes relating to inheritance, devolution and conferment of certain benefits which are available as a matter of right, that is to say, where enforcement of a "right", that is to say, where enforcement of a "right" is dependent on the establishment of the fact of death-physical or otherwise. Now the question is whether the provisions of Rules of 1974 embrace within their ambit fictional, natural and presumptive death of an employee? The time of death presents new and very important problems. The totality of mankind regards a person as dead when the earthly life has ended totally and forever. The definition of death traditionally accepted has been "total" stoppage of circulation of the blood and the cessation of the animus and vital functions consequent thereon, such as, respiration, pulsation, etc. ("heart death)." But the availability of methods not heard of and not even dreamt of—thirty or forty years ago, particularly in the area of artificial and indeterminate prolongation of life and in the area of transplantation of organs and tissues is having a significant impact upon the medical profession and the general public. Similar problems are faced in the implementation Rules of 1974 under which employment is granted not as a matter of right, but on compassionate ground to enable the family to tide over the sudden crisis. There has been a good deal of obfuscation on the issue with regard to the considerations; which should guide while giving appointment in public service on compassionate ground. As a Rule, appointment in the public service should be made strictly on the basis of open invitation applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Government nor the public authorities are at liberty to follow any other procedure or relax qualifications laid down by rules for the post. There are, however, some exceptions carved out in the interest of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family

in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the Rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such appointment. The sole object of granting compassionate employment is thus to enable the family to overcome the sudden financial crisis which has erupted on account of death of the bread-winner.

12. The expression "death " has, therefore, to be given meaning in the light of the object and purpose for which Rules of 1974 have been brought into existence by way of an exception to the general Rule that the appointment in public service should be made on the basis of open invitation and merit. The object of the Rules is to mitigate the hardship and to prevent destitution in the family of the deceased employee. This object would be frustrated if the benefit of appointment on compassionate ground is deferred to a period of more than 7 years. During the long period of 7 years, complexion of the family, its needs and requirements may totally change. It is possible that after 7 years, period, the family which was in penury, may become affluent. The financial crisis which was sought to be tide over immediately on the death of the deceased may not persist after the long period of seven years. Therefore, the very purpose of the Rules would be frustrated if benefit of appointment on compassionate ground is claimed after the statutory period of 7 years when the death of a missing employee is to be presumed. Normally, the Rules of 1974 would not apply to the case of presumption, fictional or civil deaths. However, no general Rule of law can be laid down in this regard. There may be certain situation when though, a claim for appointment on compassionate ground may be made after 7 years but the death is capable of being proved on a particular date within the said period. For example, if it is established that a person lost his life in a road, water or air accident or in a tragedy resulting from out-break of fire or the like and the dead body is not recovered; in that event after the expiry of the period of 7 years, the date of death may be presumed to be the date of the accident or the tragedy. In such tragic cases, there are hardly any chances of manipulations as may be done in the case of a-presumptive death drawn on the basis that a person was missing for the last 7 years. If a general Rule that the dependant of the deceased employee may apply for appointment after seven years on compassionate ground, is laid down, in that event the possibility of the employee's fleeing away in harness with a view to make available appointment to his dependant after the expiry of the period of 7 years cannot be ruled out and once the appointment is made, such employee, who has fled away, may appear after the expiry of the statutory period of 7 years. This tendency, if at all, may be curbed by interpreting the expression "death" as physical death for the purpose of Rules of 1974 and the death of a person whose body is not found or is traced out, but he has lost his life in an accident of road, water, or air or any tragedy of the type mentioned above. Barring the deaths in the above circumstances, all other

presumptive, fictional and national deaths are held to be outside the purview of Rules of 1974.

13. For the reasons stated above, the petitioner is not entitled to the benefit of Rules of 1974 as on the date on which presumption of death of Ganga Prasad Tewari was raised, he shall be deemed to have stood superannuated in the year 1987. The respondents have rightly rejected the claim of the petitioner by order dated 20.8.1996 for appointment on compassionate ground under the aforesaid Rules. The petition has no merit. It is accordingly dismissed. However, the respondents are directed to ensure that all dues, treating the father of the petitioner, late Ganga Prasad Tewari, to have superannuated on 30.6.1987, which are admissible to the family members of late Sri Tewari, are paid within two months from the date of production of a certified copy of this judgment, if they have already not been paid.