
(2011) 01 RAJ CK 0054
In the Rajasthan High Court
Case No : Civil Writ Petition No. 7622 of 2007

Smt. Kumud Bhatt

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 11-01-2011

Acts Referred:

Evidence Act, 1872 — Section 108
Penal Code, 1860 (IPC) — Section 420
Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1958 — Rule 19, 268B, 268C, 268D

Citation : (2011) 1 RLW 547

Hon'ble Judges : Mohammad Rafiq, J

Bench : Single Bench

Judgement

Mohammad Rafiq, J.—This writ petition has been filed by Petitioner assailing order passed by Respondents dated 13.01.1995 by which her husband Ramesh Chand Bhatt was dismissed from services in disciplinary proceedings initiated on basis of charge-sheet issued to him for willful absence from duties. Petitioner's husband Ramesh Chand Bhatt was placed under suspension by order dated 10.11.1987 and thereafter a criminal case was registered against him on 09.06.1987 for offence u/s 420 IPC vide FIR No. 219/1987.

2. According to Respondents, Shri Ramesh Chand Bhatt last attended his duties with their office on 02.03.1988 and thereafter his whereabouts could not be known. In those facts when service of charge-sheet could not be affected on him, a notice was published in daily Hindi newspaper "Dainik Navjyoti" (Ajmer edition) on 22.09.1994 clearly giving out that he should report on duties within fifteen days failing which ex-parte proceedings envisaged under Rule 19 of Rajasthan Civil Services (Classification, Control & Appeal) Rules, 1958 (for short, "CCA Rules") shall be initiated against him. Since Shri Ramesh Chand Bhatt did not attend duties nor any information was received about him, he was removed from service.

3. Shri P.C. Sharma, learned Counsel for Petitioner has argued that late husband of Petitioner was last attended Respondent's office on 02.03.1988 and thereafter his whereabouts could not be known. Even police in aforesaid first information report have been consistently maintaining that he could not be traced for many years and that it is not known where he has gone to. Learned counsel submitted that as per Section 108 of Indian Evidence Act, a person who has not been heard of for seven years by those who would naturally have heard of him if he had been alive, he should be presumed to have died and considering him to be dead, proceedings that were held by Respondents under Rule 19 of the CCA Rules must be held to be nullity in law because no proceedings against dead person can be continued. It is further argued that Petitioner may be held entitled to receive family pension on expiry of period of one year from date he was last attended office of Respondents i.e. from 02.03.1989 in terms of proviso to Rule 268B of Rajasthan Service Rules and that order of his removal dated 13.01.1995 be quashed and set-aside and Petitioner should be held entitled to receive all terminal benefits/retiral benefits including general provident fund, gratuity, state insurance, arrears of salary, leave encashment etc. together with interest. The Petitioner however stated that refusal by the Respondents for family pension was contrary to proviso of Rule 268B of the Rajasthan Service Rules which is reproduced as under:

Provided further that if a Government servant is unheard of for more than a period of one year the family pension at the rate prescribed under Rule 268 C shall be sanctioned and authorized to the member of his/her family as defined under Rule 268D on submission of an application alongwith Indemnity Bond and Affidavit in the prescribed form and also a copy of F.I.R. lodged with the Police about the dis-appearance of the Government servant. If in any case, the Government servant subsequently re-appears the family pension shall immediately cease to be admissible and payable. The amount of family pension already paid to the family, shall be recoverable from the salary of the Government servant.

4. Learned Counsel for Petitioner, in support of his arguments, cited judgment of this Court in Smt. Shakuntala Kanwar v. Union of India and Ors. 2002 (4)WLC (Raj.) 315; Smt. Phooli Devi and Anr. v. State of Rajasthan and Anr. 2001 (5)WLC (Raj.) 625, and a Single Bench judgment of this Court in Kaushlendra Singh Naruka v. The State of Rajasthan and Anr. 2000 (1) WLC (Raj.) 723.

5. Per contra, Shri M.F. Baig, learned Deputy Government Counsel, appearing on behalf of Respondents, opposed writ petition and submitted that so long as it is not proved that Ramesh Chand Bhatt has died, it cannot be a matter of presumption and on that basis Petitioner cannot be held entitled to receive terminal benefits, payment of family pension etc. In any case, widow of an employee who has been removed from service by way of penalty, cannot be paid family pension as per the Rules. Efforts were made by Respondents to serve notice on late Shri Ramesh Chand Bhatt when he could not be traced. Notice was

published in newspaper and it was thereafter that Respondents passed removal order of Petitioner's husband under Rule 19 of the CCA Rules. Even declaration has not been sought from the competent court u/s 108 of the Indian Evidence Act that Ramesh Chand Bhatt is dead. Cited judgments are distinguishable. Writ petition be therefore dismissed.

6. I have heard learned Counsel for Petitioner as well as learned Deputy Government Counsel and perused available record.

7. The issues raised in this writ petition in so far as the proposition of law on controversy involved is concerned, are no longer res interga. A Division Bench of this Court in Phooli Devi (supra) authoritatively held in somewhat similar circumstances as under:

12 Rather action of the Appellant State in initiating inquiry proceedings after seven years of disappearance of the Government servant and further holding such inquiry proceedings without service of pre and/or post initiation of proceedings in order to culminate into order of punishment of removal, both are against the constitutional mandate and principle of natural justice. That being so, the learned Single Judge has rightly condemned the action of the Appellant State by holding that termination of a Government servant who has not been traced out or not heard of at all or his whereabouts were not known for more than seven years, is no meaning, inasmuch as no charge sheet could be issued to a dead person who by virtue of S. 108 of the Evidence Act is presumed to have died.

13. Once the decks are clear that admittedly Nanagram Meena was not heard of at all for more than seven years from the date of his disappearance of missing (3.4.1986), in support of which there is an uncontroverted pleadings of the writ petitions duly supported by an affidavit to the effect that she has not heard of her husband (Nanagram Meena) since 3.4.86 and for last more than seven years, a presumption would must arise in her favour by virtue of Section 108 of the Evidence Act that her husband has been dead. Thus viewed, the Appellant State therefore have to grant relief to the writ Petitioners on the presumption that her husband is dead and she is a widow of deceased government servant entitling to grant of relief as sought for in their writ petition. Having scanned the impugned judgment of the learned Single Judge assailed before us, we find no infirmity whatsoever in the said judgment and the learned Single Judge was justified in allowing the writ petition and in granting relief in favour of the writ Petitioners as detailed above, which does not warrant any interference by this Court. In the said view of the matter, this appeal is dismissed. No Costs.

8. Another Division Bench judgment of this Court in Smt. Shakunala Kanwar (supra) also on the same issue held in para 11 and 12 as under:

11. By reading this relevant Clause 3 of the memorandum, it is clear that a report should be lodged with the concerned Police Station about missing of the personnel and this fact should also come on record that employee have not been

traced despite all efforts having been made by the police. In the present matter, both conditions are satisfied. Report has been lodged in police by Commandant 27th battalion BSF himself about missing of Sayar Singh and this fact is also established that Sayar Singh has not been traced despite all efforts having been made by the police, so we are of the considered view that the case is fully covered by the Government Decision O.M. No. 1/17/86 P & PW dated 29th August, 1986 and the Petitioner Appellant is entitled for all benefits which are available to the family of Sayar Singh according to above Government Decision. In the writ petition filed by the Appellant Petitioner it has been stated that her husband had been wrongly dismissed from service from 9.6.83, she has also mentioned that no such copy of order regarding dismissal of service of Petitioner's husband was received by the Petitioner and entire action of Respondents is mere cover up of their mistake. On the other hand, learned Counsel for the Respondents have also not placed on record copy of any such order of dismissal. The circumstances of this case and facts established by the Petitioner clearly shows that it is not a case of desertion by constable Sayar Singh but it is a case of missing of a personnel and therefore if any such order has been passed about dismissal of Sayar Singh that is absolutely bad in the eye of law. We are also of the view that it is a case of missing of Sayar Singh and therefore case of the Petitioner should be treated as her husband Sayar Singh is missing and his whereabouts are not known since 1983 and under these circumstances provisions given in above mentioned memorandum are fully applicable in present matter. We are also of the view that if any dismissal order has been passed by concerned Commandant or any Official, such order is absolutely illegal and deserves to be set aside which we hereby do. We are also of the view that this appeal should be accepted and judgment of the learned Single Judge should be set aside and the writ petition should also be accepted.

12. Consequently, we allow this special appeal filed by the Petitioner-Appellant Shakuntala and set aside the judgment dated 10.07.1995 passed by the learned Single Judge. The husband of the Appellant Smt. Shakuntala is missing since 1983, he could not be traced despite all efforts having been made by the Police and her case is fully covered by the Government Decision O.M. No. 1/17/86-P & PW, dated the 29th August, 1986, D.P. & P.W. On 25.1.1991 and Memorandum the Government of India, Ministry of Personnel PG & Pension dated 18.2.1993, therefore Respondents Nos 1 to 4 are directed to consider the case of Appellant-Smt. Shakuntala in accordance with the Government Decision O.M. No. 1/17/86-P & PW, dated the 29th August, 1986, and grant all the benefits which are available to Petitioner according to the above mentioned Government order with all consequential benefits. Costs made easy.

9. Single Bench judgment cited by learned Counsel for the Petitioner is also on similar controversy where Petitioner's father was missing for last seven years and was deemed to be dead. In those circumstances, Respondents were directed to consider case of Petitioner therein for compassionate appointment and give him appointment in accordance with law.

10. A bear look at order dated 13.01.1995 make it clear that Petitioner's husband was dismissed from service on charge of being willfully absent from 03.03.1988. Although a notice was published in newspaper 22.09.1994 but no one appeared and proceedings were thus conducted ex parte and finally culminated into dismissal of Petitioner's husband. Petitioner being illiterate could not timely lodged the First Information Report about her missing husband. But that was no reason not to grant family pension to her. Although presumption about death of missing person can according to Section 108 of Indian Evidence Act be raised only upon expiry of period of seven years. But Rule 268B of R.S.R. as quoted above make it clear that grant of family pension would not await expiry of period of seven years. If it is proved that a government servant is missing for more than a period of one years as prescribed under Rule 268-C, payment of family pension shall be sanctioned and authorized to member of family of missing government servant as defined under Rule 268C on submission of application along-with affidavit in prescribed form and also a copy of FIR lodged in the Police Station.

11. It is all the more surprising that when the Petitioner submitted the application, she was informed by Respondents that since Petitioner's husband was dismissed from service, payment of family pension was not admissible to her. A perusal of order of dismissal dated 13.01.1995 would evidently make it clear that Petitioner's husband was placed under suspension pursuant to some forgery committed by him; respondent department thereupon lodged first information report against him with concerned police station for offence u/s 420 IPC; Petitioner last attended office on 02.03.1988 but thereafter he never turned back to his duties; Petitioner's husband remained willfully absent and that too for a long period hence, there was no necessity to conduct departmental enquiry under Rule 16 of CCA Rules; a notice was therefore got published in daily Hindi newspaper Dainik Navjyoti (Ajmer edition) on 22.09.1994 stipulating therein that in case Ramesh Chand Bhatt is not turned back to his duties within 15 days, ex-parte proceedings envisaged under Rule 19 of CCA Rules shall be initiated against him; despite above notice, neither Petitioner's husband attended his duties nor any information in this regard was received from his side even after expiry of stipulated period of 15 days. IN those facts, department initiated departmental proceedings against Petitioner's husband under Rule 19 of the Rules of 1958 and he was dismissed from services vide order dated 13.01.1995.

12. Division Bench of this Court in Phooli Devi (supra) was dealing with case wherein also husband of Petitioner absented from his duties with effect from 03.04.1986 and did not report back despite publication of notice in newspaper on 11th October, 1987 and 22nd March, 1988. Finally a charge sheet was issued to him on 28th May, 1993 followed by an order of his removal from service on 23rd April, 2001. The Division Bench held that whatever pre and/or post inquiry proceedings initiated against Nanagram, were totally against constitutional mandate so also principles of natural justice. None of communications issued prior to or after initiation of inquiry upon charge sheet dated 28.5.93 were got

served upon him as they all returned back duly unserved as is established from the statements of memo of the charge-sheet itself or published notices obviously because Nanagram has been missing; his whereabouts were neither known nor heard of for seven years from 3.4.86 the date of disappearance of Nanagram. Thus observing, Division Bench upheld view taken by learned Single Judge wherein action of Respondents was condemned as illegal and unconstitutional.

13. Observations made by Division Bench squarely applies to facts of present case. There is however one additional factum that need to be noticed that although husband of Petitioner was absent on duty from 03.03.1988, no charge-sheet was issued to him and in ex-parte proceedings under Rule 19 of CCA Rules his services were dismissed vide order dated 13.01.1995. When husband of Petitioner not having been heard about for more than seven years is presumed dead, entire disciplinary proceedings conducted against him stood vitiated and were rendered illegal. His dismissal from service having been made contrary to provisions of C.C.A. Rules and in utter disregard of principles of natural justice was therefore void, non-est and illegal.

14. It is evident from perusal of impugned order that Respondents did not hold full-fledged enquiry under Rule 16 of the CCA Rules which even otherwise could not have been held against a dead person. Moreover, in present case an order simplicitor under Rule 19 of the CCA Rules has been passed for removing Petitioner's late husband Ramesh Chand Bhatt.

15. There was no justification for Respondents not to have made payment of family pension to Petitioner on expiry of period of one year from date her husband disappeared with effect from 02.03.1988. Respondents informed Petitioner that she was not entitled to receive family pension because her husband was dismissed from service. Since a period of more than twenty-two long years has now passed since late husband of Petitioner disappeared and she has now been held entitled to family pension. I do not deem it appropriate to direct Respondents to consider her case at this stage for grant of compassionate appointment.

16. In result, writ petition is partly allowed. The order dated 13.01.1995 is quashed and set aside. On expiry of period of seven years from 02.03.1988 a presumption should arise with regard to death of Petitioner's husband with effect from 02.03.1995. Petitioner is however declared entitled to receive family pension with effect from 02.03.1989, after expiry of period of one year from date her husband was last heard of, in accordance with proviso to Rule 268B of R.S.R. Consequent upon declaration of dismissal order of Petitioner's husband as illegal, Respondents are directed to grant all terminal benefits to Petitioner treating her to be a widow of deceased government servant though taking 02.03.1988 as basis for calculating terminal benefits and make payment of all terminal benefits and arrears of family pension together with interest @ 6% per annum within a period of three months from the date of service of copy of this order.

17. The writ petition is partly allowed in terms of the directions as aforesaid with no order as to costs.