
(2013) 08 MP CK 0258

In the Madhya Pradesh High Court

Case No : Writ Petition No. 3261 of 2012

Vimlesh Batham

APPELLANT

Vs

State of Madhya Pradesh and Another

RESPONDENT

Date of Decision : 13-08-2013

Acts Referred:

Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 108

Citation : (2013) 08 MP CK 0258

Hon'ble Judges : Sujoy Paul, J

Bench : Single Bench

Advocate : Chetan Kanoongo, for the Appellant; Nidhi Patankar, Government Advocate and Shri Suresh Agarwal, for the Respondent

Final Decision : Partly Allowed

Judgement

Sujoy Paul, J.—By invoking jurisdiction of this Court under Article 226 of the Constitution, the petitioner, wife of Shri Shyam Sundar, has filed this petition seeking benefits of family pension and other retiral dues. Brief facts are as under:-

The case of petitioner is that she is legally wedded wife of Shyam Sundar, a ward boy working with the respondent-department. Copy of Green-card Certificate is filed as Annexure P/1. It is contended that the petitioner's husband was mentally disturbed. The petitioner was living with her children at Gwalior whereas her husband was residing at Sabalgarh in a government quarter. He was employed as ward boy in government hospital. Since he was mentally not fit, he was not in constant touch with the family members and petitioner.

It is submitted that nothing has been heard of Shyam Sundar since 2005. Thus, it is contended that more than seven years period is passed and nothing has been heard about Shyam Sundar and, therefore, he can be presumed to be dead as per the provisions of Evidence Act.

2. Shri Chetan Kanoongo, learned counsel for the petitioner by relying on certain judgments contended that the family pension and benefits be directed to be given to the petitioner.

3. Mrs. Nidhi Patankar, learned Government Advocate for the other side, submits that in the nomination form the name of son of Shyam Sundar is mentioned and not the name of the petitioner. However, it is admitted in the return that Shyam Sundar was not in a proper state of mind during his service career. It is further contended that he remained unauthorisedly absent on many occasions. Even a criminal case was lodged against him. The certificate of mental hospital, Gwalior is also filed in support of the contention that he was facing some mental problem. It is admitted that Shyam Sundar is missing for more than seven years. However, it is contended that Shyam Sundar stated that his wife has disassociated her from him legally.

4. I have heard learned counsel for the parties and perused the record.

5. The first question is whether Shyam Sundar can be presumed as dead ?

6. A Division Bench of this Court in M.P. State Co-Operative Marketing Federation Ltd. Vs. Aruna Pyasi, opined as under in para 6:-

6. In the case in hand, there is no dispute that husband of the petitioner is missing from 6-2-1992. The appellant has not proved that he was alive after this date, despite burden on it. Therefore, the petitioner succeeds to establish that from 6-2-1992, her husband was not heard of for 7 years so presumed to be dead, can be drawn in the absence of proof to the contrary by the respondent. In the circumstances of the case, Court can legitimately draw this presumption from 6-2-1992 in terms of section 108 of Evidence Act, and husband of the petitioner is deemed to have died for the past 7 years.

In the said case, the husband of the respondent Aruna Pyasi was missing and no body has heard of him for more than seven years. Thus, the Division Bench by invoking Section 108 of the Evidence Act opined that he should be presumed as dead. Consequently, the terminal benefits and compassionate appointment was directed to be given to wife Mrs. Aruna Pyasi.

7. The same view is taken by Calcutta High Court in Narayan Nayak Vs. State Bank of India and Others, , which reads as under:-

In the decision in the case of Chief Engineer, Central Zone, Andhra Pradesh State Electricity Board, Vijaywada and Others Vs. K. Naga Hema, , it was so held by a Division Bench of Andhra Pradesh High Court in fact, under the provisions of Section 108 of the Evidence Act, death is presumed when a person has not been heard of for 7 years by those who would naturally have heard him if he had been alive. Therefore, having regard to the legal proposition, particularly when the Bank had already accepted the legal death by its conduct viz. by the payment of retiral benefits to the heirs of the missing employee, the death is already presumed by the Bank.

The rule in Section 108 of the Evidence Act supersedes the time of presumption provided in the Hindu Law as well as Hanafi Law which are 12 years and 30 years respectively; It is a rule of presumption. By reason of the language applied in Section 108 of the Evidence Act, the burden to prove that such person is alive, lies on the person who affirms it, despite the person having not been heard of for 7 years by persons who would have heard of him if he were alive. The presumption of civil death or fictional death by reason of Section 108 of Evidence Act tantamounts to physical death in the eye of law. On this proposition I am supported by *Parikh v. Champa*. Thus, the presumption is a rule of evidence. By fiction the death is presumed in such circumstances unless otherwise proved by him who controverts it. Therefore, there cannot be any question of obtaining a decree of declaration of civil death by the near relatives who have not heard of him. If some one insists that he is not dead then it is he who has to prove it. In as much as the burden lies on the person who asserts that affirmative.

8. Thus, the first question needs to be answered in favour of the petitioner that after 7 years, it can be presumed that the petitioner's husband is no more.

9. The second question is whether in absence of any nomination in favour of the petitioner, she can be given benefit of family pension and other benefits. In the considered opinion of this Court, this point is also no more *res integra*. However, it is apt to mention here that the marital status of the petitioner with her husband has not been disputed by the other side. The respondents although contended that Shyam Sundar was facing criminal cases, they have not chosen to inform and indicate the outcome of the same. In other words, it is not shown whether he was convicted by any court etc. It is also not demonstrated, whether any decree of dissolution of marriage is passed at any point of time between Shyam Sundar and the present petitioner. Thus, there is no material to show that petitioner is not legally married wife of Shyam Sundar.

10. In (1999) 5 SCC 237, *G.L.Bhatia v. Union of India* the Apex Court opined as under:-

The sole question that arises for consideration in this appeal is whether the appellant, who happens to be the husband of the deceased government servant, is entitled to family pension under the provisions of the Central Civil Services (Pension) Rules notwithstanding the fact that the deceased wife in her nomination did not include the husband. The forums below have taken the view agreeing with the authorities that since the nomination was not in favour of the husband and the husband was staying separate from the wife, the husband would not be entitled to family pension in question. This view cannot be sustained.

In the light of the aforesaid provisions and there being no divorce between the husband and wife even though they might be staying separately, the appellant husband would be entitled to the family pension in terms of the rules as noted aforesaid and the authorities, therefore, committed error in not granting family

pension to the appellant relying upon the nomination made by the deceased wife of the appellant. The impugned order is, accordingly, set aside and this appeal stands allowed.

This judgment was considered by this Court in Smt. Girijabai Vs. State of M.P. and Others, Following the ratio of G.L. Bhatia (supra) this Court also opined that nomination is not necessary for grant of family pension. After Considering the relevant provisions of M.P. Civil Services (Pension) Rules, 1976, this Court opined that the petitioner is entitled for grant of family pension in accordance with rules. However, it is also mentioned in the said judgment that the gratuity is payable to the nominee under rule 46 of the Pension Rules. Thus, only family pension is directed to be paid to the family of the deceased.

On the basis of aforesaid, this petition deserves to be partly allowed. Consequently, the respondents are directed to grant family pension to the petitioner or other dependants strictly in accordance with the rules and pass appropriate orders within three months. The benefits be calculated and be proportionately paid to the eligible persons within the same time. No costs.