

**CENTRAL ADMINISTRATIVE TRIBUNAL
JAIPUR BENCH, JAIPUR**

ORIGINAL APPLICATION NO. 291/662/2017

Order reserved on 07.09.2021

DATE OF ORDER: 13.09.2021

CORAM

**HON'BLE MR. DINESH SHARMA, ADMINISTRATIVE MEMBER
HON'BLE MRS. HINA P. SHAH, JUDICIAL MEMBER**

Smt. Bhama Devi Wife of Shri Thaneshwar Prasad Sharma, aged about years, R/o Sarvay No. 74 Shivaji Nagar Kacchi Basti, Shashtri Nagar, Jaipur (Rajasthan).

....Applicant

Ms. Kavita Bhati, counsel for applicant (through Video Conferencing).

VERSUS

1. Union of India through the Secretary to the Government of India, Ministry of Mines, Shastri Bhawan, New Delhi.
2. The Director General, Geological Survey of India, 27, J.L.N. Road, Kolkata (W.B.).
3. The Dy. Director General, Geological Survey of India, Western Region, 15-16, Jhalana Doongari, Jaipur-302004.

.... Respondents

Shri V.D. Sharma, counsel for respondents (through Video Conferencing)

ORDER

Per: Hina P. Shah, Judicial Member

The present Original Application has been filed by the applicant under Section 19 of the Administrative Tribunals Act, 1985 for the following reliefs:-

- “(i) By an appropriate order the present Original Application of the applicant may kindly be accepted and the respondents may be directed to pay the terminal benefits to the applicant along with family pension in the larger interest of justice along with interest @ 18% per annum. The son of the applicant may also be considered for the compassionate appointment in place of his father.
- (ii) By an appropriate order, the order dated 29.07.2004 removing Shri Thaneshwar Prasad from service may kindly be quashed and set aside.
- (ii) By an appropriate order or direction the respondents may kindly be directed to pay cost of the application to the applicant.
- (iv) Any other order or direction which the Hon’ble Tribunal deems just & proper may also be passed in favour of the applicant. ”

2. The brief facts of the case, as stated by the applicant, are that the husband of the applicant, Shri Thaneshwar Prasad, was working as Bearer in GSI Canteen since 1985. He went missing while working on 30.09.2001 and his whereabouts are not known till

date. Thereafter, the brother of Shri Thaneshwar Prasad along with the applicant lodged a report of missing person in Bhatta Basti Police Station on 08.09.2002 and a report was registered as Report No. 496/2002. Also his name was telecasted under missing persons in newspapers as well as in T.V. Vide report dated 07.11.2008, it was informed that still efforts are being made about the said husband of the applicant namely, Shri Thaneshwar Prasad. In the meanwhile, respondent No. 3 issued a charge sheet dated 09.08.2002 under Rule 14 of CCS (CCA) Rules, 1965 and charges were leveled for unauthorizedly absent from duties since 01.10.2001 till date. In spite of knowing the fact of the husband of the applicant missing, respondents have served charge sheet which is unjust and arbitrary. Thereafter, Inquiry Officer was appointed and ex-parte inquiry was conducted. After receiving inquiry report, the Disciplinary Authority concluded the matter ex-parte holding the charge of absentism as proved. The respondent No. 3 then published a notice in local newspaper dated 29.07.2004 whereby penalty of 'Removal from service' was passed. In the meanwhile, the applicant constantly represented with the respondents for grant

of family pension in terms of Pension Rules. But no action was taken by the respondents on the same. As in spite of lodging report of missing since 08.09.2002 and as per Section 107 of the Indian Evidence Act, in spite of 07 years passed and that he has not been heard, it is presumed that the person is not alive and, therefore, disciplinary action against such a person does not hold good. A legal notice was served on respondents to grant death-cum-retirement gratuity along with family pension to her family, but as no benefits were provided, the applicant had filed a Writ Petition being registered as S.B.C.W.P. No. 17402/2012 which came to be disposed of vide order dated 30.01.2014 and respondents were directed to consider the case of the applicant for grant of retiral benefits, compassionate appointment with other dues that may be payable in case of death of a government servant and pass appropriate order on the application / representation of the applicant. In spite of the order of Hon'ble High Court as no relief was granted to the applicant, she filed a Contempt Petition (CCP No. 1375/2017) before the Hon'ble High Court but the same was dismissed vide order dated 01.11.2017 on the grounds of delay. Feeling aggrieved by the action

of the respondents, the applicant has preferred the present Original Application for grant of retiral benefits, family pension, compassionate appointment to her son as well as for quashing the order of removal of her husband from service dated 29.07.2004.

3. a) Respondents vide their reply raised preliminary objection and stated that on ground of delay and laches, the present Original Application deserves to be rejected. As per the applicant's own version that missing person report was lodged by way of an FIR on 08.09.2002 as the husband of the applicant went missing since 30.09.2001 and the present Original Application has been filed after a delay of 16 years. Even after presumption of missing person is no more and as per Section 107 of the Indian Evidence Act if accepted then too, the present Original Application is filed in 2017 without any justified and reasonable grounds explaining the delay in approaching the Tribunal. The applicant was supplied copy of order dated 03.06.2014 issued in compliance of the order of the Hon'ble High Court, however, the applicant has not approached the Tribunal at relevant time and

again belatedly approached the Tribunal after 03 years, which is highly belated and, therefore, without filing an application for condonation of delay as prescribed under Section 21 of the Administrative Tribunals Act, 1985, no relief can be claimed by the applicant. The second objection raised by the respondents is that the applicant has not availed the alternate remedy available under the rules. The order of removal from service is appealable and the applicant did not choose to file statutory Appeal as prescribed under CCS (CCA) Rules 1965 and, therefore, not availing alternate remedy also the present Original Application deserves to be dismissed.

b) On merits, respondents state that the Vigilance Section of Western Region has published Notice in local newspapers about absentism of the husband of the applicant since 01.10.2001 from duty and was ordered to report to duty within 15 days of the notice. After inquiry being held as per rules, the husband of the applicant was found absent from duties since 01.10.2001 vide order dated 28.04.2003. Also a Memorandum of Charge Sheet was issued on 09.08.2002. Thereafter, the applicant vide her letter

dated 12.09.2002 intimated the respondents that an FIR has been lodged on 08.09.2002 regarding missing of her husband. Thereafter, regular inquiry proceedings were held as per rules in accordance with the procedure laid down in CCS (CCA) Rules 1965. On conclusion of proceedings, major penalty "Removal from service" was imposed upon the husband of the applicant i.e. Shri Thaneshwar Prasad vide order dated 29.07.2004. Since the respondents have never admitted that the husband of the applicant is dead, but have passed orders of removal from service, therefore, being removed from service as per rules, he or his legal heirs are not entitled for any financial benefit. Therefore, claim of the applicant stands infructuous. As Shri Thaneshwar Prasad was removed from service on account of absentism under CCS (CCA) Rules 1965, order of removal from service remains in force. It is further stated that as per Hon'ble High Court's direction, a speaking order dated 03.06.2014 was passed by Western Region, Jaipur wherein it was informed that release of admissible benefits to the family of the deceased Govt. Servant cannot be made at par with the normal case of death of a Govt. servant, as long as the penalty order is not

quashed and set aside by the competent authority as the order of removal still exists. Also in view of the speaking order and existing rules, her case was found "unfit" for grant of relief. Thus, the present Original Application being devoid of merits deserves to be dismissed.

4. The applicant filed a rejoinder denying the contentions of the respondents. The applicant further states that the present case of the applicant is covered by several case laws and it is squarely covered by the observation of Hon'ble High Court of Kerala in the case of Marimma Samuel vs. State of Kerala (WP No. 8107/2010), therefore, she is entitled for the benefits. The case of the applicant was purposely kept pending for several years by the respondents and that she is fighting for justice since last several years and that she should have been paid provisional pension after one year from the date her husband went missing. As her right to claim terminal benefits is a recurring cause of action, there is no question of delay and laches. Also as per OM dated 29.08.1986, family pension of the dependent has to be started immediately after one year of lodging of

FIR. Therefore, Original Application filed by the applicant deserves to be allowed in larger interest of justice.

5. We have heard learned counsels for the parties at length through Video Conferencing and examined the pleadings as well as the judgments cited by the parties.

6. Both the applicant as well as the respondents have reiterated their submissions.

7. The factual matrix of the case is that the husband of the applicant while working with the respondents went missing since 30.09.2001 and an FIR was registered to that effect with Bhatta Basti Police Station on 08.09.2002. In the meanwhile, the respondents issued a charge sheet dated 09.08.2002 under Rule 14 of CCS (CCA) Rules, 1965 in the name of Shri Thaneshwar Prasad for his unauthorized absence from duties since 01.10.2001 to till date. As the copy of charge sheet sent on local address mentioned was received back with remarks "there is nobody by such name in Survey No. 74, Shivaji

Nagar”, so a notice was published in local newspapers mentioning that Shri Thaneshwar Prasad was absent from duty w.e.f. 01.10.2001 and was ordered to report within 15 days of the notice but he never reported to GSI, Western Region, Jaipur for duty, as per office records. Therefore, an ex-parte inquiry was held as per GOI Instructions (6) below Rule 14 of CCS (CCA) Rules, 1965, appointing an IO/PO as Shri Thaneshwar Prasad was found unauthorized absent from his duties since 01.10.2001 vide order dated 28.04.2003. The applicant, i.e. wife of Shri Thaneshwar Prasad, vide her letter dated 12.09.2002 intimated that FIR has been lodged on 08.09.2002 regarding incidence of missing of her husband.

8. We have observed that the inquiry proceedings were conducted in accordance with the procedure laid down as per CCS (CCA) Rules, 1965. On concluding of inquiry, the Inquiry Officer held the charges of being absent from duties as proved which was from 01.10.2001 till date. Thereafter, the Disciplinary Authority imposed punishment of 'Removal from service' upon Shri Thaneshwar Prasad vide order dated 29.07.2004 under CCS (CCA) Rules, 1965. The

said order was also published in the local daily newspaper.

9. It was the contention of the applicant that the presumption provided under Section 107 of Indian Evidence Act applies to the present matter which provides that when the question is whether a man is alive or dead and it is proved that he has not been heard of for 07 years by those who would have naturally have heard of him if he had been alive, then in such a case, the concerned person shall be presumed to be dead. Thus, no disciplinary action against the person who is not alive can sustain and, therefore, the punishment of 'Removal from service' does not hold good. It is the claim of the applicant that she made several representations to the authorities for grant of family pension and gratuity but no action was taken by them in this regard. Therefore, the applicant was forced to serve a legal notice for grant of death-cum-retirement gratuity along with family pension.

10. In spite of the legal notice, since no benefits were provided to the applicant, she filed S.B.C.W.P. No.

17402/2012 before the Hon'ble High Court and the Hon'ble High Court vide its order dated 30.01.2014 disposed of the Writ Petition with the following directions:

"In view of the above, the writ petition is disposed of with a direction to respondents to consider the application/representation of the petitioners for grant of retiral benefits, compassionate appointment with other dues that may be payable in case of death of a government servant, and pass appropriate order on the application/representation of the petitioners within a period of three months from the date a copy of this order is produced before them."

The applicant preferred a representation accordingly and the respondents vide order dated 03.06.2014 informed the applicant that release of the admissible benefits to the family of the deceased govt. servant cannot be made at par with the normal case of death of a govt. servant, as long as the imposition of penalty order (termination) is imposed and the same is not quashed/set aside by the competent authority and her case was found "unfit" for grant of relief. Thereafter, since no benefits were given to the applicant, she filed a Contempt Petition, (CCP No. 1375/2017), before the Hon'ble High Court but the same was dismissed vide order dated 01.11.2017 on the ground of delay.

11. On the other hand, it is seen that after dismissal of Contempt Petition before the Hon'ble High Court, the applicant has approached this Tribunal for grant of retiral benefits, family pension, compassionate appointment to her son as well as for quashing the order of removal of her husband from service dated 29.07.2004 by way of filing the present Original Application on 21.12.2017. The respondents have raised two preliminary objections with regard to limitation as well as for non-availing alternate remedy of statutory Appeal, besides merits and prayed for dismissal of Original Application.

12. After going through the pleadings and after hearing the parties, it is clear that the applicant has earlier approached the Hon'ble High Court by way of filing SBCWP No. 17402/2012 praying for similar reliefs as prayed for in the present Original Application and after hearing the submissions of the petitioner, vide order dated 30.01.2014, the Hon'ble High Court disposed of the Writ Petition with a direction to respondents to consider the application/representation of the petitioners for grant of retiral benefits,

compassionate appointment with other dues that may be payable in case of death of a government servant, and pass appropriate order on the application/representation of the petitioners within a period of three months from the date a copy of this order is produced before them.

It is seen that the said order of the Hon'ble High Court was communicated to the respondents on 14.03.2014 and respondents have gone through the representation of the applicant dated 05.06.2013 and vide order dated 03.06.2014, (Annexure R/1), the respondents have passed the following order:-

"3. As per the directions of the Hon'ble High Court, the representation dated 05.06.2013 of the petitioner was examined critically and sympathetically by the Competent Authority with emergence of the following position.

- (i) As per the direction of the Hon'ble High Court, the case of the petitioner was considered in the manner in the same way as it is treated in the normal case of death of a Government Servant.
- (ii) It emerged that the Petitioner's husband went missing from 01.10.2001.
- (iii) As per information received from the wife of the missing official, FIR was lodged with the Police vide FIR No. 496 dated 08.09.2002 at Bhatta Basti Police Station, Jaipur. As per communication dated

02.06.2011 received from the wife of the missing official, a query was made by her with the Police regarding status of the investigation. In response, the concerned Police Station vide its response / Memo dated 27.05.2011, informed that the missing person could not still be traced out and that the investigation was still going on. As per extant rules of the Govt. of India, a missing person is treated as "DEEMED DEAD" after seven years of lodging the FIR with the police and the police after due instigation finally closes the case, treating the person as untraceable and only in such situation a missing Govt. official can be treated as DEEMED DEAD.

In the instant case, since the official's service was terminated, after a disciplinary proceedings, unless an appeal is made to the Appellate Authority (AA) and the same is set aside or quashed by the AA or for that purpose, unless the order of penalty is quashed / set aside by a Competent Court of Law, his case can not be treated at par with the normal case of death of a Govt. Servant.

- (iv) The non-submission of closure of the FIR / Police case, even after seven years, have made the situation all the more uncertain and complicated.
- (v) Accordingly, arrangement for release of the admissible benefits to the family of the deceased Govt. servant can not be made at par with the normal case of death of a Govt. Servant, as long as the imposition of Penalty Order (Termination) imposed is not quashed/set aside by the Competent Authority.

Hence, keeping in view of the directives of the Hon'ble Court the undersigned has considered the matter as per the prevailing rules & law. According to the

Law her representation and application hereby decided as she is not found fit to grant relief.

This issues in compliance of the judgment order passed by the Hon'ble Rajasthan High Court at Jaipur vide its judgment order dated 31.01.2014 in the subject Writ Petition."

13. Therefore, in our opinion, the same reliefs are prayed by the applicant in the present Original Application as had been prayed before the Hon'ble High Court and, thus, when the higher forum has already decided the issue, in view of principle of res-judicata, this Tribunal is restrained from passing any further orders or directions. Also this Tribunal cannot act as an Appellate forum over the orders passed by Hon'ble High Court. As observed by the Hon'ble Apex Court in several judgments, on the principle of res-judicata, it is clear that the principle of res-judicata comes into play when by the judgment and order, a decision of a particular issue is implicit in it, that is, when any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eyes of law, to avoid multiplicity of litigation and to bring finality in it, is deemed to have been

constructively in issue and, therefore, it is taken as decided.

14. Thus, in these circumstances, though we have sympathy towards the applicant, but we have no hesitation in taking a view that the present Original Application filed by the applicant is hit by constructive res-judicata and, therefore, deserves to be dismissed. Accordingly, present Original Application is dismissed. No order as to costs.

(HINA P. SHAH)
JUDICIAL MEMBER

(DINESH SHARMA)
ADMINISTRATIVE MEMBER

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