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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK

Original Application No.148 of 1992

And

Original Application No.149 of 1992

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Date of Disposal - 21-1-1993.

Smt. Sukumati Mudi Petitioner

Versus

Union of India and others Opp. Parties

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For the Petitioner

M/s Ganeswar Rath,
P.K. Mohapatra,
A.K. Patnaik,
A.K. Mohanty,
C. Laxman,
J.C. Sahoo,
Advocates.

For the Opp. Parties

Mr. Aswini K. Misra,
Sr. St. Counsel (Central)

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CORAM:

THE HONOURABLE MR. K.P. ACHARYA, VICE CHAIRMAN

A N D

THE HONOURABLE S.R. ADIGE, MEMBER (ADMINISTRATIVE)

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1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the reporters or not? / NO
3. Whether Their Lordships wish to see the fair copy of the judgment? Yes.

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J U D G M E N T

K.P.ACHARYA,V.C.

Since the Petitioner is the same lady in both these applications and the cause of action for one case is interconnected with the cause of action relating to other case and consequential benefit, would follow in Original Application No.148 of 1992 according to the result of Original Application No.149 of 1992, though both the cases was heard one after the other from the counsel for both sides, we direct that this common judgment would govern both the cases.

2. Husband of the Petitioner in both the cases namely Shri Siropani Modi was an employee in the Postal Department initially appointed as a clerk. He served as such for about 11 years and suddenly the said Modi remained absent from duty on 7th February, 1983. A leave application was sent for grant of leave for one month. After expiry of one month, Shri Modi neither resumed his duty nor sent any intimation either to the Post Master, Keonjhar garh Post Office or to the Superintendent of Post Offices, Keonjhar. Correspondence was made with Shri Modi informing him that he should resume duty forthwith failing which disciplinary action will be taken against him. This communication was sent by registered post bearing letter

There was no response.

No.218 dated 21st July, 1983. A disciplinary proceeding was initiated and ultimately it ended against Shri Modi being an ex parte enquiry and ultimately Shri Modi was ordered removal from service. The wife of Shri Modi i.e. the present petitioner made an application for grant of family pension on the ground that her husband

is not to be heard for more than seven years and presumption

and therefore should arise that he is dead, family pension should be granted in her favour. This benefit was denied to the Petitioner as Shri Modi had been removed from service.

3. In Original Application No.148 of 1992, the Petitioner prays for grant of family pension and gratuity etc. and in Original Application No.149 of 1992, the petitioner prays to quash the exparte departmental enquiry. For the sake of convenience, we propose to deal first with Original Application No. 149 of 1992 because findings in Original Application No.149 of 1992 would decide the fate of the petitioner in Original Application No.148 of 1992 and her prayer in the said case.

4. Now coming to the merits of the case, in Original Application No.149 of 1992, the admitted position is that an exparte enquiry was conducted. According to Mr. Aswini Kumar Misra, learned Senior Standing Counsel (Central), the exparte enquiry was bound to be conducted keeping in view the guidelines indicated in Annexure R/22 laying down the procedure to be adopted while the delinquent was not to be found. Notice was sent by Registered post to the last place of residence of Shri Modi. All the Registered letters were returned back with an endorsement 'addressee is not available at his native village since long time'. At the cost of repetition it may be said that the first communication was by Registered letter No.218 dated 21.7.1983. Of course we cannot drive ourselves to conclude that correct procedure has not been followed. It has been followed according to the guidelines laid down in Annexure R/22. The fact remains that the Petitioner Shri Modi (husband of the petitioner)

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is not to be heard of since 21.7.1983. Law is well settled that if a person is not to be heard for seven years, then it is presumed that the person concerned is dead. This envisaged under section 108 of the Evidence Act. In this connection we feel tempted to refer to a judgment of the Hon'ble Supreme Court in the case of Ramrati Kuer Vs. Dwarika Prasad Sing and others reported in AIR 1967 SC 1134. At page 1140 Their Lordships have been pleased to observe as follows:

"As Ramruch had not been heard of more than seven years after he disappeared from the village, he must be presumed to be dead and the plaintiffs-respondents would in the circumstances be entitled to the property of which he was the last male-holder."

Here is a case where Shri Modi was last heard on 7.2. 1983 when he filed an application for grant of leave. According to the case of the Opposite Parties, he did not join duty on expiry of one month's leave. and in addition to the above letter dated 21.7.1983 was returned back as unserved with a report that the addressee is not available ^{his} in native village since a long time. These peculiar facts and circumstances of the case persuades us to come to a conclusion that on the expiry of seven years from 21.7.1983, it is presumed that the person concerned is dead. Law is equally well settled, and very fairly not disputed at the Bar, that the onus lies on the person

who says that the person is living to prove that the

person concerned is living. In the present case neither parties contended that Shri Modi is still living, nor they have come up with any evidence to prove that the said Modi is ^{not} dead. Mr. Aswini Kumar Misra submitted that in case this presumption is attracted then on the expiry of seven years it would be presumed that man is dead but the proceeding having been disposed of in the year 1985 there cannot be any presumption that in the year 1985, Shri Modi was dead. We are unable to accept this contention of Shri Misra learned Standing Counsel (Central) because on expiry of the period of seven years, once the man is presumed to be dead it would have a retrospective operation and therefore it would date back retrospectively to the date from which he was not at all heard. At the cost of repetition, we may say that Modi was not heard after expiry of thirty days leave granted to him. Therefore, there is no other alternative left for this court but to presume that during the period when the enquiry proceeding was conducted ex party i.e. in the year 1985, Modi was dead and a proceeding cannot be conducted against a dead man. Apart from the above, the circular issued in the year 1986 contained in Annexure 8 undoubtedly has a prospective effect but keeping in view the law laid down in the case of D.S. Nakra Vs. Union of India and others reported in AIR 1980 SC 130, on certain matters retrospective effect has to be given especially in regard to pensionary matters, otherwise there would be a clear discrimination.

Here is a case, where we find that the guidelines issued

in Annexure 8 should also be given retrospective effect for the ends of justice. Therefore, applying the guidelines contained in Annexure 8 to the facts of the present case we would hold that the departmental proceeding was not maintainable at all. In the circumstances, stated above and having come to a conclusion that the disciplinary proceeding was not maintainable, at the relevant time, the punishment order passed in the disciplinary proceeding is hereby quashed and further more we would observe that keeping in view the guidelines issued under Annexure 8, the petitioner is entitled to family pension including GPF, Gratuity and no longer any impediment exists against the petitioner relating to the removal of the petitioner's husband from service. Taking into consideration the period of service rendered by the husband of the petitioner, the petitioner's pensionary benefits as indicated above be calculated and paid to the petitioner Smt. Sukumati Modi within 90 days from the date of receipt of a copy of this judgment.

4. Thus, both the applications are accordingly disposed of leaving the parties to bear their own costs.

Sd/- S. R. Adiga /93
MEMBER (ADMINISTRATIVE)

Sd/K.P. Acharya

VICE CHAIRMAN

Central Administrative Tribunal,
Cuttack Bench, Cuttack/21.1.93/
K. Mohanty.

