

FORM NO. 4  
(See Rule 42)  
CENTRAL ADMINISTRATIVE TRIBUNAL  
GUWAHATI BENCH :  
ORDERSHEET

1. ORIGINAL APPLICATION No : -----/ 2011
  2. Transfer Application No : -----/2011 in O.A. No.-----
  3. Misc. Petition No : -----/2011 in O.A. No.-----
  - ✓ 4. Contempt Petition No : 3 -----/2011 in O.A. No. 166/2009
  5. Review Application No : -----/2011 in O.A. No.-----
  6. Execution Petition No : -----/2011 in O.A. No.-----
- Applicant (S) : Smt. JAYA Talukdar
- Respondent (S) : Sri Monoj Kumar Doley
- Advocate for the : Mr. A.R. Sikder, Mr. J.A. Azad,  
{Applicant (S)} Mr. M.H. Talukder, Mr. A. Hussain  
Mr. A. Ahmed
- Advocate for the : -----  
{Respondent (S)} CHC

Notes of the Registry	Date	Order of the Tribunal
<p>This cp is filed by the applicant through Mr. A.R. Sikder, Adv. Praying for non-compliance of the order Dtd- 8-7-2010 passed in OA. 166/2009</p> <p>Laid before the Hon'ble court for favour of order</p> <p><u>11.2.2011</u> Section officer (J) pg</p> <p><u>11.2.2011</u></p>	<p>17.02.2011</p> <p>26.05.2011</p>	<p>This is a Division Bench matter. Place it before the Division Bench at the earliest possible date. Adjourned sine die.</p> <p><u>(Madan Kumar Chaturvedi)</u> Member (A)</p> <p>On the prayer of learned counsel for the applicant list the matter on 27.5.2011 to enable the counsel to take instruction.</p> <p><u>(M. K. Chaturvedi)</u> Member (A)</p> <p><u>(N.A. Britto)</u> Member (J)</p>


-2-  
CP 3/2011 (O.A.199/2009)

27.05.2011      None present for the applicant.  
Applicant has applied for civil contempt for non-  
implementation of order dated 08.07.2010  
without applying for execution.

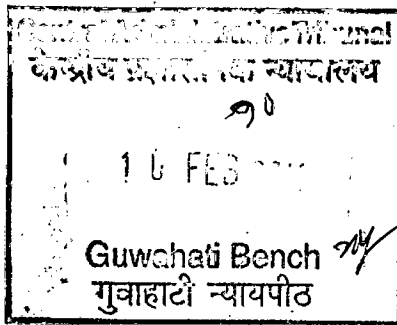
We are not inclined to entertain this  
application for civil contempt, <sup>at this stage.</sup> Applicant is at  
liberty to apply for execution.

Contempt petition is dismissed with  
above observations, with liberty aforesaid.

  
(M.K.Chaturvedi)  
Member (A)

  
(N.A.Britto)  
Member (J)

/bb/



IN THE CENTRAL ADMINISTRATIVE TRIBUNAL, GUWAHATI  
BENCH, GUWAHATI.

Filed by applicant  
Jitendra  
Anwar Hussain  
Advocate  
16/2/2011 2:04  
Jaya Talukdar

Contempt Petition No. 3 /2011  
In Original Application No.166 of 2009

In the Matter of :-

A petition under section 17 of the Central  
Administrative Tribunal Act, 1985 praying  
for punishment of the Contemnors/  
respondents for non-compliance of order  
dated 8.7.2010 passed by this Hon'ble  
Tribunal in O.A. No. 166 of 2009.

-And-

In the Matter of :-

O.A. No.166 of 2009

Smt. Jaya Talukdar

... Applicant

-Vs-

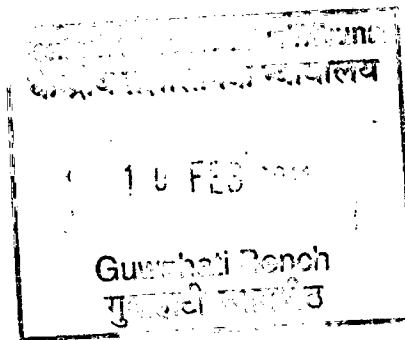
The Union of India & Ors.

... Respondents

-And-

In the Matter of :-

Smt. Jaya Talukdar,



W/o Late Chakreswar Talukdar,  
C/o Sri Paritosh Chakraborty.  
B.T. Road (Bye Lane),  
P.O. & Dist. Bongaigaon,  
Assam, PIN : 783 380.

... Petitioner

**-Versus-**

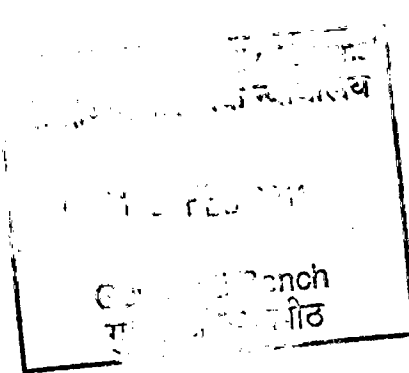
1. Sri Monoj Kumar,  
The Chief Postmaster General,  
Assam Circle, Guwahati,  
Panbazar, Guwahati - 781001.
2. Shri Pawan Kr. Singh,  
The Director of Postal Service (H.Q.),  
Assam Circle, Guwahati,  
Panbazar, Guwahati - 781001.
3. Shri Thakur Das Saha,  
The Superintendent of Post Office,  
Goalpara Division, Dhubri,  
P.O. & District - Dhubri, Assam,  
PIN : 783 370.

### ... Contemnors/Respondents

-And-

In the Matter of :-

Non-compliance of the order dated  
8.7.2010 of this Hon'ble Tribunal



298  
Jaya Galukder,

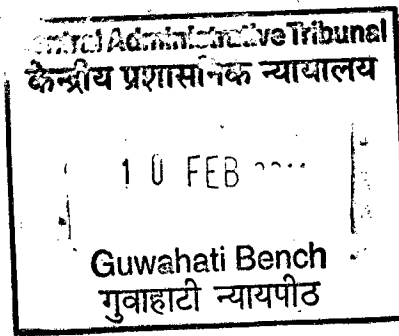
passed in Original Application No.166  
of 2009.

The humble petition of the petitioner  
above named;

**MOST RESPECTFULLY SHEWETH:-**

1. That the petitioner begs to state that she filed O.A. No. 166/09 challenging the impugned order dated 15.7.08 issued under the signature of Superintendent of Post Offices, Goalpara Division forfeiting the claim of past service benefits of her husband and to set aside the impugned penal order vide Memo No. F-6-1/2001-02 dated 10.2.06 by which service of her husband was dismissed on alleged charges of misappropriation of Rs.103809.42. This Hon'ble Tribunal after taking into consideration of totality of facts and circumstances of the case set aside the aforesaid impugned order by its order dated 8.7.2010 passed in O.A. No.166/09 and directed the respondent authority to release the retrial and other pensionary benefits on account of the service of the petitioner's husband as per law within three months from the date of receipt of the order of this Hon'ble Tribunal.

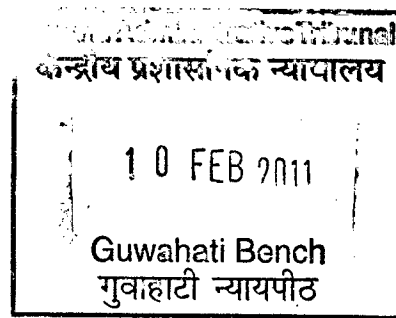
A copy of the order dated 8.7.2010  
passed in O.A. No. 166/09 is annexed  
herewith and marked as Annexure-A.



2. That the petitioner begs to state that after obtaining a certified copy of order dated 8.7.10 placed the same before respondent No.1 along with a prayer petition dated 27.8.10 to comply with this Hon'ble Tribunal's order. The good office of the said respondent has acknowledged the receipt of copy of the same on the same day i.e. 27.8.10.

A copy of the prayer petition dated 27.8.2010 is annexed herewith and marked as Annexure-B.

3. That the petitioner begs to state that almost more than 4 months have elapsed from the date of receipt of the certified copy of the final order dated 8.7.10 passed in O.A. No. 166/09. But the respondent authority has till date not released the retrial and other pensionary benefits although the respondent authority was to comply with the direction of this Hon'ble Tribunal within 3 months.
4. That the contemnor/respondent has wilfully and deliberately disobeyed this Hon'ble Tribunal's Order dated 8.7.10 and thus committed contempt of court deserves stringent punishment u/s 17 of the Administrative Tribunals Act, 1985 in exercise of the powers conferred by section 23 of the Contempt of Courts Act, 1971.
5. That the petitioner begs to state that no other contempt petition on the same facts has been filed by her previously.



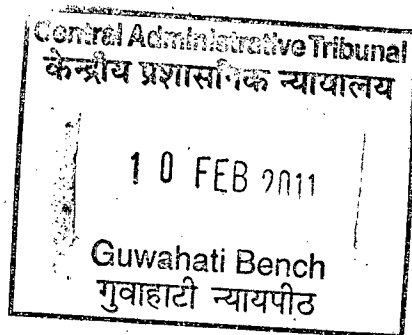
Page 288

6. That it is stated that the instant contempt petition is not barred by limitation under section 20 of the Contempt of Court Act, 1971 as it is filed within one year from the date of alleged contempt.
7. That this contempt petition is filed bonafide in the interest of justice.

Under the above facts and circumstances it is therefore prayed that your Lordships would be pleased to admit this contempt petition, issue notice to show cause as to why a contempt proceeding shall not be drawn up against the respondent authority/contemnor for committing contempt of court for wilful and deliberate disobedience of this Hon'ble Tribunal's order and shall not be punished under section 17 of the Central Administrative Tribunal Act, 1985 or pass such any other order or orders as this Hon'ble Tribunal may deem fit and proper.

-And-

Further, it is also prayed that in view of the deliberate disrespect and disobedience to this Hon'ble Tribunal's



Order dated 8.7.2010 passed in O.A. No. 166 of 2009, the respondents/contemnors may be asked to appear in person before this Hon'ble Tribunal to explain as to why they should not be punished under the contempt of Court proceeding.

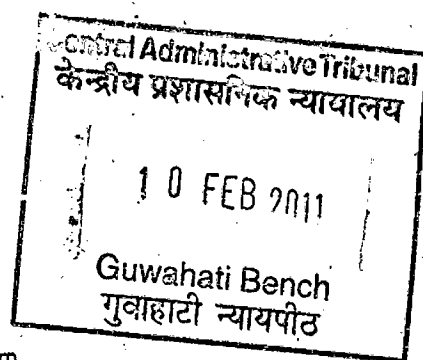
And for this act of kindness your humble petitioner as in duty bound shall ever pray.

Draft Charge

The applicant/petitioner aggrieved for non-compliance of order dated 8.7.2009 passed by this Hon'ble Tribunal in O.A. No. 166/09. The contemnors/respondents have wilfully and deliberately violated this Hon'ble Tribunal's order by not releasing the claim of past service benefits of her husband and other pensionary benefits on account of service rendered by the petitioner's husband. Accordingly the respondents/contemnors are liable for prosecution under the Contempt of Court Act, 1971 and severe punishment thereof as provided and also to appear in person before this Hon'ble Tribunal to reply the charges levelled against them.

... Affidavit





- 7 -

A F F I D A V I T

I, Smti. Jaya Talukdar, wife of Late Chakraswar Talukdar, ~~xxx~~ Aged about 51 years, C/o. Sri Paritosh Chakraborty, B.T. Road (Bye Lane), P.O. & Dist.- Bongaigaon, Assam, Pin - 783380, do hereby solemnly affirm and state as follows :

1. That I am the petitioner in the instant contempt petition and as such I am acquainted with the facts and circumstances of this case. I am competent to swear this affidavit.

2. That the statements made in this affidavit and in paragraphs 3 to 6 are true to my knowledge those made in paragraphs 1 & 2 being matters of record are true to my information derived therefrom which I believe to be true and the rest are my humble submissions before this Hon'ble Court.

And I sign this affidavit on this the 10th day of February, 2011 at Guwahati.

Identified by :

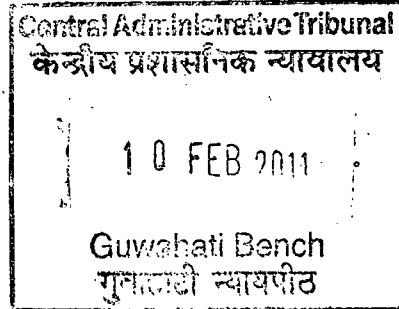
*Jaya Talukdar*

DEPONENT

*Anwar Hussain*  
Advocate

## CENTRAL ADMINISTRATIVE TRIBUNAL, GUWAHATI BENCH

Original Application No.166 of 2009

Date of Order: This, the 8<sup>th</sup> Day of July, 2010.THE HON'BLE MR MUKESH KUMAR GUPTA, MEMBER (J)  
THE HON'BLE MR MADAN KUMAR CHATURVEDI, MEMBER (A)Smti Jaya Talukdar  
Wife of Late Chakreswar Talukdar,  
C/O Shri Paritosh Chakraborty,  
B.T.Road (Bye Lane)  
P.O. & District-Bongaigaon,  
Assam, Pin-783380

By Advocate Mr.J.A.Azad

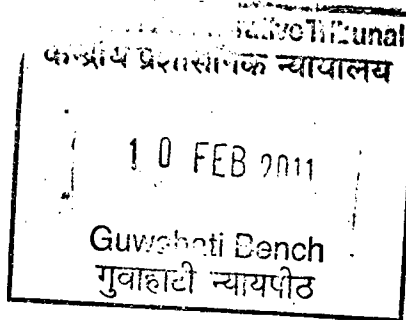
-Vs-

1. The Chief Post Master General,  
Assam Circle, Guwahati, Panbazar,  
Guwahati, Pin-781001
2. The Director of Postal Service (HQ)  
Assam Circle, Guwahati, Panbazar,  
Guwahati, Pin-781001
3. The Superintendent of Post Offices,  
Goalpara Division, Dhubri  
P.O. & District-Dhubri, Assam  
Pin-783301
4. The Deputy Commissioner of Chirang,  
BTAD, Kokrajhar, Assam,  
Pin:783370
5. The Superintendent of Police,  
Kokrajhar, P.O. & District- Kokrajhar,  
Assam, PIN-783370

Respondents

By Mr.M.U.Ahmed, Addl.C.G.S.C.



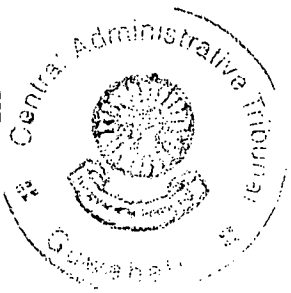
ORDERMR MADAN KUMAR CHATURVEDI (A)

By this O.A applicant makes a request to allow the claim of past service benefits of the applicant's husband and to set aside the impugned Memo No.F-6-1/2001-02 dated 10.02.2006.

2. Adverting to the facts, we find that Late Chakreswar Talukdar (hereinafter would be referred to as Mr. Talukdar), husband of the applicant was senior most postmaster at Bengatal Sub-Post Office in the district of Chirang. On 17.07.2001, Mr. Talukdar went to the office but he did not return back home. An FIR was lodged alleging, inter alia, that Mr. Talukdar was absent from duty since 17.07.2001 and it was alleged in the FIR that Mr. Talukdar misappropriated govt. money amounting to Rs.103809.42. The matter was investigated by the police and charge sheet was submitted on 31.05.2002 showing Mr.Talukdar as absconder. G.R. Case No.450/2001 was registered. CJM, Kokrajhar examined one Upendra Nath Barman, ASI in connection with execution of NBWA/P&A issued against the accused, husband of the applicant. Investigating police officer initially submitted report dated 18.12.2005 before the CJM, Kokrajhar that no trace of the applicant's husband could be collected and his whereabouts are not known. On that basis, CJM, Kokrajhar passed the order dated 20.06.2006, which reads as under:-

"In the Court of C.J.M.Kokrajhar  
G.R.No.450/2001  
U/s = 409 I.P.C.

State  
-Vs-  
ri Chakreswar Talukdar



## Order Sheet

Central Administrative Tribunal  
केन्द्रीय प्रशासनिक न्यायालय

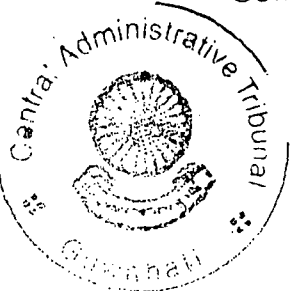
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Guwahati Bench  
गुवाहाटी न्यायपीठ

Date	Order	Signature
20-6-2006	Accud. Absent. E.O. Present. He is examined and discharged. The P.A. against the and Chakreswar Talukder proceed. Hence the accd is declared as absconder and the case against the accd is filed until further order.	

Sd/-D.C.Chetia Phukan  
C.J.M.  
Kokrajhar"

3. Applicant was in deep sense of apprehension that her husband might have been kidnapped by the extremist as, the Bengal area was badly affected by the extremist element at the relevant point of time. Applicant therefore went to the police station to lodge a missing report but the police officer on duty told her that lodging of said report is not necessary as because Postal Department has already filed report. Finding no alternative, she made a request to the D.C., Chirang to make an investigation into the matter. Despite all the best efforts applicant's husband could not be traced out. Applicant's husband left her along with two daughters and one minor son. Applicant has no other source of income. She made a request to the concerned authorities for the financial assistance. Representation was also made before the DC, Bongaigaon for redressal of his grievances. She also approached the Postmaster General, Guwahati for necessary action, but nothing was done in the matter.

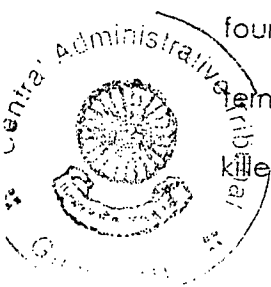


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Guwahati Bench  
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293

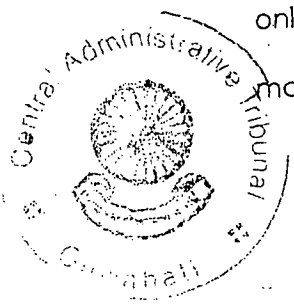
4. The Superintendent of Post Offices, Goalpara Division vide letter dated 15.07.2008 rejected the prayer made by the applicant on a plea that her husband had misappropriated Rs.103809.42. Mr.Talukdar had been dismissed from service for violation of departmental rules. As per the prescription of Section 24 of the CCS (Pension) Rules, 1964 past service benefits has been forfeited. On that basis applicant's claim for retiral benefit has been rejected.
5. Mr.J.A.Azad, learned counsel appearing for the applicant contended that departmental action by way of dismissal from service is not appropriate because it was ex-parte and the person against whom the proceeding is taken is still untraced. Said action has been taken without giving adequate opportunity of being heard. As such, it is violative of the principles of natural justice. Unless the charged official is traced out and the allegation/charge of absconding, unauthorized absence and misappropriation of govt. money are proved, it is not correct to take punitive action against Mr.Talukdar. It was further submitted that the CJM vide order dated 20.06.2006 held that the applicant's husband is absconder. This order was rendered as because Mr.Talukdar did not appear before the Court on the appointed day. From this it cannot be concluded that Mr. Talukdar misappropriated govt. money. It is unbelievable that a person who had immaculate service career of 25 years would misappropriate Rs.103809.42 knowing fully well that his retiral benefits from office would be many times more than the so-called misappropriated amount. Mr.Talukdar was a man of integrity. Nothing incriminating was found against him constituting misconduct for which his service was terminated. There stands a strong possibility of his being kidnapped and killed by the extremist. It was stated that applicant is a poor lady. Her



husband's service was the only source of income of the family, who is missing for more than seven years. Applicant is running from pillar to post with her minor children for redressal of her grievance. Nothing has been done so far. It was strongly prayed that justice be done in the matter.

6. Mr.M.U.Ahmed, learned counsel appearing for the respondents submitted that Mr.Talukdar has been dismissed from service w.e.f. 10.02.2006. Court case against him was filed on 20.02.2006 and he was declared as absconder. After that applicant vide her application dated 25.06.2008 asked for service benefits on the plea that since whereabouts of Mr.Talukdar is not known, she should be given retiral benefits. It reveals from the examination of the case that there is no provision under CCS Rules or CCS (Pension) Rules to grant service benefits to wife of dismissed govt. servant. Accordingly, this fact was intimated to her vide letter dated 15.10.2008. Mr.Talukdar misappropriated govt. money while he was working as Sr. Postmaster. Departmental action was taken against him and he was dismissed from service. Since applicant is not an employee under the Union of India, as such, she cannot approach this Tribunal for redressal of her grievances.

Next it was argued that period of limitation is reckoned with reference to the initial final order passed against the employee. The order against Mr.Talukdar was passed on 10.02.2006. O.A. should have been filed by Mr.Talukdar and not by his wife within 09.02.2007 but the O.A. was filed by his wife in 2009, which is not within the limitation period prescribed under Section 21 of the Administrative Tribunals Act, 1985. This Act is applicable only to the employee of the Union of India in connection with service matters. It is not applicable to general citizen for personal matters. Besides,

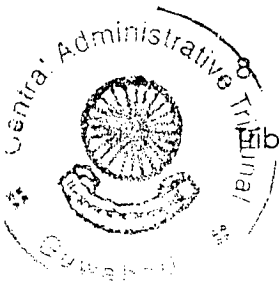


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the applicant could have gone to the police for reporting the missing of her husband, but she did nothing. It was pointed out that Mr.Talukdar showed false liabilities and took excess cash. The correct position was ascertained and confirmed in presence of Executive Magistrate. According to learned standing counsel for the respondents, wife of the employee is entitled to service benefits only after the demise of the employee while in service or after retirement. But in the present case, husband of the applicant is alive and he misappropriated govt. money and remained absent from duty without any information for which he was punished and dismissed from service w.e.f. 10.02.2006. On this factual backdrop, wife or family of the employee are not entitled to service or pensionary benefits. Mr. M.U.Ahmed submitted that without any conclusive proof, it cannot be assumed that Mr.Talukdar was killed by extremist. It was reiterated that under the law, he is absconder and not a missing person. A criminal case under G.R.Case No.450/2001 under Section 409 of IPC is still pending under CJM, Kokrajhar. Commenting on applicability of prescription of Section 108 of the Indian Evidence Act, 1872, it was submitted that Mr.Talukdar cannot be presumed to be a dead person. Such presumption is not relevant in the context of an absconder. Learned standing counsel relied on various precedents to buttress the contention.

7. We have heard the rival submissions so advanced by Mr.J.A.Azad, learned counsel for the applicant and Mr.M.U.Ahmed, learned counsel for the respondents in the light of material placed before us and precedents relied upon.

At the outset respondents assailed the jurisdiction of this Tribunal to decide this matter. We do not find any merit in the contention of



the respondents on this aspect. As a matter of fact, wife of the employee, who has not been heard of for seven years, is making this petition for claiming the retiral and pensionary benefits of her husband. This matter fully comes within the ambit and purview of the jurisdiction of this Tribunal.

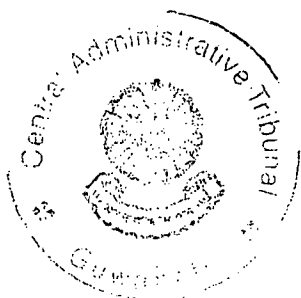
9. Coming to the merits of the case, we find that the applicant was informed by the Superintendent of Post Offices, Goalpara Division, Dhubri vide letter dated 15.07.2008 that her husband retained excess cash amounting to Rs.1,03,809.42 without any legal justification. As such, he violated the departmental rules. The aforesaid shortage was found on the basis of inventory prepared by the Magistrate in presence of the staff. As per Article-II of memorandum No.F6-1/2001-02 dated 10.02.2006, it was worked out as under:-

"Cash	=Rs.2776.10
Stamp	=Rs.6701.00
Revenue	=Rs.1400.00
Total	Rs.10877.10
Due from BOs	Rs. 7080.09
	Rs.17957.19

S.O. a/c book of the office (current) was then examined and found that said Shri Talukdar had written up S.O. a/c book upto 13-07-2001 and as per S.O. a/c book dtd 13.07.2001 closing balance of Bengtal S.O. was as below.

Cash	=Rs.1,07,540.02
Stamp	=Rs.2753.50
Revenue	=Rs. 140.00
Due from BOs	Rs. 6030.00
	Rs.1,16,463.61

Said Shri Talukdar performed his duties on 14.07.2001 and written up B.O. summary upto 14.07.2001 but did not maintain the S.O. a/c book upto 14.07.2001. As per B.O. summary dated 14.07.2001 a sumo of Rs.7080.09 showed due from its Branch Offices. Shri Talukdar also issued M.O. for Rs.1613, paid M.O. for Rs.2000/- and paid bill for Rs.40/- respectively on 14.07.2001 as per voucher found available. But all the above amount was not brought into a/c on 14.07.2001. Besides stamp worth Rs.5730/- was remitted to Bengtal S.O. on 10-07-2001 by the SPM, Bongaigaon S.O., but the amount found not acknowledged and brought into a/c till 14.07.01. All





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Guwahati Bench  
गुवाहाटी न्यायपीठ

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278

the transactions stated above had been taken into account and assessed closing balances as follows.

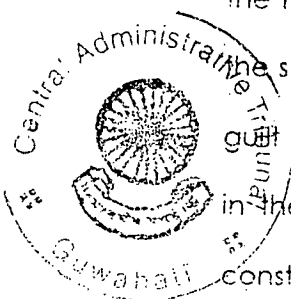
C.B. dated 13.07.2001	=Rs.1,16,463.61
Stamp remitted to Bengtal but not acknowledged.	=Rs. 5,730.00
M.O. issued but not bring to account	=Rs. 1,613.00
Total receipt side	=Rs.1,23,806.61
Less M.O. paid and bills paid	=Rs. 2,040.00
CB	=Rs.1,21,766.61

But on physical verification the executive Magistrate found Rs.10,877.10 as cash/stamp/Revenue balance in the office. A sum of Rs.7080.09 was due from its B.Os. and hence the total shortage was (Rs.1,21,766.61-17,957.19)= Rs.1,03,809.42 (Rupees one lakh three thousand eight hundred nine & paise forty two) only."

10. Mr.Talukdar was not available for comments. It appears that solely on the basis of aforementioned computation, it was concluded that aforesaid amount was misappropriated by Mr.Talukdar and since he was not found, he was taken as absconder.

11. The prayer of the applicant was not acceded to and no attempt was made to trace out Mr. Talukdar. The suspension order was passed in absentia and he was dismissed accordingly without investigating the truth.

12. It transpires from the perusal of records that no investigation was made to find out the actual state of affairs. There can be various reasons due to which reconciliation in account could not be tallied. One of the reasons might be misappropriation but that can not be attributed as the sole reason. It is not correct to brand a person without establishing the guilt as criminal. It is a basic principle of criminal jurisprudence enunciated in the dictum "ACTUS NON FACIT REUM NISI MENS SIT REA" (in order to constitute a crime mind and body both must concur). The maxim of English

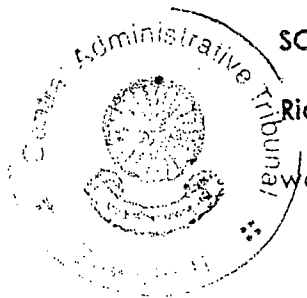


*[Handwritten signature]*

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Law as propounded by Justice. Holroyd is: "it is better that ten guilty men should escape rather than one innocent should suffer". Merely on the basis of doubt one cannot be branded as criminal. The requirement of adequate opportunity of being heard is sine qua non which cannot be dispensed with. If the person is not available, attempt should be made to find out the truth by exploring all the possible means. From the records, it appears that nothing was done in this regard.

13. It is pertinent to note that in the past Mr. Talukdar maintained immaculate record and his integrity was never doubted. He disappeared under the mysterious circumstance. At the relevant point of time, the area was vulnerable. The fact that he was kidnapped cannot be ruled out. Besides, an official, who served for more than 25 years with integrity and to the satisfaction of the department, cannot be presumed to have misappropriated money when his benefits from the office would come ten times more of the so-called misappropriated amount. He had cordial relationship with his spouse. He had three minor school going children. On this factual backdrop, it is difficult to believe that he would venture to commit such crime. It is the contention of Mr. M.U. Ahmed, learned counsel for the respondents that there can be a situation in which an order passed in violation of natural justice need not be set aside. For this proposition, he relied on decision of Hon'ble Apex Court in **Aligarh Muslim University & Others v. Mansoor Ali Khan, (2000) 7 SCC 529**. In this case, no doubt this proposition is laid down but with rider that where no prejudice is caused to the person concerned. In the case of **M.C. Mehta v. Union of India, (1997) 6 SCC 237** this view was originally taken. Court referred to the decision in **Ridge v. Baldwin, 1964 AC 40** wherein breach of principles of natural justice was in itself treated as prejudice and no other 'de facto' prejudice needed



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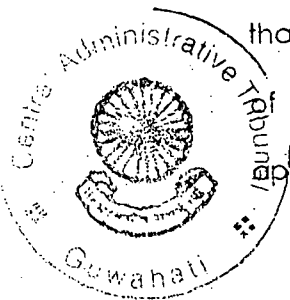
Guwahati Bench

गुवाहाटी न्यायपीठ

to be proved, but thereafter this rule was relaxed and in the case of S.L.Kapoor v. Jagmohan, (1980) 4 SCC 379 an exception was laid down, namely, if upon admitted or indisputable facts only one conclusion was possible, then in such a case, the principle that breach of natural justice was in itself prejudice, would not apply. In other words, if no other conclusion was possible on admitted or indisputable facts, it is not necessary to quash the order, which was passed in violation of natural justice. While expressing this view, court put a caveat that this being an exception, great care must be taken in applying this exception. In the facts of the present case, we find that no attempt was made to find out the truth. The fact in issue is a disputed fact. Therefore other conclusion was possible as such requirement of natural justice was not complied with, ex consequenti, prejudice was caused.

Next precedent relied upon was **Indra Bhanu Gaur v. Committee, Management of M.M.Degree College and Others**, AIR 2004 SC 248. In this case, appellant was Principal of a college. He was also acting as Sr. Superintendent of the Examination Centre. He was charged for replacing his son's answer book. Appellant was given reasonable opportunity to present his case before the enquiry committee. But he did not extend his cooperation. On this factual backdrop, Apex Court held that appellant cannot complaint of denial of opportunity of hearing. Facts of this present case are totally different and as such, this decision is not applicable in the facts and circumstances of present case.

In the course of hearing, our attention was also invited to the prescription of Section 108 of the Indian Evidence Act, 1872. This section reads as under:-

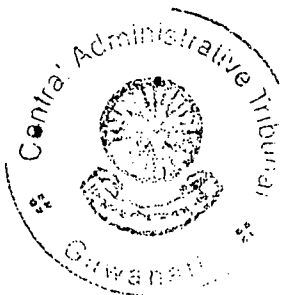


"Section 108 Burden of proving that person is alive who has not been heard of for seven years. - [Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is [shifted to] the person who affirms it."

Mr.M.U.Ahmed, learned counsel for the respondents submitted that Section 108 is not exhaustive. A suitable presumption requiring death or presumed death can be drawn on the basis of attending circumstances and reliable material on record.

Reliance was placed on the decision of Apex Court rendered in the case of **LIC of India v. Anuradha**, AIR 2004 SC 2070. In this case, Hon'ble Court held that:

"the law as to presumption of death remains the same whether in the common law of England or in the statutory provisions contained in Sections 107 and 108 of the Indian Evidence Act, 1872. In the scheme of the Evidence Act, though Sections 107 and 108 are drafted as two sections, in effect, Section 108 is an exception to the rule enacted in Section 107. The human life shown to be in existence, at a given point of time which according to Section 107 ought to be a point within 30 years calculated backwards from the date when the question arises, is presumed to continue to be living. The rule is subject to a proviso or exception as contained in Section 108. If the persons, who would have naturally and in the ordinary course of human affairs heard of the person in question, have not so heard of him for seven years, the presumption raised under Section 107 ceases to operate. Section 107 has the effect of shifting the burden of proving that the person is dead on him who affirms the fact. Section 108, subject to its applicability being attracted, has the effect of shifting the burden of proof back on the one who asserts the fact of that person being alive. The presumption raised under Section 108 is a limited presumption confined only to presuming the factum of death of the person whose life or death is in issue. Though it will be presumed that the person is dead but there is no presumption as to the date or time of death. There is no presumption as to the facts and circumstances under which the person may have died. The presumption as to death by reference to Section 108 would arise only on lapse of seven years and would not by applying any logic or reasoning be



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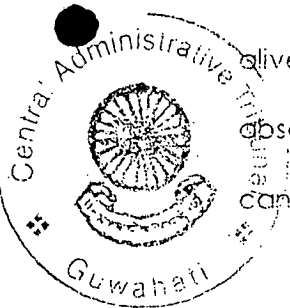
Guwahati Bench  
गुवाहाटी बेंच

permitted to be raised on expiry of 6 years and 364 days or at any time short of it."

302

In the common law, law of onus is based on the maxim, namely, "INCUMBIT PROBATIO QUI DICIT NON QUI NEGAT" (burden of proof lies upon one who alleges the existence of a truth, not upon one who denies it). Section 107 of the Indian Evidence Act, 1872 is based on this rule. However, Section 108 carves out an exception in the shape of proviso to Section 107. It has the effect of shifting the burden of proof back on one who asserts the fact of the person being alive. The presumption raised under Section 108 is confined to presuming factum of death of the person whose life or death is in issue. In the case of **Rubabbuddin Sheikh v. State of Gujarat, AIR 2007 SC 1914**, it was held that there is a presumption if the body is not found or the person concerned is not found for a period of seven years, only then said person can be presumed to be dead. In the present case, question is whether Mr. Talukdar is alive or dead? Initially his wife expressed possibility of his death by killing by extremist, but no investigation was conducted in that regard. Now, it is a fact that Mr. Talukdar has not been heard of for seven years by those who would naturally have heard of him if he had been alive. In these circumstances, burden of proving that Mr. Talukdar is alive is shifted on the respondents, who are alleging that he is not dead but absconder. Under the law, after expiry of seven years period, Mr. Talukdar can be presumed as dead person.

14. Another important question, which requires our consideration is apropos the payment of subsistence allowance. Indisputably Mr. Talukdar was placed under deemed suspension w.e.f. 17.07.2001 vide order dated 09.01.2003 as per respondents affidavit dated 20.02.2010. The



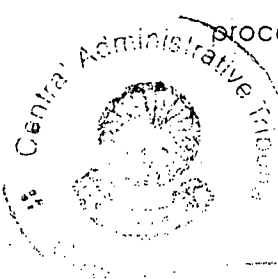
16 FEB 2011

Guwahati Bench  
গুৱাহাটী ন্যাযপীঠ

consequence of suspension requires the payment of subsistence allowance. This question was specifically put to respondents vide order dated 28.05.2010, albeit case was adjourned for seeking appropriate instruction on this aspect. Nothing has placed before the Bench in this regard. It was orally submitted that no payment on account of subsistence allowance can be made unless the Govt. servant furnishes a certificate that he is not engaged in other employment, business, profession or vocation. In our considered opinion Mr. Talukdar was not available, as such furnishing of such certificate was an impossibility. It is a trite law canonized in the dictum: LEX NON COGIT AD IMPOSSIBILIA (law cannot compel you to do the impossible).

In view of this, provisions of FR 53 have to be construed in a reasonable manner. The contention that there is no pleading on this aspect would amount to negating the rights under the rules. Moreover, the factum of deemed suspension came to the notice when the respondents filed aforesaid affidavit. In our considered opinion, technicality cannot defeat the ends of justice.

15. If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. Adverting to the facts we find that no enquiry was made as to the fact that whether Mr. Talukdar is dead or alive. If he was presumed to be alive at that point of time, why efforts were not made for proper service of the charge-sheet and notices? Punishment was inflicted without following the due procedure of law. No action was taken, on the basis of appeal, preferred



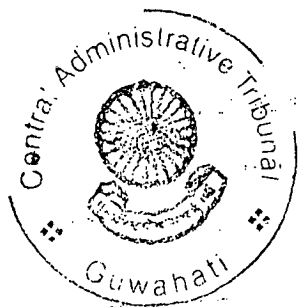
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Guwahati Bench  
গুৱাহাটী ন্যায়পীঠ

on his behalf by his wife, the present applicant in this case. Nothing was placed before us to show that Mr. Talukdar is alive.

16. Taking into consideration totality of facts and circumstances of the case, we set aside the impugned Memo No.F-6-1/2001-02 dated 10.02.2006 and direct the respondent authority to release the retiral and other pensionary benefits on account of the service of the applicant's husband as per law within three months from the date of receipt of this order.

17. In the result, O.A. stands allowed. No costs.



Sd/- M.K. Gupta  
Member (J)  
Sd/- M.K. Chaturvedi  
Member (A)

TRUE COPY

प्रतिलिपि

22/7/2010

अनुभाग (सिपि)

Section Officer (Sd/-)

Central Administrative Tribunal

Guwahati Bench

গুৱাহাটী ন্যায়পীঠ

22  
Annexure — B  
305  
Central Administrative Tribunal  
केन्द्रीय प्रशासनिक न्यायालय

10 FEB 2010

Guwahati Bench  
गुवाहाटी न्यायपीठ

To,  
The Chief Post Master General  
Assam Circle, Guwahati, Panbazar  
Guwahati.

Dated, Bongaigaon the 27/8 August, 2010.

Ref:- Final Order passed by the Hon'ble Member,  
Central Administrative Tribunal, Guwahati  
Branch in Original Application No.166 of 2009  
passed, 8th July, 2010 (Smt. Jaya Talukdar - Vs -  
C.P.M.G., Assam Circle Guwahati & four others )

Sub:- Request for release of retiral and other pensionary  
benefits on account of the service of the appli-  
cant's husband viz. Late Chakreswar Talukdar.

Petitioner :

Smt. Jaya Talukdar  
W/O Late Chakreswar Talukdar  
C/O Shri Paritosh Chakraborty  
B.T. Road (Bye-Lane )  
P.O. & P.S. Bongaigaon,  
District-Bongaigaon,  
Pin- 783380 (Assam)

Sir,

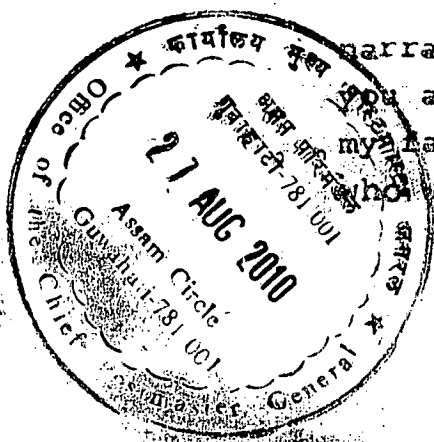
In reference to the above, most respectfully I  
beg to submit you as under :

That Sir, certainly you are well aware about the  
final verdict of the above referred case which was passed  
on 8th July, 2010 in favour of me in regard to claim of  
part service benefits of my husband and to set-aside the  
impugned Memo No.F-6-1/2001-02 dated 10.02.2005.

That Sir, it is needless to say that I have already  
narrated to you in my previous application placed before  
you about the poor economic conditions of the members of  
my family after the absence of my husband Chakreswar Talukdar  
who was missing on 17th July, 2010. Discharging as senior

Contd.....P/2.

Anwar Hussain  
Advocate





23

304

National Administrative Tribunal  
केन्द्रीय प्रशासनिक न्यायालय

10 FEB 2011

Guwahati Bench  
गुवाहाटी न्यायपीठ

(Page - 2 )

most post Master at Bengtoli Sub-post office in the District of Chirang. In his absence our economic condition is at present beggars' description.

I, therefore, fervently request you to release the financial benefits. A photostat copy of the said judgement and final order is enclosing herewith for your speedy decision.

Thanking you Sir,

Yours faithfully,

*Jaidev P. Choudhary*

( J. A. T. )

Anwar Hussain  
Advocate