

(2024) 05 CAL CK 0071**Calcutta High Court (Appellate Side)****Case No:** WPA No. 19235 Of 2021

Tara Devi & Anr

APPELLANT

Vs

Bank Of India & Ors.

RESPONDENT

Date of Decision: May 24, 2024**Acts Referred:**

- Constitution Of India, 1950 - Article 12
- Evidence Act, 1872 - Section 107, 108

Hon'ble Judges: Rai Chattopadhyay, J**Bench:** Single Bench**Advocate:** Kishore Mukherjee, R.N. Majumder, S.M. Obaidullah, Roni Chowdhuri**Final Decision:** Allowed**Judgement**

Rai Chattopadhyay, J

- The writ petitioner seeks release of ex-gratia lump sum amount to her on the ground of presumption of death, of her husband and erstwhile employee of the respondent Bank. Since her claim as above has not yet been answered by the Bank, this writ petition has been filed.
- The petitioner has inter alia sought relief by issuance of a writ in the nature of mandamus commanding the respondent Bank to release the ex-gratia sum amount immediately with an interest @ 18% per annum.
- The husband of the writ petitioner No.1 was employed as a peon with the respondent No. 1/Bank of India, since February 1, 1983. It is admitted by the petitioners, the respondents as well as the police authorities that, the said person went missing and untraceable since February 2, 2007. Till date no trace of that person could

be found out by either the police or any of the relatives.

4. Under such circumstances the petitioner No. 1 approached the respondent Bank for release of retirement benefits including Gratuity and Provident Fund. An application was also made on April 14, 2014, seeking appointment for petitioner No. 2 on compassionate ground on the presumption of death of his father. The stand taken by the Bank authorities has been no different at that point of time than now, that is, to keep a stoic silence with respect to the prayers as above. Hence, this Court interfered pursuant to a writ petition filed by the present petitioner No. 1.

5. Ultimately, pursuant to the direction of this Court the respondent Bank took up the issue and passed an order dated May 21, 2019. The crux thereof may be reproduced as herein below:-

"4.1 The terminal benefit of Shri Sukhdeo Prasad Singh is settled/being settled, considering his date of death as 28.05.2007 (presumed), i.e date on which GD was filed with Tiljala P.S.

4.2 The request made for Compassionate Appointment of your son Shri Ranjit Kumar cannot be considered, as during the relevant time, there were no provisions to extend Compassionate Appointment."

6. Hence, according to the said order dated May 21, 2019, the terminal benefits of the person was released to the present petitioners presuming the death of the person to have happened on May 28, 2007, that is, the date of filing the general diary at Tiljala Police Station.

7. On September 28, 2021, the petitioners submitted their application seeking relief of ex-gratia lump sum payment in their favour as the legal heirs of the said person. That is yet to be granted by the respondent Bank.

8. Mr. Kishore Mukherjee appearing for the petitioners has emphatically submitted that considering the facts and circumstances of the case and the law settled in this regard pursuant to various decisions of the Constitutional Courts, the respondent Bank should have released the benefit of ex-gratia payment in favour of the present petitioners, presuming the said missing person to have died. He further elaborates his arguments on the basis of the order of the respondent, dated May 21, 2019. He has stated that it would not be a fresh exercise to be undertaken by the respondent while accepting presumption of death of the said person. He submits that the respondent Bank has already accepted death of the person on presumption while settling his terminal benefits in favour of the present petitioner. Under such circumstances, according to Mr. Mukherjee the benefit of lump sum ex-gratia automatically falls in line, to be released to the present petitioners. He has attacked the alleged inaction of the respondent Bank in this matter that for no justifiable reason the petitioner's claim for

lump sum ex-gratia has been withheld by the respondent Bank. He says further that the same being the due, payable to the stipulated category of persons in terms of the policy decision of the respondent Bank itself, such unreasonable withholding of dues of the petitioners is arbitrary and also unlawful.

9. Mr. Mukherjee has relied on a judgment of Co-ordinate Bench of Madhya Pradesh High Court dated July 26, 2021 in W.P. No. 7249 of 2012 (Smt. Meena Dhaigude vs. Maha Pravandhak State Bank of India), which may have a persuasive value for the proposition that an employee who went missing and did not join duty for months together, would be considered as a case of dying in harness for family.

10. On the basis of argument as noted above, Mr. Mukherjee has insisted that the writ petition may be allowed and adequate relief be granted to the petitioners.

11. Mr. R.N. Majumder, being assisted by Mr. S.M. Obidullah and Mr. Roni Chowdhuri are representing the respondents. He has however strongly objected to the contentions and prayers of the writ petitioners. He would say that those cannot be considered as maintainable.

12. Mr. Majumder has firstly pointed out that the Civil Court has not decreed regarding the death of the said missing person. Rather, he says that the Civil Court has declined to pass a decree for that and such order of the Civil Court has been upheld by the Appellate Court. Under such circumstances, according to Mr. Majumder, the respondent Bank cannot override by its order the decision of a competent Civil Court by presuming the death of the said missing person.

13. Secondly, Mr. Majumder would categorically rely on the "Scheme for Payment of Ex-gratia Lump Sum Amount in Lieu of Appointment on Compassionate Ground". He would say that the scheme came into effect on November 6, 2007, and did not categorise legal heirs of a missing employee to be benefited under the said scheme. He would further submit that the scheme came into effect at a time when the said missing employee, was discharging duties in a regular manner. Therefore, it is suggested that acceptance of the said scheme, without any prejudice or condition, by the said missing employee, must be construed.

14. Mr. Majumder further rely on the previous scheme dated January 15, 2005, also to show that at no point of time the respondent Bank has made any policy to include legal heirs of the missing employee for allowing benefit treating that as died in harness.

15. Mr. Majumder has relied on the Hon'ble Supreme Court decision that is reported in AIR 1998 SC 1681 (Uptton India Ltd. vs. Shammi Bhan & Anr.), supporting his contention that the non-contractual part of the conditions of employment of the said missing person would be governed within the four corners of the policy, manifested through the well formulated scheme of the respondent Bank, as mentioned above. He

says that the obligation on the part of the respondent Bank in that case would be to the extent of the terms spoken about in the scheme, and only that and not beyond. He has referred to the following paragraph of the judgment :-

"9. The general principles of the Contract Act applicable to an agreement between two persons having capacity to contract, are also applicable to a contract of industrial employment, but the relationship so created is partly contractual, in the sense that the agreement of service may give rise to mutual obligations, for example, the obligation of the employer to pay wages and the corresponding obligation of the workman to render services, and partly non-contractual, as the States have already, by legislation, prescribed positive obligations for the employer towards his workmen, as for example, terms, conditions and obligations prescribed by the Payment of Wages Act, 1936; Industrial Employment (Standing Orders) Act, 1946; Minimum Wages Act, 1948; Payment of Bonus Act, 1965; Payment of Gratuity Act, 1972 etc."

16. On the grounds as above, Mr. Majumder has sought that the present writ petition be dismissed.

17. Admittedly, the husband of the petitioner No. 1 was an employee of respondent No. 1/Bank since long, that is, from February 1, 1983. He has not been traceable for years together, is also a fact, not disputed in this case. The date of missing of the person is stated to be February 2, 2007, by the petitioners whereas in the order dated May 21, 2019, the respondent Bank has taken the concerned date to be May 28, 2007, that is, the date of lodging missing general diary by the petitioners with the police. The dispute relates to if after lapse of more than seven years from the date when the person went missing, the respondent Bank, can presume the same to be death of the person in accordance with law and dying in harness for the family. The question also is if so presumed by the respondent Bank, can the benefits allowable to the legal heirs of a person dying in harness, be extended to the present petitioners as the legal heirs of the said person.

18. Admittedly, however, in this case the Civil Court and the Appellate Court had declined to grant a decree to that effect, in a suit by the present petitioners. Mr. Mukherjee has not failed to mention the ground for rejection of such a decree by the Civil Court on the basis of the verdicts of the Hon'ble Supreme court, regarding presumption of death of a person after seven years period from the date of his being untraceable. The law having been settled like this, the Civil Court has desired not to enter into the merits of the case. Hence the suit was dismissed and the order of the suit Court was upheld by the Appellate Court.

19. So far as the respective stipulations made in the 'scheme' framed by the respondent Bank, which have been heavily relied on by the same, are concerned, before discussion

with regard to that, the same be quoted as herein below:-

"4. APPLICABILITY

The Scheme will be applicable in the following cases of employees:-

- (i) Employee dying in harness (other than due to injury while performing official duty);**
- (ii) Employee dying due to injury sustained while performing official duty within or outside office premises (excluding travel from residence to place of work and back);**
- (iii) Employee dying while performing official duty within or outside the office premises (excluding travel from residence to place of work and back) due to dacoity/robbery/terrorist attack;**
- (iv) Employee seeking pre-mature retirement due to incapacitation before reaching the age of 55 years."**

20. According to the respondent Bank the settled scheme as above would be applicable in case of its employees, which has however, not included a case with respect to a missing person. With this reason the respondents have strongly put forth that the benefit under the said scheme would not be allowable in case of the present petitioners.

21. This Court is of the view that having not denied service of the said missing person with the respondent Bank for years together the Bank cannot shut the doors on the face of his legal heirs when time comes for the Bank authorities to compensate adequately, the legal heirs of the person, in absence of the said person. The greater objective of supporting the family of an employee who may not be in a position to earn and support the family, cannot be sub-served for some technical reasons. The categories of employees as listed in the said scheme does not include a missing person. However having not included so, the list cannot be termed as an exhaustive one. Of course the makers of the scheme could not have foreseen each and every eventuality, when they may require application of this scheme in a particular case. That is why the authorities are required to take not any stringent outlook regarding application of the scheme but a flexible one should be followed. That is more so, keeping in mind the greater perspective and objective for promulgation of such a scheme in the Bank, which is otherwise a 'State' within the meaning of Article 12 of the Constitution of India.

22. To quote the Hon'ble Supreme Court in the case of LIC of India v. Anuradha reported in (2004) 10 SCC 131, is herein below:-

"14. ** 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. *****"**

23. According to Section 108 of The Indian Evidence Act, 1872 -

"108. Burden of proving that a person is alive who has not been heard of for seven years.

[Provided that when] [Substituted by Act 18 of 1872, Section 9, for "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] [Substituted by Act 18 of 1872, Section 9, for "on".] the person who affirms it."

That he has not been heard for seven years by those who would naturally have heard of him, if he had been alive, if accepted by the Bank, under the provision of Section 108 of The Indian Evidence Act, 1872, it has no other option than to presume death of the person. Burden of proving is not about the death of the person but that the person is alive, whereas Section 108, has provided for presumption of a person being dead on fulfilment of conditions, as stipulated therein. The obvious inference to be drawn based on the provisions as above, is about the presumption that the man was dead at the time when the question arose subject to a period of seven years absence and being unheard of having elapsed before that time.

24. A three Judges Bench decision of Hon'ble Supreme Court reported in AIR 1967 SC 1134 (Ramrati Kuer vs. Dwarika Prasad Singh) may be mentioned to support the proposition that person not heard of for seven years is to be presumed as dead.

25. The law is well settled that in case a person is untraceable for more than seven years, his death may be presumed. Pertinent is to find that the respondent Bank has

released the terminal benefits in favour of the writ petitioners considering such presumption of death of the husband of the petitioner No.1.

26. It is also a settled law that to determination of the point of time of the death of the person, would be a matter of evidence and not of presumption, subject to proof of it depending upon the factual or circumstantial factors. It is not to be mentioned separately that the question for determination as above would arise only when the particular fact are uncertain or disputed, which is not a case here. Therefore, the glaring necessity of a decree of a Civil Court to be available may not be felt by the authorities in this case to consider petitioner's prayer as above.

27. This Court finds that the Bank should not have any difficulty in presumption of death of the person when admittedly for more than seven years, no where abouts of the said missing person could be traced. And in that event, there should not be any impediment for the respondent Bank to allow a wider connotation to the scheme as mentioned above to consider the present writ petitioners to be beneficiaries under the said scheme.

28. On the discussion as above the Court finds the prayer of the writ petitioners to be allowable. And thus the Writ petition No. WPA 19235 of 2021 is allowed.

29. Let the respondent Bank release the ex-gratia lump sum payment in favour of the present petitioners, who are legal heirs of the erstwhile employee namely Sukhdeo Prasad Singh, in terms of the prevalent scheme of the Bank, along with interest at the rate of savings bank interest in a Nationalised Bank. The interest as above shall be payable from the date of application made by the petitioners for the ex-gratia, till the date of actual payment. The exercise as above shall be concluded by the respondent Bank within the period of four weeks from the date of this order.

30. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of all formalities.