

## Bandita Sarkar Vs State of Assam and Others

**Court:** Gauhati High Court

**Date of Decision:** Feb. 13, 2015

**Acts Referred:** Army Act, 1950 - Section 106

Constitution of India, 1950 - Article 19, 31

Evidence Act, 1872 - Section 108

**Citation:** (2015) 2 GLT 1042

**Hon'ble Judges:** Michael Zothankhuma, J

**Bench:** Single Bench

**Advocate:** S. Hoque, for the Appellant; K.K. Choudhury and R.K. Talukdar, Advocates for the Respondent

**Final Decision:** Allowed

### Judgement

Michael Zothankhuma, J

Heard Mr. S. Hoque, learned counsel for the petitioner and Mrs. K.K. Choudhury learned counsel for

respondent Nos. 1 to 4 and Mr. R.K. Talukdar, learned counsel for respondent No. 5. The case of the petitioner is that her father Sri Dharani

Sarkar joined the Assam Police Battalion as constable on 08.08.1962 and was consequently promoted to the rank of Lance Naik. That while

serving at the 5th Assam Police Battalion, Sontilla, N.C. Hills, the petitioner's father was suddenly found missing from 09.04.1986 after having

served for about 23 years and 8 months in the Assam Police Battalion.

2. Mr. S. Hoque, learned counsel has submitted that on the failure to trace out her husband by the authorities of the Police Battalion and her family,

the petitioner's mother approached the concerned authorities for releasing pension and her pensionary benefits in respect of her missing husband.

However, the petitioner's mother expired on 11.04.2000 without getting any family pension or other pensionary benefits.

3. The petitioner's elder brother Sri Sunil Sarkar thereafter submitted a representation before the Inspector General of Police (OSD), Assam

praying for releasing pension and other pensionary benefits in respect of their missing father and for the period their deceased mother would have

been entitled for the same. The Inspector General of Police (OSD) Assam, thereafter vide letter dated 05.08.2004 addressed to the Commandant,

of 5th Assam Police Battalion, Sontilla NC Hills requested sanctioning GIS saving and insurance money to the next kin of the missing police man.

The Inspector General of Police (OSD) vide letter dated 06.10.2004 again requested the Commandant 5th AP Battalion for furnishing original

service sheet alongwith relevant documents for considering sanctioning the pensionary benefits to the petitioner. The commandant 5th AP Battalion

vide letter dated 07.01.2008 requested the officer-in-charge Dispur PS, Kamrup to make enquiry about the existence of the family members of the

missing police man and make a detailed enquiry of the matter for onward submission of family pension proposals to the next kin of the deserter

police man.

4. The officer incharge, Dispur Police Station thereafter gave his report dated 28.01.2008 in which he stated that the missing police man was a

deserter since 09.04.1986 and had a wife who was deceased and two children including the petitioner. Thereafter the commandant 5th AP

Battalion forwarded the family pension proposal for the next kin of the deserter police man to the Inspector General of Police (R) vide letter dated

17.03.2008, who in turn, requested the Commandant 5th AP Battalion vide letter dated 19.05.2008 asking him to furnish duly filled indemnity

bond and legal heir certificate for drawing other pensionary benefits. The letter dtd. 19.5.2008 is reproduced below-

ASSAM POLICE HEADQUARTERS

ULUBARI :: GUWAHATI:-7

Memo No. E/II-Pen/08/27, 569/3,

dated Ghty. The 19.5.2008

To,

The Commandant, 5th A.P.B.N.

Sontilla N.C. Hills, Assam,

Sub:- Family pension case in respect of Missing LNK Dharani Sarkar of 5th A.P. BN. Sontilla.

Ref.:- Memo N.O. BN. 5/G/F. Pen/08/3280, dtd. 17.03.08.

With reference to the subject and memo cited above, I am directed to inform you that the ""Indemnity Bond"" of the above named family pension

case of your Unit has been found in blank. It is to be checked and properly filled-up in the proforma of ""Indemnity Bond"" from Annexure-I, II.

2. The family pension may be allowed after expiry of one year period from the date of issue of the Police report from the concerned Police Station

under the Govt. Notification No. PPG(P) 75/91/242, dtd. 29.03.2000. But, you have prepared and furnished the family pension documents of the

missing LNK to this A.P. Hqrs. On 17.03.2008 after issuing of the Police report i.e., on 18.01.2008 without follow up the Govt. Notification.

3. On scrutiny of the service sheet and other pension documents it appears that children of the missing LNK have been found adulthood till issue of

date of Police report i.e., on 28.01.2008. The children of the Govt. servant is not entitled to family pension as per Rule-143 of A.S.(P) Rule 1969.

Hence, legal heir certificate may be furnished for drawing of other Govt. documents i.e., Leave Salary, G.P.F., G.I.S. and D.C.R.G. money due to

missing Govt. servant.

The service sheet alongwith all other connected pension papers in respect of missing LNK. Dharani Sarkar is returned herewith with a request you

to resubmit the same after clarifying the above mentioned defects.

An early action is requested.

Inspector General of Police, (L)

Assam::: Guwahati:-7

5. Learned counsel for the petitioner submits that thereafter the petitioner had obtained legal heir certificate and in terms of which the GIS, DCRG,

leave encashment was sanctioned to the petitioner by the Commandant 5th AP Battalion.

6. The commandant 5th AP Battalion thereafter vide his letter dated 15.05.2010 resubmitted the pension papers in respect of the petitioner's

missing father before the Inspector General of Police (L) i.e., respondent No. 3. The respondent No. 3 thereafter vide letter dated 08.07.2010

submitted all the relevant family pension documents before the Accountant General of Assam for sanctioning the same in favour of the petitioner.

However, as nothing was sanctioned by the respondent No. 5, i.e., the Accountant General office, the petitioner filed the present writ petition

praying for release of the arrear family pension to the petitioner with effect from 10.04.1986 to 11.04.2000 i.e., the period the deceased mother

would have got the family pension and with effect from 12.04.2000 till the date the petitioner attained her majority. The petitioner also prayed for

interest alongwith the payment of family pension. Learned counsel for the petitioner has submitted that as per Rule 142 and 143A of the Assam

Pension Service Rules, the petitioner is entitled to get family pension for the period her mother was entitled to get pension and for the period from

the date of death of her mother till she attained the age of 21 years. He has also referred to Section 108 of the Indian Evidence Act, 1872 which

states that the petitioner's father should be presumed to be dead after 7 years and as such, the petitioner was entitled to the family pension.

7. Section 108 of Indian Evidence Act is as follows:-

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.

8. The question of whether Section 108 of the Indian Evidence Act, 1872 could be applied in the present case so as to enable the petitioner and

her deceased mother to be able to receive family pension from the date of disappearance, i.e., in 09.04.1986 is also considered. Section 108 of

Evidence Act, 1872 being a rule of evidence, no rule of universal applicability can be spelt out regarding the presumed date of death. Only

presumption under the section is that the person is dead, if he has not been heard for 7 years and this presumption only arises when such question

is raised as to whether the person is alive or dead.

9. The respondent Nos. 1 to 4 have submitted in their affidavit that there was no specific Government rule regarding grant of pensionary benefits

when the government employee is missing prior to issue of Government OM No. PPG (P) 75/91/242 dated 29.03.2000. However, on the basis

of Section 108 of the Indian Evidence Act, 1872 when it is proved that the person has not been heard of for 7 years, the Court certificate issued

can be treated as a basis for giving pensionary benefits to the next kin of the missing person. Learned counsel for the respondent Nos. 1 to 4

further stated that such Court certificate not being issued or was ever given to the respondents regarding release of pensionary benefits. The further

case of respondent Nos. 1 and 2 is that the DCRG, leave encashment, GIS has been paid to the petitioner and that pensionary benefits could not

be paid to her as she became a major, i.e., 21 years of age.

10. The High Court of Kerala in Indira K. Vs. Union of India & Ors. in OP No. 18590 of 1999 (K) held that if the police report has stated that if

a missing person is untraceable for seven years the presumption of death of such person is available under Section 108 of the Evidence Act. The

case in Indira K. (Supra) is with regard to a missing army sepoy who was declared as deserter and dismissed under Section 106 of the Army Act

However, once the presumption of death became available under Section 108 of the Indian Evidence Act, 1872, further consequences would

follow. In the said case, it was also held that:

there may be cases where the missing person may be dead or permanently disabled mentally or physically which may not come to the notice of

the Army or the family. Even in such cases also, the army may be justified in declaring him deserter but the position will continue only until expiry of

7 years from the date of missing of the person when presumption of death is available under Section 108 of the Evidence Act, 1872. Therefore, as

and when presumption of death is available under Section 108 of the Evidence Act, 1872, the whole position changes and the presumption of

death supersedes the declaration of dismissal and as a deserter under Section 106 of the Army Act. Consequently, the family members can claim

all the benefits as if the man is dead on the date of his disappearance.

11. In *Zishan Khan Vs. District Inspector of Schools, Varanasi and Others*, (2012) 4 ADJ 501 : (2012) 133 FLR 996 , it was held that (1)

Ordinarily, a person not heard of for the statutory period shall be presumed to be dead on expiry of seven years and not earlier; (ii) Section 108 of

the Indian Evidence Act, 1872 is not exhaustive. It is permissible for the Court to raise a suitable presumption regarding the date of presumed

death depending upon the attending circumstances and other reliable material son record. In other words, no Rule of universal applicability can be

spelt out regarding presumption of death.

12. In view of the fact that the presumption of death of the petitioner's father has been made available under Section 108 of the Indian Evidence

Act, 1872 and which relates back to 09.04.1986, I am of the opinion that the petitioner is entitled to receive the family pension in respect of late

father i.e., Dharani Sarkar, Armed Battalion constable.

13. Mr. R.K. Talukdar, learned counsel for the respondent No. 5 has submitted that as per Sub Rule 5 of Rule 143A of the Assam Services

Pension Rules, 1969, herein after to referred to as the 69 Rules, the date of disappearance of the employee has to be reckoned from the date of

issue of the report by the concerned police station and the benefits of family pension and DCRG are to be sanctioned after a period of one year

from the date of such report issued by the police station. Mr. Talukdar has submitted that since the report of the police station was issued on

18.01.2008 as could be seen from annexure 7 of the Writ petition, the petitioner was not entitled for pension as the sanction of the family pension

could be made only from 18.01.2009. The further contention of Mr. RK Talukdar is that as the petitioner's mother expired in 2000 and as the

petitioner had become a major before the year 2009, the family pension could not be paid to the petitioner. The learned counsel for the respondent

No. 5 has further relied upon Rule 143B of the Assam Service Pension Rules 1969 which reads as under:

The rules and procedures under Rule 143-A shall also apply in the case of missing pensioners mutatis-mutandis-

1) ""The family pension at the rates indicated in the PPO will be applicable in the case of missing pensioners.

2) Death gratuity will also be payable to the families, but not exceeding the amount which would have been payable as retirement gratuity if the

person has retired. The difference between retirement and death gratuity shall be subsequently payable after the death is conclusively established or

on the expiry of one year period from the date of issue of the police report from the concerned police station stating that the pensioner has not

been traced out after all efforts had been made, whichever is earlier.

3) The Indemnity Bond to be obtained for the purpose from the family members of the missing pensioners have been prescribed as per format

enclosed at Annexure-III & IV".

14. For better understanding of the case in hand, Rule 143A is also reproduced below.

The family pension and death-cum-retirement gratuity to the families of Government servant who suddenly disappears leaving their families and

whose whereabouts are not known shall be granted after observing the following formalities-

1. When an employee disappears leaving his family, the family may be paid in the first instance the amount of salary due, leave encashment due and

the amount of GPF having regard to the nomination made by the employee.

2. After the elapse of a period of one year as provided under sub-rule (5) below, other benefits like death-cum-retirement gratuity/family pension

may also be granted to the family subject to the fulfillment of conditions prescribed in the following sub-rules.

3. The above benefits may be sanctioned by the Head Offices after observing the following formalities-

i. The family of disappeared employee must lodge a report with the concerned police station and obtain a report that the employee has not been

traced after all efforts had been made.

ii. An Indemnity Bond as per annexure-I shall be taken from the nominees/dependents of the employee that all payments shall be adjusted against

the payment due to the employee in case he appears on the scene and makes any claim.

4. The head of offices shall assess all Government dues outstanding against the Government servant and effect their recovery in accordance with

the provisions laid down in clause 7 (seven) of the Office Memorandum No. FMP. 14/86/23, dated 26-05-87 and other instructions in force for

effecting recovery of the Government dues.

5. The date of disappearance of the employee shall be reckoned from the date of issue of the report by the concerned police station stating that the

employee has not been traced out after all efforts had been made and the period of one year after which the benefits of family pension and Death-

cum-retirement Gratuity are to be sanctioned shall also be reckoned from this date.

6. The family should apply to the Head of Office of the Government servant for grant of family pension and Death-cum-retirement gratuity for grant

of family pension after one year from the date of disappearance of the Government servant in accordance with the prescribed gratuity as contained

in OM No. FMP. 14/86/23. Dtd. 26.4.87.

7. Other rules and procedures of the Assam Services (Pension) Rules, 1969 shall apply in setting the cases under this rule wherever necessary.

15. There is also a note under Rule 143 A, reads as follows:

Inserted as new rules 143A and 143B, vide notifications No. PGP(P) 75/91/242, dated the 29th March, 2000 (this rule come into force with

effect from 29th day of August, 1986).

16. In Deokinandan Prasad Vs. The State of Bihar and Others, AIR 1971 SC 1409 : (1971) 1 LLJ 557 : (1971) 2 SCC 330 : (1971) SCR 634

Supp , the Supreme Court held that the payment of pension does not depend upon discretion of the state but is governed by the rules made in that

behalf and a government servant coming within such rules is entitled to claim pension. It was also held that pension is a right vested in a government

employee. It was also held that this right was also property under clause (1) of Article 31 and sub-section (f) of Clause 1 of Article 19 of the

Constitution of India. The pension thus being a fundamental right, it could only be taken away or curtailed in the manner provided in the

constitution.

17. In the present case, the police man went missing on 09.04.1986. The petitioner in paragraph 3 of the writ petition has stated that the

petitioner's mother thereafter approached the concerned authority for releasing the pension and other pensionary benefits in respect of her missing

husband. It is also surprising that the respondents, especially the respondent No. 4 i.e., the Commandant 5th AP Battalion for the first time wrote a

letter dated 07.01.2008 to the Officer-in-charge of Dispur PS Kamrup to make enquiry about the petitioner's missing father. No reasons have

been given by the respondents as to why they have asked for police enquiry 22 years after the alleged disappearance of the petitioner's father.

18. Now coming to sub rule 5 of Rule 143A of the Assam Services (Pension) Rules, 1969, the said provision provides for the sanctioning of the

family pension 1 year after the concerned police station makes a report stating that the said missing person cannot be traced. In this case, the

report of the Officer-in-charge of the Dispur PS, Kamrup was made on 28.01.2008 in pursuance to the Commandant's letter dated 07.01.2008.

Prior to 07.01.2008, neither the petitioner nor the commandant 5th AP Battalion had made any request or lodged an FIR with the concerned

police station with regard to the petitioners missing father. As the Dispur PS report is dated 28.01.2008, the respondents have to sanction the

family pension as per sub-Rule 5 of Rule 143A of 1969 Rules only with effect from 28.01.2009 if 143A(5), and 143B of the 69 Rules is applied

w.e.f. 29.8.1986.

19. The fundamental right to receive pension according to the rules enforced accrued to the petitioner's mother and the petitioner on the date he

went missing as he has completed 23 years 8 months and 1 day of continuous and regular service as on 09.04.1986. The retrospective affect given

to Rule 143 And Rule 143B of the 1969 rules is violative of the vested right that has accrued to the petitioner's mother and the petitioner if it

curtails and up bridges the fundamental rights of the petitioner's mother and petitioner to receive pension. This can only be done in the marine

provided under the Constitution. In any event the disappearance of the petitioner's father was even prior to the date of affect given to Rule

143A(5) in as much as the petitioner's father went missing on 09.04.1986, while the Rule 143A was given effect from 29.08.1986. Thus, the

rights of the petitioner's late mother and petitioner to get family pension cannot be curtailed by the said Rule 143A(5) and 143B and as such, their

vested right was not up bridged or curtailed.

20. Rule 142 of the 69 Rules is also reproduced below:

142. Notwithstanding the provisions in rules 140 and 141 above, if a Government servant after rendering minimum of 7 (seven) year's continuous

service dies while in service, the family of such Government servant may be granted a pension at the rates and conditions mentioned below-

i. For a period of 7 (seven) years from the date following the date of death or till the date on which the officer would have reached the normal age

of superannuation had he remained alive, whichever period is shorter, the pension payable under this section will be at 50 (fifty) percent of the

basic pay last drawn, subject to a maximum of twice the pension admissible under rule 141 above.

ii. The pension payable thereafter will be at the rate laid down in rule 141 above.

iii. The provisions of this rule will not be applicable if the Government servant had put in less than 7 (seven) year's continuous service prior to his

death.

iv. The other provisions in this section will continue to operate.

v. This rule will have effect from 1st January, 1967.

21. In the present case, the report of the Officer-in-Charge of the Dispur Police Station was made on 28.01.2008 in pursuance to the

Commandant's letter dated 07.01.2008. Thus, the presumption of death under Section 108 of Evidence Act becomes available in respect of the

petitioner's husband on the basis of the police report. As the police report dated 28.01.2008 relates back to the date of disappearance of the

petitioner's father as on 09.04.1986, the consequences will follow as on 09.04.1986. I am thus of the view that in a case of this nature, a Court



certificate is not mandatory for presuming the death of a person under Section 108 of the Evidence Act.

22. However, as the Allahabad High Court in Zishan Khan (supra) has held that:

ordinarily, a person not heard of for the statutory period shall be presumed to be dead on expiry of seven years and not earlier"".

the effective date of payment of family pension will have to be counted from the date of disappearance, i.e., 09.04.1986, to seven years thereafter

on 09.04.1993, though the presumption of death and payment of family pension relates back to 09.04.1986. The petitioner is thus entitled to draw

arrear family pension with effect from 09.04.1993 to 11.04.2000 which was receivable by her mother and also arrear family pension with effect

from 12.04.2000 till date the petitioner became an adult.

23. It is also not in dispute that the petitioner's husband has not been seen or heard of since 09.04.1986 till today. The petitioner, her relatives and

the petitioner's father's friends have also not heard of the petitioner's husband from 09.04.1986 till today and no person has come forward to

rebut the presumption of death of the petitioner's father till today.

24. The respondents are accordingly directed to release the arrear family pension to the petitioner with effect from 09.04.1993 and till the

petitioner attained majority as per the Assam Services Pension Rules, 1969. The writ petition is accordingly allowed. No costs.