

**(2003) 09 JH CK 0025**

**Jharkhand High Court**

**Case No:** Writ Petition (L) No. 179 of 2003

Smt. Meena Kumari

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

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**Date of Decision:** Sept. 23, 2003

**Acts Referred:**

- Constitution of India, 1950 - Article 226
- Evidence Act, 1872 - Section 107, 108

**Citation:** (2003) 4 JCR 569

**Hon'ble Judges:** M.Y. Eqbal, J

**Bench:** Single Bench

**Advocate:** Sanjay Prasad, for the Appellant; A.K. Mehta, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

@JUDGMENTTAG-ORDER

M.Y. Eqbal, J.

In this writ petition the petitioner has prayed for quashing the ex parte order by which petitioner's husband was dismissed from service on the charge of his absence from duty and further for a direction upon the respondents to give her employment on compassionate ground.

2. The facts of the case lies in a narrow compass : Petitioner's husband, Harish-chandra Pandey was permanent employee of the respondents working in Lodna colliery. Petitioner's husband last went to the colliery to attend his duty on 26.5.2986 and after duty he did not return to his house and he is missing since then. The petitioner who is the wife reported about the missing of her husband to respondent No. 3. When the whereabouts of the husband of the petitioner was not known, the petitioner made a representation to the respondents for providing her employment on compassionate ground. The petitioner ultimately raised industrial

dispute and the matter was referred by the Government to the Tribunal for adjudication being Reference Case No. 99/95. The Central Government Industrial Tribunal, after hearing the parties, gave his award on 31.5.2001 holding that the petitioner is not entitled to the relief sought for by her.

3. I have heard Mr. Sanjay Prasad, learned counsel for the petitioner and Mr. A.K. Mehta, learned counsel appearing on behalf of the respondents.

4. From the award it appears that the following dispute was referred to the Tribunal for adjudication :

"Whether the demand of the union for dependant employment by M/s. BCCL, of Smt. Meena Kumari w/o Shri Harish Chandra Pandey on compassionate ground is justified ? If so, to what relief the dependant is entitled ?"

5. Before the Tribunal the Management took a stand that there is no provision for providing employment either under NCWA II or NCWA III to the dependant of a dismissed employee. Since Harish Chandra Pandey was dismissed from the service for unauthorised absence, his dependant cannot be appointed on compassionate ground.

6. The petitioner examined herself before the Tribunal as a witness along with other witnesses and deposed about the missing of her husband since 26.5.1986. From the side of the Management it was stated that when the husband of the petitioner remained absent from duty, a charge-sheet was issued and notice was sent to the concerned employee which was returned unserved. The Tribunal recorded a finding that no material paper was produced before the Court about the missing of the petitioner's husband. In absence of any evidence, there is no scope to say that the fact of missing has been proved.

7. Admittedly the respondents issued charge-sheet and notice of departmental proceeding to the missing employee which was returned unserved. No notice of the departmental proceeding was given to the petitioner. The petitioner along with other witnesses deposed before the Tribunal about the missing of her husband since 1986. No contrary evidence was produced by the Management to disprove the fact of missing of the employee.

8. It was argued before the Tribunal referring Section 108 of the Evidence Act that as the employee is missing for more than seven years, he may be presumed to be no more in the world. The Tribunal held that the submission could be considered if the petitioner would have been able to prove the missing of the employee.

9. Sections 107 and 108 of the Evidence Act deal with presumption of death of a person. These two sections are founded on the presumption of things once proved to have existed in a particular state are to be understood as continuing in that state until the contrary is established by direct or circumstantial evidence. Section 107 deals with presumption of continuance of life and Section 108 deals with

presumption of death. Section 108 provides counter presumption and provides that where a person is continuously absent from house for a period of seven years, unheard of by persons who would have naturally received intelligence from him, he is presumed to be dead and burden of proving that he is alive, is shifted to the person who affirms that he is not dead.

10. The petitioner prima facie proved the missing of her husband since 1986 which has not been disproved by the Management. In such circumstance, presumption would be that the employee is dead. Admittedly departmental inquiry proceeded ex parte by the Management without knowing the whereabouts of the employee. The order of dismissal, therefore, cannot be sustained in law.

11. In similar circumstance a Bench of this Court in the case of Smt. Renuka Mahatain v. Union of India and Ors. (2002) 2 LJLR 314 held as under :

"As noticed above the respondent conducted ex parte enquiry and order of dismissal was passed. Neither the respondents have contended that the memo of charge or the notice of inquiry was personally served upon the petitioner or her husband, nor is there any document to show that the petitioner or her husband had the notice and knowledge about the departmental proceeding. The respondents have also not disputed the fact that the petitioner's husband is missing since 1991. In such circumstance, the petitioner ought to have been given at-least a notice or opportunity of hearing by the respondents before passing the dismissal order of the petitioner's husband from service so that the petitioner could have informed the respondents regarding the missing of her husband for more than seven years. In such circumstance, it was wholly unjust and unfair on the part of the respondents to dismiss the petitioner's husband from service in a departmental proceedings and thereby debarring the petitioner from receiving monetary benefits and other benefits which is permissible under the rules of the respondents/ BCCL."

12. The aforesaid judgment was affirmed by the Division Bench in LPA No. 324/2002. The order of dismissal of the petitioner's husband from service is illegal and violative of the principles of natural justice. Consequently the impugned award rejecting the claim of the petitioner for compassionate appointment, is also liable to be quashed. The matter needs reconsideration by the respondents.

13. For the aforesaid reasons, this writ application is allowed and the impugned order of dismissal and the award passed by the Tribunal are set aside. The Management is directed to hold a fresh disciplinary inquiry, if they so desire, against the husband of the petitioner after giving opportunity of hearing to the petitioner. If the petitioner prima facie proves the fact of missing of her husband, then appropriate order for giving employment to the petitioner may be passed presuming the petitioner's husband to be dead.