

Ful Devi Vs. State of Bihar and ors.

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Court : Patna

Decided On : Jul-16-2004

Judge : Aftab Alam, J.

Acts : Service Law; [Evidence Act, 1872](#) - Sections 108

Appeal No. : CWJC No. 11042 of 2001

Appellant : Ful Devi

Respondent : State of Bihar and ors.

Advocate for Def. : Sanjay Singh, S.C. IX

Advocate for Pet/Ap. : Ashwani Kumar Singh and Vijay Shankar Shrivastava, Adv.

Disposition : Petition dismissed

Judgement :

Aftab Alam, J.

1. The petitioner is the wife of one Bhagwan Chandra Mishra who was a police constable and was posted at the material time at Police Headquarters, Hajipur. She filed this writ petition in 2001 stating that her husband was traceless, from January, 1991, for a period of over seven years. She sought a direction from this

Court to the concerned authorities, inter alia, to pay her the retiral dues of her husband as well as his arrears of salary from the date of his disappearance.

2. It appears that at the time of filing the case the petitioner was not aware that a departmental proceeding was held against her husband for his unauthorized absence from duty. The proceeding was initiated on 21.11.1998, though in the normal course he would have retired from service on 30.4.1998. The proceeding was held ex-parte, at the end of which an order was passed by the Superintendent of Police, Vaishali under his memo No. 1769, dated 23.6.1999. By this order the Superintendent of Police held that the charge of unauthorized absence was established against the proceed. He, therefore, directed forfeiture of his salary for the period 1.7.1992 to 30,4.1998, the date of his retirement and adjustment of that period of his absence from duty as extra-ordinary leave.

3. The matter rested at that stage but after the filing of this case the mater started moving once again. During the pendency of this case the petitioner was given all the retiral dues of her husband. She was also allowed family pension w.e.f. 30.4.1998 (the date of retirement of her husband) and the amount of family pension was fixed on the basis of the salary receivable by the petitioner on 1.7.1990. The settlement of the petitioner's claim was apparently made on the basis of the order passed by the Superintendent of Police, Vaishali on 23.6.1999.

4. The order dated 23.6.1999 was brought on record as Annexure- A to the supplementary counter affidavit filed on behalf of the second respondent. The petitioner then filed IA No. 3253 of 2004, seeking to challenge the order dated 23.6.1999. She further made a prayer for amendment of her reliefs in view of the development taking place during the pendency of the case,

5. In course of hearing Mr. Anjani Kumar Singh strongly assailed the validity and legality of the departmental proceedings initiated against the petitioner's husband, in absentia, after the date of his superannuation from service. Mr. Singh submitted that the petitioner was entitled to her husband's full salary from the date of his disappearance till the date of his superannuation. Alternatively, he submitted that in any event the petitioner was entitled to family pension from the date of disappearance of her husband and that, according to him, could not be denied to

her in any event.

6. As regards the challenge to the departmental proceeding the petitioner appears to be on firm grounds. The departmental proceeding held against the petitioner was apparently quite misconceived and unsustainable in law for the simple reason that it was initiated after the date on which the employee would have retired from service. In other words, the proceeding was held at a time when the contract of service had already come to an end as a result of the employee attaining the age of superannuation. The departmental proceeding and the final order passed in it on 23.6.1999 must, therefore, be held to be bad and illegal.

7. But that does not bring the petitioner any nearer to the reliefs claimed by her, namely, payment of full arrears salary of her husband from the date of his disappearance till the date of his retirement or alternatively, the payment of family pension to her from the date of his disappearance.

8. Admittedly, the petitioner was last seen on 1.7.1992 and he is traceless from that date. No direction can, therefore, be issued for payment of his salary from 1.7.1992 to 30.4.1998 on the simple principle of no work - no pay.

9. But in support of his claim for full salary for that period Mr. Singh strongly relied upon a bench decision of this Court in *Arhul Devi v. State of Bihar and Ors.*, 1991 (2) PUR 483.

10. It is true that certain observations in paragraphs 6 and 7 of the judgment seem to support the petitioner's claim. But on a close scrutiny the judgment is completely distinguishable from the facts of the case in hand. In *Arhul Devi* the wife of a missing police man had come to this Court within a year of her husband's disappearance seeking a writ, of Habeas Corpus for his production. At the initial stages in that case the Court had directed the superior police authorities to make a thorough search for him and had also directed for payment of half of his monthly salary to his wife for the survival of the family. Later, when it became clear that the police authorities were unsuccessful in tracing him out the case was finally disposed of long before the completion of the period of seven years from his disappearance that would give rise to the presumption that he was dead. In that

view, the Court did not issue any direction for payment of his death cum retiral dues to his wife. The Court further held that for the disappearance of the police man concerned the Dhaka police and the Superintendent of Police, Motihari were also responsible in some ways. This would be evident from the following passage in the judgment :

'The stage, however, to draw any presumption that he is dead has not yet arisen. Seven years have not yet elapsed. Presumption today will be that he is alive. No direction, therefore, can be given to pay to the petitioner's family pension treating her husband as one who has died in harness or other such benefits which accrue on account of such death. The situation like one in hand could not have arisen, had the Dhaka police and the Superintendent of Police, Motihari acted in accordance with law. We for the reasons aforementioned, therefore, are of the opinion that respondents cannot escape the liability of providing to the petitioner and her children livelihood as her husband provided to them. In our view respondents shall be liable to pay to the petitioner full emoluments of her husband both arrears and current until it is found that her husband is dead or his contract of service is determined in accordance with law either by the age of compulsory retirement or by action in accordance with the prescribed procedure of Law.'

11. It was in those circumstances that the direction was made for payment of full salary of the missing Police man to his wife from the date of his disappearance.

12. Mr. Singh alternatively, submitted that in any event the petitioner must be paid family pension from 1.7.1992, the date of disappearance of her husband! This prayer too cannot be allowed. The family pension becomes payable on the death of employee. Any direction for payment of family pension from 1.7.1992 would be based on the assumption that Bhagwan Chandra Mishra was dead on that date for which there is absolutely no evidence.

13. It may be noted that Section 108 of the Evidence Act provides that in case a person is not heard of for seven years, he or she may be presumed to be dead. The section does not provide any presumption as to the actual date of death. There can be no presumption that the person died on the date of his disappearance or on the expiry of the period of seven years from the date of his

disappearance or on any other date falling in between the two. In case someone claims a relief on the basis of a certain date being the date of death of a person the onus squarely lies on him or her to prove the date of death by leading evidence. See AIR 1926 Privy Council 9 (11) (Lal Chand Marwari v. Mahant Rampur Gir and Anr.

14. In the absence of any evidence that Bhagwan Chandra Mishra died on 1.7.1992, no direction can be issued for payment of family pension to the petitioner from that date.

15. The petitioner has been paid the retiral dues of her husband and she is also getting family pension w.e.f. 30.4.1998. No further relief can be allowed in her favour. This writ petition is dismissed.

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