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Court : Allahabad

Decided On : Sep-16-2004

Reported in : 2005(1)AWC239

Judge : Tarun Agarwala, J.

Acts : [Evidence Act, 1872](#) - Sections 107 and 108; Dyeing-in-Harness Rules

Appeal No. : C.M.W.P. No. 4531 of 2000

Appellant : Smt. Usha Devi

Respondent : Chief General Manager, Bina Project N.C.F.L. and ors.

Advocate for Def. : V.K. Barman and ;S.M. Dayal, Adv.

Advocate for Pet/Ap. : Rajendra Chaubey, Adv.

Disposition : Petition dismissed

Judgement :

Tarun Agarwala, J.

1. The petitioner's husband was appointed as an Electrician. He had taken two days casual leave on 21.1.1992, which was granted. The petitioner did not report for duty w.e.f. 24.1.1992 and accordingly he was charge sheeted on 3.3.92. Since no reply was forthcoming, an enquiry officer was appointed who submitted his

report on 27.10.92, on the basis of which the disciplinary authority passed an order dated 22.3.93 terminating the services of the petitioner. The order of termination was subsequently published in the newspaper on 27.3.93.

2. The petitioner contended that her husband left for work on 21.1.1992, but never returned after duty. In 1997, the petitioner approached the respondent to give her an employment in order to sustain herself and her family till such time as her husband was found. Since no action was taken on her representation, the petitioner filed Civil Misc. Writ Petition No. 11233 of 1998, which was disposed of by an order dated 31.3.98 directing the authority concerned to decide the representation. The authority concerned rejected the representation of the petitioner vide its order dated 3.9.1998 on the ground that the services of the petitioner had been terminated by an order dated 22.3.93 and therefore, the question of giving employment to the petitioner on compassionate grounds under the Dying-in-Harness Rules does not arise. The petitioner thereafter, did nothing in the matter and filed Civil Misc. Writ Petition No. 13160 of 1999 alleging that since her husband was missing for the last seven years, he was presumed to be dead and therefore, the petitioner should be given a job on compassionate ground under the Dying-in-Harness Rules. This Court vide order dated 12.4.99 disposed of the writ petition with a direction to the authority concerned to consider the case of the petitioner for an appointment under the Dying-in-Harness Rules in the light of the fact that her husband was missing for more than seven years and was presumed to have died a civil death.

3. Based on the directions given by the High Court, the petitioner again made a representation dated 20.4.99, which was again rejected by an order of the competent authority dated 16.6.99. It transpires that the petitioner thereafter, filed an appeal, which was also rejected by an order dated 16.8.1999. Consequently, the petitioner has filed the present writ petition for quashing of the orders dated 16.6.99 and 16.8.99 and further praying that she should be given an employment on compassionate ground under the Dying-in-Harness Rules.

4. Heard Sri Rajendra Chaubey, the learned counsel for the petitioner and Sri S.M. Dayal, the learned counsel appearing for the respondents.

5. The petitioner has raised an issue that she was entitled for an appointment under the Dying-in-Harness Rules on the presumption that her husband was dead and had not been found for the last seven years. This presumption is governed by Sections 107 and 108 of the Indian Evidence Act. The entire controversy centers around the applicability and the extent and scope of Sections 107 and 108 of the Evidence Act.

6. Section 107 of the Indian Evidence Act deals with the presumption of continuation of life. Section 108 deals with the presumption of death. Sections 107 and 108 of the Indian Evidence Act are reproduced hereinunder :

'107. Burden of proving death of person known to have been alive within thirty years.-When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

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.'

7. The Privy Council in Lal Chand Marwari v. Mahant Ramrup Gir, AIR 1926 PC 9 held : 'There is only presumption, and that is that when these suits were instituted in 1916 Bhawan Gir was no longer alive. There is no presumption at all as to when he died. That, like any other fact, is a matter of proof.'

8. The provision of Sections 107 and 108 of the Evidence Act was again considered at length by the Supreme Court in N. Jayalakshmi Ammal and Ors. v. R. Gopala Pathar and Anr., 1995 Supp (1) SCC 27 and after analyzing the entire case law held that the burden of proof was upon the plaintiff to prove that her husband died on a particular date and that merely relying on the presumption under Section 108 of the Evidence Act by itself was not sufficient.

9. In *L.I.C. of India v. Anuradha* : AIR 2004 SC2070 , the Supreme Court after considering the entire case laws summarized the provisions of Sections 107 and 108 as under :

'On the basis of the abovesaid authorities, we unhesitatingly arrive at a conclusion which we sum up in the following words. The law as to presumption of death remains the same whether - in 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 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 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 permitted to be raised on expiry of 6 years and 364 days or at any time short of it. An occasion for raising the presumption would arise only when the question is raised in a Court, Tribunal or before an authority who is called upon to decide as to whether a person is alive or dead. So long as the dispute is not raised before any forum and in any legal proceedings the occasion for raising the presumption does not arise.'

10. From the aforesaid, it is clear that there is a presumption that the person is dead but there is no presumption as to the date or time of death. Applying the aforesaid principle to the present facts of the case; I find that the services of the petitioner was terminated after holding a departmental enquiry by an order dated 22.3.93. There is no pleading or averment in the writ petition regarding the date of death of the petitioner. Only a presumption has been drawn that the petitioner's husband is missing for the last seven years and is therefore presumed to be dead. The petitioner has also not brought on record any first information report, which she had lodged reporting that her husband was missing. Until and unless the petitioner obtains an order from a competent court or authority certifying that her husband is dead in my opinion, the drawing of the presumption that the petitioner's husband is dead is by itself not sufficient to grant the relief on an appointment under the Dying-in-Harness Rules. The petitioner is required to plead and prove that her husband died on or before 22.3.1993, i.e., the date prior to the order of dismissal. Since the petitioner has not pleaded this fact, namely, the date when the petitioner has died, no relief can be granted to her. The petitioner could not be entitled to any employment on compassionate ground merely on a presumption that her husband is presumed to be dead.

11. In view of the aforesaid, the petitioner is not entitled to any relief. The writ petition is devoid of any merit and is dismissed.