



GAHC010012432016



IN THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

WRITPETITION (C) No. 2095/2016

Smti. Pravabati Devi,

Wife of Late Triloki Nath Singh

Resident of Village and P.O. Ailakhimillia (via-Ratanpura), District- Mau, Uttar Pradesh, PIN-221706

.....Petitioner

-Versus-

1. The State of Assam,

Represented by the Commissioner & Secretary to the Govt of Assam, Home & Political Department, Dispur, Guwahati-6.

2. The Director General of Police, Assam,
Ulubari, Guwahati-7, District-Kamrup (M), Assam.

3. The Inspector General of Police, Assam,
Ulubari, Guwahati-7, District-Kamrup(M), Assam.



4. The Deputy Inspector General of Police (Southern Range), Silchar, District, Cachar, Assam.

5. The Superintendent of Police, Cachar, Silchar, District-Cachar, Assam.

6. The District Magistrate, Cachar, Silchar, District-Cachar, Assam.

7. The Accountant General, Assam, Maidamgaon, Beltola, Guwahati-28, District-Kamrup(M), Assam.

8. The Commissioner and Secretary to the Government of Assam, Pension and Public Grievances Department, Dispur, Guwahati-6

.....Respondents

:: BEFORE::

HON'BLE MR. JUSTICE SOUMITRA SAIKIA

For the Petitioner : Mr. P.P. Baruah, Advocate
Mr. R. Sarma, Advocate

For the Respondents : Mr. T.C. Chutia, Addl. Sr.
Government Advocate, Assam
: Mr. S.K. Medhi for R-7

Date of Hearing : 15.06.2023

Date of Judgment : 18.10.2023



JUDGMENT & ORDER (CAV)

This writ petition has been filed by the petitioner aggrieved by the speaking order No. HMA.575/2012/77 dated 17.11.2015 whereby the family pension was held to be not payable to the petitioner who was the widow of missing Constable 580 Triloki Nath Singh of Cachar DEF as per Rule in view of the opinion of the Pension and Public Grievances Department that family pension to the wife of the missing constable cannot be granted since the case is neither covered under Govt. O.M. No. PPG(P)75/91/242 dated 29.03.2000 nor does it fall under Rule 143 of Assam Service (Pension) Rules, 1969. The further prayer of the petitioner is for setting aside the order being D.O. No. 3283 dated 25.06.1971, by which order, it was stated that the husband of the petitioner was discharged from service but a copy thereof was never served upon the petitioner. The facts pleaded in the writ petition are that the husband of the petitioner, Triloki Nath Singh, was duly appointed as Constable in Unarmed Branch (UB) against the existing vacant post where he joined on 31-03-1965 in Assam Police and he had undergone basic training at Dergaon. After successful completion of the training, he was posted in different units in the Cachar district. The husband of the petitioner



discharged his duties as Constable under administrative jurisdiction of Superintendent of Police, Cachar, Silchar without any blemish throughout his service career. It is stated that the husband of the petitioner while in service at Karimganj police station in undivided Cachar district was missing from 30-12-1969 and his whereabouts were not traced out till date inspite of all efforts from the family as well as by the authority concerned. At that time, the petitioner was at her matrimonial home at Ailakhimillia(via-Ratanpura), District-Mau, Uttar Pradesh although her male child who was aged about only 4 months then. The information regarding her husband missing came to the knowledge of the petitioner vide letter No. R/8646 dated 23-04-1970 issued by the Superintendent of Police, Cachar, Silchar directing her husband to resume in his duties. But the said letter could not served to the addressee since he had remained untraced and as such it was sent to his permanent address at Mau in U.P., which was the matrimonial home of the petitioner.

2. As the petitioner did not receive any service benefit of her husband as his whereabouts could not be traced out, the petitioner submitted several representations before the respondents authorities praying for release of the service benefits in respect of her missing husband. Since these representations did not evoke any response, the son of the petitioner



who by that time had attained majority approached the respondent authorities to enquire about the status of the case of his father who was missing since 30.12.1969. As no satisfactory replies were forthcoming from the respondents, a legal notice was served on the respondents by a counsel demanding release of service benefit of her husband. Pursuant to the said legal Notice, the Inspector General of Police vide WT Message under Memo No. E/II-17.660/10-A dated 17.04.2001 directed the Superintendent of Police, Silchar/ Karimganj to submit detailed report regarding the status of the missing husband of the petitioner with a request to send the pension proposal for grant of provisional pension/Death-cum-Retirement Gratuity (DCRG) etc. In pursuance to such directions issued by the Inspector General of Police, the Superintendent of Police, Cachar, Silchar directed the son of the petitioner to appear before him with all relevant papers and service records of his father to facilitate preparation of pension papers. Accordingly, the son of the petitioner appeared before the Office of the Superintendent of Police, Cachar, Silchar and submitted all relevant papers.

3. The Superintendent of Police, Cachar, Silchar vide memo No. SLC/R/13/2005/8765 dated 22.12.2005 intimated the District Magistrate, Cachar, Silchar that the husband of the petitioner was found missing since



31.12.1969 and also forwarded a report submitted by the Superintendent of Police of Mau District, Uttar Pradesh along with a report of the Pradhan Gaon Panchayat Ailak in the State of U.P., requesting for issuance of a certificate presuming the husband of the petitioner to be dead as without such certificate to pensionary benefit payable to the petitioner could not be processed. It was mentioned that since seven (7) years had already elapsed, a certificate to that effect of the presumption of the death of the husband of the petitioner was necessary. The missing report collected from the Officer In-charge, Haldarpur, Janpith Muktha, District Mau, Uttar Pradesh had also been forwarded to the District Magistrate, Cachar.

4. In response to the communication of the Superintendent of Police, the Additional District Magistrate, Cachar, Silchar vide letter No. CMJ 35/98/184 dated 25.06.2007 informed the Superintendent of Police, Cachar, Silchar that the Government pleader Silchar had opined that the husband of the petitioner who has not been heard since 31.12.1969, as such presumption may be drawn that the said constable is dead and a certificate in that respect may be issued.

5. The Superintendent of Police, Cachar, Silchar thereafter, by communicated dated 29.06.2007 intimated the Joint Director, Health Service (Death and Birth), Cachar, Silchar regarding the opinion stated to



have been issued by the District Magistrate, Cachar and requested for a death certificate to be issued in respect of the husband of the petitioner presuming him to be dead in order to enable the pension papers to be processed.

6. In response to the request made by the Office of the Superintendent of Police, Death certificate was issued by the Registrar of Births & Death dated 28.11.2007 declaring the date of death as 01.01.1977. Thereafter, in order to process the pension papers, the Superintendent of Police, Cachar, Silchar requested the petitioner to submit required documents as was indicated in the letter dated 16.12.2010 which was issued by the Inspector General of Police along with other particulars like specimen signature, descriptive Rule showing height, colour of skin, age with identification mark and details of family members with date of birth of each members as well as sufficient copies of the photographs. The petitioner was also asked to submit the required pension Forms duly filled up. All these documents as sought for were duly submitted by the petitioner before the Superintendent of Police. The Inspector General of Police (L) vide letter No. E/II-17,660/31 dated 24.08.2010 forwarded the necessary family pension documents to the Office of the Accountant General, Assam for necessary action. The Office of the Accountant General, Assam,



however, returned the file to the Office of the Inspector General of Police (L), Assam with the endorsement that the case of the petitioner is not covered by the O.M dated 29.03.2000 issued by the Government of Assam since the said O.M had taken effect from the date of issuance of the O.M. and as such, the petitioner's case be processed as normal family pension case and to prepare duplicate service book as without the service book, pension papers cannot be processed.

7. The matter was thereafter, forwarded to the Department of Home (A), Government of Assam for necessary documents in favour of the grant of family pension to the petitioner. The Department of Home (A), Government of Assam communicated to the Office of the Assistant Inspector General of Police, Assam (AIGP) to investigate the genuineness of the case and furnish a report.

8. In pursuance to this communication, the Superintendent of Police, Cachar, Silchar was directed to investigate the genuineness and thereafter an enquiry was conducted by the Addl. Superintendent of Police(B), Cachar, Silchar and findings were submitted in an enquiry report that the claims made by the petitioner were genuine. The relevant papers and documents relating to family pension of the petitioner were thereafter, again forwarded by the Department to the Principal Accountant General for



taking necessary action. The concurrence of the Pension and Public Grievance Department vide U/O No. PPG(P)429/2012 dated 21.11.2012 was also obtained.

9. The Office of the Accountant General, thereafter, returned the file again raising certain queries and the file was thereafter again re-submitted by the relevant Department after meeting all the queries. While re-submitting the pension papers/documents, it was intimated that the Departmental Proceedings were drawn up against the husband of the petitioner vide DP No. 11/1970 and the same was disposed of by discharging him from service w.e.f. 31.12.1969 vide DO No. 3238 dated 25.06.1971 as the Constable was missing from service. Thereafter, by a speaking Order No. HMA.575/2012/77 dated 17.11.2015, the Department of Home & Political, Government of Assam closed the family pension case of the petitioner holding that she was not entitled to get family pension as per the Rules. It was held that the Pension and Public Grievances Department, Government of Assam opined that the family pension to the petitioner in respect of the missing Constable cannot be granted since the case is neither covered by Government O.M No. PPG(P)75/91/242 dated 29.03.2000 nor does it fall under Rule 143 of the Assam Service (Pension) Rules, 1969.



10. It is this order issued by the Department of Home & Political, Government of Assam being Order No. HMA.575/2012/77 dated 17.11.2015 and the Departmental Proceeding being D.O. No. 3238 dated 25.06.1971 stated to have been conducted against the missing husband of the petitioner whereby he was discharged from service are being specifically assailed praying for interference and quashing of the said orders.

11. The learned counsel for the petitioner submits that the husband of the petitioner was found missing from 30.12.1969 and as such the case of the petitioner is covered by the OM No. FMP.45/85/139 dated 26.05.1987 issued by the Government of Assam, Department of Finance. It is submitted that the family pension scheme of 1964 was introduced w.e.f 01.01.1964 following the Government of India's Family Pension Scheme, 1964. The said scheme was applicable to all those who entered service on or after 01.01.1964 and also to those who were employed on 31.12.1963 but did not opt to retain the old Family Pension Scheme of 1954. It is submitted that under the Scheme of 1964, the Family Pension is admissible in case of death of any employee after 01.01.1964 and the family members are entitled to a family pension in the event of death of the pensioner. It is submitted that the husband of the petitioner was a regular employee and



at the time he went missing, he had completed 04 years 24 days in service.

It is submitted that the respondent authorities misinterpreted the provisions of the OM which is applicable to the husband of the petitioner and thereby passed the impugned order dated 17.11.2015. As such, the impugned order dated 17.11.2015 passed by the Secretary to the Government of Assam, Home & Political Department is not sustainable and therefore, liable to be set aside and quashed.

12. It is submitted that the declaration of death of the husband of the petitioner was obtained at the instance of the respondent authorities and it is also admitted that the petitioner was missing from 30.12.1969 and his whereabouts could not be traced out inspite of all efforts of the family members as well as the respondent authorities. It is submitted by the learned counsel for the petitioner that the initiation of the Departmental Proceedings against the husband of the petitioner by D.P. No. 11/1970 and imposition of punishment of discharge from the service is unsustainable in law as the same is illegal and is therefore liable to be set aside and quashed. It is submitted that the present petitioner is a senior Citizen and has been running from pillar to post seeking the rightful dues of a family pension but the respondent authorities neglected to release the same and thereby they are duty bound in law to be directed by this Court to consider



and release the family pension payable to the petitioner. The learned counsel for the petitioner has relied upon the Judgment of this Court in *Rejia Khatuan Vs. State of Assam and Ors*, reported in 2001 (3) GLT 262 in support of his contentions.

13. The respondents No. 2, 3 & 5 have contested the case claims of the petitioner by filing affidavit.

14. The learned Addl. Senior Government Advocate representing the respondents relying on the affidavits filed submits that the Government O.M. No. FMP/45/85/139 dated 26.05.1987 is enforceable in case of retirement of Government employee or death while in service. However, the husband of the petitioner was missing w.e.f 30.12.1969. He submits that as on date there is no proof available as to whether the husband of the petitioner is dead or alive and as such the O.M No.FMP/45/85/139 dated 26.05.1987 will not cover the case of the petitioner and therefore, the same has been rightly rejected by the respondent authorities. It is further submitted by the learned Addl. Senior Government Advocate that the Government Notification No. PPG (P) 75/91/242 dated 29.03.2000 which also relates to the disappearance of the Government Employee came into force only on 29.08.1986, whereas the husband of the petitioner



disappeared w.e.f. 30.12.1969. As such, the O.M dated 29.03.2000 also does not cover the case of the petitioner.

15. The learned counsel for the petitioner submits that the communication dated 25.06.2007 issued by the Addl. District Magistrate, Cachar, Silchar cannot be considered to be a finding arrived at by the concerned authority in terms of Section 108 of the Indian Evidence Act, 1872. The said communication merely reflects the opinion of the Government pleader Silchar that the presumption can be drawn in respect of the husband of the petitioner that he is not alive under the provisions of the Evidence Act, 1872.

16. The learned counsel for the respondents submits that such an opinion does not have a force of law and an appropriate order was called for declaring that the husband of the petitioner went missing w.e.f. 31.12.1969 by the Competent Court. As such, this communication will not have any force of law as is required under the provision of the evidence Act. Consequently, the death certificate issued by the Department of Births and Deaths certifying the death of the petitioner's husband on 01.01.1977 also is contrary to the provisions of law and therefore, cannot be relied upon by the petitioner in support of his contentions. Under such circumstance, unless a finding is arrived at by a competent Court regarding



the fact that the husband of the petitioner went missing from 31.12.1969, the closure of the pension case by the competent authority rejecting the claim of the petitioner cannot be faulted with. In that view of the matter, there is no merit in the writ petition, the same ought to be dismissed.

17. The learned counsels for the parties have been heard. Pleadings on record have been carefully perused. From the pleadings on record, it is seen that the petitioner's husband joined served of the Assam Police Force as a Constable (Unarmed Branch) on 31.06.1965 although no appointment order has been enclosed by the petitioner, this fact is not disputed by the respondents themselves. The petitioner's husband was reportedly missing with effect from 31.12.1969. As such it is seen that the petitioner's husband had worked as Government Servant under the Assam Police with effect from 31.06.1965 to atleast 31.12.1969. The Assam Pension Rules, 1969 was brought into force under Article 309 of the Constitution of India and in supersession of the Rules in the Assam Pension Manual, Second Edition, 1939.

18. Rules 18 of the Rules specifies that the Rules in Chapter VIII (Liberalized Pension Rules) excluding Section III namely Family Pension 1954, apply to Officers belonging to any of the Classes- I, II and III who either-



- (a) Joined their appointment on or after 13th February 1954;
- (b) Having joined the appointment before that date did not hold a lien or a suspended lien on a permanent pensionable post under the State Government before that date; or
- (c) Though holding a lien or suspended lien on a permanent pensionable post under the State Government before that date did not specifically opt for the existing pension rules applicable to them prior to 13th February, 1954 or specifically opted for the liberalized pension rules coming into force on 13th February, 1954 (Chapter VIII) and thus came under them.

These Rules also applied to Class-IV Government Servants irrespective of their dates of the entry into the service.

19. Under Rule 31, it is provided that service of an Officer does not qualify for pension unless it confirms to the following three conditions:

- (1) The service must be under the Government;
- (2) Employee must be substantive and permanent; and
- (3) The service must be paid by the Government.

20. Under Rule 68 of the Pension Rules, pension is classified under the following heads:

- (a) Compensation Pension
- (b) Invalid pension
- (c) Superannuation pension
- (d) Retiring pension



21. For the purposes of the case, the first three classes of pension are not required to be referred to as the husband of the petitioner admittedly does not fall under these three categories. In so far as the Retiring pension is concerned, the husband of the petitioner also does not fall under that category as under Section 5 Rule 96, it is provided that a retiring pension is granted to an Officer who is permitted to retire after completing qualifying superior service for 30 years or such less time, as may, for any special class of Officers be prescribed.

22. Under Rule 97, the Governor of Assam may at its discretion allow a Government servant to retire on proportionate pension after 25 years of qualifying service and the amount of pension and/or gratuity calculated according to the table applicable to him had he retired on invalid pension.

23. Under Rule 123 of the Pension Rules, it is provided that the Rules in the Chapter will apply to members of Police Forces constituted under the Police Act 1861. Rule, 126, however, prescribes that service in the Police Force mentioned under Rule 123 qualifies for pension.

24. The minimum length of qualifying service after which the pension become admissible on retirement for members of "Superior Service" has been recorded as ten (10) years by the Assam Pay Committee and the recommendation of the Pay Committee was made in the year 1964 which



has been accepted by the Government of Assam. In the facts of the present case, the husband of the petitioner was joined as a Constable in the Unarmed Branch (UB) against an existing vacant post on 31.03.1965 in the Assam Police Service. Although no appointment order of the husband of the petitioner has been enclosed but the same is, however, not denied by the respondent/authorities that he was appointed in the said post. The husband of the petitioner while serving at Karimganj Police Station in the undivided Cachar District went missing on 30.12.1969 and his whereabouts thereafter were not traced out either by his family members or by the Department.

25. As discussed above, under the Pension Rules read with Assam Pay Commission in order that a Government Servant becomes entitled to pension besides satisfying the requirement under Rule 31 of the said Rules, the person must have rendered service for atleast 10 years. However, under such condition is prescribed under the Pension Rules for grant of Family Pension in the case of death of a person. Ordinarily a continuous service of atleast one year is considered sufficient for grant of family pension to the legal heirs/family members of the deceased Government Servant under the Family Pension Scheme. So admittedly, the husband of



the petitioner rendered his services for a little over 4 years 9 months after which he went missing.

26. In cases of Government Servants who went missing, the provisions of Rule 143A is applicable where the procedure is prescribed for family pension in case of disappearance of Government Servant. However, this provision is inserted only on 29.03.2000 and this Rule is stated to have come into force with effect from 29.08.1986 as is reflected in the footnote to the Rules of 143A. The claim of family pension was rejected by the respondent Department on the ground that this 143A is not applicable as it came into force well after the husband of the petitioner purportedly went missing.

27. Under the Evidence Act, Section 108 presumption can be drawn that a person is not alive when a person has not been heard from for a period of seven (7) years. The Section provides that the burden of proving that a person is alive who has not been heard of for seven years is on the person who affirms it. Under the Provisions of Section 108 of the Evidence Act, the burden initially will be on the person that the concerned person has not been heard of for seven years who would have naturally heard from the concerned person if he had been alive.



28. The provision of Sections 107 and 108 of the Indian Evidence Act, 1872 deals with the presumption of continuation of life and the presumption of death respectively. The Apex Court in *N. Jayalakshmi Ammal and Ors. Vs. R Gopala Pathar and Anr*, reported in *1995 Supp (1) SCC 27* was considering these provisions in the context of that case. The Apex Court referred to the Principle summarized of Sir John Woodroffs and Amir Ali's Law of Evidence 15th Edition at Page-672-673 as under:

"The principle of Section 107 is that when once a state of things is shown to exist, there is in law a presumption of its continuance for a period for which such state of things ordinarily lasts. This section is merely a deduction from this presumption. If a person is shown to have been alive within thirty years of the date on which the question whether he is alive or dead arises, there is a presumption of his being alive, and the burden of proving that he is dead lies on him who asserts that he is dead. But this presumption is rebutted, if it is shown that he has not been heard of for seven years by those who if he had been alive, would naturally have heard of him; and, on such proof being given the burden of proving that he is still alive, is, under Section 108, upon those who assert that he is alive. The presumption under Section 108 is as to the fact of death at the time the question was raised and not at any particular antecedent time. There is no presumption also to the cause and circumstances of the death.

Section 107 deals with the presumption of continuation of life, whereas Section 108 deals with the presumption of death. Section 108 enacts a proviso to Section 107 by specifying that when a person was continuously absent for seven years and he was not heard by his friends and neighbours he may be presumed to have died and the burden of proving that he is alive shifts on the person that he is alive. The presumption of continuance of life under Section 107 ceases at the expiration of seven years from the period when the person in question was last heard of. The presumption under Section 107 will apply when the question is whether a person was alive or dead and not where the question is whether the person was alive or dead on a particular date."

29. Similarly, the Apex Court also referred to the law on the point summarized in the book of M. Monir's *Principles and Digest of the Law of Evidence*, Vol. 2, 7th Edn. at page 1145. In the said book the law on this point was summarized:

"The only presumption enjoined by Section 108 of the Evidence Act being that a person who has not been heard of for seven years or more is dead at the time the question is raised, there can be no presumption of his being dead or alive at any particular time of the period for which he has not been heard of. There is neither any presumption of his being alive for a period of seven years from the time he was last heard of; nor any presumption of his having died immediately after his disappearance, nor any presumption of his being alive or dead at any particular time antecedent to the suit or proceeding in which the question of his being dead or alive arises. The result, therefore, is that where nothing more is shown than that a person has not been heard of for seven years or more, the party, on whom the burden of proving him to be alive or dead at any particular time during the period he has not been heard of lies, will fail."

(emphasis supplied)

30. The Apex Court also referred to the other treatises like Sarkar on Evidence and Halsbury's Laws of England on this question. The Apex Court came to the conclusion that if a person has not been heard of for seven years, there is a presumption that he is dead. But what time within that period he died is not a matter of presumption but of evidence. Referring to various Judgments including the Judgments of the privy council, the Apex Court held on the facts of that case that presumption of death after seven years can be held under Section 108 Evidence Act but that presumption



does not apply to the date on which the person died. That is a fact which is required to be proved.

31. In *LIC of India Vs. Anuradha*, reported in (2004) 10 SCC 131, the Apex Court held that 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 an issue though it will be presumed that the person is dead but there is no presumption as to the date or the time of death. There is no presumption as to be facts and circumstances under which the person may have died. The only inference permissible to be drawn and based on the presumption is that man was dead at that time when the question arose subject to a period of seven years absence and the unheard of having elapsed before that time. At what point the person was dead is not a matter of presumption but of evidence, factual or circumstantial and the onus of proving that death had taken place at any given point in time or date since the disappearance or within the period of seven years lies on the person who stakes the claim. It was held that rarely may it be permissible to proceed on the premise that death had occurred on any given date before the period of seven years absence were shown to have elapsed.



32. In *Rejia Khatun (Supra)*, a Co-ordinate Bench of this Court was considering the case of the petitioner therein who had applied for pensionary benefit in respect of her husband who had subsequently expired. In *Rejia Khatun (Supra)*, the husband of the petitioner therein was the headmaster of a school at the relevant point in time and because of his conviction by trial Court, he was discharged from his service. The husband of the petitioner was convicted in a criminal case by the Sessions Judge, Nagaon. Being aggrieved, the husband of the petitioner along with other accused persons preferred criminal appeal which was pending before this Court at the relevant point in time. However, during the pendency of the appeal, the husband of the petitioner expired and the appeal was abated in so far as the husband of the petitioner therein was concerned. This Court upon perusal of the relevant materials came to a finding that under the Provisions of Assam (Discipline and Appeal) Rules, 1964 read with FR 52, there is no provision to discharge an employee. Pursuant to any enquiry being conducted, the employee may be found to be guilty as charged and appropriate punishment be imposed as prescribed under the Rules or the employees found to be not guilty as charged. The term “discharge” is not prescribed as a punishment under Rule 7 of the Assam (Discipline and Appeal) Rules, 1964. As such, once a person is not dismissed or removed



from service, he is entitled for all benefits like pension, gratuity etc on his retirement or death. This Court held that discharge is not a ground to deny the pensionary benefits to a person who has in the meantime expired as unless the person is dismissed from service, he will be deemed to be in regular service under the appropriate Rules.

33. In the present proceedings, a death certificate dated 28.11.2007 certifying the date of death as 01.01.1977 of "Triloki Nath Singh" namely the husband of the petitioner was issued by the Department of Health Services on the communication received from the Superintendent of Police, Cachar, Silchar. This communication is based on the opinion received from the Addl. District Magistrate. The fact remains that this death certificate was issued upon the communication received from the Office of the Superintendent of Police, Cachar, Silchar and the same has not been disputed or disbelieved i.e. the respondent authorities. As per the provisions of 108, presumption has been drawn as to the death of the husband of the petitioner on 01.01.1977 which is seven years from the date when the husband of the petitioner was purportedly missing. The date when the husband of the petitioner went missing was 30.12.1969. That being the undisputed position on facts, there is no denial that the husband of the petitioner completed more than one year of service as a Government



Servant satisfying the requirement under Rule 31 of the Pension Rules. If that be so then the claim of the petitioner for family pension must be entertained. However, this claim has been negated on the ground that a Disciplinary Proceedings was initiated against the petitioner's husband and under the Assam Discipline and Appeal Rules, 1969 and the punishment was imposed on the late husband of the petitioner and he was stated to have been discharged from service. In the affidavit filed by the Superintendent of Police, it was stated that vide Disciplinary Proceedings No. 11/1970, the petitioner's husband was discharged from service w.e.f. the date of his desertion which is 30.12.1969. The order of discharge from service was passed by the Departmental Order No. 3238 dated 25.06.1971. No enquiry report or the proceedings that was conducted against the late husband of the petitioner was produced before the Court inspite of affidavits being filed and further opportunities being granted.

34. The learned Government Advocate fairly submitted before the Court that no records in respect of the proceedings conducted are available. However, only a disciplinary proceedings Register is available wherein it is recorded that vide D.O. No. 3238 dated 25.06.1971, the order of discharge was issued by the Department discharging the petitioner from service from the date of his desertion which is 30.12.1969.



35. A further affidavit was also filed by the Inspector General of Police (Administration), Assam reiterating the stand of the Police Department and further stating that the case of the petitioner was rejected on the ground that the Government OM No. FMP/45/85/139 dated 26.05.1987 is enforceable in case of retirement of a Government Employee or death while in service. However, since the husband of the petitioner went missing with effect from 30.12.1969 and that there was no proof available as to whether the husband of the petitioner is dead or alive, the Government OM dated 26.05.1987 does not cover the case of the husband of the petitioner.

36. On these facts, the petitioner has approached this Court praying for grant of family pension for the services rendered by the husband of the petitioner till the date he went missing on 30.12.1969. No materials were placed before the Court in respect of the purported Departmental Proceedings stated to have been initiated by the Department against the husband of the petitioner discharging him from service vide order dated 30.12.1969 to justify the correctness of the procedure adopted.

37. That apart, the Department does not dispute the fact that police officers under the Assam Police Force are amenable to the Assam Discipline and Appeals Rules, 1964. The respondents stated that the Departmental Proceedings was initiated the said Rules of 1964. If that be so in Rejia



Khatun (Supra), a Co-ordinate Bench of this Court had categorically held that under provisions of Assam Discipline and Appeals Rules, 1964 read with Fundamental Rule (FR)-52 of the Assam FR&SR, there is no provisions to discharge an employee. The punishment, if required to be imposed under the Discipline and Appeals Rules must be one of the punishments as prescribed under the said Rules. Perusal of the Rules reflect that under Rule 7 of the Assam Discipline and Appeal Rules, the punishments are prescribed. "Discharge" is not one of the punishments prescribed under the said rules. Therefore, the punishment of "discharge" imposed was held to be bad by a Co-ordinate Bench of this Court in *Rejia Khatun(Supra)*.

38. As discussed above, in the absence of the records relating to the Disciplinary Proceedings initiated, it is not possible for this Court to arrive at a definitive finding as to the correctness of the procedure prescribed and punishment imposed. That apart, it is not disputed that the proceedings were conducted ex-parte against the husband of the petitioner went missing. No materials have been placed before the Court to substantiate the stand of the Department that due notice as required under the provisions of law was served upon the late husband of the petitioner or was received by the petitioner and other family members informing that the Department has proceeded or is contemplating to proceed on the



Departmental Enquiry is the husband of the petitioner. No Presenting Officer was shown to have been appointed during the enquiry purportedly conducted. No materials were placed to substantiate that the procedure adopted while conducting Departmental enquiry was as per the procedure prescribed under law and no prejudice was caused to the husband of the petitioner thereby during the said enquiry.

39. Under such circumstances and more particularly in the absence of even the order of discharge passed in the D.P. No. 11/1970 not being made available before the Court, the proceedings cannot be held to have been conducted as per the provisions of law. On the face of it *per se* the steps adopted by the respondent department in imposing penalty on the husband of the petitioner by way of the Disciplinary Proceedings purportedly initiated against her husband is *ex-facie* illegal and contrary to the basic principle of natural justice besides being opposed to the procedure prescribed under the Assam Discipline and Appeals Rules, 1964. Under such circumstances, this Court cannot permit the impugned order of discharge passed by the Disciplinary Authority pursuant to a Disciplinary Proceedings purported to have been conducted by the respondents. The impugned order dated 25.06.1971 is held to be bad in law and is therefore held to be not enforceable against the late husband of the petitioner.



40. In so far as the applicability of the provisions of Pension Rule are concerned, having discussed that there is no shortfall on the part of the late husband of the petitioner in respect of satisfying the requirements of qualifying service under Rule 31 as well as taking note of the fact of the he had completed regular service of 4 years 24 days as reflected in Paragraph-9 of the affidavit filed by the Inspector General of Police (Administration), Assam the claim of the petitioner has to be accepted for grant of family pension. The only hurdle projected by the respondent authority is that the provisions of Section 143A which relates to grant of family pension in case of disappearance of Government Servants, came into effect on 29.08.1986 and therefore the claim of the petitioner cannot be entertained as the Government OM dated 29.06.2000 by which this provision was inserted.

41. Having considered the arguments as well as the provisions of the law, it is seen that a presumption has already been drawn in respect of the death of the husband of the petitioner as per provision of Section 108 of the Evidence Act and a death certificate dated 28.11.2007 was also issued by the Competent Authority in the Health Department upon a communication issued by the Superintendent of Police, Cachar, Silchar. As such where the service rendered by a Government Servant is not in the



dispute and the bonafides of the claimant of family pension of the missing Government Servant is not questioned by the respondents nor is it the case of the respondents that there was no provision for grant of family pension at the relevant point in time, the technical objection taken resort to by the respondents that the provisions of Section 143A and the Office Memorandum dated 26.05.1987 came to be enforced well after the date when the late husband of the petitioner went missing and therefore no claim of family pension is entertainable, is also not acceptable. The provisions of 143A which were inserted in the Rule Book with effect from 29.08.1986, merely lays down the procedure prescribed for grant of Family Pension in case of missing Government Servants. Under Section 143A, the following procedure is prescribed:

143A 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 G.P.F. having regard to the nomination made by the employees.

(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 subjected 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 employees 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 employees that all payments shall be adjusted against the payments 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 provision laid down in clause 7(seven) of the office Memorandum No-FMP.14/86/23 dt. 26.5.87 and other instruction in forces for effecting recovery of the Government dues.

(5) The date of disappearance of the employees/ shall be reckoned from the date of issue of the report by the concerned police station that the employee has not been traced out after all efforts had been made and the period of 1(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 after 1(one) year from the date of disappearance of the Government servant in accordance with the prescribed procedure for sanction of family pension and death-cum-retirement gratuity as contained in OM No.FMP. 14/86/23 dt. 26.4.87 NOTE: In case the disbursement of death-cum-retirement gratuity is not effected within 3 (three) month from the date of application received from the applicant alongwith



necessary documents the interest shall be paid at the rates applicable and responsibility for the delay shall be fixed.

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

42. Similarly, the Notification dated 26.05.1987 prescribes that family pension is admissible in case of death of Government Servant after one year of regular service or in case of death of the pensioner after 01.01.1964. Under the said Notification it is also provided that the benefit of family pension Scheme 1964 may be extended to all eligible members of the family in accordance with the provisions of Rule 140 of the Assam Services (Pension) Rules, 1969 and Section IV of Family Pensions Scheme, 1964 irrespective of the retirement and death of the Government Servant. The said Notification No. FMP. 45/85/139 dated 26.05.1987 which is extracted below:

*"Government of Assam
FINANCE (AUDIT & FUND) DEPARTMENT
OFFICE MEMORANDUM*

Sub: GRANT OF FAMILY PENSION TO FAMILIES OF GOVERNMENT EMPLOYEES WHO RETIRED OR DIED BEFORE 01-01-64 OR ARE OTHERWISE NOT COVERED BY THE FAMILY PENSION SCHEME, 1964 ENCLUDING THOSE WHO WERE IN SERVICE ON 01-01-64 BUT OPTED NOT TO BE COVERED BY THE FAMILY PENSION SCHEME, 1964.

1. At present there are two family pension scheme, viz, (1) Liberalised Family Pension Scheme, 1954 (2) Family Pension Scheme, 1964.

The Family Pension Scheme 1954 was introduced with effect from 13-02-1954 in the line of Government of India's Family Pension Scheme,

1950. Under this Scheme, as amended pension was available to the family of a Government servant who died while in service or after retirement after completion of minimum of 20 years of service and admissible for 10 years only with the condition that family pension will no case extend beyond 5 years from the date on which the deceased officer retired or on which he would have retired on superannuation in normal course according as death took place after retirement or while the officer is in service.

2 The Family Pension Scheme, 1964 was introduced with effect from 01.01.1964 following Govt. of India's revised Family Pension Scheme, 1964. This scheme was applicable to all those who entered service on or after 01-01-1964 and also to those who were an employee on 31-12-63, but did not opt to retain the old family pension scheme of 1954. Under this Scheme of 1964, family pension is admissible in case of death of a Government servant after one year of regular service or in case of death of pensioner after 01-01-64. Under this Scheme, family pension is admissible to the Widow/Widower till the death of the Widow/Widower or remarriage whichever is earlier or to the children till they become adult if there is no surviving Widow/Widower.

3. This Family Pension Scheme, 1964 was initially a contributory one and every employee eligible to the benefit of this Scheme is required to Surrender a portion of gratuity, where admissible equivalent his two months emoluments subject to a maximum of Rs. 3,600/ .

However, with effect from 19-07-78, this pre-condition of surrender of a portion of gratuity for family pension, 1964 was done away with.

4. The State Govt. following the Govt. of India in the light of judgment on 30th April 1986 of the Supreme Court of India in respect of the Central Govt. servants/pensioners have been considering a proposal for extending on humanitarian consideration, the benefit of Family Pension Scheme, 1964 as amended on 19-07-1978 to the families of those Govt. servants who were/are borne on pensionable establishment and are presently not covered by that Scheme namely the families of those Govt. employees who retired/died before 01-01-1964 and those who were alive on 31 12-1963 but opted out of the 1964 Scheme.

5. The Govt. of Assam has accordingly been pleased to decide that

(a) The benefit of Family Pension Scheme, 1964 may be extended to all the eligible members of the family in accordance with the provisions of rule 140 of Assam Services(Pension) Rules, 1969. Section IV-Family



Pension Scheme, 1964 irrespective of date of retirement/death of Govt. servant.

(b) All the eligible persons including dependants, shall be allowed the increased pension rates as in force on 19-07-1978 i.e. as per rule introduced with effect from 01-01-73 vide Annexure-1.

(c) The arrears of family pension may be granted w.e.f. 19-07-78 (the date on which contribution of two months emoluments by pensioners was dispensed with) or from subsequent date they become eligible for family pension, whichever is later. The benefit will also be available in cases where the death of the pensioners occurs hereafter.

(d) Persons who are now to be granted the benefit of family pension will not be required to contribute two months emoluments. Similarly, no demand for refund of contribution already made by pensioners will be entertained by the Govt. and

(e) Life time arrears of family pension would also be payable in respect of widow/eligible members of the family of the deceased Govt. employees who were alive on 19-07-78 and who died subsequent to this date for the period from 19-07-78 to the date of death to family pensioners.

6. In case where the deceased Govt. servant/pensioners opted not to come under the family Pension Scheme 1964 by surrendering a part of Gratuity and the family was granted family pension for a limited period or are enjoying family pension granted for a limited period under the Family Pension Scheme 1954 will also be entitled to family under Family Pension Scheme, 1964 with effect from 19-07-78 (under these orders if the drawl of case family pension under 54 scheme has ceased before 19-07-78). In case the family pension under 1954 scheme is continuing the family pension may be revised from 19-07 78 as admissible under the Family Pension Scheme 1964 in terms of these orders.

7. It has also been decided that in addition to the family pension relief on family pension and medical allowance sanctioned from time to time Shall also be admissible.

&. The respective Heads of Deptt/Office or other authorities all are competent to sanction family pension may compute the family pension including relief in terms of the provisions of this Office Memorandum with effect from 19-07-78 or from a later date from which the family pension is admissible and sanction payments subject to observance of procedure mentioned below, for issue of necessary authority for drawl as admissible after checking by the Accountant General, Assam.



9. The eligible members of the family would have to apply for family pension to the Head of Office from which the Govt. servant retired. In case a Deptt. has been abolished or merged with another Deptt, the family pension would have to be processed and sanctioned by the office in which the parent Deptt of the retired Govt. servant is merged or the office which is keeping the records of the abolished office. The application for family pension should be made in the attached form (Annexure-II). The Head of office/Deptt. Would verify the particulars, compute the family pension including relief as prescribed in the previous para, and send the application etc. to the Accountant General, Assam for issuing necessary authority drawl of family pension as admissible.

10. The applicant will have to satisfy the Head of Office that she/he is widow/widower or eligible child of the Govt servant concerned and establish identity by production of relevant documents viz the P.P.O. of the late Government servant, wherever is possible. The family pension/revised family pension would be authorized for payment by the Accountant General, Assam on receipt of papers from the Head of Office/Department from which the Govt. servant retired. Further, since the entitlement of family pension in accordance with the provisions of the office Memorandum would initially be worked out by the Head of Office/Department which the pensioners last served at the time of retirement or death, it would also be the responsibility of the Head of Office or Department to determine the beneficiary who would be entitled to receive payment of Be time arrears mentioned in para 5(e) of this O.M. GP.45/85/139 dated 26-05-87.

11. If in any case formation relating to the last pay dawn total Service rendered etc. is not available either with the Widow who is applying for the family pension and the Deptt are also unable to lay hands on old records and as such finalization of such case is held up resulting in hardship to the claimant of family pension, the instructions laid down below may be followed for deciding such cases.

a) Pay for calculation of family pension where no records are available On receipt of the application in the prescribed form for sanction of family pension, administrative authority should take immediate steps to locate the old records. If particulars of last pay drawn are neither available in the Deptt/Office nor made available by the Accounts Office, a note may be recorded on the file detailing the steps taken to obtain these particulars resulting in a failure. Thereupon, the family pension may be decided based on the documentary proof furnished by the applicant. if no documentary



proof has been furnished by the applicant, the pension may be determined with reference to the midpoint of the scale of pay attached to the post.

However, the procedure for calculating family pension on ad-hoc basis as prescribed above should be followed only as a last resort after earnest efforts by the Head of Office have failed in treating the relevant record and a dead end has been reached.

b) Form for assessing and authorizing the payment of family

A form for assessing and authorizing the payment of family pension in respect of cases which are covered by this O.M. devised and is enclosed as Annexure-III.

c) Calculation of relief on family pension to be granted with effect from 19-07-1978 or later.

In accordance with para 5(c) of this Deptt's O.M. arrears of family pension are to be granted with effect from 19-07-1978 or from a Subsequent date when they become payable. After pension has been calculated the relief on family pension payable in pursuance of para 6 above will be calculated. To facilitate early sanction of family pension and relief thereon as applicable, a table listing relief payable to family pension is attached as Annexure-IV.

d) Determination of the genuineness of the claimant for family pension.

As mentioned in para 10 above & is the responsibility of the applicant to satisfy the Head of Office that she/he is Widow/Widower or eligible child Of the Govt. servant concerned and establish identity by Production of relevant documents viz PPO of the Late Govt. servant or any other records which &s available. In cases where no such records are available it has been decided that the claimant may be asked to produce One of the following documents for establishing her/his genuineness:

(i) Succession Certificate from a Court or

(ii) Affidavit sworn before a Magistrate, or

(iii) Affidavit of the claimant on a plain paper supported by any two documents which may be acceptable to the head of the Deptt/Pension Sanctioning Authority.

Sd/-Illegible

(P.P Borah)

Deputy Secretary to the Government of Assam

Finance (A.F.) Deptt."



43. As such this Office Memorandum clearly stipulates that the benefits of Family Pension Scheme are to be extended to all eligible members of the family irrespective of the date of retirement/death of the Government Servant.

44. As such, since pursuant to drawl of presumption and the issuance of the Death Certificate dated 28.11.2007, the Government servant namely the husband of the petitioner was declared to be dead with effect from 01.01.1977, the benefit of Family Pension Scheme is bound to be extended to family members of the Government Servant as per the provisions laid down. The Notification dated 26.05.1987 does not bring in any new provision for grant of family pension and therefore it cannot be interpreted that this Notification will be applicable only with effect from the date it is made effective namely 26.05.1987. This Notification is but a clarificatory Notification of the position under the Pension Rules read with the family pension Scheme which was already in existence.

45. As such both the said Notification dated 26.05.1987 as well as the provision of Rule 143A cannot be permitted to be interpreted in any other manner by the respondents so as to permit them to exclude the claim of



the petitioner towards family pension since her husband has been declared to be dead by issuance of the Death Certificate dated 28.11.2007.

46. Considering all of the above, this Court is of the view that the prayers in the writ petition ought to be allowed. The respondents authorities are directed to release the family pension benefits payable to the petitioner with effect from the date of issuance of the death certificate i.e. 28.11.2007. The Disciplinary Proceedings by which the husband of the petitioner was imposed the punishment vide D.O. No. 3230 dated 25.06.1971 by which the husband of the petitioner was stated to have been discharged from service cannot be permitted to operate in law. In the absence of relevant records being produced before the Court to effectively decide the perversity of the D.O. No. 3230 dated 25.06.1971, this Court refrains from interfering and setting aside with this order. However, we made it clear that the said order of discharge is declared to be not enforceable against the husband of the petitioner and the same will not operate as a bar in finalizing the family pensionary benefits claimed by the petitioner as a legal heirs of the deceased constable namely Triloki Nath Singh who has been certified to be dead on 01.01.1977 by Death Certificate dated 28.11.2007 issued by the Health Department.



47. The Directions contained above, shall be complied with as expeditiously as possible within the outer limit of 90 days from the date of receipt of a certified copy of this order.

48. The petitioner will submit a copy of this order along with all necessary details including bank details before the respondent No. 2, Director General of Police, Assam, Ulubari who will forthwith forward the claim of family pension to the other competent authorities.

49. With the above observation, the writ petition stands allowed. No order as to costs.

JUDGE

Comparing Assistant