

**IN THE HIGH COURT OF MANIPUR**

**AT IMPHAL**

**W.P. (C) No. 1047 of 2015**

***Shri Phanjoubam Birahari Singh***, aged about 65 years, S/o (L) Ph. Tomal Singh of Andro Khuman Leikai, P.O. Yairipok, P.S. Andro Imphal East District, Manipur.

***... Petitioner***

**-Versus-**

- 1.** The State of Manipur represented by the Principal Secretary (Home), Government of Manipur, Manipur Secretariat at Babupara.
- 2.** The Director General of Police, Manipur, Manipur Police Head Quarters at Imphal.
- 3.** The Commanding Officer, 2<sup>nd</sup> Indian Reserve Battalion, Manipur at Khuman Lampak, Imphal.

***... Respondents***

**B E F O R E**

**HON'BLE MR. JUSTICE AHANTHEMBIMOL SINGH**

For the Petitioner	::	Mr. Kh. Samarjit, Sr. Advocate asstd. by Mr. Armananda, Advocate
For the respondents	::	Mr. Niranjan Sanasam, GA
Date of Hearing	::	<b>27-04-2023</b>
Date of Judgment & Order	::	<b>31-05-2023</b>

**JUDGMENT & ORDER**

**[1]** Heard Mr. Kh. Samarjit, learned senior counsel assisted by Mr. Armananda, learned counsel appearing for the petitioner and Mr. Niranjan Sanasam, learned GA appearing for the respondents.

**[2]** The petitioner filed the present writ petition with the prayer for directing to pay the retiral and other benefits including family pension due payable to his son, who was serving as Rifleman in the Manipur Police

[2]

Department, by quashing the suspension order dated 18-08-2005 and removal order dated 14-07-2006.

[3] The brief facts of the present case is that the petitioner's son, viz., Shri Ph. Premkumar Singh, was serving as a Rifleman in the 2<sup>nd</sup> Indian Reserve Battalion and he was posted in the 'C'-Company of the 2<sup>nd</sup> IRB, however, at the relevant point of time, he was attached to the Commando Unit of the Moirang Police Station. On 28-04-2005, the Commandant, 2<sup>nd</sup> IRB sent an official message to the petitioner through a special messenger intimating that the petitioner's son along with one of his friends absented from his post since 13-03-2005 and both of them did not returned back to the post and that their whereabouts are not known till that date. The petitioner was also requested to trace out his missing son and to hand him over to the Unit at the earliest.

[4] It is the case of the petitioner that soon after receiving the message dated 28-04-2005 about the missing of his son, the petitioner promptly went to the office of the Commandant, 2<sup>nd</sup> IRB to enquire about the whereabouts of his missing son as his son did not returned home and the petitioner also requested the Commandant to trace out his missing son. Subsequently, on several occasions the petitioner went to the office of the Commandant, 2<sup>nd</sup> IRB and requested the Commandant to find out his missing son as the petitioner could not trace out any whereabouts of his missing son. The Commandant always assured the petitioner that the authorities are trying their level best to trace out the whereabouts of the petitioner's missing son by sending out hue and cry notice to all the forces/

**[3]**

guards of the Unit including all the Police Stations in Manipur directing them to apprehend the missing personnel if found in their jurisdiction and to hand him over to the unit. When the petitioner did not get any positive result from the side of the respondents, he submitted a missing report dated 09-08-2007 to the Officer-in-Charge of Moirang Police Station with the request for tracing out the whereabouts of his missing son by registering a regular FIR case, however no positive response was forthcoming from the side of the police also.

**[5]** Instead of making an all-out effort for tracing out the missing personnel and despite having knowledge that the petitioner's son is missing without any clue, the Commandant, 2<sup>nd</sup> IRB issued an order dated 18-08-2005 placing the missing son of the petitioner under suspension in contemplation of a Departmental Enquiry. Thereafter, a Departmental Enquiry was initiated against the missing son of the petitioner by issuing a Memorandum dated 19-08-2005 and by framing charges against the petitioner's son that he absented himself from his place of posting w.e.f. 01-08-2005 till 18-08-2005 without any leave or permission from the competent authority.

On receiving the said Memorandum, the petitioner submitted a written statement on behalf of his missing son giving a detailed account of the facts and circumstances of the missing of his son and also requesting the Commandant, 2<sup>nd</sup> IRB to carry out a thorough investigation to trace out the petitioner's missing son by taking the assistance of the concerned Police Stations.

[4]

[6] Without at all considering the written statement submitted by the petitioner and without making any investigation to trace out the petitioner's missing son, the authorities proceeded and completed the Departmental Enquiry initiated against the missing son of the petitioner in his absence and thereafter, the Commandant, 2<sup>nd</sup> IRB issued an order dated 14-07-2006 ordering the removal of the petitioner's son from service w.e.f. the date of issue of the said order. It is the case of the petitioner that the said removal order has not yet been officially communicated till today.

After about ten years from the date of missing of his son, the petitioner submitted a representation dated 07-10-2015 to the respondents requesting for paying Death-cum-Retirement Gratuity, admissible GPF, admissible GIS, Leave Encashment and family pension due payable to the petitioner 's son, however without any positive result. Having been aggrieved, the petitioner approached this court by filing the present writ petition to redress his grievances.

[7] Mr. Kh. Samarjit, learned senior counsel appearing for the petitioner submitted that the petitioner's son had been missing since 13-03-2005 without any trace or clue and nothing has been heard about his whereabouts for the last more than 18 years and accordingly, by operation of law as provided under the provisions of Section 108 of the Indian Evidence Act, 1872, It can be reasonably presumed that the petitioner's missing son is dead. In support of his contention, the learned senior counsel cited the judgment rendered by the Hon'ble Apex Court in the case of “**LIC**

**of India Vs. Anuradha**", reported in **(2004) 10 SCC 131**, wherein it has been held as under:-

***"14. 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 the 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 the 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 the 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."***

**[8]** It has been submitted on behalf of the petitioner that the manner in which the authorities proceeded with the Departmental Enquiry against the petitioner's son and removing him from service by issuing the impugned removal order dated 14-07-2006 is very much arbitrary and illegal,

inasmuch as, the authorities knew all along that the petitioner's son was missing since 13-03-2005 without any trace or clue despite the best efforts to trace out the whereabouts of the petitioner's missing son. According to the learned senior counsel, the Departmental Enquiry was proceeded against a missing person in his absence and without affording him any chance or opportunity to defend himself and in complete violation of the principle of natural justice. It has also been submitted that the Departmental Enquiry was conducted against a missing person, who can be reasonably presumed to be dead and as such, the whole proceedings of the Departmental Enquiry as well as the impugned removal order are not sustainable in eyes of law and accordingly, the same are liable to be quash and set aside. The learned counsel further submitted that the impugned removal order dated 14-07-2006 has not yet been communicated officially to the concerned persons till today and accordingly, the said order cannot be regarded as anything more than provisional in character and it does not become effective till it is communicated. In support of his contention, the learned counsel cited the judgment of the Hon'ble Apex Court in the case of **“Greater Mohali Area Development Authority & ors. Vs. Manju Jain & ors.”** reported in (2010) 9 SCC 157, wherein it has been held as under:-

***“22. The Constitution Benches of this Court in Bachhittar Singh v. State of Punjab and State of Punjab v. Amar Singh Harika, have held that an order does not become effective unless it is published and communicated to the person concerned. Before the communication, the order cannot be regarded as anything more than provisional in character. A similar view has been reiterated in Union of India v. Dinanath Shantaram Karekar and State of W.B. v. M.R. Mondal.”***

***“23. In Laxminarayan R. Bhattad v. State of Maharashtra this Court held that the order of the authority must be communicated for***

***conferring an enforceable right and in case the order has been passed and not communicated, it does not create any legal right in favour of the party.***

***“24. Thus, in view of the above, it can be held that if an order is passed but not communicated to the party concerned, it does not create any legal right which can be enforced through the court of law, as it does not become effective till it is communicated.”***

The learned senior counsel submitted that the petitioner is entitled to the reliefs sought for in the present writ petition and accordingly, prays for directing the respondents to release the retiral and other service benefits including family pension due payable to the family of the missing personnel after quashing and setting aside the impugned suspension order as well as the impugned removal order.

**[9]** At the outset, Mr. Niranjan Sanasam, learned GA appearing for the respondents raised an objection regarding the maintainability of the present writ petition. It has been submitted by the learned GA that there is an effective and alternative statutory remedies for filing appeals against the impugned order and without availing such statutory remedies, the petitioner cannot approach this court directly by filing the present writ petition. Accordingly, the learned GA submitted that on this count alone, the present writ petition is liable to be rejected.

**[10]** It has also been submitted on behalf of the respondents that a Departmental Enquiry was proceeded against the petitioner's son on account of his unauthorised absence and the said Departmental Enquiry was proceeded strictly in terms of the relevant rules and on the basis of the enquiry report, the petitioner's son was imposed the major penalty of

**[8]**

removal from service. It has also been submitted on behalf of the respondents that as the petitioner's son was imposed the major penalty of removal from service on account of his misconduct, the delinquent or any of his family members including the petitioner is not entitled to any service benefits. The learned counsel accordingly submitted that the present writ petition deserves to be dismissed as being devoid of merit.

**[11]** I have heard the submissions advanced by the learned counsel appearing for the parties at length and also carefully examined the materials available on record. In the present case, as per the message dated 28-04-2005 of the Commandant, 2<sup>nd</sup> IRB, the petitioner's son went missing since 13-03-2005 without any trace or clue. It is also an undisputed fact that the petitioner's son is missing for the last more than 18 years and nobody has heard anything about his whereabouts despite the best efforts to trace him out. Faced with such undisputed facts, this court find merit and substance in the submissions advanced by the learned counsel appearing for the petitioner that by operation of law as provided under Section 108 of the Indian Evidence Act, 1872, it can be reasonably presumed that the petitioner's son has expired.

**[12]** This court also found force and merit in the submission advanced by the learned counsel appearing for the petitioner that the manner in which the authorities proceeded with the Departmental Enquiry against the missing son of the petitioner is arbitrary and illegal for the simple reason that the authorities knew all along that the petitioner's son went missing since 13-03-2005 without any trace or clue and nobody know anything



about his whereabouts. In my considered view, in such a situation, the authorities ought to have proceeded for payment of retirement gratuity and family pension to the family of the missing personnel as provided under the Government of India's Office Memorandum dated 29-08-1986 read with subsequent O.M. dated 02-07-2010 issued by the Government of India in connection with Rule 54 of the CCS (Pension) Rules, 1972 for payment of family pension, which are adopted by the Government of Manipur, instead of initiating the Department Enquiry against the missing personnel. It may be pointed out here that in the said O.Ms. dated 29-08-1986 and 02-07-2010, it is, inter alia, provided that when an employee disappears leaving his family, the family can 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 and after the lapse of a period of six months, other benefits like retirement or death gratuity/ family pension may also be granted to the family after observing the following formalities:-

- (i) The family 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 by the police;
- (ii) An Indemnity bond should be taken from the nominee/ dependants of the employee that all payments will be adjusted against the payments due to the employee in case he appears on the scene and makes any claim.

[13] In the present case, it is found on record that the petitioner made a missing report on 09-04-2017 to the Officer-in-Charge, Moirang

**[10]**

Police Station about his missing son and making a request for tracing out the whereabouts of the missing son by registering a regular FIR case. It is also found on record that the Superintendent of Police, Bishnupur District, Manipur wrote a letter dated 02-11-2017 to the petitioner informing him that as per a missing report made by the petitioner, the then O.C. of Moirang Police Station made all possible measures to trace out the missing Rifleman to the best level but the missing Rifleman remain untraced.

Taking into consideration the above facts and the provisions of the Government of India's O.Ms. dated 29-08-2016 and 02-07-2010, this court is of the considered view that the petitioner is entitled to get the reliefs sought for in the present writ petition.

**[14]** Taking into consideration the facts and circumstances of the present case and by operation of law, this court can reasonably presumed that the petitioner's son had expired as the petitioner's son remain missing for the last more than 18 years without anyone knowing about his whereabouts, especially when this fact is not controverted by the respondents. As the petitioner's son is presumed to have died and as this court is of the considered view that the Departmental Enquiry was proceeded against the petitioner's missing son and a major penalty of removal from service was imposed upon the missing son of the petitioner arbitrarily and illegally, this court is not inclined to accept the submission advanced by the learned GA appearing for the respondents. In the result, the wit petition is allowed with the following directions:-

- (i) The impugned order of suspension dated 18-08-2005 as well as the impugned removal order dated 14-07-2006 issued by the Commandant, 2<sup>nd</sup> IRB, Imphal are hereby quashed and set aside.
- (ii) The respondents are directed to release all the service benefits and retiral benefits due payable to Rifleman (Late) Ph. Premkumar Singh to the present petitioner within a period of three months from the date of receipt of a certified copy of this order.

With the aforesaid directions, the present writ petition is disposed of. There will be no order as to cost.

**JUDGE**

**FR / NFR**

*Devananda*