

**High Court of Judicature at Allahabad
(Lucknow)**

**Reserved on 03.10.2024
Delivered on 24.10.2024**

Court No. - 2

Case :- SPECIAL APPEAL DEFECTIVE No. - 436 of 2024

Appellant :- Amardeep Kashyap

Respondent :- State Of U.P. Thru. Addl. Chief Secy. Msme Lko. And 3
Others

Counsel for Appellant :- Om Prakash Mani Tripathi

Counsel for Respondent :- C.S.C.

Hon'ble Rajan Roy,J.

Hon'ble Om Prakash Shukla,J.

(Per Om Prakash Shukla, J.)

1. Heard Sri Om Prakash Mani Tripathi, learned counsel for the appellant and Sri Gopal Kumar Srivastava, learned Standing Counsel for State-respondents.

2. The present Special Appeal stems out of an order dated 05.04.2024 and dated 12.07.2024 ('Impugned orders') passed by learned Single Judge of this Court in Writ A No.2731 of 2024 (Amardeep Kashyap Vs. State of U.P. and Others) and Civil Misc. Review Application Defective No.117 of 2024 respectively. Apparently, vide the said impugned order, the learned Single Judge did not find any illegality in the order dated 03.02.2023 passed by the Deputy Commissioner, Industries, Gonda wherein the claim of the appellant for compassionate appointment was rejected by the Deputy Commissioner.

3. The factual matrix of the case lies in a narrow compass. The appellant's father, Sri Ghanshyam Kashyap was working as a peon/Anuchar at Jila Udyog Kendra, Gonda, Uttar Pradesh and went missing on 25.06.2012, which

although was reported by his family on the same day, however a formal missing complaint came to be filed on 27.06.2012. Apparently, despite extensive efforts to trace Sri Ghanshyam Kashyap they were futile. In the intervening period, since record reveal that the date of birth of the appellant's father Sri Ghanshyam was 08.11.1953, he attained the age of 60 years on 30.11.2013. No retirement benefits were extended by the respondent-Zila Udyog Kendra, Gonda in the absence of clarity of status of Sri Ghanshyam as confirmed by them vide letter dated 19.12.2019 wherein the representation of the mother of the appellant was rejected for providing of any financial help or compassionate appointment before the completion of seven years from the date of missing.

4. Subsequently, after a lapse of period of seven years, the family of the appellant filed a suit on 16.10.2019, seeking a declaration of Sri Ghanshyam's civil death, which came to be allowed by the learned Civil Judge, Senior Division, Gonda vide a judgment dated 22.04.2022 and during the pendency of the said suit, the mother of the appellant, Mrs. Urmila Devi also died on 07.05.2021.

5. It is claimed by the appellant that after declaration of civil death by the court, he received an appointment letter dated 28.05.2022 for the position of chowkidar from the Deputy Commissioner, Zila Udyog and Protsahan Kendra, Gonda. However, when he went to join on the said position, he was not allowed to join for extraneous reasons and even his original appointment letter was taken away by the said respondent and was directed to produce death certificate of his father. The appellant thereafter obtained a death certificate issued by the Registrar of Birth and Death, which mentioned the date of death of the appellant's father to be 16.10.2019.

6. Thus, being aggrieved, the appellant filed Writ A No.6138 of 2022 for payment of dues and emoluments of late Sri Ghanshyam to his family as well as for seeking compassionate appointment for the appellant. However, the

said Writ was disposed of vide an order dated 20.09.2022, directing the appellant to file a detailed representation raising all his grievance and correspondingly the respondent was directed to dispose the said representation within a time bound manner by a reasoned and speaking order.

7. However, the said representation was rejected on 03.02.2023 by the respondent authority, which came to be challenged by the appellant vide Writ A No.2731 of 2024 seeking quashing/setting aside of the order dated 03.02.2023 and praying for appointment to the appellant on the compassionate ground under the Dying in Harness Rules, 1974. The learned Single Judge after hearing the appellant, while dismissing the Writ Petition vide order dated 05.04.2024 came to observe as herein below:-

"5. It is the petitioner's case that his father had gone missing on 30.06.2012. As per the provisions of law, he shall be presumed to be dead seven years after the date on which he went missing, which comes in the year 2019. The petitioner's father would have attained the age of superannuation on 30.11.2013. Therefore, from the material available on record, it cannot be said that the petitioner's father had died in harness and, therefore, the petitioner cannot claim compassionate appointment in place of his father.

6. The learned counsel for the petitioner has submitted that the petitioner had been issued an appointment letter on the post of Chawkidar but the same was cancelled subsequently. However, the order of cancellation has not been assailed by way of this writ petition and, therefore, the issuance of appointment letter and cancellation thereof would not confer any rights on the petitioner or any ground to claim compassionate appointment, unless the petitioner is otherwise entitled to be appointed on compassionate basis. "

8. Apparently, after the dismissal of the aforesaid Writ, the appellant preferred another Writ A No.3831 of 2024 before the learned Single Judge of this Court. However, the said Writ Petition was dismissed as withdrawn and liberty was granted to the appellant to file Review of the order dated

05.04.2024 passed in Writ A No.2731 of 2024. Thus, the appellant preferred Civil Misc. Review Application No.117 of 2024, which also came to be dismissed vide order dated 12.07.2024. It is this order dated 12.07.2024 passed in the Review Application as well as the order dated 05.04.2024 passed in the Writ A No.2731 of 2024, which have been sought to be challenged in the present appeal.

9. The learned counsel for the appellant argued that the Review Application was wrongly dismissed by the learned Single Judge, inasmuch as the same was filed on the ground of discovery of new and important material and evidence of oral cancellation of his compassionate appointment. He further contended that the Review Application was filed after liberty having been sought by the appellant in Writ A No.3831 of 2024 on 16.05.2024, wherein he had sought implementation of his appointment order dated 28.05.2022. According to him, the said appointment was on compassionate ground as his father had gone missing since 25.06.2012 and he has not been allowed to join for extraneous consideration. Learned counsel for the appellant further submitted that there is a dichotomy in the stand of the respondent as on the one hand they have rejected the representation for compassionate appointment vide order dated 03.01.2023 and 03.02.2023 whereas on the other hand he has been issued a compassionate appointment vide order dated 28.05.2022. The learned counsel relied on the judgment of this Court in Civil Misc. Writ Petition No.17395 of 2011 to contend that there is no distinction between the civil death and natural death for the purpose of grant of compassionate appointment. Learned counsel has admitted the fact that the date of death as 16.10.2019 instead of 25.06.2012 has been given by the Nagar Palika and not in the declaratory suit filed by the appellant seeking declaration of the civil death of his father.

10. On the contrary, learned counsel for the respondent has supported the impugned order. According to the learned counsel, the date of death of the missing employee has to be construed on the date of declaration of the civil

death by the competent court. According to him, in the present case, the father of the appellant although went missing on 25.06.2012, but his civil death came to be declared by the civil court only on 22.04.2022 on a suit filed by the appellant on 16.10.2019 and by which time the appellant's father would have already attained the age of superannuation on 30.11.2013. Thus, according to him the appellant was not entitled for compassionate appointment and there was no question of issuance of any appointment letter dated 28.05.2022 or its alleged oral cancellation.

11. Having heard learned counsel for the parties, this Court is of the view that the moot question to be determined by this Court is as to whether a person who is unheard of for a period of seven years, is to be presumed to have died on the date he went missing or soon thereafter or at the close/end of period of seven years. Thus, which date would be presumed as the date of death of Sri Ghanshyam Kashyap, father of the appellant? The answer to the said question would hold a key to his compassionate appointment as admittedly the appellant can be granted appointment only in case his father died in harness or died during his service period.

12. Admittedly, father of the appellant went missing on 25.06.2012 and he would have superannuated on 30.11.2013 based on the date of his birth referred earlier. Thus, in case it is found that his father died in harness during the period from 25.06.2012 to 30.11.2013 he can lay his claim to compassionate appointment.

13. While this moot question has drawn attention of several Courts on various occasions, the Courts have tried to resolve the aforesaid controversy by considering the extent and scope of Section 107 and 108 and other provisions of Indian Evidence Act, 1872, as such, before dealing with the case laws on the subject, it would be apt to examine the provisions of Section 107 and 108 of the Indian Evidence Act, 1872, which have material bearing with the question in controversy involved as under:-

"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 a person is alive who has not been heard of for seven years.

[Provided that when] [Substituted by Act 18 of 1872, Section 9, for "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] [Substituted by Act 18 of 1872, Section 9, for "on".] the person who affirms it."

14. Thus, Section 107 is about the burden of proving death of a person known to have been alive within thirty years, whereas Section 108 is about the burden of proving that the person has not been heard of for seven years.

15. The Hon'ble Supreme Court in the case of **L.I.C. of India Vs. Anuradha; (2004) 10 SCC. 131**, observed in paragraph 12 to 15 as quoted herein below:-

"12. Neither Section 108 of Evidence Act nor logic, reason or sense permit a presumption or assumption being drawn or made that the person not heard of for seven years was dead on the date of his disappearance or soon after the date and time on which he was last seen. The only inference permissible to be drawn and based on the presumption is that the man was dead at the time when the question arose subject to a period of seven years absence and being unheard of having elapsed before that time. The presumption stands un-rebutted for failure of the contesting party to prove that such man was alive either on the date on which the dispute arose or at any time before that so as to

break the period of seven years counted backwards from the date on which the question arose for determination. At what point of time the person was dead is not a matter of presumption but of evidence, factual or circumstantial, and the onus of proving that the death had taken place at any given point of time or date since the disappearance or within the period of seven years lies on the person who stakes the claim, the establishment of which will depend on proof of the date or time of death.

13. A presumption assists a party in discharging the burden of proof by taking advantage of presumption arising in his favour dispensing with the need of adducing evidence which may or may not be available. Phipson and Elliott have observed in 'Manual of the Law of Evidence' (Eleventh Edition at p.77) that although there is almost invariably a logical connection between basic fact and presumed fact, in the case of most presumptions it is by no means intellectually compelling. In our opinion, a presumption of fact or law which has gained recognition in statute or by successive judicial pronouncements spread over the years cannot be stretched beyond the limits permitted by the statute or beyond the contemplation spelled out from the logic, reason and sense prevailing with the Judges, having written opinions valued as precedents, so as to draw such other inferences as are not contemplated.

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 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 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.

15. If an issue may arise as to the date or time of death the same shall have to be determined on evidence-direct or circumstantial and not by assumption or presumption. The burden of proof would lay on the person who makes assertion of death having taken place at a given date or time in order to succeed in his claim. Rarely it may be permissible to proceed on premise that the death had occurred on any given date before which the period of seven years' absence was shown to have elapsed.

16. On same lines is the judgment of this Court in **Ram Singh Vs. Board of Revenue, U.P. Allahabad, AIR 1964 All. 310**, while dealing with the content and scope of provision of Section 108 of Indian Evidence Act and it was held that all that one can presume under Section 108 is that the person concerned is dead but one can not fix the time of person's death under the provision of said section. Section 108 however, is not exhaustive on the question of presumption as regards the death of a person. The Court may in the circumstances of each case make suitable presumption even regarding the time of death of person concerned. In the said case Hon'ble Mr. Justice V.G. Oak, as he then was, observed as under :

"Section 108, however, is not exhaustive on the question of presumption as regards death of a person. The Court may make a suitable presumption in accordance with the circumstances of each case :-

(1) Suppose a man sails in a ship, and the ship sinks. Thereafter the man is never seen alive. Under such circumstances, it is reasonable to assume that the person died in the ship wreck.

(2) When a person goes for pilgrimage he or she ordinarily returns home in six months or in a year. In the present case, Smt. Rukmini left for Gangasagar Yatra 17 years ago. Since then she has not been heard of. It is reasonable to assume that, she died in some accident or of some disease during the journey or at Gangasagar."

17. Likewise is the judgment in **Smt. Narbada and another Vs. Ram Dayal, A.I.R. 1968 Rajasthan 48**, wherein it was held that presumption about the death of a person who is unheard of for seven years under Section 108 of Evidence Act can earliest be drawn when the dispute in which the question as to whether a person is alive or dead is raised and is brought to the court. The presumption cannot be given a further retrospective effect for the reason that the occasion for drawing a presumption under the provision arises only when the dispute regarding the death of a person who has been unheard of for seven years is raised in a court of law and it is only then that the question of burden of proof would arise under the Evidence Act. Section 108 relates to the question of burden of proof in a matter before a Court of law. Further while dealing with the question that as to when the death of a person who has not been heard of for seven years or more than seven years should be deemed to have taken place in para 14 of the aforesaid decision the Rajasthan High Court observed as under:

"(14). This question as to when the death of the person who has not been heard of for seven years or more than seven years should be deemed to have taken place came up for consideration of this Court in ILR (1959) 9 Raj 276 and the learned Judge, after considering certain authorities,

including the Privy Council case, came to the conclusion that although there is a presumption of death at the expiration of a period of not less than seven years in duration, there is no presumption that the death occurred at the end of seven years or at any other particular time during the period a person has not been heard of. Where a party relies on a specific date of death of a person, who has not been heard of for seven years or more, he must prove the specific date. It was also laid down that where a person is not heard of for seven years or more and no specific date of death has been or can be presumed, the earliest date on which it can be presumed that such a person was not alive shall be the date on which the suit was filed and it cannot be given a further retrospective effect.

18. In **Subhash Ramchandra Wadekar Vs. Union of India, AIR 1993 Bombay 64**, the question arose for consideration as to what was the presumed date of death of Ramchandra Arjun Wadekar who had left the home on 9th January 1984 and was not heard of by the petitioner and other relative since then. While dealing with the said question, the learned High Court in para 12 made a very important observation, which is worth noting, as under :-

12. If Section 108 of Evidence Act, 1872 were to be interpreted literally, it would have to be held that law presumes death of a person unheard of for seven years but is silent in respect of date of presumed death. It is therefore, a possible view that the date of presumed death must be proved by the party concerned as a fact by leading reliable evidence. This aspect of the matter is not very clear and one comes across conflicting observations in several decided cases on the subject. In light of authorities cited by the learned Counsel on both sides referred to in later part of this Order, I have reached the following conclusions;-

(1) Ordinarily a person unheard of for the statutory period shall be presumed to be dead on expiry of seven years and not earlier.

(2) Section 108 of Indian Evidence Act, 1872 is not exhaustive. It is permissible for the Court to raise a suitable presumption regarding date of presumed death depending upon the attendant circumstances and

other reliable material on record. In other words, no rule of universal applicability can be spelt out regarding presumed date of death. In my opinion, proposition No. 1 must operate subject to proposition No. 2.

19. Thus, it is clear as broad daylight from the aforesaid judgments that a declaration of civil death by the civil court under Section 108 of the Indian Evidence Act, 1872 would not lead to a presumption with regard to date and time of death. Essentially, the said declaration is based on a statutory presumption, which comes into play only after the lapse of seven years and not prior. 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 even on expiring of six years and 364 days or at any time short of it. Further, the essential criteria or rather the condition precedent for the raising of the said presumption is expiry of seven years and most importantly, the 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 the person is alive or dead, by placing reliance on the said presumption.

20. However, it is also clear that the presumption of Section 108 is not the only mechanism for declaration of death. As held by the Hon'ble Supreme Court, suppose an individual does not wish to rely on the presumption as provided under Section 108 of the Indian Evidence Act, 1872, he is well within his/her right to prove by cogent evidence that the date and time of death is prior to seven years. The Hon'ble Court has clearly held that; if an issue arises as to date or time of death the same shall have to be determined on evidence direct or circumstantial and not by assumption or presumption. The burden of proof would lie on the person who makes assertion of death having taken place at a given date or time in order to succeed in his claim, prior to the lapse of seven years.

21. From a perusal of records, it is apparent that no doubt the appellant had filed a suit seeking declaration of civil death of his father, however, it is seen

that the appellant did not seek declaration as to any specific date of death of his father and no evidence was adduced for proving a specific date or time of death. The order dated 22.04.2022 of the learned Civil Court is purely based on the presumption of death as provided under Section 108 of the Indian Evidence Act, 1872. In fact, there is no specific date of death mentioned, what to talk of any date prior to the order of declaration, which could have given an impetus to the claim of compassionate appointment to the appellant. Further, the learned Civil Court has also observed that the order would become automatically inoperative/ineffective, in case the father of appellant, Ghanshyam Kashyap is found to be alive, which also as a corollary meant that the learned Civil Court did not specify any date and time of death as it was not proved based on any evidence with any amount of certainty that the father of the appellant died on a specific date and time.

22. Further, in view of the above, this Court is also not impressed by the submission of learned counsel for the appellant that the death certificate of the appellant's father issued by the Registrar of Birth and Death, mentioned the date of death of the appellant's father to be 16.10.2019 merely because the suit was filed on 16.10.2019 and that date should be construed as 27.06.2012, the date on which the missing complaint was filed.

23. A learned Single Judge of this Court, in almost an identical situation was dealing with the rejection order passed for compassionate appointment by U.P. Rajya Vidhut Utpadan Ltd., Lucknow, wherein the declaration of civil death was granted by the civil court on 07.07.2018, and by that time, the father had already superannuated on 30.05.2010. The learned Single Judge after noting various precedents relied by the parties, including the judgment of **(I) L.I.C. of India Vs. Anuradha (Supra)**, **(II) Nagpur Bench of Bombay High Court in Second Appeal No.18 of 2016 (Sou. Swati W/o Abhay Deshmukh and ... vs Shri. Abhay S/O. Purushottam Deshmukh)** decided on 26.02.2016 and **(III) Division Bench Judgment of the Andhra Pradesh High Court in Writ Petition No.34859/2016 (Union of India**

represented by its Secretary and Others Vs. Polimetla Mary Sarojini And Another) decided on 31.01.2017, dismissed the petition on the ground that presumption would not arise unless a specific date of death is proved by evidence in the given facts since the date of death was neither disclosed nor was proved, the writ petition was rejected [*see order dated 04.12.2019 passed in Writ A No.19124 of 2019 (Vivek Kumar Verma Vs. Uttar Pradesh Rajya Vidyut Utpadan Nigam Limited And 02 Others)*].

24. In view of the above discussions, as the father, if alive would have attained the age of superannuation on 30.11.2013. Whereas, in view of the law on the subject, his civil death cannot be presumed on a date prior to 16.10.2019 when the suit was filed for such declaration, the petitioner's claim for compassionate appointment is not sustainable on aforesaid law.

25. For all the aforesaid reasons, this Court does not find any infirmity in the impugned orders dated 05.04.2024 and 12.07.2024 passed by the learned Single Judge of this Court in Writ A No.2731 of 2024 and Civil Misc. Review Application Defective No.117 of 2024 respectively.

26. As a sequel to the above, the present Special Appeal is **dismissed**.

27. There shall be no order as to the costs.

[Om Prakash Shukla, J.] [Rajan Roy, J.]

Order Date :- 24.10.2024

Saurabh