

Phone: 9212310.

NO: C.A 130-K OF 2019
Arising out of
NO: C.P 664 - K OF 2018
SUPREME COURT OF PAKISTAN

Karachi, the 11th Sep.,2019

From:

The Senior Court Associate,
Supreme Court of Pakistan,
M.R. Kayani Road,
Karachi.

To,

The Registrar,
Hon'ble High Court of Sindh,
Karachi.

INWARD TO 12351
BRANCH R/o
DATE 12/09/19
HIGH COURT OF SINDH AT KARACHI

SUBJECT:- CIVIL APPEAL NO: 130 - K OF 2019
Arising out of
CIVIL PETITION NO: 664 - K OF 2018
(Parveen Shaukat Vs. Province of
Sindh and others)

On appeal form the Judgment/Order of
the High Court of Sindh, Karachi. Dated
15-11-2017, in C.P No.D-4177/2016.

I am directed to enclose herewith for information and necessary
action a certified copy of the Judgment of this Court dated:31-08-2019,
Converting the above-cited Civil Petition into an Appeal & ^{partly} Allowed.

2. I am also to invite your attention to the directions of this Court
contained in the enclosed Judgment, for necessary action.

3. The receipt of this letter along-with its enclosure may kindly be
acknowledged.

Encl:- Certified copy of Judgment.


(SYED ZAFAR ALI)
Sr. Court Associate
cebr.

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE MUSHIR ALAM
MR. JUSTICE FAISAL ARAB
MR. JUSTICE SAJJAD ALI SHAH

CIVIL PETITION NO. 664-K OF 2017

(On appeal against the judgment dated 15.11.2017
passed by the High Court of Sindh, Karachi in C.P.
No. D-4177/2016)

Parveen Shoukat

... Petitioner

VERSUS

Province of Sindh and others

... Respondents

For the Petitioner: Mr. Rafiq Ahmed Kalwar, ASC

For the Respondents: Mr. Sibtain Ahmed, AAG

Amicus curiae: Mr. Shahid Anwar Bajwa, ASC

Date of Hearing: 31.08.2018

JUDGMENT

FAISAL ARAB, J.- The husband of the petitioner, who was working as a Deputy Secretary in BPS-18 with the Government of Sindh, was kidnapped on 09.05.1999. The incident was reported to the police but he could not be recovered. The family gave up on him on the assumption that the kidnapers might have killed him. In 2009, the petitioner filed a suit seeking declaration of her husband's death in terms of Article 12^c of Qanoon-e-Shahadat Order, 1984, which was granted on 19.03.2010. The petitioner then applied to the department for family pension, which was granted in terms of Sindh Government's notification dated 26.07.2006, which allowed family pension from the date when the petitioner's husband went missing. The petitioner, however, took the stand that she is entitled for family

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pension at the rate that was applicable on the expiry of the seven years from the date of kidnapping and not that was applicable on the date of kidnapping. When her claim was denied, she filed a constitution petition before the High Court, which was dismissed vide impugned judgment. Hence, this petition.

2. Mr. Shahid Anwar Bajwa, who was appointed as *amicus curiae* referred to the judgments reported in the cases of Ganesh Bux Singh Vs. Mohammad (AIR (31) 1944 Oudh 266), H.J. Bhagat Vs. Life Insurance Corporation of India (AIR 1965 Madras 440), Muhammad Sarwar Vs. Fazal Ahmad (PLD 1987 SC 1) and N. Jayalakshmi Ammal Vs. R. Gopala Pathar (AIR 1995 SC 995). He submitted that in these cases it was held that scope of Section 108 of the repealed Evidence Act (equivalent to Article 124 of Qanoon-e-Shahadat Order, 1984) is only to the extent that it presumes a missing person dead and in no way helps to draw an inference as to the probable time of death of a missing person within those seven years, therefore, the probable time of death has to be inferred independent of the provision of Article 124 on the basis of material and circumstances that come on the record. He summed up by stating that under Article 124 only death of the missing person can be presumed after seven year statutory period has elapsed but this Article does not help in visualizing his probable time of death within those seven years, which in terms of Muhammad Sarwar's case purely depends on the facts and circumstances of each case.

3. Learned counsel for the petitioner, on the other hand, argued that under Article 124 of the Qanoon-e-Shahadat Order,

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1984 death of a missing person is to be presumed on the date when the seven years period expired. He submitted that the petitioner will suffer financially if the family pension is given at the rate which was payable on the first day of her husband's kidnapping. He further submitted that learned High Court wrongly went with the decision of the Government of Sindh and erred in considering the first day on which petitioner's husband went missing as the date on which he would be presumed to have died and not on the date when seven years period expired. Lastly, he submitted that the petitioner being a widow is entitled to pensionary benefits as are calculable when the seven years of her husband's kidnapping elapsed i.e. on 09.05.2006.

4. Learned Assistant Advocate General, on the other hand, defended the impugned judgment, which was rendered by placing reliance on the Government of Sindh's letter dated 16.01.1994 issued by Finance Department. This letter only provides that if an employee is missing or remains untraced for a period of seven years as envisaged under Article 124, family pension as admissible under the rules may be allowed to his legal heirs. At best this letter only acknowledges the presumption of death that arises when a missing person is not heard of for seven long years. Obviously through such a letter, probable time of death within those seven years period cannot be visualized which purely depends on the facts and circumstances of each case. The question that arises is whether Article 124 of Qanoon-e-Shahadat Order, 1984 has any application with regard to visualizing the probable time of death of a missing person, is the question that needs to be

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answered. In this regard the meaning and scope of Articles 123 and 124 of Qanun-e-Shahadat Order, 1984 need to be briefly explored. For convenience sake these Articles are reproduced below:-

"123. Burden of proving death of person known to have been alive within thirty years: Subject to Article 124, 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.

124. Burden of proving that person is alive who has not been heard of for seven years. When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

5. In terms of Article 123 of the Qanun-e-Shahadat Order, 1984 when a question arises as to whether a person is dead or alive and it is shown that he was alive within last thirty years, the burden to prove that he is no more alive is on the person who claims that he is dead. So in terms of Article 123 it is to be proved for a fact before a court of law that a person who was alive in the last thirty years has actually died on the basis of positive evidence. This rule of evidence has an exception which is contained in Article 124 of the Qanun-e-Shahadat Order, 1984. It is attracted where a person has disappeared and is not heard for a period of seven long years by any of those who would have naturally heard of him had he been alive. In such eventuality, Article 124 raises a

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presumption that a person has disappeared without a trace for seven years may no more be alive. So without the proof of actual death as envisaged under Article 123, a missing person in terms of the legal fiction contained in Article 124 is to be presumed dead, if he is not heard for seven years by those who would have definitely heard of him had he been alive. What Article 124 at best does is that it prevents the court from entertaining a case for making a declaration of death of a missing person until the statutory seven year period prescribed therein expires. To prescribe a waiting period is of utmost importance as presuming a missing person to be legally dead without waiting for a sufficient period of time has its own adverse consequences on his rights e.g. his estate would be distributed among his heirs or in favour of those who are beneficiary of his Will. The missing person's right of inheritance from a relation dying after he went missing would also be effected in case he resurfaces in two or three years. If no reasonable period is prescribed by law and within a year or two of his disappearance he resurfaces, by then his property would have already gone in the hands of his presumptive heirs or beneficiaries of his Will who may have already dealt with it in a manner that has left very little or nothing to be restored back to the returned person. By prescribing a minimum period of seven years what the law only suggests is that before presuming a missing person to be legally dead, persons interested in seeking such a declaration should wait for seven years as it is quite possible that within such period he might resurface or his whereabouts may become known, in case he is still alive. So this seven year period is nothing but a safety precaution provided by law which requires the concerned parties to

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wait for a certain period of time and only upon expiry of such period seek declaration from the Court that the missing person may no more be alive.

6. Section 108 of repealed Evidence Act is equivalent to Article 124 of the Qanun-e-Shahadat Order, 1984. Similar question came up in the case of Ram Singh Vs. Board of Revenue, U.P. Allahabad (AIR 1964 Allahabad 310) and it was held as under:-

"5. But Sec. 108 Indian Evidence Act is not exhaustive on the question of presumptions as regards death of a person. The Court may make a suitable presumption in accordance with the circumstances of each case. Suppose, a man sails in 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 shipwreck. 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. She appears to have left about the year 1940. We may reasonably assume that, she probably died by 1941 or 1942 in connection with her pilgrimage. There is evidence to the effect that, Deo Singh died about 1945. If the plaintiffs established circumstances indicating Smt. Rukmini's death by 1942, and further proved that Deo Singh died in 1945, they have proved their case. The Revenue Courts were justified in holding that, Smt. Rukmini died during Deo Singh's life-time."

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7. In the case of Smt. Bhanumati Dayaram Mhatre Vs. Life Insurance Corporation of India (AIR 2008 Bombay 196), the same question was addressed as follows:-

"5. Section 3 of the Evidence Act prescribes the standard of proof by defining the word "proved" as follows:

"Proved - A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

If the test of preponderance of probability laid down by Section 3 of the Act is applied, that is to say a fact is said to be proved if the Court considers its existence to be so probable that a prudent man ought, under the circumstances of the particular case, to act upon certain supposition that it exists, then it would have to be held that Kushal has died on 13th November, 1995 or soon thereafter. If he was alive after 13th November 1995, there was no reason for him not to contact his immediate family members. It is not the case that Kushal left the house in distress or he was under some disability which prevented him from returning home or even contacting his family members. Nor is it shown that Kushal was missing in such circumstances or could be at such place wherefrom he could not even contact his parents or close family members. Considering the fact that Kushal was not under any distress or disability nor was he in the situation wherefrom he could not contact his family members coupled with the fact that he has not contacted his family members at all since 13th November, 1995 and has been declared to be dead by

the declaratory decree of the competent Court makes us, as men of ordinary prudence, believe that Kushal must have died on 13th November, 1995 or soon thereafter."

8. In the case of Muhammad Sarwar Vs. Fazal Ahmad (PLD 1987 SC 1), this Court held as under:-

"It is to be observed that the words "when the question is" occurring in both sections 107 and 108 (Articles 123 and 124 of Qanoon-e-Shahadat Order, 1984) have reference only to question of the burden of proof at the trial and not at any antecedent point of time. Thus, if a person has not been heard of for seven years there is a presumption of law that he is dead but this presumption does not extend to the date of death. Indeed there is no presumption that he died at the end of the first seven years, or at any particular date. This fact has necessarily to be proved as a fact because section 108 does not direct the Court to presume that the person who has not been heard of for the last seven years had, in fact, died at the expiry of seven years. It only provides that such a person is presumed to be dead without fixing the time of death. It is for this reason that where it is necessary to establish that a person died at any particular time such a fact must be proved by positive evidence. Thus, notwithstanding the presumption of death it would be possible for the Court to give a finding that it occurred after the expiry of the period of seven years since the time when he was last heard of, if the evidence so warrants.

The upshot is that section 108 of the Evidence Act merely creates a presumption that the person, who has not been heard for seven years, is dead, at the date of the suit, and does not refer in any way as to the date of his death, which has to be proved in the same way as any other relevant fact in the case."

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9. By presuming a person dead in terms of Article 124 of Qanoon-e-Shahadat Order, 1984, it does not mean that this Article is of any help in determining when he actually died in those seven-year period. He is just presumed dead for all intent and purposes after a period of seven years has expired. Therefore, Article 124 by itself is of no help in visualizing the probable time of death of a missing person within those seven years. However, the Court which is seized of the matter for making a declaration in terms of Article 124 is not prevented from visualizing the probable time of death on the basis of the circumstances in which the person has disappeared. Thus inference as to the probable time of death of a person who has gone missing for more than seven years can be drawn by the Court only by considering the facts and circumstances in which the person has disappeared. So once a missing person is presumed dead after the full seven-year statutory period has expired, the circumstances surrounding the disappearance of a person would facilitate the court in determining his probable time of death within those seven years. This is also the ratio laid down by this Court in Muhammad Sarwar's case referred by the learned *amicus curiae*.

10. In the present case, the petitioner has claimed that the date of her husband's probable time of death should be reckoned from the date when the seven year period after his disappearance expired i.e. on 09.05.2006 whereas the respondent had considered this date to be 09.05.1999 i.e. the very first day when the petitioner's husband was kidnapped. As both the stands sought to

be canvassed before us are based on pure rule of thumb, it would be very unsafe to lay down a principle of law with regard to time of death in a very rigid manner. Section 2(4) of Qanoon-e-Shahadat Order, 1984 states *"a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists"*. As the probable time of death of a missing person could be any day within the statutory seven year period, it all depends on taking into consideration the circumstances in which a person has gone missing. One can visualize various situations e.g. a soldier goes missing on a war theatre. After the war has ended and he still does not return and his name is also not listed in the tally of prisoners of war provided by the enemy. In that situation, it can be inferred that he might have vanished in some explosion during the war without a trace. In this background, his probable time of death can be the date when the war had ended. A group of mountaineers go on an expedition to conquer the K-2 mountain, however, on their way back one of them gets lost. After a month of unsuccessful search and rescue operation, it could safely be presumed that he might have died as it is highly unlikely that he could have braved the harsh weather conditions more than a month or two which he must have faced on the expedition. Then there is a situation like the present one where a person is kidnapped and not heard of for seven long years. History of kidnappings shows that many a times a kidnapped person is kept in captivity for months together. Keeping this in sight, it would be very difficult to fix the very first day of

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disappearance as the probable time of death in captivity. Considering that the probable date of death upon expiry of the statutory seven year period would also be too long, therefore, any reasonable time would be safe to visualize. The fact that on the disappearance of the petitioner's husband, FIR was lodged on 14.01.2000 wherein it was stated that on 09.05.1999, the husband of the petitioner informed her that he will go to Sehwan and Dadu and then he will go to Sukkur to receive his salary. It is also stated in the FIR that on the next day, the petitioner received telephone calls from unknown number and on 27.05.1999 an unknown letter was received from which it was deduced that the petitioner's husband has been kidnapped. Thereafter, FIR was lodged on 14.01.2000. It appears that after giving up all hopes and under the apprehension that the kidnappers might have killed the petitioner's husband, the FIR was lodged. Taking all this into consideration, the death probably may have taken place somewhere around the date of lodging of the FIR. Therefore, such date should be assumed to be the probable date of his death.

11. From the above discussion, it is evident that the probable time of death within seven year period can be independently visualized and declared by a court of law keeping in view the circumstances in which a person in a particular case went missing. Article 124 by itself is of no help in drawing the inference as to when within those seven years period the missing person might have died. We, therefore, hold that the family pension is to be calculated from the probable date of lodging of the FIR i.e. 14.01.2000.

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12. For what has been discussed above, this petition is converted into appeal and partly allowed. The impugned judgment is set aside. The respondents are directed to recalculate family pension by treating the probable date of death of petitioner's husband to be 14.01.2000. The respondents are directed to complete the process of revising the pensionary benefits of the petitioner within two months from the date of this judgment. Before parting with the judgment, we appreciate the valuable assistance rendered to this Court by Mr. Shahid Anwar Bajwa, learned ASC who appeared as *amicus curiae*.



Sd/= Mushir Alam, J
 Sd/= Faisal Arab, J
 Sd/= Sajjad Ali Shah, J

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 12/9/19

Senior Court Associate
 Supreme Court of Pakistan
 Karachi.

Announced on 06.09.2019 at Karachi.

Approved For Reporting
Khuram

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 07/9/2019