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GAHC010222892019

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/6867/2019

DIPAMANI KALITA
W/O LT. SAHABUDDIN AHMED, R/O VILL. NAGAON, P.O.AND PS. BAIHATA CHARIALI, KAMRUP (R), PIN-781381, ASSAM

VERSUS

THE STATE OF ASSAM AND 5 ORS.
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM, REVENUE AND DISASTER MANAGEMENT DEPTT. DISPUR, GUWAHATI-6, ASSAM

2:THE STATE OF ASSAM
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
PENSION AND PUBLIC GRIEVANCES DEPTT. DISPUR
GUWAHATI-6
ASSAM

3:THE DEPUTY COMMISSIONER
KAMRUP (RURAL)
AMINGAON
ASSAM
PIN-781031

4:THE DIRECTOR OF PENSION
ASSAM
HOUSEFED COMPLEX
DISPUR
PIN-781006
ASSAM

5:THE ACCOUNTANT GENERAL
ASSAM
MAIDAMGAON

BELTOLA

GUWAHATI
KAMRUP (M)
PIN-781029
ASSAM

6:ASTANA BEGUM
W/O LT. SAHABUDDIN AHMED
R/O VILL. GOG
P.O. BARPALAHA
PS. BAIHATA CHARIALI
KAMRUP (R)
PIN-7813981
ASSA

Advocate for the Petitioner : MR. M K CHOUDHURY

Advocate for the Respondent : GA, ASSAM

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 06.09.2021

Heard Mr. M.K. Choudhury, learned senior counsel assisted by Mr. P. Bhardwaj, learned counsel for the petitioner. Also heard Mr. J. Handique, learned standing counsel for the respondent no.1, Mr. J.K. Goswami, learned Additional Senior Govt. Advocate appearing for the respondent nos.2, 3 and 4, Mr. R.K. Talukdar, learned standing counsel for the respondent no.5 and Mr. M.S. Ali, learned counsel for the respondent no.6.

2. The petitioner is the second wife of Late Sahabuddin Ahmed. Her husband had died in a road accident on 18.07.2017, leaving behind the petitioner with her 12 (twelve) years old son. At the time of his death, the husband of the petitioner was serving as Lat Mandal in the office of the Deputy Commissioner, Kamrup (Rural), Amingaon (respondent no.3). The petitioner is

aggrieved by non-sanctioning of pension and other pensionary benefits on the death of her husband and accordingly, this writ petition has been filed under Article 226 of the Constitution of India.

3. The case projected by the petitioner is that her husband, during his lifetime, was married to the respondent no.6. Out of the said marriage, he had 2 (two) children, a son of 20 years of age and a daughter of 14 years of age. It is projected that the respondent no.6 had estranged relationship with her husband and they were separated before marriage of the petitioner and she was residing in her parental house at village Gog under Kamrup (Rural) district. It is also projected that at the time of separation in the year 2004, her husband had paid a lumpsum maintenance amount to the respondent no.6. The petitioner relies on the marriage certificate dated 30.06.2004 solemnized under the Special Marriage Act. It is further projected that the name of the petitioner was entered into the service records of her husband, namely, Md. Sahabuddin Ahmed and the name of petitioner and her son which was furnished by the deceased husband were also entered in the relevant column of the employee data sheet at Sl. No.1 and 2 wherein the petitioner was referred to be the spouse and her son was mentioned as his son. After the death of husband, the petitioner had approached the respondent no.3, seeking sanction of pension and other pensionary benefits and as the matter could not be settled by the respondent no.3, the petitioner has approached this Court.

4. The learned senior counsel for the petitioner has referred to Rule 143 of the Assam Services (Pension) Rules, 1969 and it is submitted that being the wife of her deceased husband, the petitioner was entitled to family pension and other pensionary benefits. It is also submitted that the husband of the

petitioner, being a follower of Mohammedan law was entitled to have more than one wife. By referring to the decision of this Court rendered in the case of *Sirazun Nessa Vs. State of Assam & Ors., 2011 (4) GLT 751* as well as the decision of this Court in the case of *Musstt. Khadija Begum Vs. Musst. Rejina Begum & Ors., WA 244/2017* decided on 15.12.2017, it is submitted that the Division Bench of this Court had held that the second wife of Mohammedan employee is entitled to a share in the family pension of her late husband.

5. By making reference to the provisions of section 4(a) of the Special Marriage Act, 1954 which provides that one of the condition of marriage is that neither party should have a spouse living and in this context, by referring to section 24 of the Special Marriage Act, 1954, it is submitted that in order to declare the marriage between the petitioner and her husband to be void, the respondent no.6 had not filed any suit. It is submitted in her affidavit-in-opposition, the respondent no.6 had admitted the marriage of the petitioner with her husband. It is submitted that it was incumbent on the respondent no.6 to challenge the said marriage and to have it declared to be void. Accordingly, it is submitted that notwithstanding the provisions of section 24 of the Special Marriage Act, 1954, as the marriage has not been declared to be void, the petitioner ought not to be deprived of pension, which the petitioner is entitled to under Rule 143 of the Assam Services (Pension) Rules, 1969. It is also submitted that as the personal law of a Mohammedan permits second marriage, the personal law of the deceased husband would prevail and the writ petitioner would be entitled to the benefit of marriage by getting her share in respect of the pension and other pensionary benefits.

6. The learned standing counsel for the Revenue Department has

submitted that the Deputy Commissioner, Kamrup (Rural), Amingaon (respondent no.3) had called both the petitioner and the respondent no.6 and had taken their views on pensionary benefits, but as the matter could not be amicably settled, he had taken a decision to seek views of the Pension and Public Grievances Department, which was not received till the date of affidavit-in-opposition is filed. The stand of the respondent no.5 is to the effect that the Accountant General would take decision only after receiving the pension proposal and prior to that, he has no role to play. The learned State counsel submits that they have nothing to say in the matter on private dispute between the petitioner and the respondent no.6.

7. Per contra, the learned counsel for the respondent no.6 has placed reliance on the decision of the Supreme Court of India in the case of *Md. Salim Ali (dead) through LRs & Ors. Vs. Shamshudeen (dead) through LRs, Civil Appeal No. 5158/2013* decided on 22.01.2019, *Swapnanjali Sandeep Patil Vs. Sandeep Ananda Patil, AIR 2019 SC 1500* and *Pranati Roy Vs. State of Assam & Ors., WP(C) 1405/2018* decided on 11.02.2021. It is submitted that the marriage between the husband of the petitioner and the petitioner was void and therefore, the petitioner would not get any benefit of pension and other pensionary benefits. It is also submitted that the cause title of the writ petition would clearly demonstrate that the petitioner had not shown Islam as her religion and therefore, the principles of Mohammedan law would not be attracted in favour of the petitioner.

8. Therefore, the only question which is required to be determined is whether the petitioner, being a Hindu and married to her husband, a Mohammedan under the Special Marriage Act, 1954 would be entitled to

pension and other pensionary benefits.

9. It is not in dispute that on the date of marriage between the petitioner and Late Sahabuddin Ahmed was registered under the Special Marriage Act, 1954, he had a spouse living, being respondent no.6. There is no document showing that the prior marriage of the husband of the petitioner with respondent no.6 had been annulled.

10. In the case of *Pranati Roy (supra)* cited by the learned counsel for the respondent no.6, the petitioner therein was a Hindu and her husband was also a Hindu. Nonetheless, this Court by referring to the Rules 143, 136 and 137 of the Assam Services (Pension) Rules, 1969 had decided on facts that the respondent no.7 therein was the first wife (eldest) and it was also held that the petitioner being the second wife of the deceased employee would not get benefit under Rule 136 and resultantly her claim under Rule 143 was not maintainable. In this regard, this Court had relied on the decision in the case of *Deokinandan Prasad Vs. State of Bihar & Ors., 1971 AIR 1409.* It would be relevant to quote the provisions of Rule 143 of the Assam Services (Pension) Rules, 1969:

> "*143. (i) Family for the purpose of rules in this Section will include the following relatives of the officer-*
>
> *(a) wife, in the case of a male officer;*
>
> *(b) husband, in the case of a female officer;*
>
> *(c) minor sons; and*
>
> *(d) unmarried minor daughters.*
>
> *Note 1. - (c) and (d) will include children adopted legality before retirement.*

Note 2. – Marriage after retirement will not be recognized for purposes of rules in this Section.

(ii) The pension will be admissible-

(a) in the case of widow/widower up to the date of her/his death or re-marriage whichever is earlier.

(b) in the case of minor son, until he attains the age of 18 years.

(c) in the case of unmarried daughter, until she attains the age of 21 years or marriage, whichever is earlier.

Note. – In cases where there are two or more widows, pension will be payable to the next surviving widow, if any. The term 'eldest' would mean seniority with reference to the date of marriage.

(iii) Pension awarded under the rules in this Section will not be payable to more than one member of an officer's family at the same time. It will first be admissible to the widow/widower and thereafter to the minor children.

(iv) In the event of re-marriage or death of the widow/widower, the pension will be granted to the minor children through their natural guardian. In disputed cases, however, payments will be made through a legal guardian.

(v) The temporary increases granted on pension will not be admissible on the Family Pension granted under the Scheme in this Section."

11. From the above, it is seen that Note of the said rules provide that the pension would be payable to eldest surviving widow. On her death it would be payable to the next surviving widow, if any.

12. It would also relevant to refer to Rule 26(1) of the Assam Civil Services (Conduct) Rules, 1965, which provides that "*No Government servant who has a wife living shall contract another marriage without first obtaining the permission of the Government, notwithstanding that such subsequent marriage*

is permissible under the personal law for the time being applicable to him." Accordingly, it is seen that Rule 26(1) of the said 1965 Rules does not make any distinction among the Govt. employees on the basis of personal law governing them. In other words, the said rule prohibits polygamy. Therefore, it appears that although under the Muslim personal law, the deceased husband of the petitioner being a Mohammedan was guided by the Muslim personal law to contract a second marriage, but the provisions of Rule 26(1) of the 1965 Rules puts a restriction that no Govt. servant, who has a wife living shall contract a second marriage without first obtaining the permission of the Govt. From the pleadings made in the writ petition, there is no statement to that effect that the second marriage was contracted by the deceased husband of the petitioner by obtaining prior permission from the competent authority of the Govt.

13. The Supreme Court of India in the case of *Md. Salim Ali (supra)* had made the following observation in paragraph 11, 12 and 13:

> "*11. In Syed Ameer Ali's Mohamedan Law also, the same principle has been enunciated. The learned author, while dealing with the issue of the legitimacy of the children, observed at page 203 of Vol. II, 5th edition:*
>
> > "*The subject of invalid marriages, unions that are merely invalid (fasid) but not void (batil) ab initio under the Sunni Law, will be dealt with later in detail, but it may be stated here that the issue of invalid marriage are without question legitimate according to all the sects."*
>
> *For example, if a man were to marry a non scriptural woman, the marriage would be only invalid, for she might at any time adopt Islam or any other revealed faith, and thus remove the cause of invalidity. The children of such marriage, therefore, would be legitimate." Tahrir Mahmood in his book Muslim Law in India and Abroad, (2nd edition) at page 151 also affirms that the child of a couple whose marriage is fasid, i.e., unlawful but not void, under Muslim law*

will be legitimate. Only a child born outside of wedlock or born of a batil marriage is not legitimate.

A.A.A. Fyzee, at page 76 of his book Outlines of Muhammadan Law (5th edition) reiterates by citing Mulla that the nikah of a Muslim man with an idolater or fireworshipper is only irregular and not void. He also refers to Ameer Ali's proposition that such a marriage would not affect the legitimacy of the offspring, as the polytheistic woman may at any time adopt Islam, which would at once remove the bar and validate the marriage.

12. The position that a marriage between a Hindu woman and Muslim man is merely irregular and the issue from such wedlock is legitimate has also been affirmed by various High Courts. (See Aisha Bi v. Saraswathi Fathima, (2012) 3 LW 937 (Mad), Ihsan Hassan Khan v. Panna Lal, AIR 1928 Pat 19).

13. Thus, based on the above consistent view, we conclude that the marriage of a Muslim man with an idolater or fireworshipper is neither a valid (sahih) nor a void (batil) marriage, but is merely an irregular (fasid) marriage. Any child born out of such wedlock (fasid marriage) is entitled to claim a share in his father's property. It would not be out of place to emphasise at this juncture that since Hindus are idol worshippers, which includes worship of physical images/statues through offering of flowers, adornment, etc., it is clear that the marriage of a Hindu female with a Muslim male is not a regular or valid (sahih) marriage, but merely an irregular (fasid) marriage."

14. From the above, it appears that under the principles of Mohammedan law, the marriage of muslim man with an idol worshiper is neither valid nor a void marriage, but is merely an irregular marriage. As per section 22 of the principles of Mohammedan law by Mulla (20th edition), the capacity of marriage relates to every Mohammedan of sound mind who had entered into the contract of marriage. The petitioner not being a Mohammedan, the marriage would not be a marriage without strict meaning of the Mohammedan law. In the present case in hand, it is seen that the petitioner was not married

as per customary Mohammedan law but she was married under the Special Marriage Act, 1954 and that the provisions of Section 4(a) of the said Act renders the marriage as void. Moreover, the petitioner is still using her Hindu name and there is nothing on record to show that the petitioner had accepted the religion of Islam as her faith.

15. Section 4 of the Special Marriage Act, 1954 is quoted below:

> "*4.* ***Conditions relating to solemnization of special marriages****.—Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:—*
>
> *(a) neither party has a spouse living;*
> *(b) neither party—*
>
> *(i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or*
>
> *(ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or*
>
> *(iii) has been subject to recurrent attacks of insanity * * *;*
> *(c) the male has completed the age of twenty-one years and the female the age of eighteen years;*
> *(ci) (d) the parties are not within the degrees of prohibited relationship:*
>
> *Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship; and*

6(e) where the marriage is solemnized in the State of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which this Act extends.

Explanation.—In this section, "custom", in relation to a person belonging to any tribe, community, group or family, means any rule which the State Government may, by notification in the Official Gazette, specify in this behalf as applicable to members of that tribe, community, group or family: Provided that no such notification shall be issued in relation to the members of any tribe, community, group or family, unless the State Government is satisfied—

(i) that such rule has been continuously and uniformly observed for a long time among those members;

(ii) that such rule is certain and not unreasonable or opposed to public policy; and

(iii) that such rule, if applicable only to a family, has not been discontinued by the family."

16. From the above, it appears that section 4 of the Special Marriage Act does not save a second marriage contracted by a Mohammedan male.

17. The learned senior counsel for the petitioner has strenuously argued that under section 24 of the Special Marriage Act, it was incumbent on part of the respondent no.6 to have the marriage between the petitioner and her husband declared to be void. Section 24 of the Special Marriage Act is quoted below:

"*24. **Void marriages**.—(1) Any marriage solemnized under this Act shall be null and void [and may, on a petition presented by either party thereto against the other party, be so declared] by a decree of nullity if—*

(i) any of the conditions specified in clauses (a), (b), (c) and (d) of section 4 has not been fulfilled; or

(ii) the respondent was impotent at the time of the marriage and at the time of the institution of the suit.

(2) Nothing contained in this section shall apply to any marriage deemed to be solemnized under this Act within the meaning of section 18, but the registration of any such marriage under Chapter III may be declared to be of no effect if the registration was in contravention of any of the conditions specified in clauses (a) to (e) of section 15:

Provided that no such declaration shall be made in any case where an appeal has been preferred under section 17 and the decision of the district court has become final."

18. From the words "*and may, on a petition presented by either party thereto against the other party, being so declared*" it is seen that the said words were substituted by the Marriage Laws (Amendment) Act, 1976 (68 of 1976) and the said part of the provisions of section 24 apparently makes it clear that it would only be available to a party to the marriage to have a petition presented for declaring the marriage to be a nullity. The fact that the marriage is void, is culled out from the provisions of section 4(a) of the said Act, which provides that neither party has a spouse living. Reference may be made to the decision of this Court in the case of *Fazila Begum @ Fazilya Begum Vs. State of Assam & Ors, 2008 Supp GLT 507: (2009) 3 GLR 201,* wherein the second marriage of a Mohammedan male was found to be contrary to Rule 26(1) of the Assam Civil Services (Conduct) Rules, 1965 and having held so, it was further held that the claim of the writ petitioner in having pensionary benefits cannot be said to be legal in view of Rules 136, 137 and 143 of the Assam Services (Pension) Rules, 1969. The said decision was followed by this Court in the hereinbefore referred case of *Pranati Roy (supra).*

19. On a perusal of the decision of this Court in the case of *Sirazun Nessa (supra),* the Court has deemed appropriate to quote paragraph 15 thereof below:

"*15. It is true that under Rule 143(i) there is no indication of entitlement of family pension by more than one wife. However, in the Note appended to Rule 143(ii) definitely points out consideration of the claim for family pension by two or more widows. The aforesaid rule, as a whole, indicates that the eldest surviving widow would be entitled to the family pension. At the same time, the Rule has not ruled out taking into consideration the valid marriage of two or more wives by a Mohammedan employee."*

20. From the above, it appears that the Division Bench of this Court was considering the case on the facts that there was a valid marriage of two or more wives by a Mohammedan employee. As indicated above, in the present case in hand, the petitioner, who is a Hindu had married her deceased husband, who was a Mohammedan, under the Special Marriage Act, 1954, and at the time of such marriage, the condition precedent of Section 4(a) of the Special Marriage Act was conspicuously absent. Therefore, the marriage would be void. In the case of *Musst. Rejina Begum (supra),* the facts do not reveal that the second marriage was void.

21. Under such circumstances, the Court is inclined to follow the decision of this Court in the case of *Fazila Begum (supra)* to hold that in view of the provisions of Rules 143, 136 and 137 of the Assam Services (Pension) Rules, 1969 read with Rule 26(1) of the Assam Civil Services (Conduct) Rules, 1965, the claim of the petitioner for pension and other pensionary benefits is not found sustainable and the writ petition stands dismissed in so far as her claim is concerned. However, under the law, the minor son of the petitioner would still

be entitled to his share on the pension and other pensionary benefits.

22. Accordingly, the Court is inclined to direct the respondent no.3, i.e. the Deputy Commissioner, Kamrup (Rural), Amingaon to make a proposal for pension and other pensionary benefits by providing for a share of the pension on account of Late. Sahabuddin Ahmed to Priyanku Parash, son of the petitioner and Late Sahabuddin Ahmed.

23. At this stage, the learned standing counsel for the respondent no.5 submits that as per the existing rule, the pension payment order cannot be shared. He submits that the pension payment order would be made in the name of the respondent no.6 and at the stage of disbursement, the Treasury Officer concerned of Kamrup (Rural) District, Amingaon would release the share of the son of the petitioner, namely, Priyanku Parash. Therefore, the respondent no.5 is directed to pass appropriate orders so that the Treasury Officer concerned would be able to separately disburse the share of pension to Priyanku Parash, son of the petitioner and Late Sahabuddin Ahmed.

24. Accordingly, it would be open to the petitioner to open a bank account in the name of the minor son and the petitioner may recorded her name as mother and natural guardian of her son Priyanku Parash.

25. The Court is inclined to clarify that this order shall not be read as an order adjudicating the respective rights and liberties of the petitioner *vis-a-vis* with regard to any other matter including property and any other rights in respect to her dis-entitlement to pension and other pensionary benefits. In other words, the Court has not determined any other rights of the parties, as

such, nothing contained in this order shall prejudice the petitioner in respect of any other right or claim.

26. The writ petition stand partly allowed to the extent as indicated above.

27. Parties are left to bear their own cost.

JUDGE

Comparing Assistant