

(2022) 12 GAU CK 0035

Gauhati High Court

Case No: Writ Appeal No. 160 Of 2018

Mustt Junufa Bibi

APPELLANT

Vs

Mustt Padma Begum

@ Padma Bibi And 4

RESPONDENT

Ors

Date of Decision: Dec. 22, 2022

Acts Referred:

- Constitution Of India, 1950 - Article 25
- Assam Services (Pension) Rules, 1969 - Rule 143, 143(i), 143(ii)
- Assam Civil Services (Conduct) Rules, 1965 - Rule 26

Hon'ble Judges: R.M. Chhaya, CJ; Achintya Malla Bujor Barua, J; Soumitra Saikia, J

Bench: Full Bench

Advocate: Y S Mannan

Final Decision: Disposed Of

Judgement

1. Heard Mr. YS Mannan, learned counsel for the appellant Mustt Junufa Bibi. Also heard Mr. RC Saikia, learned counsel for the respondent No. 1

Mustt Padma Begum @ Padma Bibi, Ms. D Borah, learned counsel for the respondents in the Health Department of the Government of Assam, Mr.

A Hassan, learned counsel for Accountant General, Assam, Ms. N Sarma, learned counsel for the respondents in the Education Department as well

as Mr. J.K Goswami, learned additional senior Government Advocate for the respondents in the Pension Department. Further heard Mr. RKD

Choudhury, learned Dy.SGI for the authorities under the Union of India inasmuch as, in some of the matters where also the question referred is to be

answered that the Union of India are respondents.

2. Junufa Bibi has instituted WA 160/2018 being aggrieved by the judgment and order dated 26.07.2017 in WP(C) No. 2182/2016. WP(C) No.

2182/2016 had been instituted by the respondent No. 1 Padma Begum @ Padma Bibi (hereinafter referred as Padma Begum) being aggrieved by the

PPO No. 9011112044447 and GPO No. 11220444713 dated 30.09.2013 by which the appellant Junufa Bibi had been provided to be the beneficiary of

the family pension in respect of the deceased Tarif Uddin Ahmed. The deceased Tarif Uddin Ahmed was an employee in the Health Department of

the Government of Assam and was receiving the pension upon retirement from service on attaining the age of superannuation till he died on

13.08.2015.

3. Admittedly, the respondent No. 1 Padma Begum was the first wife and the appellant Junufa Bibi was the third wife of the deceased Tarif Uddin

Ahmed, although the respondent No. 1 Padma Begum is stated to have been living separately and there was also an order dated 28.07.1993 of the

learned Principal Judge, Family Court Guwahati in FC.Crl.No.86/1993 for payment of maintenance to the respondent No. 1 Padma Begum.

4. The issue that arose before the learned Single Judge in WP(C) No. 2182/2016 was also on the question as to if the parties are governed by the

Mohammedan Law, whether the pension would be entitled to the first wife or to the second or other wives. By referring to a Division Bench judgment

rendered in *Sirazun Nessa & vs- State of Assam and others*, of this Court, reported in 2011 (4) GLT 751 and the judgment of the Hon^{ble}

Supreme Court in *Khurshid Ahmed Khan & vs- State of Uttar Pradesh and Others*, reported in (2015) 8 SCC 439, a conclusion was arrived in

paragraph 16 of the judgment dated 26.07.2017 in WP(C) No. 2182/2016 that although in *Sirazun Nessa (supra)*, it was held that the second wife is

entitled to the proportionate family pension, but by following the ratio laid down by the Hon^{ble} Supreme Court in *Khurshid Ahmed Khan (supra)*

as well as in view of Note.1 to Rule 143 (ii) of the Assam Services (Pension) Rules, 1969 (in short the Pension Rules of 1969), the non-inclusion of

the respondent No.1 Padma Begum as a nominee in the pension papers submitted by the deceased Tarif Uddin Ahmed cannot deprive her from what

she should rightfully receive, in a situation where she was not divorced and continued to the first wife of the deceased employee.

5. In WA 160/2018 by Junufa Bibi, reliance had been placed by the appellant in Sirazun Nessa (supra), wherein it was also provided that the pension

of a deceased employee can be divided proportionately between his widows. It had also been submitted on behalf of the appellant Junufa Bibi that the

judgment rendered in Sirazun Nessa (supra) had also been followed by the Division Bench in Mustt. Khadija Begum â€"vs- Mustt Rejina Begum and

five others in WA 244/2017 and Khudeja Khatun â€"vs- State of Assam and six others in WA 178/2020.

6. When the WA 160/2018 was heard by the Division Bench on 21.12.2021, the appellant Junufa Bibi relied on paragraphs 15 and 16 of Sirazun

Nessa (supra) to raise the contention that even the second or subsequent wives of a deceased Mohammedan employee would be entitled to the family

pension. Paragraphs 15 and 16 of Sirazun Nessa (supra) are extracted below:-

â€œ15. 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.

16. At this stage, we would like to address the effect of â€"Conduct Rulesâ€™, while determining the claim of the family pension. As noted earlier,

the learned Single Judge has referred to Rule 26 of the â€"conduct Rulesâ€™; which has put certain pre-conditions for contracting a second marriage.

Admittedly the â€"conduct Rulesâ€™ do not totally prohibit a 2nd marriage, provided it is permitted under the personal law and custom of the

concerned Government employee. The only rider is to obtain permission from the Government. In our considered opinion, any violation of the Conduct

Rules may entail disciplinary proceeding during the service tenure of a Government employee but any such violation does not amount to declaring 2nd

marriage between the two Muslim spouses void, provided it is otherwise legal and valid. Hence, the rejection of the claim of a second Mohammedan

wife with the aid of "conduct Rules"™ is unsustainable in law."

7. It is noticed that in paragraph 15 of the judgment in *Sirazun Nessa* (supra), the provision of Rule 143(1) of the Pension Rules of 1969 was taken

note of to arrive at a conclusion that the Note appended thereto refers to the claim for family pension by two or more widows and although it provides

that the eldest of the surviving widow would be entitled to the family pension, but at the same time, the Rule had not ruled out the possibility of a valid

marriage of two or more wives by a Mohammedan employee. In paragraph 16 of the said judgment in *Sirazun Nessa* (supra), Rule 26 of the Assam

Civil Services (Conduct) Rules, 1965 (in short Conduct Rules of 1965) was referred for arriving at a conclusion that although contracting a second

marriage may be a misconduct for a disciplinary proceeding, but it does not amount to declaring the second marriage between two persons governed

by the Mohammedan Law to be a void or illegal marriage.

8. The Division Bench in *Sirazun Nessa* (supra) was concerned with two conflicting judgments in *Amina Khatun* "vs- *Jahura Khatun* reported in

2004 Suppl GLT 67 and *Suraiya Sultana* "vs- *State of Assam*, reported in 2006 Suppl GLT 533, where the decision rendered in *Amina*

Khatun(supra) was that Rule 143 of the Pension Rules of 1969 does not rule out the possibility of entertaining a claim for family pension by more than

one spouse of a deceased Government employee, whereas in *Suraiya Sultana* (supra), the view taken was that the second or subsequent wives would

not be entitled to the family pension. Accordingly, the Division Bench in *Sirazun Nessa* (supra) was in agreement with the view taken in *Amina*

Khatun (supra) in preference over the decision in *Suraiya Sultana* (supra) by further requiring the departmental authorities to ask the surviving widows

of the deceased employee to clarify the ratio of their claim for the family pension in accordance with the Mohammedan Law.

9. But while hearing the matter in WA 160/2018, as reflected in the order dated 21.12.2021, the Division Bench took note of the provisions of Rule

143 of the Pension Rules of 1969 and arrived at a view that Note.1 to Rule 143 (ii) clearly provides that where there are two or more widows, pension

will be payable to the eldest surviving widow and on her death, it would be payable to the next surviving widow, if any. Accordingly, in the order dated

21.12.2021, the view taken by the Division Bench in Sirazun Nessa (supra) was differed.

10. In view of the difference of the view, formed by the Division Bench in the order dated 21.12.2021 in WA 160/2018, and that of in Sirazun Nessa (supra), the matter has been referred to the Larger Bench for its decision.

11. In the facts and circumstances, as well as in view of the propositions of law referred hereinabove, the question for determination would be:

(1) Whether the second or further wives of a deceased employee where both are governed by the Mohammedan Law would be entitled to the

benefits of a family pension of such deceased employee?

(2) If yes, to whom the family pension is payable under the Assam Services (Pension) Rules, 1969?

12. At the very outset we take note that in all such judgments referred for the purpose i.e. Sirazun Nessa (supra), Khadija Begum (supra), Khudeja

Khatun (supra), Suraiya Sultana (supra) and Amina Khatun (supra), the question for determination was on the validity and acceptability of the

marriage in respect of the second or further wives of a deceased employee where both were governed by the Mohammedan Law and consequent

upon such validity and acceptability of marriage, the entitlement of such second or further wives for the benefits of a family pension.

13. As regards the validity and acceptability of a marriage of a second wife or further wives where the parties are governed by the Mohammedan

Law, would definitely be governed by the principles of the personal law to which the parties are subjected. Neither the law regarding payment of

pension or family pension, as the case may be, nor the law relating to any service condition of an employee who is also governed by Mohammedan

Law can determine the validity and acceptability of a marriage of a second wife or further wives where all the parties are governed by Mohammedan

Law. Although in Khurshid Ahmed Khan (supra) it had been held by the Honâ€™ble Supreme Court that contracting a second marriage during the

sustenance of their first marriage would be a matter of religious practice rather than a religious faith and belief and therefore, such religious practice

cannot be the basis to invoke the provisions of Article 25 of the Constitution of India so as to render the U.P. Government Servantsâ€™ (Conduct)

Rules, 1956 to be unconstitutional which provides the contracting of a second marriage to be a misconduct for the purpose of a disciplinary proceeding, but the said decision also do not lead to any conclusion that the marriage of the second or further wives where the parties are governed by the Mohammedan Law would be invalid or unacceptable in law.

14. Rule 143 of the Pension Rules, 1969 is extracted as below:

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 legally before retirement.

Note 2: (a) Marriage for the purpose of admissibility of pensionary benefits to the spouse of a retired official shall mean marriage before or after retirement.

(b) Child/ Children for the purpose of pensionary benefits of a retired official shall mean child/children born before or after retirement.

(ii) The pension will be admissible-

(a) In the case of a widow/ widower upto the date of her/his death or remarriage whichever is earlier.

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

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

Note:1 In cases where there are two or more widows pension will be payable to the eldest surviving widow. On her death it 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, the pension 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.â€

15. As reading of Rule 143(1) goes to show that for the purpose of family pension a family would comprise of the relatives of the officer, which also

includes the wife in case of a male officer. If the second or further wives of a male officer are acceptable and valid under the personal law governing

the parties, we see no reason as to why such second or further wives would not be construed to be a wife of the male officer.

16. If the validity and acceptability of the marriage of a second wife or further wives where parties are governed by Mohammedan Law would be

determined by the personal laws of the parties, and the personal laws provide for the validity and acceptability of such marriage, the second wife or

the further wives where parties are governed by Mohammedan Law, would have to be construed to be also the family members of the deceased

employee and therefore, under Rule 143(1) of the Pension Rules of 1969 be entitled to the benefits of a family pension.

17. But a further question remains as to whether being entitled to the benefits of a family pension would also necessarily mean that the State

Authorities providing for a family pension would have to pay or apportion and pay the family pension to the second and further wives of a deceased

employee separately where the parties are governed by the Mohammedan Law.

18. For the purpose, we look into the provisions of Note 1 to Rule 143(ii) of the Pension Rules of 1969. A reading of Rule 143 (i) of the Pension Rules

of 1969 makes it discernable that the wife in case of a male officer would be included as a family for the purpose of the Rules and a marriage for the

purpose of pensionary benefits to the spouse of a retired official shall mean a marriage before or after retirement. Note 1 to Rule 143 (ii) provides that

in cases where there are two or more widows pension will be payable to the eldest surviving widow and on her death, it will be payable to the next

surviving widow and the term eldest would mean seniority with reference to the date of marriage. Rule 143 (iii) further provides that the pension so

awarded under Rule 143 will not be payable to more than one member of the officer's family at the same time.

19. A conjoint reading of Note 1 to Rule 143 (ii) and Rule 143 (iii) of the Pension Rules of 1969 makes it explicit and unambiguous that the family

pension would be payable to the eldest of the surviving widow in the event of there being two or more widows and further that even if there are minor

children who may also be entitled to the benefits of the family pension, the pension would be paid to only one member of the family at the same time,

where at first instance it would be paid to the eldest of the surviving widow and thereafter, on her death to the next surviving widow, if any and in its

absence to the minor children.

20. As a corollary to the provisions of the Rule 143 (iii) of the Pension Rules of 1969, Note 1 to Rule 143 (ii) would have to be read to mean that the

family pension would be payable to the eldest of the surviving widows in the event there are two or more widows, and thereafter, on her death it

would be payable to the next surviving widow, if any and thereafter, to the minor children if the occasion arises.

21. In the circumstance, the concept of a validity and acceptability of a second marriage where the parties are governed by the Mohammedan Law

and the consequential entitlement to the benefits of a family pension and the concept to whom the family pension would be payable under the Pension

Rules of 1969 are held to be two separate and unrelated concepts and the implication of the concept of a validity and acceptability of a second

marriage or further marriages where the parties are governed by the Mohammedan Law would have no bearing on the concept to whom the family

pension is payable under the Pension Rules of 1969. It is held that irrespective of the validity and acceptability of a second marriage or further

marriages where the parties are governed by the Mohammedan Law, the family pension under Rule 143 of the Pension Rules of 1969 would be

payable to the eldest of the surviving widow, which would also be applicable for a family pension where the parties are governed by the principles of

Mohammedan Law, and where there may be a validity and acceptability of the second wife or further wives in respect of a deceased Mohammedan

employee.

22. We further hold that the family pension being payable to the eldest of the surviving widow or wife would not mean that the entire family pension so payable would be the personal property of the eldest of the surviving widow or wife and the family pension so payable would be held by the eldest of the surviving widow or wife as a trustee for all such other persons who are entitled to the benefits of the family pension in terms of Rule 143 of the Pension Rules of 1969.

23. We also provide that in the event any such other persons who are entitled to the benefits of the family pension in terms of Rule 143 of the Pension Rules of 1969, including the second or further wives, in a case where the parties are governed by the Mohammedan Law, are not appropriately maintained by the eldest of the surviving widow or wife to whom the pension would be paid, the remedy thereof would be to make a claim for maintenance in the appropriate forum under the law and not a claim for a payment of the family pension by the State authorities directly to such persons. But however, if in a given case the State authorities on their own volition are of the view that under an acceptable circumstance the authorities are agreeable or required to pay the pension separately to any such member of a family of a deceased employee, this judgment may not be construed to be an absolute bar on such separate payment.

24. The reference made by the order dated 21.12.2021 is answered accordingly.
Writ Appeal No. 160/2018 accordingly stands closed.