
(2007) 06 GAU CK 0031

Gauhati High Court (Shillong Bench)

Case No: None

Bless Bamon and Others

APPELLANT

Vs

State of Meghalaya and Others

RESPONDENT

Date of Decision: June 6, 2007

Acts Referred:

- Constitution of India, 1950 - Article 19(1)(f), 31

Citation: (2007) 3 GLT 875

Hon'ble Judges: T. Vaiphei, J

Bench: Single Bench

Final Decision: Allowed

Judgement

T. Vaiphei, J.

These writ petitions, arising out of almost identical facts and involving common questions of law were heard together and are being disposed of by this common judgment. Whether family pension and other retiral benefits of a deceased Government employee are payable to her/his children through their legal guardian when the widow/widower is alive, but does not claim such benefits, is the short question which falls for consideration in the two writ petitions.

2. Mr. V.K. Jindal, the learned senior counsel for the petitioners, Mr. B. Bhattacharjee, the learned Counsel for the State respondents, Mr. R. Debnath, the learned CGC appearing for the Accountant General, Meghalaya and Mr. S. Sen, the learned Counsel for the private respondent in WP (C) No. 45 (SH) of 2005 have been heard at length.

3. To simplify the matter, I shall first deal with the facts in WP(C)No. 45(SH) of 2005, decide the same and thereafter apply the outcome thereto to the facts of WP (C) No. 255(SH) of 2006. The material facts of the case in WP (C) No. 45(SH) of 2005 are that the deceased, namely, Smti Meruna A Sangma, was during her lifetime serving as UDA in the Office of the District Family Welfare Bureau. Tura and died on 9.7.2001

and left behind certain securities and debts amounting to Rs. 78,300/- payable by her Office. The deceased is survived by her two minor children and her husband i.e. the respondent No. 6. The petitioner No. 1, who is the sister of the deceased, applied for and obtained Succession Certificate dated 13.9.2001 from the Court of the Addl. District Magistrate, Tura in connection with S/C Case No. 83 of 2001 to receive The debts and securities of the deceased. The petitioner also obtained Guardianship Certificate in respect of the minor children of the deceased i.e. the petitioners Nos. 2 and 3 vide the order dated 20.11.2001 passed by the learned Addl. Deputy Commissioner. The parties are governed" by Garo customary law in matters of marriage, inheritance/succession, etc. As per this customary law, when the respondent No. 6 refused to accept the wife offered to him by the clan as replacement of the deceased, he stood released from the Akhing bondage whereupon the petitioner No. 1 took over the responsibility of looking after the petitioners Nos. 2 and 3 and became their guardian. It is on record that the respondent No. 6 did not contest the Guardianship Certificate proceeding initiated by the petitioner No. 1. It is also an undisputed fact that the respondent No. 6 swore the affidavit dated 17.3.2003 (Annexure-10) declaring that he has been released from the Akhing bondage and has no connection with the family of the deceased; that the petitioner No. 1 is the sole custodian of the petitioners Nos. 2 and 3 and that all the dues, debts and securities and the family pension of the deceased be paid to the petitioner No. 1, who has, as stated earlier, become the guardian of the minor children in terms of the Guardianship Certificate issued by the learned Deputy Commissioner in favour of the petitioner No. 1.

4. The representation made by the petitioner No. 1 to the respondent No. 3 for payment of those dues/pensionary benefits on the basis of the Succession Certificate and Guardianship Certificate was thereafter processed and referred to the respondent No. 4 and 5 for necessary action. The respondents Nos. 4 and 5 refused to honour both the Succession Certificate and the Guardianship Certificate submitted by the petitioner No. 1 for payment of the aforesaid dues. The stand taken by the respondent No. 4 and 5, as reflected in their affidavit-in-opposition, is that as per the Meghalaya Civil Services (General Provident Fund) Rules, 1985 ("the Rules" for short), the term "family", in the case of a female subscriber means the husband and children of a subscriber, provided that if a subscriber by notice in writing to the accounts officer expresses her desire to exclude her husband from her family, the husband shall henceforth be deemed to be no longer a member of the subscriber's family in matter to which the GPF Rules relate. Thus, when the deceased did not issue a notice expressing her desire to exclude the respondent No. 6 from her family, the husband and the children of the deceased alone are entitled to receive the amount payable under the GPF. It is also the case of the answering respondents that as per Rule 48(ii)(a) of the Meghalaya Civil Service (Pension) Rules, 1983 ("Pension Rules" for short), family pension of the deceased can only be paid to her husband and her minor children and not any one else. Thus, according to the

respondents Nos. 4 and 5, when the husband and the children of the deceased are admittedly alive, the production of Succession Certificate and Guardianship Certificate by the petitioner for receiving pensionary benefits is of no avail. It is thus the contention of these respondents that payment of such pensionary benefits on basis of Succession Certificate and Guardianship Certificate would certainly discharge the liabilities of the Government, but these Certificates do not cast an obligation on the part of the Government to pay the pensionary benefits to the petitioner, for such claims can always be resisted if they are otherwise not in order. Lastly, it is contended by these respondents that the Pension Rules are silent on the question of payment of family pension according to customary law and, therefore, the petitioner is not authorized to act beyond the scope of power under the law of the land. As for the share of the minors in DCRG, it is submitted by the respondents that when the natural guardian of the minors in the person of the respondent No. 6 is alive, the petitioner is not entitled to receive/draw the shares of the minor-children of the deceased. As for the State-respondents, they do not dispute the case of the petitioner that the respondent No. 6, on his refusal to accept the new wife offered to him by the clan according to Garo customary law, he stood released from the Akhing bondage and waived his right to be the guardian of the minor children. Their only case is that payment of pensionary benefits, etc. lies within the purview of the respondents Nos. 4 and 5.

4.1. It is not in dispute that the petitioner No. 1 has already/obtained Succession Certificate and Guardianship Certificate. The respondent No. 6 has never challenged the legality or otherwise of these Certificates obtained by the petitioner No. 1. The Guardianship Certificate at Annexure-5 undoubtedly declares and recognizes the petitioner No. 1 as the legal guardian of the petitioners Nos. 2 and 3. The affidavit at Annexure-10 sworn by the respondent No. 6 not only admits that he no longer has connection with the family members of the deceased but also acknowledges the grant of Guardianship Certificate to the petitioner No. 1 by the Deputy Commissioner. The genuineness of this certificate is not questioned by him either in this proceeding. In the absence of affidavit-in-opposition filed by the respondent No. 6, this is a fit case for applying the doctrine of non-traverse, which means that where material averment is passed over without a specific denial, it is taken to be admitted. Consequently, the respondent No. 6 is deemed to have waived his right to claim the family pension. DCRG and other pensionary benefits of the deceased employee. It is, however, the contention of the respondents Nos. 4 and 5 that as long as the respondent No. 6 is alive and is not remarried and there are also the minor-children of the deceased, the claim of the petitioner No. 1 to receive such benefits on the basis of the Succession Certificate and Guardianship is not admissible under the Meghalaya Pension Rule and Civil Service (General Provident Fund) Rules, 1985. In my opinion, the tone and tenor of the case set up by the said respondents seem to suggest that they are objecting to the payment of those benefits to the petitioner No. 1 only on the ground that she is claiming the same in her personal capacity and

not in her capacity as the legal guardian of the petitioners Nos. 2 and 3. The pleadings of the petitioner No. 1 rules out such inference; she is making the claim in her capacity as the legal guardian of the minor-children of the deceased since the respondent No. 6, who is their natural guardian, is not looking after them and does not object to the grant of Guardianship Certificate in her favour by a competent court of jurisdiction. In any case, once the respondent No. 6, for any reason, has admittedly waived his right to receive the family pension, etc. of the deceased, I do not see any legal impediment in releasing such benefits to the petitioner No. 2 and 3 through the petitioner No. 1 as will be seen hereafter.

5. For the purpose of payment of family pension, Rule 48(i) of the Pension Rules defines the terms "family" to include wife, in the case of a male officer; husband, in the case of a female officer, minor sons and unmarried daughters. Rule 48(ii) makes pension admissible in the case of widow/widower upto the date of her/his death or re-marriage, whichever is earlier, in the case of a minor son, until he attains the age of 18 years, and in the case of an unmarried daughter, until she/he attains the age of 21 years of marriage, whichever is earlier. Rule 48(iii) says that pension awarded under the Pension Rules will not be payable to more than one member of an officer's family at the same time and that it will first be admissible to the widow/widower and thereafter to the minor children. Rule 48(iv) explains that 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 and that in disputed cases, however, payments will be made through a legal guardian. Thus, the payment of family pension to a legal guardian in disputed cases is contemplated by the Pension Rules. True, there is no specific provision under the Pension Rules for payment of family Pension to the legal guardian when the natural guardian does not come forward to claim the same or has waived his right to the family pension even though he has not re-married. Can it then be fair to deny payment of the family pension to the minor children of the deceased employee when they are not at all looked after or maintained by their father, who has by the affidavit dated 17.3.2003 and by his conduct before this proceeding waived his right to receive the family pension and has expressly acknowledged the guardianship of the petitioner No. 1 over the petitioner Nos. 2 and 3? If the statute is silent and there is no specific prohibition, then the statute should be interpreted which advances the cause of justice (see [State of Goa Vs. Western Builders](#), .

6. In the instant case, the husband of the deceased employee i.e. the respondent No. 6 has unequivocally declared that by the operation of Garo customary practices, he was released from the Akhing bondage and has no more connection with the family of the deceased employee and that in terms of the Guardianship Certificate issued by the Deputy Commissioner, the petitioner No. 1 has taken full charge of the petitioner Nos. 2 and 3 as per mahari arrangement in conformity with the customary practices of the Garos. In view of these uncontroverted facts, the respondent No. 6 is no longer entitled to the family pension of the deceased.

Moreover, when he has expressly or by his conduct intentionally waived his right to receive the family pension and other pensionary benefits of the deceased, it is not obligatory for the respondent Nos. 4 and 5 to pay those benefits to him. A person may have legal right, but if the same is waived, enforcement thereof cannot be insisted. The term "waiver" is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or of statutory provision, may waive in and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration--see Halsbury's Laws of England, 4th Edn. Vol. 16, para 147.

7. In [Krishna Bahadur Vs. Purna Theatre and Others](#), the Apex Court reiterates the legal position by holding that a right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein; that whenever waiver is pleaded it is for the party pleading the same to show that an arrangement waiving the right in consideration of some compromise came into being and that statutory right however may also be waived by his conduct (emphasis added). In other words, whether a right can be waived or not by an individual depends on two questions. First, has the statute conferred rights and privileges exclusively on the person involved or on third persons as well? If the waiver by a party denies the benefit not solely given to him but also to third persons as well; the doctrine of waiver will not apply. To illustrate this point, in *Behram Khurshid v. State of Bombay* AIR 1955 SC 12, the Apex Court held that the right to property guaranteed under Article 19(1)(f) and Article 31 of the Constitution of India as it then stood as fundamental rights was for the benefit of the property owner in his individual capacity and that if any law was infringing those provisions, it was open to such owner whose property rights have been infringed to waive it. So far as the second category is concerned, which falls under Articles 14, 20 and 21 of the Constitution, which are enacted for the public good and are based upon public policy, they cannot be waived.

8. Once it is established on facts that the Respondent No. 6 has not only unequivocally abandoned his right to receive the family pension of the deceased but has also accepted and recognized, nay, declared that the petitioner No. 1 is the legal guardian of the petitioner Nos. 2 and 3 in terms of the Guardianship Certificate issued by the competent authority, it will be travesty of justice to deny family pension and other retirement benefits including GP Fund to the petitioner Nos. 2 and 3 on the ground that such benefits are only admissible to him as per law. Secondly, if the respondent No. 6 has declared that he is no longer the guardian of the minor-petitioners, it is the same as absence of natural guardian and, as such, the petitioner No. 1, who is the admitted legal guardian, is entitled to receive the family pension, etc. of the deceased for and on behalf of the minor-petitioners. The

fact that the Government of Meghalaya liberally construed the provisions of the cognate Rules, namely, the Meghalaya Civil Services (General Provident Fund) Rules, 1985 can be seen from its decision on Rule 33, which says that in the absence of a natural guardian, there should be adequate prima facie grounds for making payment to the person claiming it; that such grounds can exist only if he/she is shown by a sworn declaration to be de facto guardian and his/her bona fides have been ascertained; that even if a guardian has not been appointed by the Court, if the minor and his property are in the custody of some person, such person is in law a de facto guardian and that the authorities making payment should therefore require the person who comes forward to claim payment on behalf of the minor to satisfy them by affidavit that he is in charge of the property of the minor and is looking after or that if the minor has no property other than the Provident Fund money, the minor is in his custody and care.

9. It is also instructive to note another decision of the State Government on the payment to legal representative on proper identity. It says that it is not legally necessary in every case that probate, letters of administration or a succession certificate should be taken out in order to confer a title upon the heirs. Rule 39 of the said Rules provides that if any question arises relating to the interpretation of these rules, it shall be referred to the State Government whose decision thereon shall be final. Consequently, the aforesaid decisions of the State Government are finding upon the respondent Nos. 4 and 5. Moreover, the State Government has also completely overlooked Rule 36 of the said Rules which empowers it to relax the provisions of the Rules if any of them causes undue hardship to individual cases. When the State respondents do not dispute the genuineness of the case of the petitioners, they should have relaxed the relevant provisions to enable the petitioner minor-petitioners to receive these pensionary and other benefits of the deceased without abdicating its authority in favour of the respondent Nos. 4 and 5. The corresponding provisions of the authority to interpret and of the power to relax the operation of the rules in the case of pension are found in Rules 91 and 92 of the Meghalaya Civil Services (Pension) Rules, 1983. There is also thus non-application of mind on the part of the State-respondents in dealing with this case,

10. At this stage, it will also be profitable to take notice of the contents of AG Letter No. 61/Audit/95-75, dated the 19th January, 1976 reproduced in Swamy s Pension Compilation (18th Edn.) at page 143, which deals with a case when the husband declines to accept family pension in any capacity. That was the case where on the death of a married woman employee, who left behind minor children, the husband of the deceased had declined to accept the family pension in any capacity and also given his consent to pay the same to the real guardian of the deceased's children, i.e. his father-in-law. The widower was having another living wife at the time of the death of the deceased Government servant. The following point was raised for clarification from the Ministry of Finance in consultation with the Ministry of Law and Department of Personnel and Administrative Reforms. If the husband has

another living wife at the time of death of a female Government servant, it is the same as re-marriage and as such the husband of the deceased female Government servant is not entitled to the family pension under Rule 54(6)(i) of the CCS (Pension) Rules, 1972. It is thus decided that it would be in order to pay the family pension to the minor children through the father of the deceased employee, i.e., their guardian, even when the natural guardian, i.e. father of the children, is living, which is, however, subject to recognition of his legal guardianship by the court. What is significant in that case is that there was no, technically speaking, remarriage and that the husband of the deceased was only having another wife living at the time of death of the female Government servant. Nevertheless, such condition was treated as re-marriage. In the instant case also, the respondent No. 6, on the facts established, can no longer be treated as the natural guardian of the minor-petitioners. This is a situation in which there is de facto absence of the natural guardian of the minor-petitioners. Consequently, there is no difficulty in holding that the petitioner Nos. 2 and 3 are entitled to receive the family pension, gratuity and GP Fund of the deceased employee through their legal guardian, namely, the petitioner No. 1.

11. For what has been stated in the foregoing, this writ petition is allowed. The State-respondents and the respondent Nos. 4 and 5 are directed to sanction the family pension and other retiral benefits, the subject matter of this writ petition, of the deceased employee to the petitioner Nos. 2 and 3, as the case may be, and release the same to them through the petitioner No. 1 on her fulfilling the prescribed formalities within a period of 45 days of the receipt of this judgment and order. Since the payments were apparently withheld due to bona fide misconception of law, the parties are directed to bear their respective costs.

W.P. (C) No. 255(SH) 2006

In this writ petition, the petitioner No. 1 is the mother of the late Banjop Bamon, who died on 13.7.2004, when he was serving as Constable in the Unarmed Branch under the Superintendent of Police, in the Office of the Police Reserve, Jowai. The petitioner No. 1 obtained Succession Certificate in respect of debts and securities of the deceased and also obtained Guardianship Certificate for the two minor children of the deceased. The deceased was originally married to the respondent No. 4, but they were separated in February, 1994 whereafter the respondent No. 4 re-married one Shemlut Pakma in July 2001. On her remarriage, the respondent No. 4 was ex-communicated from the Church of Thadlaboh Presbyterian Church, Jowai on 17.12.2006. The respondent No. 4 also gave birth to a male baby on 23.1.2006 in KJP Assembly Hospital, Jowai from her said second husband. After his separation from the respondent No. 4, the deceased got married to the respondent No. 5 on 28.7.2001 according to the Pnar Tribal Customary rites of Jaintia Hills District and sired two children i.e. the petitioner Nos. 2 and 3, on 23.4.2000 and 6.11.2003 respectively. The deceased died on 13.7.2004. According to the petitioner No. 1,

after the death of the deceased, the respondent No. 5 deserted the minor-petitioners and left them under the care of the petitioner No. 1. It was against this backdrop that both the Succession Certificate and the Guardianship Certificate were obtained by the petitioner No. 1. On the basis of these certificates gratuity and leave salary were paid to the petitioners. Notices were issued to the respondent Nos. 4 and 5, but they failed to contest the writ petition.

12. As in WP (C) No. 45(SH) of 2005, the respondent No. 3 refused to sanction the family pension, etc. to the minor-petitioners. The stand taken by the respondent No. 3, as evident from Annexure-8 authorised by Sr. Accounts Officer in the Office of the Accountant General (A&E), Meghalaya, appears to be that so long as the respondent No. 4, who is the wife of the deceased, is alive, she alone is entitled to the family pension and other retiral benefits and that where there are two or more widows, pension would be payable to the eldest surviving widow. In the instant case also, when neither the respondent No. 4 nor the respondent No. 5 came forward to make parallel claim to the family pension and other retiral benefits, they are deemed to have waived their right to receive the family pension and other benefits. Moreover, when the respondent No. 4, who is the nominee for receiving such benefits, has re-married, it is certainly a case of re-marriage. Therefore, in terms of the decision of the Central Government reproduced earlier, the respondent No. 4 is no longer entitled to receive such benefits. As for the respondent No. 5, in view of the uncontroverted position that she has abandoned the petitioner Nos. 2 and 3, who are now under the legal guardianship of the petitioner No. 1, she is also deemed to have waived her right to receive such benefits as the next surviving widow of the deceased employee. It must be remembered that the petitioner No. 1 claims the payment of such benefits only on behalf of the minor-petitioners and not for herself, in which case it will be inadmissible. Consequently, I hold that the family pension and other retiral benefits of the deceased employee are payable to the petitioner Nos. 2 and 3 through the petitioner No. 1 on the basis of the Guardianship certificate and the Succession certificate obtained by her from the competent court of jurisdiction.

13. In the result, this writ petition succeeds. The respondent Nos. 1, 2 and 3 are accordingly directed to sanction payment of the family pension and other retiral benefits of the deceased employee, which are the subject matter of this writ petition, in favour of the petitioner Nos. 2 and 3 and release the same through the petitioner No. 1 on her fulfilling the formalities prescribed by the rules within a period of 45 days from the date of receipt of this judgment. Since the payment was apparently withheld by the respondents due to bona fide misconception of law, the parties are directed to bear their own costs.