

**(2015) 05 GAU CK 0054**

**Gauhati High Court**

**Case No:** Intest Case No. 8 of 2006

Zubeda Ahmed

APPELLANT

Vs

Fazlia Begum

RESPONDENT

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Date of Decision: May 7, 2015

Acts Referred:

- Succession Act, 1925 - Section 272, 370, 370(2), 371, 372

**Citation:** (2016) AIR (Guw) 5

**Hon'ble Judges:** Nishitendu Chaudhury, J

**Bench:** Single Bench

**Advocate:** D. Mozumdar and H. Sharma, for the Appellant

**Final Decision:** Allowed

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### **Judgement**

Nishitendu Chaudhury, J

This appeal under Section 384 of the Indian Succession Act, 1925 (hereinafter referred to as Act) is directed against the judgment and order dated 18.6.2005 passed by the learned District Judge, Nalbari in Title Suit No. 7 of 2005 granting succession certificate in favour of the petitioner and the respondent No. 1.

2. The second wife of late Abdul Kashem Ahmed filed application under Section 272 the Indian Succession Act, 1925 before the learned District Judge at Nalbari leading to registration of case being Misc. Succession Case No. 63 of 2003. In that application, applicant stated that her husband was a handloom officer in the Handloom & Textiles Department of Assam and retired from the same position on superannuation. He was earning Rs. 6500/- per month. After his retirement, he died on 2.2.2003 leaving behind the applicant and the respondent No. 1 Mustt. Jubeda Ahmed, two surviving wives and as many as ten sons and daughters. Names and address of all these legal heirs were mentioned at para-5 of the application and the same are quoted below:

"5. That, at the time of death the deceased left the following heirs including the petitioner.

1. Musstt. Jubeda Ahmed, wife (1st) W/O. L.A.Q. Ahmed, aged 65 yrs.

2. Mustt. Daiji Ahmed, D/O. L.A.Q. Ahmed, aged 45 yrs.

3. Mustt. Rezina Ahmed, D/O. L.A.Q. Ahmed, aged 40 yrs.

4. Md. Illias Ahmed, S/O. L.A.Q. Ahmed, aged 37 yrs.

5. Mustt. Razi Begum, D/O. L.A.Q. Ahmed, aged 34 yrs.

6. Md. Idrish Ali, S/O. L.A.Q. Ahmed, aged 32 yrs.

7. Mustt. Tanuza Begum, D/O. L.A.Q. Ahmed, aged 29 yrs(married).

All are residing at Japarigog (Krishnanagar) Guwahati, Kamrup (Assam)

8. Mustt. Fazila Begum, send W/O. Late Abdul Kashem Ahmed, aged 55 years.

9. Mustt. Babita Begum, D/O. Late Abdul Kashem Ahmed, aged 30 years.

10. Mustt. Zasmin Khatun, D/O. Late Abdul Kashem Ahmed, aged 27 years

11. Mustt. Runa Lyla Khatun, D/O. Late Abdul Kashem Ahmed, aged 24 years

12. Hanif Ahmed, S/O. Late Abdul Kashem Ahmed, aged 20 years

13. Nihar Ahmed, S/O. Late Abdul Kashem Ahmed, aged 17 years

All are residing at Vill.Bonpura, P.S. Mukalmua, Dist.Nalbari (Assam)"

3. The properties left behind by the Late Abdul Kashem Ahmed was described in the Schedule to the application and it contains only monthly pension of Rs. 6500/- per month. The schedule is quoted below:

"Schedule: Monthly pension @ Rs. 6500/- per annum from T.O. Dispur vide PPO No. DIS/48602."

4. The petitioner prayed that succession certificate be issued to her in respect of the said property. The opposite party Jubeda Ahmed and others appeared and submitted a written objection contesting the claim of the petitioner. Even the second marriage of Late Abdul Kashem Ahmed with Fazila Begum was also denied in para-5 of the said written objection. In para-7 of the written objection, it was claimed that Jubeda Ahmed was the only legally married wife of Late Abdul Kashem Ahmed and that opposite parties No. 3, 4, 5, 6 and 7 are the sons and daughters born out of the said wedlock. With these averments on facts the opposite parties prayed that the application be dismissed.

5. Upon perusal of the rival contention of the parties, the learned trial court framed as many as five issues:

(1) Whether the case is maintainable?

(2) Whether there is cause of action?

(3) Whether the petitioner is legally married wife of the deceased?

(4) Whether petitioner was the 2nd wife of late Abdul Kashem Ahmed?

(5) What other relief/reliefs the parties are entitled to?

6. Petitioner examined herself as PW-1, one Noor Ahmed as PW-2 and one Sumartya Van as PW-3. Opposite party No. 1 on the other hand examined herself as DW-1 and one Ramjan Ali as DW-2. All these witnesses were duly cross-examined by the respective counterpart.

7. Upon consideration of the materials available on record, the learned trial court decided issues No. 1 and 2 in the affirmative holding that the application was maintainable and that there was cause of action for the same. Coming to issues No. 3 and 4, the finding of fact arrived at by the trial court is that the petitioner Fazila Begum was the married wife of Late Abdul Kashem Ahmed and the petitioner was the second wife. Thereafter, the learned trial court decided issue No. 5 holding that both the petitioner and the opposite party No. 1 are entitled to succession certificate for half of the pensionary amount in respect of the deceased husband Late Abdul Kashem Ahmed. The first wife of Late Abdul Kashem Ahmed has preferred this appeal challenging the aforesaid judgment and order passed by the learned District Judge in aforesaid testamentary case which was eventually re-numbered as Testamentary Case No. 8 of 2006.

8. I have heard Mr. D. Mazumdar, learned senior counsel for the appellant assisted by Ms. H. Sarma. None appears for the respondent. In course of argument of the case, a question arose as to whether second wife of a retired government employee is entitled to any benefit under the relevant service rules. Under such circumstance, this court requested Mr. A. Goyal, learned Advocate who is present in the court to assist the court in this case and the learned counsel readily agreed to render his valuable service. Court records appreciation for his service for adjudicating the present case.

9. The application filed by the petitioner Fazila Begum who is the respondent herein was filed under Section 372 of the Indian Succession Act praying for succession certificate. Succession certificate is dealt under Part-X of the Act and Section 370 thereof indicates that it can be issued in regard to debts and securities. Security has been defined under Section 370(2) of the Act which does not include the benefit of family pension and the same is quoted below for ready reference:

"370. Restriction on grant of certificates under this Part.--

(2) For the purposes of this Part, "security" means--

- (a) any promissory note, debenture, stock or other security of the Central Government or of a State Government;
- (b) any bond, debenture, or annuity charged by Act of Parliament 1[of the United Kingdom] on the revenues of India;
- (c) any stock or debenture of, or share in, a company or other incorporated institution;
- (d) any debenture or other security for money issued by, or on behalf of, a local authority;
- (e) any other security which the 2[State Government] may, by notification in the Official Gazette, declare to be a security for the purposes of this Part."

10. Under Section 371 of the Act, the learned District Judge under whose jurisdiction the deceased ordinarily resided has been given jurisdiction to grant certificate and Section 372 of the Act provides the contents of the application. Section 372(f) shows that the applicant must mention the "debts and securities" in respect of which the certificate is applied for. Thus, on perusal of Section 370, 371, 372, it appears that a succession certificate is available only in regard to "debt and security" left behind by the deceased. Securities are also specifically defined in Section 370(2). Prima facie benefit of family pension has nowhere been mentioned in the Section as quoted above. In clause 370(2) there are as many as five Sub Clauses. Sub Clause-2(a) to 2(d) form a definite genus like promissory note, debentures, stock or other securities, bond etc. Applying the principle of ejusdem generis, Clause (e) must be of the same genus to which the provision of other Sub-clauses, namely, 2(a) to 2(d) belong. The benefit of family pension does not come in any way within the same genus as that of promissory note, bond, debentures, stock and other securities of Central government or State government etc. So by no stretch of imagination can it be held to be the "debt or security" within the meaning of Part-X of the Act. This being the position, it is to be held that family pension not being "debt or security" within the meaning of part-X of the Indian Succession Act, 1925 no succession certificate can be granted under Section 371 of the Act in respect of the benefit of family pension.

11. The benefit of family pension is a creature of the relevant service rules. Under the Rule 137 and 141 of the Assam Services (Pension) Rules, 1969, family of a deceased employee is entitled to family pension as per the provision of the rules. The definition of the family has also been defined under Rule-143 of the same rules. Whether a member of the family is entitled to the benefit of family pension or not is a matter within the province of relevant service rules and it cannot come within the sweep of succession certificate.

12. In the case in hand, the applicant under Section 372 of the Act was admittedly a second wife of a gazetted officer of the State of Assam. He was governed by a set of service rules including Assam Civil Services (Conduct) Rules 1965. Rule 24 of the said

rules provides that bigamy is prohibited. Even under Clause-24(2) a female government servant have been debarred from marrying a person who has a wife living at that time without first obtaining the permission of the government. This being the position, it is clear that a government servant is not entitled to second marriage on assertion of right under the relevant personal law. Rule 24 of the said rules has been enacted after taking into consideration that some personal law must be in force permitting an individual to enter into bigamy. Rule-24, 1965 is quoted below:

"24. Bigamous marriage-(1) 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.

(2). No female Government Servant shall marry any person who has a wife living without first obtaining the permission of the Government."

13. Mr. A. Goyal, learned Amicus Curiae brings to the notice of the court that a similar provision exist in Uttar Pradesh Government Service Conduct Rules 1956 under Rule 29(1) of the said rules. One Khurshid Ahmed Khan a member of the Uttar Pradesh Government servant contracted a second marriage while being in service under the Government. The U.P. government drew up a disciplinary proceeding against him and ultimately removed him from service considering bigamy as a misconduct. Challenging his removal, he approached the Hon"ble Supreme Court finally, inter-alia challenging the vires of Rule-29(1) referred to above and the Hon"ble Supreme court by judgment delivered on 9.2.2015 in Civil Application No. 1662 of 2015 arising out of SLP No. 5097 of 2012 held that the removal of the government servant on the charge of bigamy was not improper. Considering the previous law laid down by the Hon"ble Supreme Court in the case of [Smt. Sarla Mudgal, President, Kalyani and others Vs. Union of India and others](#), AIR 1995 SC 1531 : (1995) CriLJ 2926 : (1995) 2 DMC 351 : (1995) 4 JT 331 : (1995) 3 SCALE 286 : (1995) 3 SCC 635 : (1995) 1 SCR 250 Supp : (1995) 2 UJ 764 and in the case of [Javed and Others Vs. State of Haryana and Others](#), AIR 2003 SC 3057 : (2003) 3 CTC 620 : (2003) 6 JT 283 : (2003) 135 PLR 531 : (2003) 5 SCALE 602 : (2003) 8 SCC 369 : (2004) SCC(L&S) 561 : (2003) 1 SCR 947 Supp : (2003) AIRSCW 3892 : (2003) 5 Supreme 371 , the Hon"ble Supreme Court held that the personal law cannot come to any help to rescue a government servant from the rigour of the provision of the relevant service rules which prohibits bigamy. This being the position, there is no doubt that even if a personal law permits bigamy or polygamy in case of a member of that community but once the individual gets into service such licence under the personal law cannot override the provision of the relevant service rules. All the provisions of the service rules will be equally applicable to him and if there is any provision in the service rules which is contrary to service law, the same shall stand eclipsed and the employee shall be subject to the action under the provision of the service rule.

14. At this stage, Mr. D. Mozumdar has drawn attention of the court to a judgment rendered by this court in the case of [Musst. Fazila Begum @ Fazliya Begum Vs. State of Assam and Others](#), (2009) 3 GLR 201 : (2008) GLT 507 Supp wherein this court had already held that second wife of a Muslim is not entitled to family pension because of the provision of pension rules. Thus, on consideration of the totality of circumstances, it emerges that benefit of family pension is neither a security within the meaning of section 370 of the Indian Succession Act nor is a second wife during subsistence of the first marriage of the government employee is entitled to the benefit of family pension. These relevant aspects of the matters were not considered by learned District Judge while granting succession certificate jointly to the first wife and the second wife of Late Abdul Kashem Ahmed. The judgment is apparently contrary to the law holding the field and accordingly the same deserves to be set aside. The impugned judgment is accordingly set aside.

15. Appeal stands allowed. No order as to cost.

16. Send down the records.