

GAHC010062352023



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

Case No. : WP(C)/1694/2023

BIMALA MALO
W/O- LATE GOBINDA CHANDRA MALO,
RESIDENT OF LOKOPRIYA PATH, WARD NO. 9,
NABHETI, P.O.- MARIGAON, P.S.- MORIGAON, DISTRICT- MORIGAON,
ASSAM.

VERSUS

THE STATE OF ASSAM AND 10 ORS
REPRESENTED BY THE SECRETARY TO THE GOVERNMENT OF ASSAM,
EDUCATION DEPARTMENT (ELEMENTARY),
DISPUR, GUWAHATI- 06.

2:THE SECRETARY TO THE GOVT. OF ASSAM
FINANCE DEPARTMENT
DISPUR
GUWAHATI-06.

3:THE DIRECTOR OF PENSION
GOVERNMENT OF ASSAM
NAHARONI PATH
HOUSEFED

DISPUR
BASISTHAPUR
GUWAHATI-06
ASSAM.

4:THE DIRECTOR
ELEMENTARY EDUCATION
ASSAM
KAHILIPARA

GUWAHATI.

5:THE ACCOUNTANT GENERAL
ASSAM
BELTOLA
GUWAHATI-27.

6:THE COMMISSIONER
EMPLOYEES PROVIDENT FUND
ASSAM
BHANGAGARH
GUWAHATI-5.

7:THE DISTRICT ELEMENTARY EDUCATION OFFICER
MORIGAON
ASSAM.

8:THE CIRCLE OFFICER
BHURAGAON REVENUE CIRCLE
BHURAGAON
MORIGAON
ASSAM.

9:THE BLOCK ELEMENTARY EDUCATION OFFICER
LAHORIGHAT
MORIGAON
ASSAM.

10:THE TREASURY OFFICER
MORIGAON TREASURY OFFICER
DISTRICT- MORIGAON
ASSAM.

11:GITA MALO
S/O- LATE KATIK MALO

RESIDENT OF VILLAGE- LENGARI GAON
P.O.- CHANDUBA
P.S.- BULAGAON
DISTRICT- MORIGAON
ASSAM

Advocate for the Petitioner : MR. J I BORBHUIYA

Advocate for the Respondent : SC, ELEM. EDU

**BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA**

ORDER

Date : 22-02-2024

Heard Mr. J.I. Borbhuia, learned counsel for the petitioner. Also heard Nr. N.J. Khataniar, learned Standing Counsel, Elementary Education Department, for the respondent nos. 1, 4, 7 & 9 Mr. P. Saikia, learned Government Advocate, Assam, for the respondent nos.3 & 8, Mr. S.K. Chakraborty, learned counsel for the respondent no.6, Mr. A. Deka, learned counsel for the respondent no.11, Ms. J. Das, learned counsel for the respondent no.5 and Mr. A. Chaliha, learned Standing counsel, Finance Department for the respondent no.2 & 10.

2] This writ petition is filed by the petitioner claiming for grant of family pension payable to her in view of services rendered by her late husband Govinda Chandra Malo, who was working as an Assistant Teacher in Fatik Chandra Sarkar M.E. School, Sonduba under Lahorighat Block Elementary Education, Morigaon. The husband of the petitioner expired on 20.11.2021 during his service period, leaving behind the petitioner and their two daughters and one son. The petitioner has supported her claim by placing reliance on the death certificate dated 24.03.2022 of her husband as well as the *next of kin certificate* issued on 04.02.2022 (Annexure-4 of the writ petition) by the Office

of the Deputy Commissioner, Morigaon, showing the petitioner as the wife and her two daughters and one son as the next of kin of late Govinda Chandra Malo. According to the petitioner, in spite of applications made, the claims of the petitioner have not been granted.

3] Learned counsel for the petitioner submits that in spite of the representations being made before the respondent authorities, the pension proposal has not been forwarded and as a result, the family pension has not been released to the petitioner till date.

4] The Department of Elementary Education has filed the affidavit-in-opposition, stating that due to non submission of the *next of kin certificate*, the pension proposal could not be released. It is stated in the said affidavit that besides the petitioner, there is another person, who claims to be the second wife of the petitioner and who is also arrayed in the present proceedings as the respondent no.11. The respondent no.11 as the second wife is also claiming pension for her disabled son born out of the marriage between the respondent no.11 and late Gobindo Chandra Malo.

5] According to the Department, due to absence of proper *next of kin certificate* which is required to be forwarded by the Deputy Commissioner, Morigaon as well as the proposal for release of pension in terms of the

provisions of Rule 143 of the Assam Services Pension Rules, 1969, the pension of the petitioner has not been released.

6] The respondent no.11 has also filed an affidavit stating that she is the wife of late Govinda Chandra Malo and out of their marriage a son has been born who is certified to be a person having "*Congenital Dysarthria with Mentally Retarded*" and he has been assessed with 50% permanent disability by the competent authority who had issued the disability certificate. Learned counsel for the respondent no.11 fairly submits that there is no dispute that the respondent no.11 is the second wife of said late Govinda Chandra Malo. It is submitted that the same has also been mentioned in the application submitted before the Deputy Commissioner, Morigaon. It is submitted by the learned counsel for the respondent no.11 that she is not claiming any benefit for herself, but for her disabled son who is entitled in law to his share of the family pension.

7] Mr. J.I. Borbhuuya, learned counsel for the petitioner, disputes the contention that the respondent no.11 who claims to be the second wife of late Govinda Chandra Malo or that and she has a son who is stated to be intellectually disabled. Learned counsel for the petitioner submits that no birth certificate of her son has been placed in support of her contention and therefore, the person who is projected to be the disabled son of the respondent

no.11 cannot be accepted.

8] Mr. P. Saikia, learned Government Advocate submits that the *next of kin certificate* dated 04.02.2020 was issued by the Office of the Deputy Commissioner, Morigaon on the basis of the report filed by the Circle Officer, Morigaon showing the petitioner as the wife along with her two daughters and one son. Insofar as the communication dated 03.09.2022 is concerned, which is available at Annexure-6 of the writ petition, the report of the Circle Officer of Bhuragaon Revenue Circle reflects that besides the petitioner, the respondent no.11 found to be the second wife of late Govinda Chandra Malo and the respondent no.11's son Ganesh Malo is also included in the same communication. The Circle Officer of Bhuragaon Revenue Circle, however, has not issued any next of kin certificate pursuant to the communication dated 03.09.2020. No affidavit has also been filed by on behalf of the Deputy Commissioner, Morigaon or the Circle Officer of Bhuragaon Revenue Circle reflecting the factual position as per records available with the Department.

9] Learned counsel for the parties have been heard and pleadings on the records have been carefully perused.

10] Upon hearing the learned counsel for the parties and upon careful perusal of the pleadings available on record it is seen that the issue in the present writ

petition is for grant of family pension of the petitioner as per the legal heir certificate dated 04.02.2020 which is enclosed at Annexure-4 to the writ petition. However, the respondent no.11, who claims to be the second wife of the petitioner's husband, has also claimed for the share of pension in favour of her son Ganesh Malo, who is stated to be a disabled person. The stand of the Department before this Court reflects that the pension proposal could not be prepared and proceeded with in absence of a valid "*Next of kin certificate*" which is to be furnished by the petitioner or the respondent no.11 as no such "*Next of kin certificate*" which includes the names of both the wives, namely, the petitioner and respondent no.11 has been issued by the Office of the Deputy Commissioner, Morigaon. The law regarding the claim of family pension by the second wife is well settled by judgment of a Full Bench of this Court rendered on 22.12.2022 in *Mustt Junufa Bibi vs Mustt Padma Begum @ Padma Bibi & 4 Ors.* reported in (2023) 5 GLR 824 (Writ Appeal No.160/2018).

11] In terms of the said judgment, the eldest of the surviving widow will receive the pensionary benefit only as a trustee on behalf of other trustees. liberty was granted to the respondent Department to consider *inter se* claims of the writ petitioner. Relevant paragraphs of the said judgment are extracted herein below:

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.

12] Further the amendments brought into Rule 143 of the Assam Services (Pension) Rules, 1969 by the notification dated 09.08.2018 have been brought in to determine the grant of pension in respect of the claimants of family pension. By notification dated 03.08.2017 Rule 143 of the Assam Services (Pension) Rules, 1969 was amended to include the claim of a pension for a disabled son or a daughter if the conditions mentioned in the said amendment are fulfilled. The relevant portion of the amended Rules is extracted below:

“.....

Amendment of Rule 143(C) 2.: In the principal rules, for the existing provision in Rule 143 (C) in Sub-rule (3), for the existing Clause (a), the following shall be substituted, namely:

- (a) The disability of son/daughter which manifests itself before or after retirement/death of the Govt. servant whichever the case may be, shall be taken into account for the purpose of grant of lifetime

family pension under this Rule.

For the cases where disability of son/daughter is shown to be manifest after retirement/death of a Govt. servant, the following has to be fulfilled for claiming lifetime family pension –

- (I) All such proposals would have to be routed by the Head of Office through the Deputy Commissioners of the concerned District with specific recommendation;
- (II) Such cases would then have to be recommended by the State Medical Board;
- (III) Certificate of disability has to be issued by the Govt. approved Medical Boards of respective Districts; and
- (IV) A certificate shall be furnished by the disabled son or daughter to the Treasury or Bank as the case may be

once in a year that she or he has not started earning her or his livelihood."

13] Under such circumstances, this Court is of the view that the claim of family pension so far as the petitioner is concerned, cannot be disputed and ought to have been proceeded with by the respondent authority pursuant to the expiry of the husband of the petitioner as far back as on 21.11.2021. From bare perusal of the *next of kin certificate* enclosed to the writ petition and furnished by the writ petitioner, it is seen that the petitioner's sons and daughters all are majors. There is no claim made on behalf of the daughters that they are unmarried or dependent daughters. Under such circumstances, the authorities ought to have proceeded with the proposal for family pension in favor of the writ petitioner.

14] The question with regard to the entitlement of the second wife, namely, respondent no.11, as discussed above, has been already settled by the Apex Court. The Apex Court in *Rameshwari Devi vs. State of Bihar reported in (2000) 2 SCC 431* has laid down the law that children born out of second marriage are also entitled to pension subject to fulfillment of the prescription under the Rules. In view of the law laid down by the Apex Court in *Rameshwari Devi (supra)* and as extracted above, children born out of the wedlock of second wife cannot be

denied their share of pension. As such, the relevant paragraph of the said judgment is extracted below:-

14. *It cannot be disputed that the marriage between Narain Lal and Yogmaya Devi was in contravention of clause (i) of Section 5 of the Hindu Marriage Act and was a void marriage. Under Section 16 of this Act, children of void marriage are legitimate. Under the Hindu Succession Act, 1956, property of a male Hindu dying intestate devolve firstly on heirs in clause (1) which include widow and son. Among the widow and son, they all get shares (see Sections 8, 10 and the Schedule to the Hindu Succession Act, 1956). Yogmaya Devi cannot be described a widow of Narain Lal, her marriage with Narain Lal being void. Sons of the marriage between Narain Lal and Yogmaya Devi being the legitimate sons of Narain Lal would be entitled to the property of Narain Lal in equal shares along with that of Rameshwari Devi and the son born from the marriage of Rameshwari Devi with Narain Lal. That is, however, legal position when Hindu male dies intestate. Here, however, we are concerned with the family pension and death-cum-retirement Gratuity payments which is governed by the relevant rules. It is not disputed before us that if the legal position as aforesaid is correct, there is no error with the directions issued by the learned single Judge in the judgment which is upheld by the Division Bench in LPA by the impugned judgment.*

15] If indeed the respondent no.11 has a son born out of the marriage with late Govinda Chandra Malo as claimed, and if indeed the son does suffer from 50% permanent disability, then his share of pension also cannot be denied. The delay in settlement of pension, as is evident from a perusal of the pleadings on record, has occurred on account of the inaction by the Office of the Circle

Officer, Bhuragaon Revenue Circle, Bhuragaon, Morigaon, in furnishing the correct legal heir certificate enabling the Education Department to proceed with the release of pension. In spite of the opportunities being granted, no specific instructions has been placed before the Court. The learned Government Advocate has submitted before the Court that the Circle Officer, Bhuragaon Revenue Circle is on leave and necessary orders are likely to be passed in this matter shortly. Such submissions on behalf of the Circle Officer, Bhuragaon Revenue Circle are not appreciated by this Court in view of the fact that because of the inaction of the Circle Officer, Bhuragaon Revenue Circle, Bhuragaon, Morigaon in issuing the next of kin certificate, that completion of the formalities as regards the proposal of the family pension has been delayed for no fault on the part of the petitioner in this regard.

16] Under such circumstances without causing any further delay, this Court under the powers of Article 226 of the Constitution of India issues a Mandamus to the respondent Education Department, more particularly, the Secretary to the Government of Assam, Elementary Education Department i.e. the respondent no.1 to forthwith call for all necessary papers from any subordinate offices as may be necessary and process the claims of family pension of the petitioner without waiting for the "*Next of kin certificate*" in view of the categorical averments and submissions made by the learned counsel for the parties, more

particularly, the counsel for respondent no.11 that she is indeed the second wife of late Govinda Chandra Malo and that she has staked the claim for a share of pension not for herself but for her disabled son. The respondent authority will forthwith proceed with the proposal for claim of pension and make necessary enquiries from the competent Department to verify the claims of the respondent no.11 as regards her submission that her son was born out of her marriage with late Govinda Chandra malo and respondent no.11 and that he is a disabled child suffering from "*Congenital Dysarthria with Mentally Retarded*" and has been assessed with 50% permanent disability. The respondents will forthwith proceed to settle the claims of family pension and release the same in favor of the petitioner and any other claimant, if permissible, in terms of the provisions of the Rule 143 of the Assam Services (Pension) Rules, 1969 read with the judgment rendered by the Apex Court in *Rameshwari Devi (supra)* as well as the Full Bench judgment of this Court rendered on 22.12.2022 in *Mustt Junufa Bibi (supra)*. The entire exercise shall be completed within a period of 60 (sixty) days from the date of receipt of a certified copy of this order to be placed before the authorities concerned.

17] Writ petition stands disposed of in terms of the above.

JUDGE

Comparing Assistant