

GAHC010265522019



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

Case No. : WP(C)/8109/2019

HAFSA BEGAM
W/O- LATE AJMOL HISSAIN BARBHUIYA, VILL- BANDARKUNA PART(II),
P.S- PATHARKANDI, DIST- KARIMGANJ, ASSAM

VERSUS

THE STATE OF ASSAM AND 9 ORS
TO BE REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT OF
ASSAM, PENSION AND PUBLIC GRIEVANCES DEPTT, DISPUR, GUWAHATI-
781006

2:THE COMMISSIONER AND SECRETARY
TO THE GOVT OF ASSAM
FINANCE DEPTT
DISPUR
GUWAHATI- 781006

3:THE COMMISISONER AND SECRETARY
TO THE GOVT OF ASSAM
HOME DEPTT
DISPUR
GUWAHATI- 781006

4:THE DIRECTOR OF PENSION
HOUSEFED COMPLEX
DISPUR
GUWAHATI- 781006

5:THE ACCOUNTANT GENERAL (A AND E)
ASSAM
MAIDAMGAON
BELTOLA

GUWAHATI- 29

6:THE DGP
ULUBARI
GUWAHATI- 07

7:THE COMMANDANT 4TH APBN
KAHILIPARA
GUWAHATI- 19

8:THE COMMANDANT
15TH AP (IR) BN
ERALIGOOOL
P.O- ERALIGOOOL
DIST- KARIMGANJ
PIN- 788723

9:THE SUPERINTENDENT OF POLICE
HAILAKANDI
P.O
P.S AND DIST- HAILAKANDI
PIN- 788151

10:THE SUPERINTENDENT OF POLICE
KARIMGANJ
P.O
P.S AND DIST- KARIMGANJ
PIN- 78871

Advocate for the Petitioner : MR F A LASKAR

Advocate for the Respondent : GA, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA**

JUDGMENT & ORDER (ORAL)

Date : 04-01-2023

Heard Mr. F A Laskar, learned counsel for the petitioner. Also heard Mr. D Nath, learned Senior Government Advocate for the respondents no. 1, 3, 4, 6, 7, 8, 9 and 10 being the authorities under the Pension and Public Grievances Department of the Government of

Assam, Mr. A Chaliha, learned counsel for the respondent no. 2 being the Finance Department of the Government of Assam and Mr. A Hassan, learned counsel for the respondent no. 5 being the Accountant General (A & E), Assam.

2. The petitioner claims to be the wife of Ajmal Hussain Barbhuiya having been married under the Islamic Rites and Rituals on 25.04.2004. Ajmal Hussain Barbhuiya was a constable in the 15th Assam Police Battalion (IR), Eraligool, Karimganj. According to the petitioner, her husband was deputed to be present at the Head Quarter of 4th Assam Police Battalion at Kahilipara by an order dated 17.09.2007 along with three other constables. Although the three other constables reported at Kahilipara, the husband of the petitioner did not join in the 4th Assam Police Battalion Head Quarter at Kahilipara and to that extent, there is a report dated 20.09.2007 by the Commandant 4th Assam Police Battalion, Kahilipara.

3. According to the petitioner after her husband went missing in the year 2007 as indicated above, she had neither heard about him nor had seen him.

4. The state respondents have produced certain records which indicates that in the year 2010, the husband of the petitioner was acquitted in a criminal case as per the judgment dated 28.12.2010 in G.R. Case No. 782/2008 passed by the Additional Chief Judicial Magistrate, Lakhimpur and accordingly, a stand is taken that at least upto the year 2010, the husband of the petitioner was alive. Subsequently, by another order dated 09.10.2012 of the Commandant 15th Assam Police Battalion (IR), Eraligool, the husband of the petitioner was removed from service for remaining unauthorizedly absent in duty and the said order was passed pursuant to a disciplinary proceeding initiated in the year 2008.

5. In the aforesaid circumstance, the petitioner institutes this writ petition claiming for family pension.

6. One of the stands taken by the state respondents is that as the husband of the petitioner was removed from service, therefore, he was not entitled to pension and as a consequence thereof, the petitioner being his wife would also be not entitled to family pension. If the order of removal is to be legitimately accepted, the aforesaid contention of the respondents would also have to be accepted that the petitioner would not be entitled to

family pension.

7. In order to ascertain as to whether the order of removal would have to be legitimately accepted, we required the respondents to produce the materials before the Court as to whether the order of removal was either served on the husband of the petitioner or to that effect upon the petitioner herself.

8. The records produced before the Court reveal that the order of removal was neither served on the husband of the petitioner nor on the petitioner. The law in this respect has been settled by the Supreme Court in paragraph 16 of the judgment rendered in *State of W.B. v. M.R. Mondal and another reported in (2001) 8 SCC 443*, wherein it had been held that if an order has been passed and kept on file without being served on the person concerned, the same would be non est in law as far as the person to whom it is to be served is concerned.

9. As the order of removal had not been served either on the husband of the petitioner or on the petitioner by following the principle laid down in paragraph 16 of *State of W.B. (supra)*, we have to accept that the order of removal would be inapplicable in respect of the petitioner meaning thereby that under the law, from the point of view of the petitioner, it has to be understood that the husband of the petitioner was still in service. But at the same time, we also take note of the factual aspect that from the year 2007, the petitioner being the wife of the missing employee had neither heard about him nor had seen him.

10. In the aforesaid factual circumstance, a question for determination would arise as to whether the provisions of Section 108 of the Evidence Act, 1872, would be applicable in the present case i.e. whether under the law, it has to be understood that the husband of the petitioner is dead or alive.

11. Section 108 of the Evidence Act, 1872 is extracted as below:

“108. Burden of proving that person is alive who has not been heard of for seven years.—¹[Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is²[shifted to] the person who affirms it.”

12. A reading of the provisions of Section 108 of the Evidence Act, 1872 makes it discernable that when the question is whether a man is alive or dead, and it is proved that he had not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. In other words, as a corollary, it has to be understood that if the authority who affirms that the person is alive is unable to discharge the burden, it has to be accepted under the law that the person concerned is understood to have been dead.

13. In the instant case, the petitioner is the wife of the missing employee Ajmal Hussain Barbhuiya and being the wife, it has to be understood that it is she who would have naturally heard of her husband had he been alive. The petitioner has made a categorical assertion that she had not seen or heard about her husband from the year 2007. The respondents on the other hand have produced the materials that there was an order of acquittal by the Criminal Court in the year 2010 meaning thereby that he could have been alive around the year 2010 and further he was removed from service in the year 2012, which again does not lead to any conclusion as to whether he was alive or not.

14. Beyond the aforesaid, no further material is available.

15. Accordingly, we have to understand that at least for a period of seven years as on today, the petitioner who would have naturally heard about her husband had not heard about him since then. Accordingly, we see no reason as to why the provisions of Section 108 of the Evidence Act, 1872 would not be applicable in the present case. However, as Section 108 shifts the burden to prove that the person concerned is alive upon such authority who claims the person concerned to have been alive, we require the respondents in the Police and Home Department of the Government of Assam to rely upon any material that they have which may indicate that the husband of the petitioner had been alive during the period of the past seven years as of today. If such materials are available, the same may be put across to the petitioner to show that her husband is alive and if no such material is available, as the burden is shifted to the respondent authorities under the law, it has to be understood that the husband of the petitioner is not alive for the last seven years and as such the provisions of Section 108 of the Evidence Act, 1872, would be applicable.

16. Accordingly, we require the petitioner to approach the Commandant of 15th Assam Police (IR) Battalion at Eraligool along with all such materials which may indicate that she is the wife of the employee Ajmal Hussain Barbhuiya. In the event the petitioner discharges the burden to show with materials that she is the wife of the employee Ajmal Hussain Barbhuiya, the respondents may produce their materials, if any, to show that he is alive for the period of seven years from today. In the event the materials are available the same be made available to the petitioner and if no such material is available, the respondents may invoke the provisions of Section 108 of the Evidence Act, 1872 and understand that the husband of the petitioner is not alive any more. If the husband of the petitioner is not alive any more, in the factual background of the present case, as indicated above, it has to be understood that he is an employee of the Police Department who is dead and otherwise was in service.

17. If the husband of the petitioner was otherwise in service and he is dead, the petitioner would be entitled to the provisions of Section 140 of the Assam Services Pension Rules, 1969. Accordingly, the respondents may pass appropriate reasoned order for the family pension benefits of the petitioner under Rule 140. We are clarifying that the requirement is to invoke the Rule 140 of the Assam Services Pension Rules, 1969 and not Rule 143 (A) in the facts and circumstance of the present case.

18. It is provided that in the event the petitioner is paid any family pension and thereupon, the husband of the petitioner reappears it will be open for the respondent authorities to recall such family pension that may be allowed.

Writ petition stands disposed of in the above terms.

JUDGE

Comparing Assistant