THE HIGH COURT OF TRIPURA
AGARTALA

WP(C) NO.10 OF 2015

1. Smti. Piali Sutradhar,
D/O Sri Ratan Sutradhar,
R/O Hospital Road,
Paradise Chowmuhuni, Agartala,
West Tripura, Pin-799001.

2. Sri Anik Malakar,
S/O Late Pradip Malakar, Ex-Helper,
R/O Hospital Road,
Paradise Chowmuhani, Agartala,
District-West Tripura, Pin-799001,

(The petitioner No.2 is a minor and
as such represented by petitioner No.1,
who is his mother and natural guardian).

.... *Petitioners*

- Vs –

1. The State of Tripura,
Represented by the Secretary,
PWD Department,
Government of Tripura,
New Secretariat Complex,
P.O. Secretariat, P.S. East Agartala,
District-West Tripura, Pin-799010.

2. The Chief Engineer(R&B),
PWD Department,
Government of Tripura,
New Secretariat Complex,
P.O. Secretariat, P.S. East Agartala,
District-West Tripura, Pin-799010.

3. The Executive Engineer(PWD),
Teliamura Division,
P.O. Teliamura, P.S. Teliamura,
District-Khowai, Tripura, Pin-799201.

4. The Superintendent Engineer,
2nd Circle, PWD(R&B),
Netaji Chowmuhuni,
P.O. Agartala, P.S. West Agartala,
District-West Tripura, Pin-799010.

5. Smt. Arpita Basak(Malakar),
W/O Late Pradip Malakar,
C/O Sri Tapan Kr. Basak,
Village-Ananda Para,
P.O. Sabroom, P.S. Sabroom,
District-South Tripura, Pin-799145.

.... *Respondents*

BEFORE
HON'BLE THE CHIEF JUSTICE MR. DEEPAK GUPTA
HON'BLE MR. JUSTICE S.C. DAS

For the petitioners : Mr. D.C. Saha, Advocate

For respondent Nos.1 to 4 : Mr. S. Chakraborty, Addl. G.A.

For respondent No.5 : Mr. H.K. Bhowmik, Advocate

Date of hearing : **01.07.2015**

Date of delivery of Judgment & order : **21.07.2015**

Whether Fit for Reporting :

Yes	No
√	

JUDGMENT & ORDER

(S.C. Das, J)

Pradip Malakar, since deceased, married Piali Sutradhar(petitioner No.1) in January, 1998 and thereafter they lived and cohabited as husband and wife and out of their cohabitation Anik Malakar(petitioner No.2) was born on 04.10.2000. Marriage between Pradip Malakar and Piali Sutradhar was dissolved by a decree of divorce passed by the Judge, Family Court, Agartala on 29.10.2009 in TS(Divorce) 146 of 2008. Thereafter, Pradip Malakar married Arpita Basak(Malakar), the respondent No.5 and out of their cohabitation one son, namely Hridam Malakar was born.

Pradip Malakar was working as a Helper in the Public Works Department of the Government of Tripura under the official respondents(respondent Nos.1 to 4) and he died *in-harness* on 18.12.2013.

2. After the death of Pradip Malakar, petitioner No.1 being the mother and natural guardian of minor petitioner No.2 made application to respondent No.4 on 30.12.2013 claiming share in the family pension and other service benefits of deceased Pradip Malakar. Respondent No.3 by writing a letter dated 10.12.2014 (*Annexure-6* to the writ petition) contended that as per advice of the Law Department of the Government of Tripura the payment of death-cum-gratuity, leave salary, group insurance, GPF, etc. of deceased Pradip Malakar has been finalized and accordingly the decision of the Government was conveyed to the competent authority.

3. By filing this writ petition the petitioners claimed that petitioner No.2 being the son of Pradip Malakar through first wife is entitled to 50 percent of the amount payable towards death-cum-gratuity, leave salary, group insurance, GPF, etc. of deceased Pradip Malakar. The petitioners also claimed that petitioner No.2 is also entitled to 50 percent of the family pension.

4. Respondent No.5 by filing counter affidavit contended that Pradip Malakar at the time of his death left behind petitioner

No.2 as his minor son through first wife, Piali Sutradhar and respondent No.5 and their son Hridam Malakar. There are three legal heirs of deceased Pradip Malakar entitled to the estate of said Pradip Malakar on his death. It is the case of the respondent No.5 that Pradip Malakar is entitled to one share in leave-cum-retirement gratuity, leave salary, group insurance, GPF, etc. and in the family pension also. It is firmly contended by respondent No.5 that petitioner No.2 is not entitled to the 50 percent share of family pension and other service benefits.

5. The State respondents contended that pension is to be paid to the wife only and so respondent No.5 is only entitled to draw the pension and pension cannot be paid to petitioner No.2.

6. Learned counsel, Mr. Saha appearing for the petitioners submitted that petitioner No.1 is the divorced wife of Pradip Malakar and petitioner No.2 is the son of deceased Pradip Malakar and petitioner No.1. So, petitioner No.2 is entitled to 50 percent of the pension and other pensionary benefits due to death of Pradip Malakar and the other 50 percent respondent No.5 and her son Hridam Malakar are entitled. The official respondents refused to pay 50 percent of the pension to the petitioner No.2 and therefore direction may be given to the official respondents to make payment of 50 percent of the pension to petitioner No.2. He has also submitted that petitioner No.2 is also entitled to the 50 percent share of other service benefits.

7. On the other hand, learned counsel, Mr. Bhowmik appearing for respondent No.5 submitted that Pradip Malakar at the time of his death left behind respondent No.5 as his legitimate wife and one son, Hridam Malakar. Pradip Malakar also left petitioner No.2 as his only son through first wife who has been divorced and so the entire estate of Pradip Malakar including pension shall be divided in three parts and one part may go to petitioner No.2 and the other two part to respondent No.5 and her son Hridam Malakar.

8. Learned Addl. G.A., Mr. Chakraborty appearing on behalf of the State respondents submitted that family pension is to be paid to the wife only and that petitioner No.2 cannot claim family pension.

9. It is an admitted position that Pradip Malakar died *in-harness* on 18.12.2013. He left behind respondent No.5, Arpita Basak(Malakar) as his wife, Anik Malakar(petitioner No.2) as his son through first wife and Hridam Malakar as his son through second wife. Petitioners produced a copy of survivorship certificate dated 04.03.2014 issued by Sub-Divisional Magistrate, Teliamura which is annexed as *Annexure-4* to the writ petition. It is also an admitted position that petitioner No.1 is the first wife of Pradip Malakar and the marriage has been dissolved by a decree of divorce in TS(Divorce) 146 of 2008 on 29.10.2009 and the decree passed by the Family Court, Agartala.

10. Let us first decide whether petitioner No.2 is entitled to 50 percent of death-cum-retirement gratuity, leave salary, group insurance, GPF, etc. left by Pradip Malakar.

Sub-rule (6) of *rule 50* of *CCS(Pensions) Rules* prescribes provision as to who are entitled to such benefits in the event of death of a public servant. The word, *'family'* has been defined for the purpose of *Rule 51, 52 and 53. Sub-section 6* of *rule 50* reads thus:

> *"(6) For the purposes of this rule and Rules, 51, 52 and 53, 'family', in relation to a Government servant, means—*
>
> *(i) wife or wives including judicially separated wife or wives in the case of a male Government servant,*
>
> *(ii) husband, including judicially separated husband in the case of a female Government servant,*
>
> *(iii) sons including stepsons and adopted sons,*
>
> *(iv) unmarried daughters including stepdaughters and adopted daughters,*
>
> *(v) widowed daughters including stepdaughters and adopted daughters,*
>
> *(vi) father,*
>
> *(vii) mother,*
>
> *Including adoptive parents in the case of individuals whose personal law permits adoption.*
>
> *(viii) brothers below the age of eighteen years including stepbrothers,*
>
> *(ix) unmarried sisters and widowed sisters including stepsisters,*

(x) married daughters, and

(xi) children of a pre-deceased son."

In view of the above provision, in the admitted position of the case, petitioner No.2, respondent No.5 and Hridam Malakar, the son of Pradip Malakar through respondent No.5, all three are equally entitled to those benefits *i.e.* death-cum-retirement gratuity, leave salary, group insurance, GPF, etc. Respondent No.5 in their counter affidavit submitted that 2/3rd of the amount they have received and other 1/3rd has been sanctioned in favour of petitioner No.2 and we find no infirmity in such settlement of 1/3rd in favour of petitioner No.2.

11. In course of argument learned counsel, Mr. Saha referring to *clause (i)* of *sub-rule (6)* of *rule 50* has submitted that petitioner No.1 being the divorced wife may be treated as judiciary separated wife and she is also entitled to one share to the death-cum-retirement gratuity, leave salary, group insurance, GPF, etc.

12. It is an admitted position that the marriage between petitioner No.1 and Pardip Malakar was dissolved by a decree of divorce on 29.10.2009. So, the petitioner No.1 has no status of the wife. The words, "*judicial separation*" and the word, "*divorce*" are two separate connotations. '*Judicial separation'* is prescribed in Section 10 of the Hindu Marriage Act and '*divorce'* is prescribed in Section 13 of the Hindu Marriage Act. In a case of judicial separation marital bond remains alive. Only living of the spouse is separated by a decree of the Court, whereas in case of divorce the matrimonial relation ceased to operate. There is end of the bond and so a divorced wife cannot claim to be a wife '*judicially separated*'. A '*judicially separated*' wife means a decree passed by a competent Court for '*judicial separation*' under Section 10 of the Act. In the present case, since petitioner No.1 is a divorced wife she cannot claim the status of a '*judicially separated*' wife and therefore is not entitled to a share to the estate left by deceased, Pradip Malakar.

Further, in the writ petition, petitioner No.1 did not claim any such relief at all and hence this argument is beyond pleadings and has no merit at all.

13. Let us now decide whether petitioner No.2 is entitled to 50 percent share of the pension for the death of deceased Pradip Malakar. *Rule 54* of *CCS(Pensions) Rules* prescribes the provision in respect of payment of the family pension. *Sub-rule (7)* of *rule 54* prescribes thus:-

> *"7.(a)(i) Where the family pension is payable to more widows than one, the family pension shall be paid to the widows in equal shares.*
>
> *(ii) On the death of a widow, her share of the family pension shall become payable to her eligible child:*
>
> *[Provided that if the widow is not survived by any child, her share of the family pension shall not lapse but*

shall be payable to the other widows in equal shares, or if there is only one such other widow, in full, to her.]

(b) Where the deceased Government servant or pensioner is survived by a widow but has left behind eligible child or children from another wife who is not alive, the eligible child or children shall be entitled to the share of family pension which the mother would have received if she had been alive at the time of the death of the Government servant or pensioner.

[Provided that on the share or shares of family pension payable to such a child or children or to a widow or widows ceasing to be payable, such share or shares shall not lapse, but shall be payable to the other widow or widows and/or to the other child or children otherwise eligible, in equal shares, or if there is only one widow or child, in full, to such widow or child.]

(c) Where the deceased Government servant or pensioner is survived by a widow but has left behind eligible child or children from a divorced wife or wives, the eligible child or children shall be entitled to the share of family pension which the mother would have received at the time of the death of the Government servant or pensioner had she not been so divorced.

[Provided that on the share or shares of family pension payable to such a child or children or to a widow or widows ceasing to be payable, such share or shares, shall not lapse, but shall be payable to the other widow or widows and/or to the other child or children otherwise eligible, in equal shares, or if there is only one widow or child, in full, to such widow or child.]

[(d) where the family pension is payable to twin children, it shall be paid to such children in equal shares :

Provided that when one such child ceases to be eligible, his/her share shall revert to the other child and when both of them cease to be eligible the family pension shall be payable to the next eligible single child/twin children]."

14. It is an admitted position that petitioner No.2 is the legitimate child of deceased Pradip Malakar through divorced wife Piali Sutradhar(petitioner No.1). *Clause (c)* of *sub-rule (7)* of *rule 54* makes it absolutely clear that eligible child or children of the divorced wife is entitled to the share of family pension which the mother would have received at the time of death of the Government servant or pensioner had she not been so divorced. *Clause (a), sub-clause (i)* of *sub-rule (7)* of *rule 54* clearly prescribes that where the family pension is payable to more widows than one the family pension shall be paid to the widows in equal shares. *Sub-clause (ii)* prescribes that on the death of the widow her share of family pension shall become payable to her eligible child. On a careful reading of *sub-rule (7)* as a whole we are of the clear opinion that the eligible child/children of a divorced wife is entitled to 50 percent of the share of family pension.

15. The issue regarding payment of family pension to one member of the family has been decided in the case of ***Nanda Sinha & Ors. v. Union of India, (2012) 6 GLR 49*** by the Division Bench of the then Gauhati High Court. The fact of that reported case was that one Gobinda Das Sinha died leaving behind his first wife as well as the second wife and children through second wife. The dispute arose regarding payment of pension and other benefits to the first wife and children through second wife and while deciding that case the provisions of *Section 16* of the *Hindu Marriage Act* and *Rule 54 of CCS(Pensions) Rules* have been carefully examined and observations were made. Though there is no implication of *Section 16* of the *Hindu Marriage Act* in the present case but observation made in respect of *Rule 54(8)(i)* has been considered in that judgment in para 13 and 14 which reads as follows:

> *"13.Regarding entitlement of the family pension by respondent Nos.2, 3 and 4, on the death of Gobinda Das Sinha, has not been disputed by learned A.S.G. and even learned counsel, Mr. Sinha, in course of argument. Their only contention is that the P.P.O. issued by respondent No.2 (Annexure-8 to the writ petition) is according to law and, so, there should be no interference. Admittedly, provision prescribed in Section 54 of the CCS (Pension) Rules, 1972, is a procedural law, prescribing thereby the procedure to be followed while making payment of pension to the family members of a deceased employee. A 'subordinate law' has all force of law but cannot override the substantive law. While a 'substantive law' prescribes the right of a person to a property, such right cannot be taken away or made nugatory by applying any 'subordinate law'. The procedural law is, no doubt, directory in nature, whereas, the substantive law as reproduced above, is mandatory. No doubt, Rule 54(8)(i) has prescribed that the family pension shall be paid to one member of the family but it is to be kept in mind that the said law was*

made before amendment of Section 16 of the Hindu Marriage Act in the year 1976. The procedural law ought to be amended keeping consistence with the substantive law legislated at a later stage. Though there is no change in the procedural law, in our considered opinion, it should be harmoniously construed so that the benefit of the statutory provisions is made available to all concerned legally entitled to such benefit.

14. Provision prescribed under Section 16 of the Hindu Marriage Act is a mandatory provision, admittedly applicable to the deceased employee and his legal heirs, being Hindus. Omission to follow the same will render the action illegal and void. Whereas, the provisions prescribed in Rule 54 of the Pension Rules are directory provisions, observance of which is not necessary to validity of action. Rule has prescribed payment to one member of the family for convenience. It has not prohibited the respondent in making payment order to all legal heirs/survivors left by a deceased employee."

16. In a subsequent Division Bench judgment of this Court reported in ***(2014) 2 TLR 627, Sukesh Debnath(Minor) & Ors. v. State of Tripura and Ors.***, this Court applied the same principle and followed ***Nanda Sinha***(supra). In the present case, petitioner No.2 being the legitimate son through divorced wife is entitled to 50 percent of the family pension.

17. In view of the discussions made above, we direct that petitioner No.2, Anik Malakar is entitled to 1/3rd of the death-cum-retirement gratuity, leave salary, group insurance, GPF, etc. due to death of his father Pradip Malakar. We further direct that petitioner

No.2, Anik Malakar is also entitled to 50 percent of the family pension and the rest 50 percent respondent No.5 and her son, Hridam Malakar shall be entitled. It is made clear that petitioner No.2, Anik Malakar shall be entitled to 50% of the pension till he attains the age of 25(twenty five years) and thereafter the widow, *i.e. the respondent No.5* shall be entitled to the full pension. The official respondents are directed to issue P.P.O. accordingly.

18. The writ petition is, accordingly, partly allowed and disposed of.

Parties to bear their own costs.

JUDGE **CHIEF JUSTICE**