

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 18.04.2018	Delivered on 05.06.2018
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CORAM:

THE HONOURABLE MR.JUSTICE K.K.SASIDHARAN
AND

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

W.A.No.977 of 2017
and CMP No.13600 of 2017

R.Rajathi ... Appellant/Petitioner

versus

1. The Superintendent Engineer
TANGEDCO Ltd.,
Nagapattinam Circle,
Nagapattinam District.

2. The Audit Officer
TANGEDCO - Audit Wing,
144, Annal Salai, Chennai 600 002.

... Respondents/Respondents

Appeal filed against the order passed by this Court dated
12.07.2017 passed in W.P.No.17648 of 2017.

W.P.No.17648 of 2017:

Petition filed under Article 226 of the constitution of
India to issue a Writ of Certiorarified Mandamus calling for
the records pertaining to order in Ka.No.728 / Ni.Pi. 3 /Vu.1 /
Ko.O.Voo.Koo /16 dated 02.07.2016 of the first respondent and
quash the same consequently direct the respondents to consider
the grant of family pension to the petitioner with all
retrospective arrears.

For appellants : Mr.R.Sreedharan

For Respondents : Mr.P.R.Dhilipkumar for R1
Mr.V.Vijaya Shankar for R2

J U D G M E N T

(Judgment of the Court was delivered by R.SUBRAMANIAN, J.)

This Intra Court Appeal is directed against the order of the
learned Single Judge dated 12.07.2017 made in WP No.17648 of
2017, wherein, the claim of the appellant herein for grant for
family pension was rejected on the ground that the appellant,

being the second wife of the deceased pensioner, is entitled to family pension.

2. The facts that led to the filing of the Writ Petition are as follows:

The petitioner/appellant claimed that she was married to one C.Rethinasamy as a second wife on 19.08.1980. The said Rethinasamy was working in the Tamil Nadu Electricity Board and he retired from service on 31.10.2002 and he died on 01.10.2013.

Even in the affidavit filed in support of the Writ Petition, it is stated that prior to the marriage with the appellant/petitioner, the said Rethinasamy had married one Sundarammal and out of the said marriage they had two children, viz. R.Gavaskar and R.Karthiga. It is claimed that since Sundarammal deserted her husband Rethinasamy, he had married the appellant/petitioner as the second wife even during the subsistence of the first marriage. Subsequently, the first marriage came to be dissolved on 07.10.2003. Claiming that in view of the dissolution of the first marriage the appellant/petitioner being the surviving widow, would be entitled to family pension, the appellant/petitioner made a representation to the 1st respondent on 07.11.2003 seeking family pension. The 1st respondent by the order impugned in the Writ Petition dated 02.07.2016, rejected the claim of the petitioner/appellant for family pension, on the ground that since the marriage with the petitioner was contracted by a deceased employee on 19.08.1990, during the subsistence of the first marriage, the marriage itself is invalid and hence the appellant/petitioner is not entitled to family pension. The learned Single Judge, dismissed the Writ Petition holding that in view of the admitted position that the appellant/petitioner was married as a second wife on 19.08.1990 she would not be entitled to family pension under the Tamil Nadu Pension Rules 1978. It is this order which is challenged with the above appeal.

3. We have heard Mr.R.Sreedharan, learned counsel appearing for the appellant, Mr.P.R.Dhilip Kumar, learned counsel appearing for the 1st respondent and Mr.V.Vijay Shankar, learned counsel appearing for the 2nd respondent.

4. The only and interesting question that arises in this Appeal, is as to whether, a second wife of a Hindu, whose marriage was contracted during the subsistence of the first marriage that too after the introduction of the Hindu Marriage Act, 1955, would be entitled to family pension. Mr.R.Sreedharan, learned counsel appearing for the appellant would rely upon Sub Rule 7(a)(1) of Rule 49 of the Tamil Nadu Pension Rules 1978, which reads as follows:

"7(a)(i). Where family pension is payable to more widows than one, the family pension shall be paid to widows in equal shares."

5. By relying upon the above Rule, it is contended that the Pension Rules itself provides for payment of pension to more than one widows and therefore, de hors the fact that the marriage is invalid under the Hindu Marriage Act, 1955, the surviving widow or widows would be entitled to family pension. He would also invite our attention to the judgments of Single Judges of this Court in WP (MD) No.13372/2012 dated 04.04.2014; WP (MD) No.9374 of 2010 dated 22.07.2014; WP (MD) No.7817 of 2011 dated 26.08.2014; WP No.31990 of 2012 dated 06.08.2014 (CDJ 2014 MXC 3594); WP 15806 of 2015 dated 18.06.2015; WP No.9856 of 2015 dated 02.11.2015; WP No.12105 of 2016 dated 31.03.2016 and WP No.26377 of 2014 dated 20.10.2016 and the judgment of the Hon'ble Supreme Court in Rameshwari Devi v. State of Bihar and others, dated 27.01.2000 reported in 2000 (2) SCC 431.

6. Contending contra, Mr.P.R.Dhilip Kumar, learned counsel appearing for the 1st respondent and Mr.V.Vijay Shankar, learned counsel appearing for the 2nd respondent would point out that some of the judgments of the Single Judges of this Court relied upon by the appellant have been rendered without taking note of the amendments introduced of Rule 49 of the Tamil Nadu Pension Rules in the year 1993. The amendment introduced in 1993 in the form of an explanation reads as follows:

"Explanation:- For the purpose of this rule, the second wife shall be eligible for the benefits of family pension only if the second marriage-

(i) Solemnised as per the customary law prevailed among the community before the date of commencement of the Hindu Marriage Act, 1955 (Central Act 25 of 1955);

(ii) Solemnised under the Mohammadan Law in which bigamy is permissible."

7. Relying upon the above amendment introduced in the year 1995 by virtue of G.O.Ms.No.906, Finance (Pension) Department, dated 06.12.1995 with effect from 2nd June 1992, it is contended that if the second marriage is shown to have taken place after the coming into force of the Hindu Marriage Act 1955, during the subsistence of the first marriage, the same will not confer the right to Family Pension on the second wife.

8. Mr.V.Vijay Shankar, learned counsel appearing for the 2nd respondent also drew our attention to the judgments of the Single Judges of this Court in WP No.45 of 1996 dated 14.09.2001; WP No.44823 of 2006 dated 11.03.2001 and WP No.3096 of 2016 dated 26.04.2016. Insofar as the judgment in WP (MD) No.13372 of 2012 dated 04.04.2014 is concerned, Hon'ble Mr.Justice R.Mahadevan, who rendered the judgment after taking note of the earlier judgments of this Court in Poongavanam & Others v. Thangamani and others reported in 2012 (2) LW 291 and Felix v. Jemi and others reported in 2002 (2) TNLJ 83 and the provisions of the Section 5 of the Hindu Marriage Act, 1955 has concluded as follows:

"5. Condition for a Hindu Marriage.- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

(i) neither party has a spouse living at the time of the marriage;

(ii) at the time of the marriage, neither party,-

(a) is incapable of giving a valid consent of it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity;

(iii) the bridegroom has completed the age of twenty one years and the bride, the age of eighteen years at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two; (v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two."

From the above Section, after the coming into force of the Hindu Marriage Act, 1955, a Hindu male or female cannot marry again, during the subsistence of the first marriage and such a marriage will be void. Therefore, this Court is of the view that the marriage of the appellant/ petitioner with the deceased pensioner as second wife is not valid in the eye of Law and therefore, she cannot be termed as a widow in the strict sense, as per Rule 49 (7) of the Pension Rules, 1978.

9. After reaching the above said conclusions, the learned Judge proceeds to record a compromise reached between the parties, by which the parties had agreed to share the pension equally and have entered into the Memorandum of compromise. Hence, the above said judgment cannot be taken as a precedent to support the contention of the learned counsel for the appellant that the second wife will also be entitled to family pension.

10. In WP (MD) No.9374 of 2010, the claim of the petitioner therein was that originally the family pension that was payable on the death one Raju was shared between her and the 1st wife of the said Raju viz. Mrs.Amsavalli, the said 1st wife Mrs.Amsavalli died on 19.11.2002. Even thereafter, the Government continued to pay only half of the Family Pension to the petitioner. The petitioner therefore made a representation to the Government seeking payment of full Pension including the 50%, which was previously paid to Mrs.Amsavalli. The said request of the petitioner was rejected by the Government claiming that under the Pension Rules, the 50% of the Pension paid to Mrs.Amsavalli will lapse to the Government and the same is not payable to the petitioner, as per the Government letter dated 27.04.1993. Challenging the said order, the petitioner had filed the above Writ Petition. The date of marriage of the petitioner with the said Raju is not available in the Judgment. The learned Single Judge took note of the amendment introduced as an explanation to Sub Rule 7 of Rule 49 and concluded that the amendment could be only prospective that is on and from 02.06.1992 and it did not prohibit the wife of a bigamous marriage, from getting the share in the family pension of a Government Servant, who dies prior to that date. Taking note of the fact that the Government servant in that case died in the year 1998, the learned Judge concluded that the sharing of the family pension between the petitioner and Mrs.Amsavalli, the first wife was justified. Reference was also made to the proviso to Sub Rule 7 of Rule 49, which reads as follows:

"Provided that the widow is not survived by any child, her share of family pension shall be payable to the other widows in equal shares, or if there is only one such widow, in full to her."

11. The learned Judge concluded that since Amsavalli had a son, the petitioner therein cannot claim the half share of Amsavalli in the family pension, which has been paid to her till her death. The final conclusion reached by the learned Judge was that the amendment introduced by G.O.Ms.No.906, Finance (Pension) Department, dated 06.12.1995 with effect from 2nd June

1992 would apply only to Government Servant, who died after the said date and not before the said date, irrespective of the date of second marriage. After holding so, the learned Single Judge eventually rejected the claim of the petitioner for 50% share of the family pension that was being paid to Amsavalli till her death.

12. In Pushpavalli v. The Senior Accounts Officer, O/o. The Principal Accountant General (A &E) Tamil Nadu and another, in WP (MD) No.7817 of 2011, the same learned Single Judge, who decided the case of Tamilselvi v. The Accountant General (Accounts and Entitlements), Tamil Nadu, Chennai 18, in WP (MD) No.9374 of 2010, followed the said judgment and taking note of the fact that the Government Servant in the said case, viz. Mr.Singaram, had died on 03.06.1989, i.e., prior to the introduction of the explanation, referred to supra held that the second wife, though his marriage is illegal under the Personal Law, viz. Hindu Marriage Act, 1955, would be entitled to payment of family pension. The learned Single Judge also took note of the fact that the marriage of the petitioner with the deceased Government servant Singaram, was prior to the crucial date, viz. 02.06.1992, viz. the date on which the explanation to Sub Rule 7 of Rule 49, was introduced.

13. In S.Kamatchi v. The Accountant General & Another, reported in CDJ 2014 MHC 3594, another learned Single Judge of this court observed that de hors the Personal Law, the Pension Rules permit the second wife to get pensionary benefits following the judgment of the Madurai Bench of this Court, in WP (MD) No.13372 of 2012. We have already adverted to the judgment in WP (MD) No.13372/12. In the said Judgment, the learned Single Judge had in fact found that the widow, whose marriage is not valid in the eye of law, cannot be termed as a widow in the strict sense, as per Rule 49 (7) of the Pension Rules 1978. After concluding so on the question of law, the learned Single Judge had only recorded a compromise that was reached between the parties to have the Family Pension shared between them.

14. We are constrained to point out that the judgment in WP (MD) No.13372 of 2012 dated 04.04.2014 cannot be taken as a precedent for laying down a preposition of Law irrespective of the validity of the marriage the widow would be entitled to get Family Pension. The effect of the amendment was also not considered by the learned Single Judge.

15. In WP No.15806 of 2015, the learned Single Judge concluded that in view of the admitted facts that the petitioner

therein was living with the deceased Government Servant from the year 1976, till his death, the valid marriage could be presumed between them and therefore, she would be entitled to Family Pension.

16. It will be pertinent to point out that the relevant Pension Rules, viz. Rule 49 (7) or the explanation added to it under G.O.Ms.No.906, Finance (Pension) Department, dated 06.12.1995, or the provisions of Section 5 of the Hindu Marriage Act, were not brought to the notice of the learned Single Judge, who decided the above case.

17. In P.S.Shanthi Balakrishnan, v. The Director of Medical Education, Kilpauk, Chennai and others, in WP No.9856 of 2015, the learned Single Judge had allowed the claim for Family Pension, based on the judgment in S.Kamatchi v. The Accountant General & Another, reported in CDJ 2014 MHC 3594. From the judgment that is made available to us, we are able to see that the relevant provisions of the pension Rules or the explanation, which was introduced in 1995 with effect from 02.06.1992 were not brought to the notice of the learned Single Judge.

18. In Tmt.J. Rajakumari v. The Superintendent of Police, Trichy and another, in WP No.12105 of 2016 dated 31.03.2016, the learned Single Judge followed the earlier decision in WP (MD) No.7817 of 2011 in Pushpavalli v. The Senior Accounts Officer, O/o. The Principal Accountant General (A &E) Tamil Nadu and another and held that the second wife would be entitled to Family Pension. Again in R.Sulochana v. The State of Tamil Nadu, Rep. by Principal Secretary to Government, Revenue Department, Secretariat, Chennai 600 009 and others, in WP No.26377 of 2014, the learned Single Judge had followed the earlier Judgment in Tamilselvi's case, in WP (MD) No.9374 of 2010, cited supra, and concluded that the second wife would be entitled to Family Pension.

19. In Rameshwari Devi v. State of Bihar and others, reported in 2000 (2) SCC 431, the Hon'ble Supreme Court dealt with an Appeal filed by the 1st wife of a deceased Government servant, who contended that there was no marriage between the alleged second wife and the Government Servant, therefore, the recognition of the children born to the alleged second wife and the Government servant as illegitimate children, would be entitled to the benefits of Section 16 of the Hindu Marriage Act, 1955 as invalid. In the said case the State Government had sanctioned full family pension and the entire family pension and death-cum-retirement Gratuity benefits to Rameshwari Devi, the

first wife. When the same was questioned by the second wife, the High court directed 50% of the family pension and death-cum-retirement Gratuity benefits to be paid to the minor children of the second wife. While considering the said question the Supreme Court had observed as follows:

"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. Rameshwari Devi has raised two principal objections : (1) marriage between Yogmaya Devi and Narain Lal has not been proved, meaning thereby that there is no witness to the actual performance of the marriage in accordance with the religious ceremonies required for a valid Hindu marriage and (2) without a civil court having pronounced upon the marriage between Yogmaya Devi and Narain Lal in accordance with Hindu rights, it cannot be held that the children of Yogmaya Devi with her marriage with Narain Lal would be legitimate under Section 16 of the Hindu Marriage Act."

20. After observing so, the Hon'ble Supreme Court dismissed the appeal holding that the Government need not wait for a pronouncement to be made by the Civil Court on the status and considering Rule 11 of the Pension Rule, the same can be decided by the Government itself which is the Pension disbursing Authority. The question, as to whether, the second wife would be entitled to Family Pension, despite the fact that her

marriage is in contravention of the provisions of the Personal Law applicable to the parties was not gone into. The question that was before the Hon'ble Supreme Court was as to whether the children of the second marriage who are legitimatised, in terms of Section 16 of the Hindu Marriage Act, would be entitled to a share in the retirement cum gratuity benefits of a Government Servant and the Authority, who has to decide on the said question. Therefore, the above judgment of the Hon'ble Supreme Court does not lay down as proposition of law that the second wife would be entitled to family pension de hors the facts that her marriage would be invalid under the Personal Law applicable to the parties.

21. In *K.Muthulakshmi v. The Principal Accountant General, (Accounts and Entitlement), Tamil Nadu, 261, Anna Salai, Madras 600 018 and others*, in WP No.45 of 1996, the learned Single Judge of this Court held that the second wife of a Hindu whose marriage had taken place after coming into the force of the Hindu Marriage Act, 1955, would not be entitled to the family pension. The learned Single Judge took note of the explanation introduced by way of amendment, with effect from 02.06.1992 in reaching the said conclusion.

22. In *A.Palaniammal v. The Accountant General, Office of the Accont-General, 261, Anna Salai, Madras 600 018 and others*, in WP No.44823 of 2006, a learned Single Judge of this Court had, after referring to relevant Clauses of Rule 49 of the Tamil Nadu Pension Rules as well as the provisions of the Hindu Marriage Act, 1955 has taken the view that if the second marriage is invalid, then the second wife will not get the status of a widow and she will not be entitled to family pension. The learned Judge has also referred to the decision of the Hon'ble Supreme Court in *Rameshwari Devi v. State of Bihar and others*, reported in 2000 (2) SCC 431, cited supra,

23. It should be noted that in WP No.44823 of 2006, the petitioner had included a challenge to the clarifications issued in letters dated 02.06.1992, 24.11.1993 and 20.03.1997. The learned Judge has also considered the question of live-in relationship and has concluded that the same cannot be extended to apply to the family pension payable by the State to a widow.

According to the learned Judge, it is always open to the State Government to define family and exclude a person, who does not qualify to be termed as one among the family members and no exception can be taken to the clarification issued by the State Government. The learned Judge has also made a distinction between the obligation of a man being a husband to his wife and the obligation of the State towards the Government Servant in

affording protection to him as well as to his family during his tenure as well as after retirement. The learned Judge had observed that the same cannot be over stretched to include even provision of pension to a second wife, which, if granted, not only will fritter away the limited resources vested in the State, but also will encourage bigamous marriages, which had been prohibited not only by the Personal Law and the Criminal Law of the land, but also by the Tamil Nadu Government Servants' Conduct Rules.

24. In *Velammal v. The Additional Assistant Elementary Educational Office, Sivagangai District* and another in WP (MD) No.3096 of 2016, the learned Single Judge of this Court has, after referring to the provisions of Rule 49 7(a)(i), the explanation added to it, with effect from 02.06.1992 and the provisions of Section 5 of the Hindu Marriage Act had concluded that the second wife, whose marriage is invalid, in view of the prohibition contained in Section 5(1) of the Hindu Marriage Act 1955, will not be entitled to family pension. The learned Judge has taken such view after referring to the other judgments, which take a contrary view.

25. Coming to the facts of the present case, it is not in dispute that the marriage between the appellant and the deceased C.Rethinasamy, took place during the subsistence of the first marriage of C.Rethinasamy, with Sundarammal. The first marriage came to be dissolved only in the year 2003. Therefore, the marriage of the appellant with C.Rethinasamy, is undoubtedly an invalid marriage, in view of the prohibition contained in Section 5 of the Hindu Marriage Act.

26. We have noted various judgments of Single Judges of this Court, which apparently take contradicting views. However, before going into the reasons assigned by the learned Judges in support of their conclusions, it will be useful to extract the relevant provisions of law which will have a bearing on the conclusion. Section 5(i) of the Hindu Marriage Act, 1955, which deals with the condition for valid Hindu Marriage, reads as follows:

"5 Conditions for a Hindu Marriage:- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:-

(i) neither party has a spouse living at the time of the marriage;"

27. Rule 49 of the Tamil Nadu Pension Rules deals with family pension. The word "family pension" has been defined under Rule 3(1)(e) of the Tamil Nadu Pension Rules as follows:

"3(1)(e). 'Family Pension' means 'Family Pension, 1964' admissible under Rule 49 but does not include dearness allowance;"

Sub Rule 6 of Rule 49, which provides the payment of family pension, reads as follows:

"(6) The period for which family pension is payable shall be as follows:-

- (i) in the case of widow or widower, up to the date of death or remarriage, whichever is earlier;
- (ii) in the case of a son, until he attains the age of twentyone years, twentyfive years; and
- (iii) In the case of an unmarried daughter, until she attains the age of twentyfour years, thirty years, twenty five years or until she gets married whichever is earlier."

The other parts of the Rule are not necessary for our purposes. Rule 7 (a)(i) of the Tamil Nadu Pension Rules reads as follows:

"7 (a) (i) Where family pension is payable to more widows than one, the family pension shall be paid to widows in equal shares.

(ii) On the death of 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 cease to be payable]

[Provided that if the widow is not survived by any child, her share of family pension shall be payable to the other widows in equal shares, or if there is only one such 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 child or children or to a widow or widows ceasing to be payable, such share or shares 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 share shall be payable to the other widow or widows and or to 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]

Explanation: For the purpose of this rules, the second wife shall be eligible for the benefits of family pension only if the second marriage-

(i) Solemnised as per the customary law prevailed among the community before the date of commencement of the Hindu Marriage Act, 1955 (Central Act 25 of 1955); or

(ii) Solemnised under the Mohamadan Law in which bigamy is permissible."

Rule 19 of the Tamil Nadu Government Servants' Conduct Rules, 1973, reads as follows:

"19. Bigamous marriage:-

(1) (i) No Government servant shall, enter into or contract, a marriage with a person having a spouse living; and

(ii) No Government servant having a spouse living shall enter into or contract a marriage with any person:

Provided that the Government may permit a Government servant to enter into, or contract, any such marriage as is referred to in clause (i) or clause (ii) if they are satisfied that-

- (a) such marriage is permissible under the personal law applicable to such Government servant and the other party to the marriage; and
- (b) there are other grounds for so doing.

(2) No Government servant involve himself in any act involving moral turpitude on his part including any unlawful act, which may cause embarrassment or which may bring discredit to Government."

28. From a reading of the above provision particularly the provisions of Section 5 of the Hindu Marriage Act, 1955 and Rule 19 of the Tamil Nadu Government Servants' Conduct Rules, 1973, it is clear that a Bigamous Marriage is prohibited and is a punishable offence unless the Personal Law applicable to such Government servant and the other party to the Marriage permit such Bigamous Marriage. The provisions of Sub Rule 7 (a) (i) of Rule 49 of the Tamil Nadu Pension Rules, is only an enabling provision intended to take care of a situation where there may be two widows for a Government servant, whose marriage was valid. In case of a Hindu, if marriage has taken place prior to the coming into force of the Hindu Marriage Act 1955, such a Bigamous Marriage would have been valid. Therefore, in our considered opinion, the operation of Sub Rule 7(a) (i) of Rule 49 should be restricted only to those marriages which are validly contracted. For example, where a Government servant contracted two marriages prior to the coming into the force of the Hindu Marriage Act, 1955 and dies after the introduction of the Pension Rules, both the marriages would be valid and both the widows would be entitled to Family Pension. But the said Rule, which is an enabling provision, cannot be extended or over stretched to cover the cases of second wives whose marriages will be void, in view of the provisions of Section 5(i) of Hindu Marriage Act, 1955. That is precisely the reason why the Government, thought it fit, to include the explanation to Sub Rule 7 in the year 1992. The said explanation was introduced with retrospective effect from 2nd June 1992, in view of the clarification issued by the Government in its letter dated 02.06.1992.

29. This would not limit the applicability of the explanation to marriages which are contracted in contravention of Section 5(1) of the Hindu Marriage Act, 1955, after coming into the force of the said enactment. The very explanation is clearly worded where it says that the second wife shall be eligible for the benefits of family pension, only if the second marriage is solemnised, as per the Customary Law prevailing

among the community, before the date of commencement of the Hindu Marriage Act, 1955. Therefore, the essential element of the Rule is that the marriage should have been contracted before the commencement of the Hindu Marriage Act, 1955 and not thereafter.

30. Now advertng to the decisions of this Court, which had been cited before us, the judgment in WP (MD) No.13372 of 2012 dated 04.04.2014, as already been adverted to clearly lays down the law, inasmuch as the learned Single Judge observed that the marriage is not valid in the eye of law, and therefore, she cannot be termed as a widow in the strict sense, as per Rule 49 (7) of the Pension Rules 1978. The learned Judge taking note of compromise entered into between the parties had only recorded the compromise by invoking the provisions of the Protection of Women from Domestic Violence Act, 2005. Therefore, the said judgment cannot be taken as a precedent for laying down the preposition of law that the second wife of male Hindu, whose marriage is invalid under the Personal Law applicable to the parties, will be entitled to family pension de hors the fact that her marriage is invalid.

31. In Tamilselvi's case, in WP (MD) No.9374 of 2010, cited supra, also the learned Single Judge had in fact rejected the claim of the second wife to the share of the first wife in the family pension. However, while doing so, the learned Single Judge had held that the explanation to Sub Rule 7 of Rule 49 would be applicable only prospectively that is from the date, where the Government servant dies after 02.06.1992. This conclusion of the learned Judge, in our opinion, cannot be sustained.

32. The effect of the explanation is disqualification of the widow of an invalid marriage from seeking family pension. As already pointed out family pension is not the property of the Government Servant, it is an allowance given to or an entitlement of his family members, viz. the widow and the children, subject of course to certain conditions. Therefore, the concept of family pension cannot be treated as the estate of the Government servant and the law relating to devolution of the estate of the Government servant cannot be applied in the cases of family pension. Therefore, the date of death of the Government servant cannot be taken as a guiding factor to decide the question of entitlement of family pension.

33. It would also be seen that the second proviso to Rule 7 (a) (i), makes it clear that if the widow is not survived by a

child, such share in the family pension shall be payable to the other widows in equal share, if there is only one such widow in full to her. This makes it clear that the family pension is not the estate of the Government servant. It will also be relevant to point out that the Division Bench of this Court in Krishnaveni and others v. Mera @ Devaki and others, rendered in OSA. No.154 of 2004 dated 07.03.2012 had held that while the children born to a second wife, whose marriage is void would be entitled family pension, the second wife as such will not be entitled to family pension. This is the view of the Hon'ble Supreme Court in Rameshwari Devi's case reported in 2000 (2) SCC 431, cited supra, which accepted the position of law that a second wife of Hindu, whose marriage is otherwise invalid, is not entitled to family pension. However, the learned Judge went on to make a distinction based on the Tamil Nadu Pension Rules, 1978. As we have already pointed out the Sub Rule 7 of Rule 49 of the Pension Rules 1978, will have to be read only in the context of there being two widows for a Government servant, both of whose marriages would have been validly performed prior to the coming into force of the Hindu Marriage Act, 1955. The explanation introduced to Rule 7 in 1992 would also clarify the position regarding the entitlement of family pension. We are therefore, unable to agree with the conclusion of the learned Judge to the effect that the explanation introduced to Rule 7 will take effect only from 02.06.1992 and will apply only if the Government servant dies after the said date that is 02.06.1992.

34. In Pushpavalli's case, in WP (MD) No.7817 of 2011, cited supra, the learned Single Judge has not only chosen to follow the conclusion of the Tamilselvi's case, in WP (MD) No.9374 of 2010, cited supra, but also concluded that any wife of the void marriage, whose marriage had taken place on or after 14.10.1991 alone is not entitled to family pension, inasmuch as the second proviso to sub Rule 7 of Rule 49 was introduced with effect from 15.10.1991. This conclusion of the learned Judge, in our considered opinion, cannot be sustained. The second proviso is only an enabling provision, which provides that if one of the widows is not survived by any child her share in the family pension will be payable to the other widow in equal share or if there is only one such widow in full to her. In order to get the benefit of the proviso there should have been a valid marriage and the claimant should be a widow within the meaning of Rule 49 of the Tamil Nadu Pension Rules and the second wife, whose marriage is void cannot claim to be a widow in the eye of law. We have concluded that family pension is not the estate of the Government servant, it is an entitlement to a widow, whose marriage is a valid marriage, under the Personal Law applicable to the parties. Therefore, we are unable to subscribe to the views expressed by the learned Judge either in Tamilselvi's case, in WP (MD) No.9374 of 2010, or in Pushpavalli's case, in

WP (MD) No.7817 of 2011, referred to supra.

35. In S.Kamatchi v. The Accountant General & Another, reported in CDJ 2014 MHC 3594, the learned Judge has not given his own reasons, but he has only chosen to follow the judgment of another Single Judge of this Court. As already adverted to in WP(MD) 13372 of 2012, dated 04.04.2014, the learned Single Judge, who decided the case, as in fact held that a widow, whose marriage is otherwise invalid, cannot be termed as a widow in the strict sense, as per the Sub Rule 7 Rule 49 of the Tamil Nadu Pension Rules. Therefore, we do not think, the judgment in S.Kamatchi's case reported in CDJ 2014 MHC 3594, cited supra, will not also advance the case of the petitioner.

36. In Suseela @ Mary Margaret v. The Superintendent of Police, Coimbatore District, Coimbatore 18 and another, in WP No.15806 of 2015, the learned Judge has not referred to either Rule 49 of the Tamil Nadu Pension Rules or the provisions of Section 5(1) of the Hindu Marriage Act. The learned Judge concludes that in view of the fact that the Hon'ble Supreme Court had held that the marriage could be presumed on the basis of long cohabitation the second wife would be entitled to family pension as per the Rule 49. This view of the learned Judge, according to us is not in consonance either with Rule 49 of the Pension Rules or Rule 19 of the Tamil Nadu Government Servant's Conduct Rule, 1973, or the provisions of Section (5) (1) of the Hindu Marriage Act.

37. In P.S.Shanthi Balakrishnan v. The Director of Medical Education, Kilpauk, Chennai and others, in WP No.9856 of 2015, the learned Single Judge of this Court had only relied upon the judgments in S.Kamatchi's case reported in CDJ 2014 MHC 3594, and the Pushpavalli's case, in WP (MD) No.7817 of 2011, referred to supra to conclude that the second wife would be entitled to the family pension. Similar is a case in J.Rajakumari v. The Superintendent of Police, Trichy, in WP No.12105 of 2016, where the learned Single Judge of this Court had chosen to follow Pushpavalli's case, in WP (MD) No.7817 of 2011, referred to supra. We have already given our reasons for disagreeing with the views expressed by the learned Single Judge in Pushpavalli's case.

38. In R.Sulochana v. The State of Tamil Nadu, Rep. by Principal Secretary to Government, Revenue Department, Secretariat, Chennai 9, in WP No.26377 of 2014 dated 20.10.2016 also another learned Single Judge of this Court has chosen to follow the earlier judgments in Tamilselvi's case, referred to

supra.

39. In K.Muthulakshmi v. The Principal Accountant General, (Accounts and Entitlement), Tamil Nadu, 261 Anna Salai, Madras 600 018, in WP No.45 of 1996, the learned Single Judge of this Court had, after adverting to Sub Rule 7 of Rule 49, as well as the amendments there to had concluded that the second wife is not entitled to family Pension.

40. In A.Palaniammal v. The Accountant General, Office of the Account-General, 261 Anna Salai, Chennai 600 018 and others, in WP No.44823 of 2006, the learned Judge had, after taking note of the provisions of Sub Rule 7 of Rule 49, the explanation added thereto in 1992 as well as the provisions of Section 5(1) Hindu Marriage Act had concluded as follows:

"24. With reference to the contention that the Government cannot clarify the Tamil Nadu Pension Rules, 1978 which is statutory in character, it must be noted that the present Pension Rules were inherited from the Rules which were in force before the Hindu Marriage Act came into existence. Even after the Hindu Marriage Act came into existence, the personal law of government servants belonging to different religions are also different. Therefore, the Government Servants' Conduct Rules contemplated a situation, where a government servant having a personal law providing for more than one marriage can get married after getting prior permission from the Government. Therefore, the Rule contemplated different situations. But it was never the intention of the Rule makers that by making the Pension Rules, they have granted a defacto recognition to an illegitimate wife of a Government servant who belonged to Hindu religion. Whatever may be the earlier position, the clarification dated 02.06.1992 clearly brought the Pension Rules in accordance with the correct legal position. As the clarification brought the law in conformity with the correct legal position, it cannot be said to be either illegal or void or contrary to the statutory rules. Infact by subsequent clarification, the State Government had correctly laid the Rules in accordance with the law of the land and no exception can be taken."

"28. Even if the Larger Bench answers the question in favour of a woman, who claims to be the wife on account of long living as husband and wife is only in relation

to Section 125 of Cr.P.C. and not in connection with the State's obligation to pay family pension. It is always open to the Government to define the term 'Family' and exclude persons who do not qualify to be termed as 'wife'. No exception can be taken if any such clarification is issued by the State Government. It is one thing to talk about the obligation of a man being husband to his wife. The other thing is the State's obligation towards a Government servant in affording protection to him as well as to his family during his tenure as well as after retirement. But that cannot be over stretched to include even for provision of pension for a second wife, which if granted not only will fritter away the limited resources vest with the State but also will encourage bigamous marriages which had been prohibited not only by family law and the criminal law of the land but even as per the Government Servants' Conduct Rules."

41. A substantially similar view has been expressed by another learned Judge of this Court in P.Velammal v. The Additional Assistant Elementary Educational Office, Sivagangai District in WP (MD) No.3096 of 2016, wherein, after taking note of the provisions of Section 5 (1) of the Hindu Marriage Act, 1955, as well as the explanation added to Sub Rule 7 of Rule 49, the learned Single Judge has held as follows:

"12. Law is settled that two Hindus cannot contract marriage after the enforcement of the Hindu Marriage Act and if any of them is having a living spouse, the marriage would be a nullity and would also not be protected under the Conduct Rules, as well as, the pension rules. Therefore, the "second wife" as referred to under the pension rules would only include second wife whose marriage is permissible under the Personal Law, but in the case of Hindus, the second wife will have no right, whatsoever, as the law prohibits second marriage, as long as, the Government servant has a spouse who is alive. Thus for harmonious construction of the Rules governing pension, wherever, the rule provides for wives, it has to be interpreted as per the law governing marriage as applicable to the Government servant and in cases where the second marriage is void under the law, second wife will have no status of a widow of the Government servant and relying on protection of Women from Domestic Violence Act, 2005, in the opinion of this Court, is only taking a shelter."

42. We have discussed the basis on which the various

judgments, of course conflicting views, have been rendered. Insofar as the view that the second wife of the Government Servant, who died prior to 02.06.1992 as held in Tamilselvi's case, referred to supra, and the view that a widow of an invalid second marriage that had taken place prior to 14.10.1991, as held in Pushpavalli's case, have given our reasons, as to why, we are unable to subscribe to the said conclusions of the learned Single Judge. We are, therefore, of the opinion that in order to enable a second wife to claim family pension the marriage should have been valid under the Personal Law applicable to the parties, to hold otherwise would be in violation of the law of the land, viz. the Personal Law of the parties as well as the Criminal Law, which prohibits bigamous marriage.

43. We are, therefore, constrained to conclude that the judgments which conclude that a second wife would be entitled to family pension, irrespective of her marriage being void, under the provisions of their relevant Personal Law's applicable to the parties do not reflect the correct position of law and therefore will stand overruled. The applicability of Sub Rule 7 (a)(i) is confined only to cases where the second marriage is valid under the Personal Law applicable to the parties, only in such cases, widows of such marriages would be entitled to family pension.

44. In view of the foregoing discussion and conclusions, the Writ Appeal fails and dismissed. However, there will be no order as to costs.

-s/d-

Assistant Registrar (CS-IX)

True Copy

Sub-Assistant Registrar

jv

To

1. The Superintendent Engineer
TANGEDCO Ltd.,
Nagapattinam Circle,
Nagapattinam District.

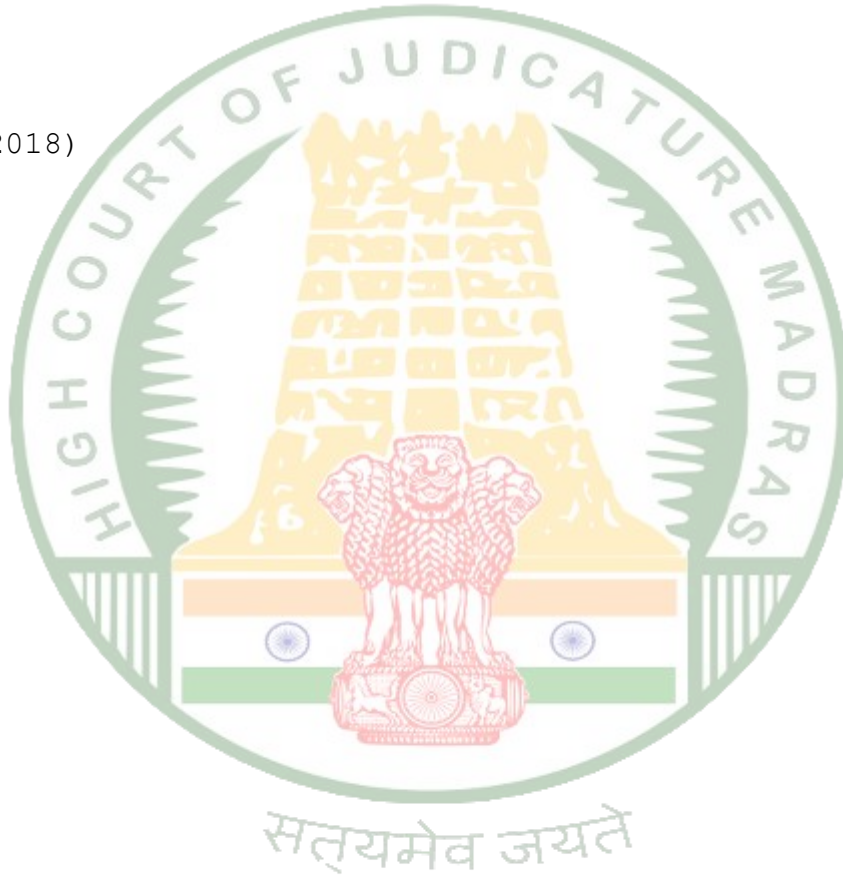
WEB COPY

2. The Audit Officer
TANGEDCO - Audit Wing,
144, Annal Salai, Chennai 600 002.

+1 CC to Mr.P.R.Dhilipkumar , Advocate sr 34622

W.A.No.977 of 2017
and CMP No.13600 of 2017

SP(08/06/2018)



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