



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 30.07.2020

DELIVERED ON : 26.08.2020

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CORAM:

THE HONOURABLE MR.JUSTICE RMT. TEEKAA RAMAN

WP(MD).No.19997 of 2013

J. Kulandai Therasa Vimala

... Petitioner

Vs.

1.The Principal Accountant General,
O/o. the Principal Accountant General (A&E) Tamil Nadu,
No.361, Anna Salai,
Chennai -8.

2.The Commissioner of Labour,
Thenampet,
Chennai.

3.The Deputy Commissioner of Labour,
O/o. the Deputy Commissioner of Labour,
Trichy.

4.The Assistant Commissioner of Labour,
O/o. the Deputy Commissioner of Labour,
Dindigul.

... Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus calling for the records from the first respondent relating to the proceedings No.P13/21305073/3/PPO No.F. 1305073 dated 08.05.2013 and quash the same and consequentially, direct the first respondent to pay the family pension and retirement benefits to the petitioner from March 2011 onwards with all attendant monetary benefits.

For petitioner

: Mr. K. Gokul

For R1

: Mr. P. Gunasekaran

For R2 to R4

: Mr. J. Gunaseelan Muthiah
Additional Government Pleader



ORDER

This Writ Petition has been filed by the petitioner seeking to quash the impugned order of the first respondent in proceeding No.P13/ 21305073 / 3 / PPO No.F.1305073, dated 08.05.2013 and consequently, direct the first respondent to pay the family pension and retirement benefits of her husband to her from March 2011 onwards.

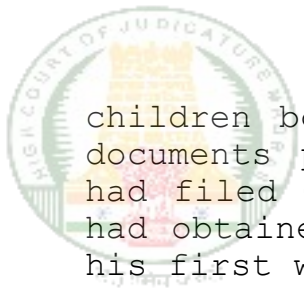
2. The petitioner, who is the second wife of the deceased Government employee viz., John Britto Lourduraj, seeks family pension.

3. The factual matrix that are necessary for the disposal of the writ petition are as follows:

(a) The husband of the petitioner viz., Mr.A. John Britto Lourduraj while serving as Labour Officer in the office of the fourth respondent, expired on 06.03.2011. The family pension proposals in favour of the petitioner were received by the second respondent. The respondents authorised only 2/3rd share of Death - Cum - Retirement Gratuity in two equal shares to the two daughters born through the petitioner. The share of Family Pension payable at 50% of each to Kumari. Amala Roseline Nesapriya, daughter born through the petitioner and Smt. Rachael Rajathi, first wife and 1/3rd share of DCRG payable to the first wife were withheld, pending receipt of family pension proposals and related documents from the Department.

(b) Aggrieved over the rejection of her claim for family pension, the petitioner has filed the present Writ Petition seeking to quash the impugned order passed by the first respondent dated 08.05.2013 and for a direction to the respondents to pay family pension and retirement benefits of her husband to her from March 2011 onwards.

4. Resisting the claim of the petitioner, the first respondent filed a counter affidavit. Based on the counter, the learned counsel appearing for the first respondent would contend that upon the demise of A. John Britto Lourduraj on 06.03.2011, the family pension proposals in respect of petitioner were received by the second respondent in the month of October 2012. During Scrutiny of the family pension proposals and service Register, it was found by the respondents that entries had been made in the service register to the effect that the Government Servant had obtained a decree for judicial separation from his first wife viz., Rachael Rajathi in O.S.No.8 of 1987. Therefore, the respondent sought for clarification, as to whether any decree of divorce had been obtained from a Court of Law annulling the marriage between the late Government Servant and Smt. Rachael Rajathi. Further, proof of the petitioner's marriage with the deceased and also the details of



children born through her were sought for. On a perusal of the documents produced, it was seen that the late Government Employee had filed O.S.No.8 of 1987 before the District Court, Dindigul and had obtained a decree dated 03.05.1988 for judicial separation from his first wife Smt. Rachael Rajathi.

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5. The learned counsel appearing for the petitioner draw the attention of this Court to Rule 49(11-A) of the Tamil Nadu Pension Rules, 1978, wherein, it is stated that a judicially separated widow is entitled to claim pension. However, under the proviso, if the judicial separation is granted on the ground of adultery, she will not entitle for family pension.

6. Per contra, the learned Additional Government Pleader has referred to various circulars issued by the Government with regard to two wives making rival claims in respect of the pensionary benefits of late Government employee. He further submitted that A decree of judicial separation will not have the effect of a divorce and that it only means separation of the husband and wife from co-habitation and that neither party to the decree can marry during the life time of the other. Hence, the second marriage solemnized by the deceased Government servant with the petitioner after the grant of judicial separation with the first wife is invalid. Therefore, the petitioner is not having the status of a legally wedded wife she is not entitled to claim family pension and other benefits.

7. The claim of the petitioner for family pension is on the ground that her husband died on 06.03.2011 and she married her husband on 04.05.1989 and begotten two children. The 2/3rd share of DCRG amount in two equal shares has already been paid to her daughters and the family pension was shared between them as 50% each. However, she contended that as per Rule 49(7)(a)(i) of the Tamil Nadu Pension Rules, 1978, she is entitled for 25% of the family pension.

8. In support of his contention, Mr. J. Gunaseelan Muthiah, the learned Additional Government Pleader appearing for the first respondent relied on the following Judgments:

(i) Division Bench Judgment of this Court reported in 2018-1-Writ L.R. 725 (R. Rajathi Vs. The Superintending Engineer, TANGEDCO Ltd., and another).

(ii) The Judgment of the Hon'ble Supreme Court reported in 2000(2) SCC 431 (Rameshwari Devi Vs. State of Bihar and others).

9. In the R. Rajathi case cited supra the Division Bench of this Court has held as under:



"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 case 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. 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."

10. The above said decisions are rendered in respect of the parties governed by Hindu Personal Law whereas in the instance case, the parties are Christians.

11. On hearing the rival submissions, the issue involved in this case is centered around the personal law of the parties i.e., Indian Divorce Act vis-a-vis the Tamil Nadu Pension Rules 49(7)(a)(c) and 49(13)(b) and 49(11-A) and the proviso thereto.

12. On a combined reading of the said Rules viz., 49(11-A) and the proviso, thereto make it abundantly clear that while Rule 49(11-A) of the Tamil Nadu Pension Rules, 1978 enables judicially separated wife to lay a claim for family pension / service benefits, however, debars the wife / spouse of public servant from claiming pension / service benefits, if such judicial separation was on the ground of adultery. It remains to be stated that Rule 49(7)(a)(i) is applicable to the person while their personal law permits for having more than one wife and not for other others.

13. In the instant case, the petitioner is a second wife of the deceased public Servant and the first wife is Tmt. Rachael Rajathi. As per Rule 49(11-A) of the Tamil Nadu Pension Rules, 1978, a judicially separated widow is entitled to claim pension. Therefore, the first wife would be entitled to claim family pension even though she is judicially separated. The Rule position regarding the payment of family pension in the cases where there are rival claims are as follows:

As per Rule 49(7)(a)(i) of the Tamil Nadu Pension

Rules, 1978, where family pension is payable to more



widows than one, the family pension shall be paid to the widows in equal shares. The Government of Tamil Nadu, have clarified in Letter No. 80668/pension/88-12, dated 29.06.1990 (Finance (pension) Department], the provisions of Rule 49 as follows:

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14. I am to clarify that the intention of the above rule is to allow family pension in equal shares only to legally wedded wives. In this case, as the Government Servant had solemnized second marriage when his first marriage subsisted, the second wife cannot claim the status of a wife in the eye of law. The provision of law is that where there is a marriage subsisting, no person can legally solemnize another marriage and if a second marriage is effected either by registration or otherwise, that marriage is a nullity and as such the second wife is not entitled to claim family pension.

15. Further clarifying the above rule, the Government of Tamil Nadu, in its letter No.112351 / pension / 90-4, dated 02.06.1992 [Finance (pension) Department] had pointed out as follows:

"the second wife get the status of legal wife in two cases viz., (1) second marriage solemnized as per the customary law among the community before coming into force of the Hindu Marriage Act 1955 and (2) the second marriage solemnized as per legal requirements in the case of persons governed by Mohammedan Law where bigamy is permissible. Hence, these are the two cases where second marriage is to be considered as valid and second wife is eligible for the benefit available to the widow under the pension rules".

16. It is trite in law that a decree of divorce and decree of judicial separation are two different things having an effect of legal status of wife with her husband. While, the former results in severance of relationship between the parties to lis, the latter has no such effect of severance of relationship. As such the relationship, consequently, material status of the wife is kept in that.

17. The parties in the instant case are Christians. As per Section 60 of the Indian Christian Marriage Act, 1872, every marriage between (Indian) Christians applying for a certificate, shall, without the preliminary notice required under Part III, be certified under this part, if the following conditions be fulfilled, and not otherwise :-

(2) neither of the persons intending to be married shall have a wife or husband still living;



18. Section 60 deals with conditions under which marriage of Indian Christian must be solemnized. One of the conditions is that neither of the persons intending to be married shall have a wife or husband still living.

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19. Thus, as per Section 22 of the Indian Divorce Act, 1869 bar to decree for divorce *a mensa et toro* but judicial separation obtainable by husband or wife No decree shall hereafter be made for a divorce *a mensa et toro*, but the husband or wife may obtain a decree of judicial separation, on the ground of adultery, or cruelty, or desertion for two years or upwards, and such decree shall have the effect of a divorce *a mensa et toro* under the existing law, and such other legal effect as hereinafter mentioned.

"The meaning of A mensa et toro (Lat), From bed and board. Judicial Separation: descriptive of a limited form of divorce.

From bed and Board. This is a Judicial Separation of husband and wife, which may be obtained at the instance of either spouse, on the ground of adulterous practices, cruelty, etc., (Trayner)

A mensa et thoro (from table to bed) describes a partial divorce in a case in which the marriage was just and lawful; but for some supervening cause, such as the commission of adultery or cruelty by the husband or wife, it becomes improper or impossible for them to live together. It only caused the separation of husband and wife; but did not dissolve the marriage. R.S. Manual Raju V. Mary Sava, AIR 1982 Kant 235, 236 [Indian Divorce Act (4 of 1869), s .22]"

20. Mr. J. Gunaseelan Muthiah, learned Additional Government Pleader appearing for the respondents 2 to 4 draw my attention to the legal heir certificate issued by the Thasildar on 24.03.2011 and the copy of the service records relating to public servant where the petitioner recorded as his wife.

21. In this case, the petitioner filed a copy of the decree passed in O.S.No.8 of 1987 on the file of District Court, Dindigul, dated 03.05.1988, wherein the Government Servant filed the above petition against his first wife Rachel Rajathi for dissolution of marriage and the judicial separation was granted on the ground of adultery by the defendant. The marriage between the writ petitioner and the deceased Government Employee took place on 04.05.1989 and subsequently, he died on 06.03.2011.



22. The core issue involved in this case is relates to the codified personal law of the retired Government Servant vis-a-vis the service law Governing the pension under the Tamil Nadu Pension Rules. Admittedly, by the decree dated 03.05.1988 in O.S.No. 8 of 1987 filed under the Indian Divorce Act, the judicial separation was granted between the parties on the ground of adultery. It is to be stated that it is not a decree of divorce and hence, the petitioner who is the second wife having solemnized the marriage though after the decree of judicial separation can be treated only as second wife which is not recognized as a legitimate under the personal law viz., Indian Christian Act and therefore, she is not entitled for family pension under the Tamil Nadu Pension Rule

23. It is to be stated that Rule 49(7) (a) (i) is applicable to the person only if the personal law permits having more than one wife. Since the parties are Christians, there are governed by the Indian Christian Act and as per the personal law applicable to the parties, they cannot have more than one wife and since it is only a decree of judicial separation which does not amount to decree of divorce. The legal status of the petitioner is not that of first wife and therefore, the contention of the petitioner that claim of the petitioner may be considered for pension under Rule 49(7) (a) (i), cannot be countenanced.

24. In view of the factual position stated supra, the petitioner is not entitled to family pension under the Rule. Moreover, it is also seen from the proviso to Rule 49(11-A) wife separated by a decree of judicial separation is entitled to claim pension.

25. However, on perusal of the decree dated 03.05.1988 passed in O.S.No. 8 of 1987, discussed supra, the decree of judicial separation was granted on the ground of adultery and in view of the proviso to aforesaid Rule 49(11-A) the first wife viz., Racheal Rajathi is not entitled to claim pension after the death of her husband and hence, I do not find any force in the argument of the counsel for the first respondent in this regard.

26. As per the counter, 50% of the amount in the family pension was withheld to be payable to the first wife viz., Rachel Rajathi and 1/3rd of DCRG payable to the first wife are withheld. In view of the above discussion and in view of terms of the decree of judicial separation, I am of the considered view that the first wife of the deceased Government employee is disqualified and debarred from claiming of pensionary benefits under the proviso of Rule 49 (11-A) of Tamil Nadu Pension Rules, 1978 and therefore, I am of the considered view that the proviso is applicable to the first wife and the amount withheld for the first respondent i.e., 50% of the share under the family pension and 1/3rd of the share DCRG are to be paid to the daughter born through petitioner herein.



27. In fine:

The answer to the core issue framed above is summarized hereunder:

(a) 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.

(b) 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 case of family pension.

(c) the date of death of the Government servant cannot be taken as a guiding factor to decide the question of entitlement of family pension.

(d) 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.

e) the widow of an invalid marriage is disqualified from seeking family pension.

f) second wife having solemnized the marriage though after the decree of judicial separation is not recognized as a legitimate under the personal law viz., Indian Christian Act and therefore, she is not entitled for family pension under the Tamil Nadu Pension Rule

g) Rule 49(7)(a)(i) is applicable to the person only if the personal law permits the person for having more than one wife and for none others.

(h) wife separated by a decree of judicial separation is entitled to claim pension, however if the decree of judicial separation was granted on the ground of adultery, she is not entitled to claim pension after the death of her husband.

28. In the interest of justice, the amount withheld for the first respondent viz., 50% and $1/3^{\text{rd}}$ of DCRG in the name of the first wife who is hereby declared to be disqualified and debarred, shall be handed over to the daughter's of the petitioner herein within a period of eight weeks from the date of receipt of a copy of this order.

29. Accordingly, the Writ Petition is partly allowed. No costs.

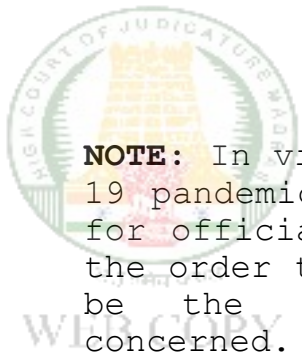
Sd/-

Assistant Registrar (AD-II)

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/ /2020

Sub Assistant Registrar(CS)



NOTE: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1.The Principal Accountant General,
O/o. the Principal Accountant General (A&E) Tamil Nadu,
No.361, Anna Salai,
Chennai -8.

2.The Commissioner of Labour,
Thenampet,
Chennai.

3.The Deputy Commissioner of Labour,
O/o. the Deputy Commissioner of Labour,
Trichy.

4.The Assistant Commissioner of Labour,
O/o. the Deputy Commissioner of Labour,
Dindigul.

+1 CC to M/s.GP (SR-14954[F] dated 26/08/2020)

ORDER MADE IN
WP(MD).No.19997 of 2013
26.08.2020

AP(08/09/2020) 9P 6C