



W.P(MD)No.8922 of 2015

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 11.07.2022

CORAM

THE HONOURABLE MR. JUSTICE G.CHANDRASEKHARAN

W.P(MD)No.8922 of 2015

and

M.P(MD)No.1 of 2015

V.Theertham

... Petitioner

Vs

1.The Account Officer,
Audit Office (Pension),
144, Anna Salai,
Chennai – 600 002.

2.The Superintending Engineer,
Tamil Nadu Generation & Distribution Corporation,
Madurai Distribution Circle,
K.Pudur,
Madurai.

3.Lakshmi

... Respondents

PRAYER: Writ Petition filed under Article 226 of Constitution of India, praying to issue a Writ of Certiorarified Mandamus, to call for the records pertaining to the order of the first respondent vide his communication in letter No.59791/1505/F.8/F.81/BBO.66904/2015, dated nil 02.2015 and quash the same as it is arbitrary and illegal and in consequence to direct the first respondent to pay the family pension to the petitioner on and from 26.10.2014, with appropriate interest, within the time to be fixed by this Court and also to pay monthly pension thereafter in accordance with law.



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For Petitioner : Mr.R.Suriya Narayanan
For R-1 & R-2 : Mr.S.Arivalagan
For R-3 : Mr.R.Gandhi

ORDER

This Writ Petition is filed for issuance of a Writ of Certiorarified Mandamus, to quash the order of the first respondent vide communication in letter No.59791/1505/F.8/F.81/BBO.66904/2015, dated nil 02.2015 and to direct the first respondent to pay the family pension to the petitioner on and from 26.10.2014, with appropriate interest, within the time to be fixed by this Court and also to pay monthly pension thereafter in accordance with law.

2. Learned counsel appearing for the petitioner submitted that the petitioner married late.Vellaichamy, an employee in the Tamil Nadu Electricity Board, in the year 1991. At the time of marriage, her husband told her parents that he got married with the third respondent and had three children through her. He also informed that the third respondent had separated from him by customary divorce. Therefore, her parents conducted her marriage with late husband Vellaichamy and she had two children through him.



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3. Learned counsel appearing for the petitioner further submitted that the petitioner's husband filed divorce petition in H.M.O.P.No.251 of 2010 before the III-Additional Sub Judge, Madurai, against the third respondent and got divorce decree in his favour on 30.07.2012. That order was not challenged and has become final. Hence, the third respondent cannot claim any right on the basis that she is the first wife of her deceased husband Vellaichamy. After the death of her husband Vellaichamy on 26.10.2014, she is entitled to family pension. When she made an application for grant of family pension, the first respondent sent a letter No.59791/1505/F.8/F.81/BBO.66904/2015, dated nil 02.2015, denying the grant of family pension citing the earlier letter, dated 07.07.2009. Therefore, this petition.

4. In response, learned counsel appearing for the third respondent submitted that it is true that Vellaichamy filed a divorce petition against the third respondent and that petition was allowed ex-parte. However, the third respondent filed a petition for setting aside the ex-parte order along with a petition under Section 5 of the Limitation Act to condone the delay of 92 days in filing the ex-parte order set aside petition. These petitions had been filed along with a



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joint memo signed by Vellaichamy and third respondent. The joint memo specifically refers to the pendency of divorce proceedings and the decision of Vellaichamy and third respondent to live together and in pursuant to the decision, they are living together. It is further stated that both of them do not want to proceed with the divorce proceedings.

5. Learned counsel appearing for the third respondent further submitted that the joint memo clearly shows the intention of Vellaichamy and third respondent to live together and not to proceed with the divorce proceedings. However, the Court instead of allowing the delay excuse petition to set aside the ex-parte order and recording the settlement reached as per the joint memo and dismissed H.M.O.P.No.251 of 2010 merely recorded the joint memo in the delay excuse petition and dismissed the petition as not pressed. This is a mistake committed by the Court and also by the learned counsel appearing for the parties. For the mistake committed by the Court and the learned counsel appearing for the parties, the third respondent cannot be penalised.



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6. Learned counsel appearing for the respondents 1 and 2 submitted that the third respondent filed a suit in O.S.No.898 of 1991 on the file of the Additional Sub Court, Madurai, against Vellaichamy and a sum of Rs.1,450/- was ordered to be paid as maintenance to the third respondent. Subsequently, this amount was reduced to Rs.1,000/- based on the order passed by this Court in C.M.P(MD)No.5705 of 2001. As per the monthly maintenance paid, the third respondent is the legally wedded wife.

7. Considered the submissions of the learned counsel appearing for the parties and perused the records.

8. From the submissions of the learned counsel appearing for the parties, it is not in dispute that the marriage between Vellaichamy and third respondent had taken place on 01.07.1974. It is also not in dispute that the marriage between Vellaichamy and the petitioner had taken place on 08.12.1991 when the third respondent is alive. Therefore, there is no doubt that the marriage of the petitioner with Vellaichamy had taken place when the first wife was alive. The issue with regard to grant of ex-parte divorce and the divorce order being still in force is the point raised by the



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learned counsel appearing for the petitioner. True it is that technically the order of ex-parte divorce passed in H.M.O.P.No.251 of 2010 is not yet set aside. But we have to consider the entire factual matrix in this case. After the passing of ex-parte divorce in H.M.O.P.No.251 of 2010, the third respondent filed I.A.No.49 of 2013 in H.M.O.P.No.251 of 2010 under Section 5 of the Limitation Act to condone the delay of 92 days in filing the petition to set aside the ex-parte order along with a joint memo. As already indicated, joint memo contains certain terms like Vellaichamy and third respondent-Lakshmi living together and their intention not to proceed further with the matrimonial proceedings, meaning thereby they wanted to live together and got the H.M.O.P.No.251 of 2010 dismissed. Unfortunately, the Court instead of allowing both the condone delay petition and set aside the ex-parte petition and recording the joint memo of compromise in H.M.O.P.No.251 of 2010, merely dismissed the delay condonation petition as not pressed. This is apparently a wrong order. Therefore, on the basis of this wrong order, we cannot conclude that Vellaichamy and the third respondent were not living together and the ex-parte divorce has become final. The joint memo clearly shows that they lived together and they wanted to terminate the matrimonial proceedings.



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9. It is also seen from the communication dated 07.07.2009 which was sent to Vellaichamy even during his lifetime that there is a specific mention that there was no legal divorce between Vellaichamy and third respondent and therefore, family pension cannot be disbursed to the petitioner. This was also intimated to the petitioner through the impugned proceedings. All these facts mentioned above clearly show that Vellaichamy and third respondent were living as husband and wife till the death of Vellaichamy and that the marriage between the petitioner and Vellaichamy had taken place when the first marriage between Vellaichamy and third respondent is in subsistence.

10. It is a settled proposition of law that the second wife during the subsistence of the first marriage cannot seek any benefits including family pension on the death of her husband. While answering a similar question in R.Rajathi Vs. the Superintending Engineer, TANGEDCO Limited and others this Court observed as follows:-



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"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."

.....

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



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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



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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.

.....

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.

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42. We have discussed the basis on which the various judgments, of course conflicting views, have



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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."



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11. In the case beforehand, it is candidly admitted by the petitioner even in the affidavit that she had married Vellaichamy when the third respondent is alive. It is established that the marriage between Vellaichamy and third respondent was in subsistence at the time of marriage of the petitioner with Vellaichamy. Therefore, this Court is of the considered view that the petitioner is not entitled for the claim of family pension as prayed for in the Writ Petition. This Court finds that there is no merit in the Writ Petition and therefore, is liable to be dismissed and dismissed accordingly. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

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Internet :Yes
Index :Yes / No
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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 Account Officer,
Audit Office (Pension),
144, Anna Salai,
Chennai – 600 002.
- 2.The Superintending Engineer,
Tamil Nadu Generation & Distribution Corporation,
Madurai Distribution Circle,
K.Pudur,
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G.CHANDRASEKHARAN, J.

ps

Order made in
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