



W.P. No.3322 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.07.2024

Pronounced on : 30.10.2024

CORAM :

THE HONOURABLE MR. JUSTICE MUMMINENI SUDHEER KUMAR

W.P.No.3322 of 2020

and

W.M.P.No.3854 of 2020

N.Jothilakshmi

... Petitioner

Vs.

1.The Deputy Director – Benefits,
Employees state Insurance Corporation (Sub regional Office),
No.1897, Trichy road,
Panchdeep Bhavan,
Ramanathapuram,
Coimbatore – 641 045.

2.The Branch Manager,
Branch office – Palladam,
ESI Corporation, Coimbatore.

...Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of Writ of Certiorarified Mandamus calling for the entire records of the order of rejection, dated 07.09.2018 passed by the 1st respondent in his proceedings bearing No.56/E/11/14/2016/PG/NON-MED-III/SRO, based on the petitioner's representation dated 30.08.2018 and quash the same and consequently direct the 1st respondent to reconsider the petitioner's representation dated 30.08.2018 and grant dependent's benefit to the petitioner.



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For Petitioner : Mr.K.R.Samratt
for Mr.H.Rajasekar

For Respondents : Ms.G.Narmadha
for Mr.G.Bharadwaj

ORDER

The brief facts that are relevant for disposal of this writ petition are as under:

One Mr.Narayanaswamy worked as Ironer in M/s.Carloo Textile, having its factory at Chennimalaipalayam, Karaipudur Village, Ganapathipalayam Road, Tiruppur with employee I.D No.842 and he was enrolled with the Employee State Insurance Corporation and necessary contributions have been paid to by his employer and the petitioner. He was married to the petitioner herein, on 23.06.1985 and out of wedlock, they have two children namely, Sathya and Manikandan. It was thereafter, the petitioner and the said Narayanaswamy obtained divorce by mutual consent in H.M.O.P.No.61 of 2004, by an order dated 07.02.2006 passed by the Court of Sub-ordinate Judge, Kovilpatti. It is thereafter, the said Narayanaswamy died in an accident occurred during the course of his employment on 02.12.2016. While, the said Narayanaswamy was alive, he submitted a nominee form prescribed under Rule 93 of Tamil Nadu Factories



Rules, 1950 nominating the petitioner herein, as his nominee in the capacity of wife for payment of dues for the period of leave with wages and pending payments/salaries to her and she was described as wife in the said nomination form. After the demise of the said Narayanaswamy, the son of the petitioner herein, made a claim for payment of dependent benefits, but the said request was rejected by the respondent Corporation on the ground that the son of the petitioner namely Manikandan had attained the age of 25 years and thereby, cease to be a dependent of the deceased employee within the meaning of Section 2(6-A) of the Employees' State Insurance (in short 'ESI') Act, 1948.

2. It was thereafter, the petitioner herein, submitted an application on 30.08.2018 claiming for payment of the dependent benefits to her claiming to be the wife of the deceased employee. In the said application, the petitioner claimed that though there was a decree of divorce, the petitioner again started living with the deceased employee from the year 2007 onwards on the advice of elders and well wishers and she lived with the deceased employee till the date of his demise. She also placed reliance on the nomination form that was submitted by the deceased employee under the Factories Act, 1948, during his life time. The said claim of the petitioner was



considered by the Corporation and through the impugned proceedings dated 07.09.2018, the same was rejected on the ground that unless the petitioner produce the remarriage certificate or favorable court ruling, dependent benefit cannot be sanctioned to the petitioner. It is aggrieved by the said order dated 07.09.2018, the petitioner approached this Court by filing the present writ petition.

3. In response to the notice issued by the Court, the respondent filed detailed counter affidavit contending that the divorced wife cannot be treated as dependent within the meaning of Section 2 (6-A) of ESI Act, 1948 once the divorce was granted by the competent Court on 07.02.2006. It is further stated that the presumption of marriage is not available to the petitioner on the ground of continuous co-habitation for number of years, as the marriage between the petitioner and the deceased employee was dissolved by the decree of divorce and so long decree is in operation, the petitioner cannot claim the status of wife of the deceased employee. The respondents also disputed the legal heir certificate issued by Tahsildhar and the certificate issued by the concerned Village Administrative Officer, Alampatti certifying that the petitioner and the deceased employee lived together as wife and



husband during the life time of the deceased employee. The respondents also raised a ground contending that the present writ petition is filed belatedly, after one and half years, after passing of the impugned order.

4. Heard Mr.K.R.Samratt for Mr.H.Rajasekar, learned counsel appearing for the petitioner and Ms.G.Narmadha for Mr.G.Bharadwaj, learned counsel appearing for the respondents.

5. The learned counsel for the petitioner while reiterating the contentions raised in the writ petition, placed strong reliance on the nomination form submitted by the deceased employee under the provisions of Factories Act in Form 34 and contended that inspite of the decree of divorce passed on 07.02.2006, the petitioner and the deceased employee lived together as wife and husband till the date of death of the employee in question and in view of the same, the deceased employee has already submitted a nomination form wherein, the petitioner herein, was shown as his wife and thereafter, notwithstanding the decree of divorce passed on 07.02.2006 by virtue of continuous cohabitation from the year 2007 till the date of death of deceased employee in the year 2016, there is presumption of marriage and the



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petitioner is bound to be treated as widow of the deceased employee on the demise of the employee in question. He also placed reliance on a decision of the learned Single Judge of this Court in W.P.No.34952 of 2019 dated 23.01.2020.

6. On the other hand, Ms.G.Narmadha, learned counsel appearing for the respondents while reiterating the contentions raised in the counter affidavit, further contended that the petitioner has an effective alternative remedy under Section 75 of ESI Act, 1948 before the ESI Court where all the issues including factual aspects can be gone into, but the petitioner instead of availing effective alternative remedy which is available, approached this Court by filing the present writ petition and therefore, raised preliminary objection against the maintainability of the writ petition itself. The learned counsel also further contended that the petitioner has got cause of action for making claim on the date of demise of the employee on 02.12.2016 itself, but the petitioner made a claim for the first time only on 30.08.2018 that is after a lapse of one year eight months. She also further contended that the divorced wife cannot be treated as widow of the deceased employee in question and therefore, the petitioner does not come within the meaning of dependent under Section 2



(6-A) of ESI Act, 1948. The learned counsel also disputed the genuineness of the legal heir certificate issued by the Tahsildhar and the certificate issued by the Village Administrative Office which are relied upon by the petitioner in support of her case, and contended that the respondent Corporation will have ample opportunity to disprove the said certificate before the ESI Court.

7. She also further contended that in terms of Section 77(1-A) of ESI Act, 1948, the petitioner has to make a claim within a period of twelve months after the claim became due and in terms of Regulation 83 of ESI (General) Regulations 1950, the claim became due on death of deceased employee, but the petitioner failed to make any claim within a period of twelve months. Thus, it is contended that the claim of the petitioner is barred by limitation. The learned counsel also further contended that, even if presuming that the deceased employee has nominated the petitioner as his nominee under the provisions of Factories Act, 1948, the same can be distinguished as nominee in all circumstances cannot be treated as dependent within the meaning of Section 2(6-A) of Act, 1948. She also further contended that the decision relied upon by the learned counsel for the petitioner in W.P.No.34952 of 2019 dated 23.01.2020 has no application to



the case on hand as the petitioner has already obtained divorce by virtue of decree passed by competent Court and the said decree is still in operation.

She also placed reliance on a decision of the Hight court of Chattisgarh, Bilaspur in W.A.No.151 of 2018 and Nagpur Bench of High Court of Bombay in First Appeal No.544 of 2013 to contend that the divorced wife cannot be treated as widow after the demise of her former husband.

8. This Court has carefully considered the submissions made on either side and also perused the entire material available on record.

9. The first objection raised by the learned counsel appearing for the respondents is on the maintainability of the writ petition, in the light of availability of alternative remedy under Section 75 of ESI Act, 1948 before the Employees State Insurance Court. It is settled law that the power conferred upon this Court under Article 226 is an unbridled power, however, this Court itself has imposed certain self restrictions for exercising its jurisdiction under Article 226 of the Constitution of India. There is no absolute bar from entertaining a writ petition in case of availability of alternative remedy also. Whether an alternative remedy that is available is an



effective remedy or not is a matter to be considered basing upon the facts of each case. Hence, the writ petition cannot be thrown out on mere availability of alternative remedy under Section 75 of ESI Act, 1948.

10. In the instant case, the claim is for payment of the dependent benefit consequent upon the death of workmen who was registered under the provisions of ESI Act, 1948. The employee died on 02.12.2016 and the claim for payment of dependent benefit was made by his son initially and thereafter, the petitioner herein, claiming to be a widow of the deceased employee, made a claim for payment of dependent benefits by submitting an application on 30.08.2018. The said claim was rejected by the respondent Corporation by passing an order dated 07.09.2018. It is thereafter, the petitioner approached this Court by filing the present writ petition in the year 2020 and the same is pending before this Court for more than four years. No doubt, if there is any factual dispute which cannot be adjudicated before this Court under Article 226, definitely, this Court would refrain from entertaining the writ petition and ought to have relegated the petitioner to the forum as provided under Section 75 of ESI Act, 1948. But that is not the case on hand. Hence, this Court is not inclined to non-suit the petitioner on the ground of availability of



an alternative remedy.

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11. The petitioner herein, claiming to be a widow of the deceased employee, having married to him on 23.06.1985 and admittedly, she gave birth to two children through the deceased employee. It is also not in dispute that the marriage of the petitioner with the deceased employee ended in divorce on 07.02.2006. It is also not in dispute that the deceased employee during his life time has submitted a nomination Form in Form 34 under provisions of Factories Act, 1948 & the Tamil Nadu Factories Rules, 1950. The submission of the said nomination Form is not in dispute. A perusal of the said nomination Form shows that the petitioner herein was nominated to receive the arrears of salary/wages, leave salary, etc in the event of death of the employee. In the said nomination form, the deceased employee, while nominating the petitioner herein, also described her as his wife. Either in the counter affidavit filed by the respondent Corporation or in the elaborate written arguments filed before this Court, the existence of the said nomination form is not disputed. No doubt, the respondents have disputed the legal heir certificate issued by the Tahsildhar concerned and the certificate issued by the Village Administrative Officer certifying that the petitioner and the deceased



employee lived together as wife and husband till the date of demise of the deceased employee. In the absence of any dispute about the nomination form submitted by the deceased employee during his life time which is also placed before this Court coupled with contention raised by the petitioner that she has been living with the deceased employee since the year 2007 onwards, till the date of demise, as his wife especially in the absence of any serious dispute about the same, her status cannot be allowed to be disputed. The respondent Corporation also not disputed the co-habitation of the petitioner with the deceased employee. Once that is established, whether such co-habitation of the petitioner with the deceased employee from 2007 till 2016, notwithstanding the decree dated 07.02.2006 would lead to presumption of marriage or not, is the only question that required to be considered by this Court. If same would given rise to presumption of marriage then, the petitioner can be treated as wife of the deceased employee and consequently, as a widow on the demise of the employee in question on 02.12.2016.

12. There is no serious dispute about the claim made by the petitioner living with the deceased employee during the year 2007 till 2016. But the contention of the respondent Corporation is only on the ground that



the said fact of living together would not give rise to the presumption of marriage as the decree of divorce is staring at the petitioner and subsisting, and there is no remarriage that took place between the petitioner and the deceased employee. In this connection, it would be relevant to refer to a decision relied upon by the learned counsel for the petitioner in W.P.No.34952 of 2019 wherein, a coordinate bench of this Court by following a decision of the Hon'ble Apex Court held as under:

“10. It is an admitted case that the petitioner got married to Dr.A.Chinnasamy on 13.02.1975, when the first marriage was in force. Therefore, there is no difficulty in coming to the conclusion that the so called marriage between the petitioner and the deceased Dr.A.Chinnasamy is illegal and not recognized by Law. The petitioner had given birth to three children through the said Dr.A.Chinnasamy. The first wife fell sick and she expired on 02.04.1997. Even thereafter, the petitioner continued to live with the deceased Dr.A.Chinnasamy till his death on 20.01.2009. Therefore, the petitioner has lived with the deceased Dr.A.Chinnasamy for nearly 12 years even after the death of the first wife. In the meantime, the deceased Dr.A.Chinnasamy had nominated the petitioner on 11.05.1999 to receive the Family Pension



after his death.

11. The only issue that requires consideration is whether this long co- habitation will ennure to the benefit of the petitioner and make her eligible to receive the Family Pension. To decide this issue, the judgment that was cited by the learned counsel for the petitioner becomes very relevant. This Court, in **S.Suseela @ Mary Margaret Vs. The Superintendent of Police and another** made in WP.No.15806 of 2015 dated 18.06.2015, had dealt with the similar issue. The relevant portions in the judgment is extracted hereunder:-

"2.The husband of the petitioner one K.M.Stanley was employed as a Head Constable in the Police Department. While he was in service, he married one Suganthi on 06.06.1973 and out of the said wedlock, they have a female child namely, Rooth Epsia. There were some difference of opinion between K.M.Stanley and Suganthi and they lived separately from 1975 onwards. While so, K.M.Stanley married the petitioner herein on 23.06.1976, when the first marriage with Suganthi was subsisting. Out of the wedlock, one male child namely, Nakeeran was born and he is now aged around 35 years.

3. The first wife namely Suganthi approached the learned Principal District Judge, Erode, by filing IDOP No.25 of 2001 seeking dissolution of marriage and the District Judge allowed the said petition on 05.11.2003 and the marriage between K.M.Stanley



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and Suganthi was dissolved. Furthermore, the said Suganthi died on 02.12.2005.

4. While so, K.M.Stanley retired from service on 31.07.2001. After retirement, he has drawn pension and he died on 28.10.2011. During his life time, K.M.Stanley gave a representation dated 26.06.2007 to the first respondent to include the name of the petitioner herein as his nominee for the purpose of getting family pension.

5. The first respondent sent a proposal dated 04.09.2014 to the second respondent to sanction family pension to the petitioner recognizing that the petitioner is the wife of the deceased Government servant. But, the second respondent passed the impugned order dated 13.02.2015, rejecting the proposal stating that since, the marriage between the deceased Government servant and the petitioner herein took place on 23.06.1976, when the marriage between the deceased Government servant and his first wife namely Suganthi was in subsistence, the petitioner herein is not eligible for family pension.

6. The petitioner has now filed this writ petition seeking to quash the impugned proceedings of the second respondent in No.Pen.33/2/pt 11155/FP/14-15 dated 13.02.2015 and to direct the second respondent to accord sanction for grant of family pension to her.

*10. At this juncture, the learned counsel for the petitioner placed reliance on a judgment of the Hon'ble Supreme Court in **Dhannulal and others v. Ganeshram and another (ILC-2015-SC-civil)**, wherein in paragraph Nos.14 and 15, it has been held as follows:-*



*“14.In the case of **Gokal Chand vs. Parvin Kumari**, AIR 1952 SC 231, this Court observed that continuous co-habitation of woman as husband and wife and their treatment as such for a number of years may raise the presumption of marriage, but the presumption which may be drawn from long co-habitation is rebuttable and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them.*

15.It is well settled that the law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for a long time. However, the presumption can be rebutted by leading unimpeachable evidence. A heavy burden lies on a party, who seeks to deprive the relationship of legal origin. In the instant case, instead of adducing unimpeachable evidence by the plaintiff, a plea was taken that the defendant has failed to prove the fact that phoolbasa Bai was the legally married wife of Chahatrapati. The High Court, therefore, came to a correct conclusive by recording a finding that Phoolbasa Bai was the legally married wife of Chhatrapati.”

11.In these circumstances, the first respondent thought it fit to send proposal for family pension to the petitioner. However, the second respondent by way of the impugned order rejected the same.

12.In view of the aforesaid facts, the second respondent was not correct in rejecting the proposal for family pension to the petitioner on the sole ground that when the petitioner married the deceased Government servant, the marriage between



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the Government servant and his first wife was subsisting.

13. In view of all the above, I am of the view that the second respondent while passing the impugned order failed to take into account the entire facts of the case, particularly, the dissolution of marriage between the deceased Government servant and his first wife in the year 2003; the death of the first wife of the deceased Government servant in the year 2005 and the continuous living together of the deceased Government servant with the petitioner from 1976 till the death of the deceased Government servant in the year 2011. Hence, the first respondent has rightly thought it fit to send proposal for family pension to the petitioner. If it is so, I am of the view that the second respondent is not correct in rejecting the proposal for family pension. It is now accepted that without the formal marriage, living together relationship has conferred every right for the parties aggrieved to claim for their legal rights. In the aforesaid facts and circumstances of the case, the order passed by the second respondent is liable to be interfered with."

*12. Even in the above judgment, the petitioner therein had married the of DV Government Employee during the subsistence of the first marriage. The only difference is that in that case, the first marriage got dissolved in the year 2003 and the first wife died in the year 2005. This Court took into consideration the judgment of the Hon'ble Supreme Court in **Dhannulal's** case. The Hon'ble Supreme Court, in the said case has*



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held that Law presumes in favour of marriage and against concubinage, when a man and woman have co-habitated continuously for a long time. By relying upon this judgment, this Court held that after the dissolution of marriage with the first wife and after her death, the petitioner therein was living with the deceased Government servant till his death. This was taken into consideration by this Court and this Court held that the petitioner therein must be considered to be the wife of the deceased Government servant atleast after the dissolution of the first marriage and the subsequent death of the first wife.

13. This Court is in complete agreement with the proposition of law that has been enunciated in the above judgment. It is very easy to brand the petitioner as a concubine and deprive her of her livelihood. However, the fact remains that the petitioner lived with the deceased Dr.A.Chinnasamy from the year 1975 up to his death in the year 2009. This means that she lived with him for nearly 34 years. The petitioner also gave birth to three children. If the petitioner had made this claim when the first wife is alive, then obviously the petitioner will not be



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entitled for Family Pension, since her relationship is not recognized by law.

14. The march of law happens only while considering the co-habitation that continues after the death of the first wife. That is the most crucial factor that was taken into consideration by this Court while granting the Family Pension to the petitioner in the case cited supra. Even in the present case, the first wife died on 02.04.1997. Thereafter, the petitioner lived with the deceased Dr.A.Chinnasamy till his death on 20.01.2009. During this period, it can always be construed that the petitioner and the deceased Dr.A.Chinnasamy were living as husband and wife and their long co-habitation itself raises that presumption of marriage. Added to that the deceased Dr.A.Chinnasamy had also nominated the petitioner on 11.05.1999 to receive the Family Pension after his death.

15. In the considered view of this Court, this Court has to necessarily lean towards the presumption of marriage rather than branding the petitioner as a concubine. This will be the most appropriate way to deal



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with the facts of the present case, if justice has to be done to the petitioner.”

13. This Court is in complete agreement with the view taken in the above decision. Even, if a decree of divorce is obtained by the petitioner is subsisting and staring at the petitioner, that would not come in the way of petitioner and the deceased employee to live together and lead life as wife and husband or to remarriage. The decree of divorce need not be set aside or modified or cancelled as a condition precedent for the petitioner and the deceased employee to live together as husband and wife or for remarriage. Therefore, the subsistence of decree of divorce by itself will not come in the way of drawing a presumption of marriage between the petitioner and the deceased employee. Once it is accepted that they lived together as husband and wife till the date of his demise of the employee notwithstanding the decree of divorce, coupled with the fact that the deceased employee during his life has acknowledged a status of the petitioner as his wife by duly submitting a nomination form after the date of decree of divorce, the subsistence of decree of divorce is not a ground to refuse the draw presumption of marriage between the petitioner and the deceased employee.



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14. Then, coming to the decision relied upon by the learned counsel for the respondent of High Court of Chattisgarh, at Bilaspur in W.A.No.151 of 2018 and Nagpur Bench of High Court of Bombay in First Appeal No.544 of 2013, they are the cases where the case of divorced wife came up for consideration and the issue was, as to whether the petitioner therein can be treated as 'widow' after the demise of 'former husband' and the Courts have come to conclusion that once the divorce took place, the relationship of wife and husband severed and the question of divorced wife being declared as 'widow' of the 'former husband' does not arise. That is not the fact situation in the case on hand. In the instant case, the specific case of the petitioner is that notwithstanding decree of divorce, the petitioner and the deceased employee lived as wife and husband throughout for about ten years prior to the demise of the deceased employee. Therefore, decision relied upon by the learned counsel for the respondents have no application to the facts of the case on hand.

15. The Employees State Insurance Act, 1948 is Social Welfare and beneficial legislation enacted for the benefit of the workmen and the



dependents and therefore, while considering the claims of the workmen or the dependents of the deceased workmen, the matter requires to be considered liberally so as to achieve the object and purpose of the Act, but not, with a view to prevent or avoid such benefits to the persons who are otherwise entitled or eligible for such benefits.

16. The only reason furnished in the impugned order is, non-production of remarriage certificate or favourable court ruling for payment of the dependent benefits to the petitioner. In the light of law laid down by this Court and the Hon'ble Apex Court dealing with presumption of marriage in the matter of pro-longed co-habitation of men and women, non-production of remarriage certificate cannot be a pre-condition for treating the petitioner as wife/widow of the deceased employee.

17. Though a serious contention is raised on the ground of limitation, the same has no application to the proceedings initiated under Article 226 of the Constitution of India, and this Court, in the facts and circumstances of the case, is of the considered view that it is a fit case to exercise the discretion of this Court under Article 226 of the Constitution of India.



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18. In the light of the above, in the considered view of this Court, the impugned order dated 07.09.2018 cannot be sustained and the same is accordingly set aside. The respondents are directed to pay all the dependent benefits, for which the petitioner being a widow of the deceased employee is eligible, as expeditiously as possible at any rate within a period of six (6) weeks from the date of receipt of a copy of this order.

19. Before parting with the case, this Court intend to acknowledge and appreciate the able arguments, advanced by Ms.G.Narmadha, young counsel, which made the job of this Court hard in rendering this Judgment.

20. Accordingly, the writ petition is allowed. The connected miscellaneous petitions, if any shall stand closed. No costs.

30.10.2024

Index : Yes/No
Speaking Order : Yes/No
dpa



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To:

1.The Deputy Director – Benefits,
Employees state Insurance Corporation (Sub regional Office),
No.1897, Trichy road,
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Ramanathapuram,
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dpa

Pre-Delivery Order made in
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