

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.03.2021

CORAM :

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

W.P.No.5706 of 2021

Malarkodi @ Malar

... Petitioner

Vs.

1. The Chief Internal Audit Officer,
Board Office Audit Branch,
TANGEDCO,
N.P.K.R.R. Maaligai, First Floor,
144/800, Anna Salai,
Chennai 600 002.
2. The Executive Engineer,
Execution and Maintenance,
Tamil Nadu Electricity Board,
Thiruvaidaimarudhur Main Road,
Kumbakonam – 612 001.
3. The Superintendent Engineer,
TANGEDCO Tanjore Taluk,
Vallam Road,
TNEB, Tanjore.
4. The Branch Manager,
Indian Overseas Bank,
Gandhi Salai,
Kumbakonam Branch.

... Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying to issue a writ of Certiorarified Mandamus, calling for the records pertaining to pension, by an order dated 25.11.2020, vide Ka.No.010206/411/Ni.Bi.2(2)/Ko.Oivu/2020, passed by the 3rd Respondent and to quash the same and further direct the Respondents to disburse the family pension and other related pensionary benefits including the life time pending arrears to the Petitioner.

For Petitioner : Ms.D.Kalaivani

For Respondents : Mr.Fakkir Mohideen

ORDER

Petitioner has come up with this Writ Petition seeking to quash the order dated 25.11.2020 passed by the 3rd Respondent vide Ka.No.010206/411/Ni.Bi.2(2)/Ko.Oivu/2020, and for a direction to the Respondents to disburse family pension and other related pensionary benefits including the life time pending arrears to her.

2. According to the Petitioner, her husband Late S.Kaliyaperumal worked as Foreman I Grade in the Kumbakonam Branch of the Respondent/TANGEDCO and after putting 33 years of service, he retired on 31.03.2004. After his retirement, he was receiving pension in his Bank Account from TANGEDCO Pensioners' Family Security Fund and lifetime arrears of pension from TANGEDCO vide PP.O.No.52572 and his monthly

pension was credited to his S.B. Account in Indian Overseas Bank, Gandhi Salai Branch, Kumbakonam.

3. It is further stated by the Petitioner that, in the Pension Account, her husband has mentioned one Mrs.Susila, who is his first wife, as his nominee. The said Susila is none other than the Petitioner's own sister. As Susila predeceased the Petitioner's husband on 21.02.2009 due to illness, the Petitioner's husband made an Application in 2015 for change in the details of nominee in his Account and requested for updating the name of the Petitioner in the nominee details in respect of his pension Account. While so, the Petitioner's husband died on 11.01.2015, leaving behind him, the Petitioner, three sons and three daughters, as his legal heirs. As all her sons and daughters got married and settled with their family, the Petitioner is greatly dependent on her husband's pensionary benefits.

4. It is the case of the Petitioner that, after the death of her husband, Provident Fund and other amount from his Pension Account was not withdrawn from his Bank Account. Due to non-withdrawal of pension from his Account, the Bank has kept the Account as 'Inactive' and the same is in non-operational stage. As the Petitioner's Application to the Respondents

seeking withdrawal of pension amount from his Account, stood rejected, having no other alternative, she has approached this Court by way of the present Writ Petition.

5. Heard the learned counsel on either side and perused the material documents available on record.

6. Admittedly, the Petitioner is the sister of her husband's first wife. Though, it has been stated by the Petitioner that, her sister Susila was suffering from cancer and hence, she was asked to marry her husband, both the said Susila and the Petitioner herein lived together under one roof, after the marriage of the Petitioner with the deceased. It is not in dispute that, the first wife of the Petitioner's husband pre-deceased the Petitioner's husband, due to illness. Hence, according to the Petitioner, she is entitled to pension and other retirement benefits of her husband in terms of Rule 49 of the Tamil Nadu Pension Rules, 1978 (in short 'Rules'). Also, it is stated that, the children of the deceased have no objection for the Petitioner getting the terminal benefits of the deceased, including pension. The Rule applicable to the employees of the Respondent Board is very old. But, Rule 49(7) of the said Rules states that, there should be a valid marriage.

7. For better appreciation, **Rule 49(7) of the Tamil Nadu Pension Rules, 1978**, is extracted hereunder:

“(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 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 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.]

[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); or

(ii) solemnised under the Mohammadan Law in which bigamy is permissible.]

[(7-A) Where family pension is payable to more than one person, each share containing a fraction of a rupee, it shall be rounded off to the next higher rupee (Except in cases where family pension, if all the shares are put together exceed the maximum limit of family pension admissible).

Provided that if a family pension (exceptional and rare) where the share of family pension as so rounded off under this sub-rule when added, causes an excess over the maximum limit, such case shall be referred to the Government.]

(8) (i) Except as provided in sub-rule(7), the family pension shall not be payable to more than one member of the family at the same time.

[*Explanation.* - For the purpose of this rule the twin children born at a single birth shall be treated as of the same age and made eligible for family pension in equal shares".]

(ii) If a deceased Government servant or pensioner leaves behind a widow or widower, the family pension shall become payable to the widow or widower, failing which to the eligible child.

[(iii) (a) If sons and unmarried daughters are alive, the eligible male or female children will be entitled for family pension in the order of their birth, irrespective of the sex of the child, and the immediate younger of him or her will be eligible for family pension only after the elder above him or her become ineligible for family pension.

(b) In the case of twin children, family pension is payable to such twin children in equal shares in the event of anyone of such children ceasing to be eligible for family pension, his or her share of family pension will

become payable to the other such child and when both such children become ineligible for family pension, the family pension will become payable to the next eligible child or twin children, as the case may be.]

8. The Hindu Marriage Act, 1955 does not permit second marriage.

Second marriage becomes valid, if solemnized after the demise of the first wife. But, it cannot be lost out of sight that, after the enactment of the Domestic Violence Act, 2005, even without marriage, when the factum of live-in-relationship between a man and woman is established, it is held to be legally valid, and over a period of time, the woman attains the status of a wife. But, after the demise of the husband, if two wives are alive, the second one will not attain the legal status of 'wife' unless Personal Law permits.

9. The issue whether presumption of marriage arises when parties are in a live-in relationship for a long period of time, which would give rise to a claim u/S. 125 Cr.P.C. came up for consideration in **Chanmuniya vs. Virendra Kumar Singh Kushwaha** before the Supreme Court. It was held that, **where a man and a woman have cohabited for a long period of time, in the absence of legal necessities of a valid marriage, such a woman would be entitled to maintenance.** A man should not be allowed to benefit

from legal loopholes, by enjoying the advantages of a defacto marriage, without undertaking the duties and obligations of such marriage. **A broad and expansive interpretation must be given to the term “wife”, to include even those cases where a man and woman have been living together as husband and wife for a reasonably long period of time.** Strict proof of marriage should not be a pre-condition for grant of maintenance u/S. 125 Cr.P.C.

10. The Parliament to protect the interest of women, who ends up as a second wife or a concubine as a result of long live-in-relationship with a male companion, has enacted the Protection of Women from **Domestic Violence Act, 2005**. Section 2(f) of the said Act, reads as follows:

“Domestic Relationship means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.”

11. The Domestic Violence Act, 2005, nowhere states that, a married man cannot have a live-in-relationship with an unmarried woman, so also, a married woman cannot have relationship with any person, more

particularly, when Section 497 of the Indian Penal Code has been struck down by the Supreme Court. The Supreme Court has held that, in a live-in-relationship between a male and female, who do not have a spouse, a situation like the present one on hand may arise, only after the demise of the legally wedded person.

12. The expression “relationship in the nature of marriage” as being akin to a common law or a defacto marriage, came up for consideration in the case of **D.Velusamy vs. D.Patchaiammal**. It was opined that, *a common law marriage is one which requires that, although a couple may not be formally married: (a) the couple hold themselves out to society as being akin to spouses; (b) the parties must be of legal age to marry; (c) the parties must be otherwise qualified to enter into a legal marriage, including being unmarried; and (d) the parties must have voluntarily cohabited, and held themselves out to the world as being akin to spouses for a significant period of time. However, not all live-in relationships would amount to a relationship in the nature of marriage to avail the benefit of Domestic Violence Act. Merely spending week-ends together, or a one-night stand, would not make it a “domestic relationship”.*

13. When there is a specific enactment of the Domestic Violence Act, 2005, Rule 49 of the Tamil Nadu Pension Rules, 1978 will take a backseat, as Domestic Violence Act, 2005, will come to the driver's seat and the woman will have to be given protection and the Rule cannot supersede the Statute mentioned supra. In the light of the Domestic Violence Act, 2005, if the live-in-relationship is established, then the woman attains the status of a wife. The march of law happens only while considering the co-habitation that, continues after the death of the first wife.

14. In a similar circumstance, a learned Single Judge of this Court in the case of **C.Sarojini Devi vs. The Director of Local Fund Audits, Chennai**, has held that, the second wife is entitled to payment of family pension after the death of the first wife. For better appreciation, relevant portion of the said judgment is extracted below:

“12. Even in the above judgment, the petitioner therein had married the 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 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 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 with the facts of the present case, if justice has to be done to the petitioner.

16. In view of the above discussion, this Court has no hesitation to quash the impugned order passed by the first respondent on 01.02.2016 and accordingly, the same is quashed. The first respondent is directed to pass necessary orders and sanction Family Pension to the petitioner with effect from the date of death of Dr.A.Chinnasamy i.e., from 20.01.2009 and disburse the arrears of pension to the petitioner, within a period of twelve (12) weeks from the date of receipt of a copy of this order. The petitioner shall be continued to be paid with the Family Pension till her life time.”

15. When the Rule specifically gives relief to more than one widow, taking into account Personal Law, the question of validity of the second marriage does not arise at all during the subsistence of the first marriage. I am of the view that, the second wife attains the deeming status of a wife from the date of demise of the first wife, in case, the husband is alive on the date of demise of the first wife. Also, when unknown relationship comes to be known after the demise of the husband, such woman may not be entitled to any relief, unless Personal Law permits more than one marriage or a declaration is obtained from the competent Judicial Forum with regard to her

legal status, after making the first wife as a party, if she is alive.

16. It is more pertinent to refer to a **Division Bench decision of this Court** in the case of **R.Rajathi vs. The Superintending Engineer, TANGEDCO, Nagapattinam District** (W.A.No.977 of 2017, dated 05.06.2018), wherein, in a similar circumstance regarding grant of pension to the second wife of the deceased employee, it has been held as under:

“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.”

17. Though, I am bound by the Division Bench decision of this Court, as the Domestic Violence Act has not been taken into account, moreso, when there are different judgments pertaining to the issue on hand, including that of mine rendered in the case of **S.Kamatchi vs. The Accountant General, O/o.Principal Accountant General, Chennai**, as

early as on 06.08.2014, which has been dealt with by the Division Bench in paragraphs 13, 17 and 35 of the judgment rendered in **Rajathi's** case (supra), I am of the view that, the matter has to be referred to a Larger Bench to arrive at a finality to the issue, as to whether **(i) Rule 49 of the Tamil Nadu Pension Rules, 1978, can take away the rights guaranteed for women under the Protection of Women from Domestic Violence Act, 2005 and (ii) a concubine, after the enactment of the Domestic Violence Act, 2005, attains the status of a companion/wife after the demise of the first wife during the lifetime of her husband and that, due to continued live-in-relationship, whether she attains the status of a wife, in order to get pensionary and other terminal benefits due to the deceased person.**

18. Taking note of the fact that women are to be respected and protected, moreso, in the light of the Protection of Women from Domestic Violence Act, 2005, the issue certainly needs to be decided by the Larger Bench. **Registry is directed to place the matter before the Hon'ble Chief Justice to constitute a Larger Bench for deciding the issue in question.**

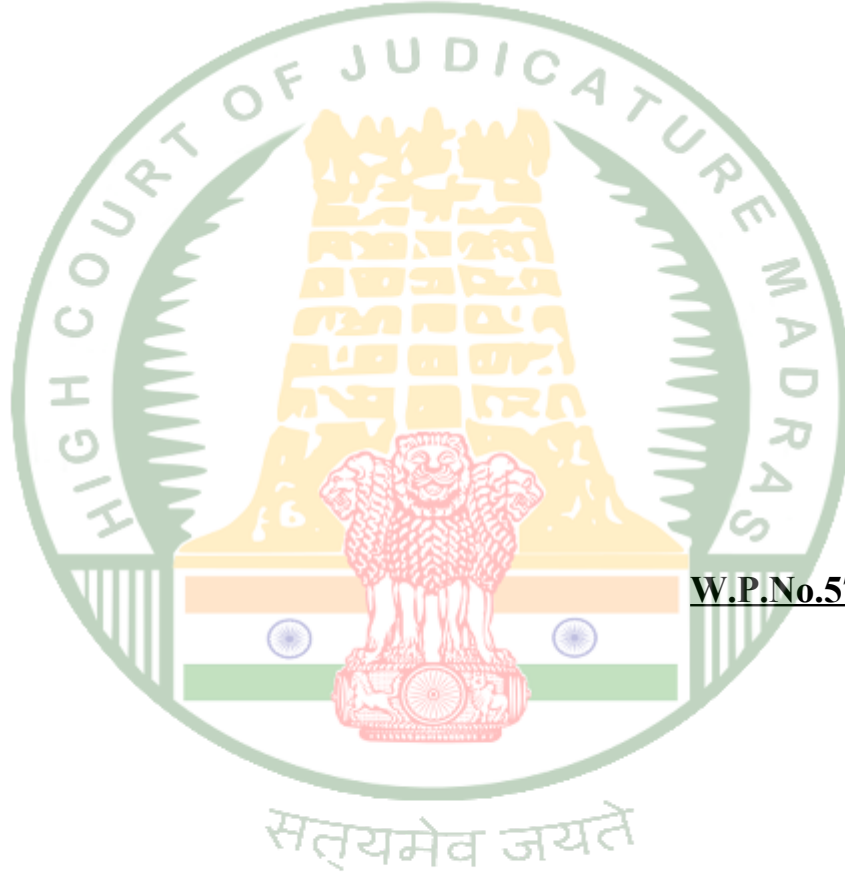
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S.VAIDYANATHAN,J.
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