

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31/07/2003

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA

WRIT PETITION.NO.9775 OF 1997

A. Pappammal .. Petitioner

-Vs-

1. Union of India,
Rep. by The Officer Commanding
Raksha Suraksha Corporation,
Ablutech, Defence Security
Corporation, Record Mill Road,
Cannanore, Kerala State.

2. The Senior Accounts Officer,
O/o. the CCDA (P) Accounts,
DSC, Mills Road, Cannanore,
Kerala State.

3. Minor Azhagurani,
Rep. by her mother and natural
guardian Nainammal,
Thambai Village,
Vahhandapuram Mazra,
Perambalur Taluk,
Trichy District. .. Respondents

Petition filed under Article 226 of the Constitution of India for the
issuance of Writ of Certiorarified Mandamus as stated therein.

For Petitioner : Mr.T. Singaravelan for
Ms.V.G. Manimegalai

For Respondents 1-2 : Mr.G. Jayachandran

Respondent-3 : Mr.R. Selvaraju

:J U D G M E N T

One Abimannan was working as Havildhar in Indian Army and
retired as such from service and thereafter he was receiving pension. While
so, he expired on 5.4.1994. There is no dispute that the present petitioner

is the widow of late Abimannan. Though disputed by the petitioner, for the purpose of this writ petition, it is assumed that the aforesaid Abimannan had married for the second time during life time of his first wife and the third respondent is the daughter begotten through the second marriage.

2. The dispute in the present writ petition is relating to eligibility of the third respondent to receive 50% of the family pension payable after the death of Abimannan. The second respondent in Proceedings No.G4/VI/MISC/DSC-96 dated 29.2.96 has sanctioned payment of 50% of the family pension to the third respondent on the footing that she was begotten through the second wife.

3. It is the contention of the petitioner that the deceased had nominated her as the beneficiary in the pension papers. It is further contended that the second respondent has committed illegality in allowing payment of 50% of the pension to the respondent No.3. On the aforesaid allegation, prayer has been made to quash the proceedings dated 29.2.1996 and to direct the respondents 1 & 2 to pay the family pension and other benefits to the petitioner.

4. A counter affidavit has been filed on behalf of the respondents 1 & 2 wherein it is indicated that apart from the petitioner and her four sons begotten through the petitioner, the deceased had married one lady Smt. Nainammal and had begotten two daughters through the second marriage and those two daughters are also the legal heirs as apparent from the legal heir certificate issued. It has been indicated that though the second marriage with Smt. Nainammal during the lifetime of the first wife was illegal and void under the Hindu Marriage Act, 1955, under the provisions of paragraph 9 of the Army Instruction 51/1980, the children of the second wife are entitled for the share of family pension. It has been indicated that since the second marriage is void, Smt. Nainammal is not entitled to any pension but, the children born to her are entitled to receive the pension as per the Army Instruction.

5. In course of hearing, the learned counsels appearing for the respondents 1 & 2 and for the respondent No.3 submitted that even though the second marriage was void, the children begotten through the second marriage shall be deemed to be the legitimate children of the deceased and are entitled to the properties of the deceased and therefore, the payment of pension to the third respondent cannot be characterised as illegal. In support of such contention, they have placed reliance upon a decision of the Supreme Court reported in 2000 AIR SCW 27 3 (RAMESHWASRI DEVI v. STATE OF BIHAR AND OTHERS).

6. As already indicated, it is unnecessary for me to decide about the factual aspect as to whether there was a second marriage with Smt. Nainammal and as to whether two daughters were born. For the purpose of deciding this writ petition, I proceed on the assumption that there was a second marriage and two daughters, including the respondent No.3, were born through such second marriage.

7. In view of the provisions contained in Sections 5(1) and 11 of the Hindu Marriage Act, the second marriage, if any, was void and as such Smt. Nainammal cannot be considered as wife (widow) of the deceased. However, Section 16 of the Act makes it clear that the children begotten through such void marriage shall be legitimate. However, in view of Section 16(3), such legitimacy shall not confer upon such children any right in or to any property of the person other than their parents. The question in this writ petition is not as to whether such children born through the alleged second marriage have any right to succeed to the properties of the deceased or not. The question is whether the third respondent is entitled to get the family pension.

8. The respondents 1 & 2 have placed reliance upon the Army Instruction relating to grant of ordinary family pension to widows/Children of Army personnel contained in paragraph 51 of the Army Instruction, 1980.

Paragraph 51(1), (6), (7), (8), and (9) being relevant, are extracted in full as follows :

□ 51. Grant of ordinary family pension to widows/Children of Army personnel (including those in DSC) governed by Military Rules.

1. In supersession of all existing orders on the subject, family pensionary benefits, as detailed in paragraph 2 and subsequent paras, will be admissible to the widows and children of all commissioned officers (including those holding EC, SSRC or TC), JCOs (including those granted Honorary Commissions as ICOs while on the effective list) OR and NCs (E), who were in service on 1-1-1964 or who joined/join service thereafter.

. . . .

6. □Family□ for the purpose of these orders will include the following relatives of the individual:

(a) Wife, and widower in the case of a lady medical officer of AMC.

(b) Minor sons; and

(c) Unmarried minor daughters.

NOTES : (1) (b) and (c) above will include children adopted legally before retirement.

(2) Marriage after retirement will not be recognised for the purpose of these orders.

7. The pension will be admissible -

(a) to a widow (widower in the case of a lady medical officer of AMC) up to the date of death or disqualification which-ever is earlier;

(b) to a minor son until he attains the age of 18 years

(c) to an unmarried daughter until she attains the age of 21 years or marriage whichever is earlier.

NOTE: With effect from 29th March 1978, unmarried daughters/son will continue to get family pension up to the age of 24 years and 21 years respectively.

8. Except as provided in para 9(a) below, family pension will not be payable to more than one member of an individual's family at the same time. It will first be admissible to the widow (widower in the case of a lady medical officer of AMC). and thereafter to the eligible minor children. In the event of disqualification or death of the widow (widower in the case of lady medical officer of AMC) the pension will be granted to the minor children through their natural guardian. In disputed cases, however, payment will be made through a legal guardian.

NOTE: If minor sons are alive, unmarried minor daughters will not be eligible for pension. The family pension will be granted to the eldest minor son in the first instance. On his disqualification/death the other minor sons will be eligible for pension according to the seniority by age. The eligibility of unmarried minor daughters for pension will start only where there is no minor son eligible for pension. In their case also the one who is the senior-most in age, has prior claim for pension.

9.(a) Where an individual is survived by more than one widow the pension will be paid to them in equal shares. On the death of a widow her share of the pension will become payable to her eligible minor child. If at the time of her death, a widow leaves no eligible minor child, the payment of her share of the pension will cease.

(b) Where an individual is survived by a widow and has also left behind an eligible minor child/children from another wife, the eligible minor child will be paid the share of pension which the mother would have received if she had been alive at the time of the death of the individual. (Emphasis added)

9. On a perusal of paragraphs 51(6) and (7) it is clear that expression "Family" for the purpose of the instruction includes the wife, minor sons and unmarried minor daughters and pension will be admissible to the widow upto the date of death or disqualification of such widow to a minor son until he attains the age of 21 years and to an unmarried daughter until she attains the age of 21 years or marriage whichever is earlier. Of course it is true that the aforesaid Instruction do not make any distinction between the children begotten through a valid marriage and the children through a void marriage. Paragraph 51(8) makes it clear that except as provided in para 9(a), family pension will not be payable to more than one member of an individual's family at the same time. It is further apparent from paragraph 8 that family pension would be admissible first to the widow and thereafter to the eligible minor children. In the event of disqualification or death of the

widow, the pension will be granted to the minor children. The Note to paragraph 8 makes it clear that if minor sons are alive, unmarried minor daughters will not be eligible for pension. Similarly, if there are more than one minor sons, the family pension will be granted to the eldest minor son in the first instance and on his disqualification/death, pension would be payable to other minor sons according to the seniority by age. The eligibility of unmarried minor daughter will start only if there is no minor son eligible for pension. The pension can be paid to two persons only in circumstances contemplated in paragraph 9(a). Where an individual is survived by more than one widow the pension will be paid to them in equal shares and on the death of a widow her share of the pension will become payable to her eligible minor child and at the time of death of such widow, if there is no eligible minor child, the payment of her share of the pension will become ceased. Under paragraph 9(b), where the individual leaves behind the widow and also the eligible minor child/children from another wife, the eligible minor child will be paid the share of pension which the mother would have received if she had been alive at the time of the death of the individual.

10. In the present case, even assuming that there was a second marriage, by no stretch of imagination, the second wife can be considered as "widow" for the purpose of paragraphs 7 and 9. In fact this position is conceded by all. However, it is argued by the counsel for the respondents 1 & 2 and the counsel for the third respondent that since the second "wife" has a minor daughter, she is entitled to the pension under paragraph 9(b). A bare perusal of paragraph 9(b) makes it clear that such provision is applicable only where an individual is survived by a widow and minor child/children from another wife. 9(b) makes further clear that such minor child would be paid the share which the mother would have received. In the present case, the mother herself would not have received the pension under any circumstances. 9(b) cannot have any application to such a case. Since the first widow is alive, in view of the provisions contained in paragraph 8, the minor children will be entitled to pension only after ineligibility or death of such widow and in no other circumstances.

11. Learned counsel appearing for the respondents have placed strong reliance upon the decision reported in 2000 A.I.R. SCW 273 (cited supra) and contended that as in the said case pension was paid to the children born through the void second marriage, similar order should be passed in the present case. The dispute in the said case related to the family pension and death-cum-retirement gratuity. Death-cumretirement gratuity was payable under the Gratuity Act. The provisions contained in the said Act do not make any distinction between a child born through a valid marriage or an invalid marriage. That question, however, does not arise in the present case as the question of payment of pension is only in dispute. So far as the question of payment of pension is concerned, the provisions under which pension was claimed in the said case are not available. The provisions relating to payment of pension in the present case, which have been extracted in the present case, were not under consideration in the said case. A perusal of the said decision makes it clear that the Supreme Court was considering the right of children in the light of Section 16 of the Hindu Marriage Act and Sections

8 and 10 of the Hindu Succession Act read with the specific provisions relating to payment of pension applicable in that case. The question now raised regarding interpretation of the specific provisions relating to payment of pension in the present case was not at all in dispute. Said decision is not applicable to the present case in view of the specific provisions relating to pension contained in the Army Instruction.

12. A contention has been raised by the petitioner that right to get pension is not a bounty and may be considered to be a property and since a child begotten through invalid marriage is also entitled to succeed to the property, the respondent No.3 has got a right to get the pension. It is true that right to get pension is not a bounty, but considered as "property" of the person. In the present case, that right belongs to Abhimannan, who had received pension, and after his death the payment of family pension become a right of the persons, who are entitled to receive the pension as per the provisions. If the right to get pension is considered as a property, all the legal heirs should be entitled to the pension on the death of the ex-serviceman and in such a case, the question of paying family pension only to the widow and her disqualification to her minor children would not arise because all the legal heirs would be entitled to get pension. In other words, even though there is a "right" to get pension, which is considered as property, such "property" is not a heritable property to be inherited by all the successors, but is a "right" of the person entitled to receive family pension in accordance with the relevant rules for payment of family pension.

13. For the aforesaid reasons, the writ petition is allowed and the order passed by the second respondent directing 50% payment of pension to the third respondent is quashed. It is made clear that no opinion is expressed regarding any factual dispute relating to the alleged second marriage. No costs.

Index : Yes
Internet : Yes
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To

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2. The Senior Accounts Officer,

O/o. the CCDA (P) Accounts,
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3. Minor Azhagurani,
Rep. by her mother and natural
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Perambalur Taluk, Trichy District.

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