

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU.

SWP No.375/2008,
CMA No. 575/2008,
CMA No. 3910/2012

Dated:24.05.2013

Vimla Choudhary and others v. University of Jammu and others

Coram:

Hon'ble Mr. Justice Tashi Rabstan-Judge.

Appearing counsel:

For the petitioner (s) : Mr. Abhinav Sharma, Advocate.

For the respondent (s) : Mrs. Aruna Thakur, Adv. for R- 1
and 2,

S. Hakumat Singh, Adv. for R-3
to 7.

Whether approved for reporting : Yes.

1. By medium of petition-in-hand, the petitioners seek the following reliefs:-

- (a) Mandamus, commanding and directing the respondents 1 and 2 to consider and consequently appoint petitioner No.2 on compassionate grounds.
- (b) Mandamus, commanding and directing the respondents to pay to the petitioners No.2 and 3 their share out of the family pension, death-cum-retirement gratuity on account of the death of their father, namely, S. Malkiat Singh, and out of other pensionery benefits.
- (c) Mandamus, commanding and directing the respondents No.1 and 2 not to pay and release all the pensionery and other service benefits to respondents 3 to 7 to the complete exclusion of petitioners 2 and 3."

2. It is contended that petitioner No.1, in the year 1989, solemnized marriage with one S.Malkiat Singh in accordance with Hindu rites during the subsistence of first marriage which S.Malkiat Singh had solemnized with respondent No.3. Out of the wedlock of first marriage of S.Malkiat Singh, four children were born, i.e. respondents 4 to 7 herein, and out of second marriage with petitioner No.1, two children were born, i.e. petitioners 2 and 3. It is further contended that S.Malkiat Singh during his life time started neglecting to maintain petitioners 2 and 3 which compelled petitioner No.1 to file a petition under Section 488 of Criminal Procedure Code (for short Cr.P.C.) on behalf of petitioners 2 and 3, who at the relevant time were minors. Petitioner No.1 did not claim maintenance for herself on account of two reasons first that her marriage with S.Malkiat Singh was admittedly void under Section 11 of the Hindu Marriage Act, and second that she was a teacher in the Education Department.
3. It is further contended that during the pendency of petition under Section 488 Cr.P.C. said S.Malkiat Singh entered into compromise with the petitioners and on the basis of said compromise, order dated 17.07.2004 came to be passed by the Court of learned Judicial Magistrate Ist Class (Forest), Jammu by virtue of which monthly

maintenance of Rs.2000, i.e. Rs.1000/- each was granted in favour of petitioners 2 and 3. The fact of marriage of petitioner No.1 with S.Malkiat Singh is discernable from the affidavits sworn by S.Malkiat Singh by virtue of which names of petitioners 2 and 3 were changed. Even in the school records, the certificates issued by the Central Board of Secondary Education (CBSE) and the state subjects, there is clearly mentioned that S.Malkiat Singh represented himself as father of petitioners 2 and 3.

4. Unfortunately, S.Malkiat Singh expired on 09.03.2008 and at the request of respondents 3 to 7, Employees Union of Jammu University represented their case for appointment on compassionate grounds, and also for release of all pensionary benefits accrued after the death of deceased S.Malkiat Singh. This fact, when came into the knowledge of petitioner No.1 through one of the colleagues of late S.Malkiat Singh that petitioners 2 and 3 were being ignored, she served a legal notice through her counsel upon respondents 1 and 2, but despite that they were bent upon to release all the pensionary benefits in favour of respondents 3 to 7. It is also contended that since the official respondents have failed to discharge their statutory duty, hence, the instant petition.

5. Respondents were put to notice and vide order dated 03.04.2008, respondents 1 and 2 were directed to withhold 2/7th share of the retiral benefits while releasing the retiral benefits in favour of respondents 3 to 7 on account of death of S.Malkiat Singh.
6. Reply stands filed on behalf of the respondents. Official respondents in their reply have contended that late S.Malkiat Singh during his life time never brought to the notice of the University that petitioners were his legal heirs and therefore, the petitioners are not entitled to any relief as sought in the writ petition.
7. On the other hand, respondents 3 to 7 in their reply contended that petitioner No.1 is legally wedded wife of one Sham Choudhary and petitioners 2 and 3 are born out of the wedlock of petitioner No.1 and said Sham Choudhary. It is also contended that they never noticed the presence of petitioners during the life time of S.Malkiat Singh and more so, the petitioners also never brought to the notice of the University authorities that they were the legal heirs of deceased S.Malkiat Singh, therefore, they are not entitled to any relief as claimed in the petition.
8. Heard learned counsel for the parties and perused the record.
9. The facts which are not in dispute are that respondents 3 to 7 are the legal heirs of

deceased employee which fact is also admitted by the official respondents. It is also admitted position that petitioners No.2 and 3 were born out of the wedlock of petitioner No.1 and S. Malkiat Singh during the subsistence of his first marriage. When S. Malkiat Singh neglected to maintain petitioners, petitioners filed petition under Section 488 Cr.P.C. and lateron S. Malkiat Singh entered into compromise with petitioner No.1 and on the basis of said compromise, order dated 17.07.2004 came to be passed by the Court of learned Judicial Magistrate 1st Class (Forest), Jammu by virtue of which monthly maintenance of Rs.2000/-, i.e., Rs.1000/- each was granted in favour of petitioners Nos. 2 and 3. The fact of marriage with petitioner No.1, though void, in terms of Section 11 of the Hindu Marriage Act, is discernable from the documents produced by the petitioners in support of their claims.

10. The only dispute in this petition is as to whether petitioners No.2 and 3 are entitled to claim share out of the family pension, death-cum-retirement gratuity on account of death of S. Malkiat Singh, once it is proved that second marriage in terms of Section 11 of the Hindu Marriage Act was void.
11. The contention of petitioner No.1 is that petitioners 2 and 3 were born out of the wedlock of petitioner No.1 and S.Malkiat Singh,

therefore, petitioners 2 and 3 are entitled to the share and also to seek appointment on compassionate grounds. This fact is discernable from the documents produced by the petitioners.

12. Learned counsel for the petitioners also in support of his case relied on a judgment of the Apex Court passed in a case titled **Rameshwari Devi v. State of Bihar and others** reported in **AIR 2000 SC 735** wherein it is held that children born out of the second marriage during the subsistence of first marriage are entitled to share in family pension and gratuity etc. What is held in paras No.14 and 16 is as under :-

14. It cannot be disputed that the marriage between Narain Lal and Yogmaya Devi was in contravention of clause (i) of Section 5 of the Hindu Marriage Act and was a void marriage. Under Section 16 of this Act, children of void marriage are legitimate. Under the Hindu Succession Act, 1956, property of a male Hindu dying intestate devolve firstly on heirs in clause (1) which include widow and son. Among the widow and son, they all get shares (see Sections 8, 10 and the Schedule to the Hindu Succession Act, 1956). Yogmaya Devi cannot be described a widow of Narain Lal, her marriage with Narain Lal being void. Sons of the marriage between Narain Lal and Yogmaya Devi being the legitimate sons of Narain Lal would be entitled to the property of Narain Lal in equal shares along with that of Rameshwari Devi and the son born from the marriage of Rameshwari Devi with Narain Lal. That is, however, legal position when Hindu male dies intestate. Here, however, we are concerned with the family pension and death-cum-retirement Gratuity payments which is governed by the relevant rules. It is not disputed before us that if the legal position as aforesaid is correct, there is no error with the directions issued by the learned single Judge in the judgment which is upheld by the Division Bench in LPA by the impugned judgment.

13. To substantiate his arguments, learned counsel for the petitioners also relied on a judgment passed by the Apex Court in case titled **Bhogadi Kannababu and others v. Vuggina Pydamma and others** reported in **(2006) 5 SCC 532**, wherein it is held that children born out of null and void marriage, are entitled to inherit the property of father with other heirs. What is held in paras 12, 13 and 14 is as under:-

12. It is an admitted position that respondents 2 and 3 were born out of the wedlock of late Suryanarayana and Pydamma during the subsistence of the marriage between Suryanarayana and Chilakamma. Even assuming, the marriage between late Suryanarayana and Pydamma cannot be treated as a valid marriage because of the subsistence of the marriage between late Suryanarayana and Chilakamma, considering the fact that respondents 2 and 3 were born out of the marriage between Suryanarayana and Pydamma, they would be entitled to succeed to the properties on the death of Suryanarayana and Chilakamma.

13. In this connection, we may consider certain provisions of the Hindu Marriage Act, 1955 (in short 'the Act').

14. Section 5 of the Act clearly states the grounds when the marriage cannot be solemnized. Clause (i) of Section 5 is one such condition, which clearly provides that no marriage can be performed if there is a living spouse. Therefore, in view of Section 5, the marriage between Suryanarayana and Pydamma cannot be considered to be legal as at the time of such marriage, Chilakamma was very much alive. Section 11 of the Act, which deals with a void marriage says that any marriage solemnized after the commencement of this Act shall be null and void if it contravenes any of the conditions specified in Clause (i), (iv) and (v) of Section 5 of the Act. Therefore, in view of Sections 5 and 11 of the Act, it must be held that the marriage between Suryanarayana and Pydamma is a void marriage as the said marriage was admittedly solemnized after the commencement of the Act. Therefore, considering that the marriage between Suryanarayana and Pydamma was a void marriage, the question that would now arise is whether their daughters, namely, respondents 2 and 3 were entitled to inherit the properties in question, with

the first wife, Chilakamma, on the death of Suryanarayana. In this connection, we may refer to Section 16 of the Act. Section 16 of the Act deals with legitimacy of children of void and voidable marriages. Sub-section (1) of Section 16 of the Act clearly says that notwithstanding that the marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate. (Emphasis supplied). Therefore, in view of section 16, it is clear that the daughters, namely, respondents 2 and 3 inherited the properties in question, along with Chilakamma, on Suryanarayana's death. Accordingly, the High Court was justified in holding that on the death of Suryanarayana, the properties in question were inherited by his daughters, namely, respondents 2 and 3, along with Chilakamma and therefore were entitled to evict the appellants from the properties in question along with Pydamma. Accordingly, the findings of the High Court on the question whether respondents 2 and 3 were entitled to inherit the properties in question of late Suryanarayana jointly with Chilakkama cannot be interfered with. That apart, in an application for eviction under the A.P.Tenancy Act in which prayer for grant of eviction of a lessee was made, it would not be necessary to decide that the daughters, respondent Nos. 2 and 3 comprehensively had to prove that on the death of Suryanarayana and Chilakamma, they were entitled to inherit the properties in question in the eviction proceedings. Therefore, it is not necessary to finally adjudicate upon the question of right, title and interest of the daughters with respect to the properties in question, which may be done in a comprehensive suit for title.

14. The aforesaid judgments squarely apply to the present case as the dispute is somehow similar. In the instant case, petitioner No.1 is claiming only share of retiral benefits for petitioners 2 and 3 and compassionate appointment for petitioner no.2.
15. On other hand, learned counsel for the respondents also placed reliance on judgments passed by the Apex Court in **The Secretary, A.P. Social Welfare Residential Educational Institutions v.**

Pindiga Sridhar and others, reported in **AIR 2007 SC 1527** and **State of Haryana and another v. Ankur Gupta** reported in **AIR 2003 SC 3797** wherein it is held that dependant of a deceased government employee shall not be entitled to employment on compassionate grounds in case one of his parents is alive and is in government employment. In the present case, petitioner No.1 has not claimed the relief for herself on two counts, one that she is a government employee and second that her marriage with S.Malkiat Singh was void in terms of Section 11 of the Hindu Marriage Act. She is claiming relief only for petitioners No.2 and 3, therefore, the aforesaid judgments are not applicable to the case in hand.

16. To my view, the children of void marriage are legitimate and are entitled to the property of the deceased employee in equal shares along with that of first wife and the children born from the first marriage. So far as relief with regard to compassionate appointment is concerned, it seems that the same cannot be claimed as a matter of right. The compassionate appointment is not a right to property of the deceased employee. The object of compassionate appointment is to provide immediate financial help to the family. Therefore, I refrain myself to comment upon it and leave this issue open

for the official respondents to consider as per the rules occupying the field.

17. From all what has been observed hereinabove, this petition is partly allowed. The official respondents are directed to pay to petitioners No.2 and 3 their share, i.e., 2/7th out of the family pension as well as death-cum-retirement gratuity and other service benefits on account of the death of their father, namely, S. Malkiat Singh and shall also accord consideration to the case of petitioner No.2 along with other heirs of late S. Malkiat Singh for compassionate appointment, of course, in terms of the rules occupying the field. Let this exercise be completed by the official respondents within a period of two months from the date a copy of the order is made available to them.

18. Disposed of as above along with connected CMA(s).

**(Tashi Rabstan)
Judge**

Jammu.
24.05.2013
'Madan'PS

