CENTRAL ADMINISTRATIVE TRIBUNAL
CALCUTTA BENCH

No. OA 350/00081/2016 Date of order : 8.4.2016

Present: Hon'ble Ms. Bidisha Banerjee, Judicial Member

SUMANA GHANTI

VS

UNION OF INDIA & ORS.

For the applicant : Mr.A.Chakraborty, counsel
Sk. Sh. Molla, counsel

For the respondents : Mr.P.B.Mukherjee, counsel

O R D E R

This matter is taken up in the Single Bench in terms of Appendix VIII of Rule 154 of CAT Rules of Practice, with the consent of both sides.

2. The applicant has sought for the following reliefs inter alia :

a) An order do issue upon the respondents particularly the respondent NO.4 i.e. Sr. Divisional Personnel Manager Officer, E. Rly., Howrah to release the entire Death cum Retirement benefits and family pension on and from 17.9.14 with all consequential benefits accrued on it in favour of the applicant;
b) An order/direction do issue upon the respondent authorities to pay interest on the accrued DCRG amount @ 18% per annum;
c) An order/direction do issue upon the respondent authorities to appoint the applicant in Railway on compassionate ground within stipulated period;

3. On being pointed out that the application is hit by bar of multiple reliefs as prayer (c) is not consequential to (a) or (b), ld. Counsel for the applicant chose not to press relief (c). As such relief (c) is being considered as not pressed with liberty to file a fresh OA on the relief.

4. The brief facts leading to the application would be as under :

Pintu Ghanti, son of Late Arun Kumar Ghanti was the Cabinman, Eastern Railway under Sr. Station Manager, Howrah. He died on 17.9.14 leaving behind his only widow Sumana Ghanti and his only son Mayukh Ghanti as his successors and legal heirs in regard to his moveable and/or immoveable assets and properties and service benefits in Railway. After the

death of the employee the applicant, Sumana Ghanti, served notice upon the respondents for release of the settlement dues and other death cum pensionary benefits of the deceased employee. The respondents did not pay any heed to her prayer and compelled her to appear before the Pension Adalat, Eastern Railway. Thereafter at the instance of the Pension Adalat the respondents only released the 50% of the death cum retirement settlement of the deceased employee without the relief of compassionate appointment.

5. The applicant is aggrieved with the communication dated 18.9.15 whereby and whereunder she has been intimated on behalf of DRM, Eastern Railway, Howrah as follows :

> *"Sub: Settlement of Late Pintu Ghanti, ex-Cabinman under SM/HWH died on 17.9.14*
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> *Ref : Your representation dt. 19.8.2015 addressed to DRM/HWH*
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> *In connection of above you are hereby intimated that the divorce of marriage between Sri Pintu Ghanti and Smt. Susmita Ghanti with mutual understanding between them in presence of Local Gram Panchayat without any decree of divorce from Competent Court of Law cannot be treated as valid divorce in the eye of law. Therefore, the 2nd marriage of Late Pintu Ghanti with you in absence of valid divorce from his 1st wife, appears to be a void marriage.*
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> *However, only you son Mayukh Ghanti is eligible for the 50% of pensionary benefits till he attains 18 years of age as per extant railway rules. Hence, you are requested to furnish requisite settlement forms (Form 8, 9, 10, 14 & 19) and three photograph duly attested by Gazetted Officer to the Beat P.I./HWH on any working day at Welfare Section/HWH on behalf of your minor son as a natural guardian. Our are also requested to open a joint bank A/c with your minor son in which the name of your minor son should remain as the first holder.*
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> *On submission of the above mentioned documents/papers your case will be processed further."*

6. Ld. Counsel for the applicant submitted that the first wife of the employee deserted him way back in 2006, she remarried one Nisith Sasmal and out of the said wedlock a son was born to her on 8.12.07, who was named as Saunava Sasmal. Therefore the applicant who was married in 2011,could not be termed as anything other than a legally married wife of the deceased employee.

7. Per contra ld. Counsel for the respondents would vociferously submit that marriage with the applicant was a void marriage and therefore she was not entitled to any family pension.

8. Be that as it may, the fact that the employee co-habited with the applicant for long and out of the relationship a son was born is an admitted fact. Further the applicant is publicly known to be the wife of the deceased employee and her status as such is corroborated by contemporaneous documents she holds.

9. On the rights of a second wife I have already passed an elaborate order in OA 1506/14 which would require to be quoted herein. The excepts from the order is as under :

> "By way of this application the applicant has sought for settlement dues and pensionary benefits w.e.f. 14.9.12 due to death of her husband while in service, upon setting aside/cancellation/rejection of impugned official letters dated 26.5.14 and 2.3.14 as contained in Annexure A/6 and A/8 respectively.
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> Therefore the claim of a second wife, to family pension, was rejected.
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> 4. During the course of hearing, ld. Counsel for the applicant would vociferously argue that when admittedly the applicant became the second wife of the deceased after death of Putul Devi, her prayer could not be rejected in the manner the respondents have rejected the prayer. Ld. Counsel in support of his contention that the applicant was entitled to be paid the settlement dues of the deceased husband on the basis of documents where her name is recorded as his wife, relied upon the following decisions :
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> i) ***Smt. Aina Devi –vs- Bachan Singh & Anr. [AIR 1980 All 174]*** rendered by Hon'ble High Court at Allahabad wherein it was held that
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> > *"Certified extracts from the electoral roll and the family register of a village which are public documents are admissible in evidence to prove their contents. The entries made therein are presumptive evidence of what they recorded until disproved by satisfactory evidence to the contrary. The burden is on the other party to prove that the entries were incorrect."*
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> ii) ***Smt. Sheel Wati –vs- Ram Nandini [AIR 1981 All 42]*** wherein it was held that

"a marriage though null and void for contravening any of the conditions prescribed by Clauses (i), (iv) and (v) of Section 5 of the Act, has yet to be regarded a subsisting fact, and in that sense it cannot be said to be wholly non est in law, or a nullity, so long as it is not declared to be null and void by a decree of Nullity of the District Court on a petition presented by either party thereto against the other party to the marriage. ***No third person can treat the marriage to be void*** *or have it adjudged to be null and void in any other suit or proceeding unless it bus already been declared to be so by a decree of Nullity of a District Court in accordance with the procedure prescribed by and under the Act; the only exceptions being the case where the aggrieved spouse of the first marriage on account of whose being living the second marriage is void, prosecutes the other spouse for being punished for bigamy under Section 406 or 495 of the Indian Penal Code, read with Section 17 of the Hindu Marriage Act; or the ease where the aggrieved spouse prosecutes the guilty spouse for a contravention of Clauses (iv) and (v) of Section 5 under Section 18(b) of the Act.*

(emphasis supplied)

Citing the aforesaid proposition ld. Counsel would argue that in order to treat the marriage of Sushila Devi, the alleged second wife with the deceased employee as void, the first wife could initiate proceedings for bigamy under Section 406 or 296 of IPC read with Section 17 of Hindu Marriage Act or get the spouse prosecuted for contravention of clauses (iv) & (v) of Section 5 under Section 18(6) of the Act or ought to have obtained a decree of nullity from a competent Court of Law, in absence of which the respondents were bound to consider the present applicant for the settlement dues.

He would further place the following decisions in support :

iii) In ***Smt. Nirmala & Ors. -vs- Smt. Rukminibai & Ors. [AIR 1994 Karnataka 247]*** the Hon'ble Division Bench referred to a decision rendered in ***Smt. Parameshwaribai -vs- Muthojirao Scindia [AIR 1981 Kant 40]*** propounding the following :

One thing that stands out permanently in this case is that during his life time Narayanrao treated and acknowledged defendant No. 1 as his legally wedded wife and defendants 2 to 7 as his legitimate children. This position is also not disputed but in fact admitted by the plaintiffs themselves.

When there is a cohabitation of a man and a woman as husband and wife, a presumption arises to the effect that there was a valid marriage between the parties. In Badri Prasad v. Deputy Director of Consolidation the Supreme Court held that where a man

and a wpman live as husband and wife for about 50 years, a strong presumption arises in favour of their wedlock. It is also further held that the proof as to the factum of marriage by examining the priest and other witnesses is not necessary in such cases. The law in its wisdom has laid this presumption. If a man and a woman live as husband and wife for a pretty long time and the husband acknowledges his woman as his wife, a presumption can be raised in favour of the legality of their marriage. To expect them to bring witnesses at a point of time when the witnesses will not be available to prove their marriage is to expect something which cannot be done by the parties at that point of time. Therefore, the law in its wisdom has created this presumption in favour of a valid marriage.

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A man and a woman tied together by wedlock form the least unit of our complex society and whenever a man and woman lived as husband and wife for a fairly long time and were so reputed, law presumes that they are living as husband and wife and not in a state of concubinage. Presumption is both with regard to factum of marriage and legality of it. It is a strong presumption as it goes to the root of the structure of society and the persons who challenge it will have to rebut it by clear, cogent and satisfactory evidence. This burden is heavy on them."

The Hon'ble Court held :

In view of the law quoted above, it is clear that a cohabitation of a man and a woman as husband and wife for a long time under the same roof will raise a presumption of a legal and valid marriage in their favour and the off-springs of such union cannot be termed as illegitimate. This presumption will be a rebuttable presumption. But the evidence required to rebut this presumption cannot be an evidence of mere probabilities but it should be an evidence to prove conclusively that the possibility of such valid marriage is completely ruled out. A perpetual union of a man and a woman goes in favour of legality and not a crime. The evidence of DW-1 proves that there was a valid marriage between her and Narayanrao somewhere in 1948 at Hebbal and the case of plaintiffs that DW-1 was a kept mistress of Narayanrao is difficult to accept. From the evidence, it is clear that the age of DW-1 was 60 when she deposed in the year 1986. Therefore she must have been around 22 years of age when she married Narayanrao in the year 1948. No such antecedents of DW-1 are brought in evidence to show that either she came from a family of ill-repute or she was a woman of loose morals or of a bad character so as to make her to live with Narayanrao at such an young age as kept mistress. Even the treatment that Narayanrao meted out to her and her children in his house and in the society at large is as his legitimate wife and legitimate children born to her in his union with DW-1. This leads to an inference that there was a valid marriage between Narayanrao and defendant No. I in the year 1948 at Hebbal as deposed by defendant No. 1. A presumption can be raised in favour of their marriage by virtue of a law of cohabitation of Narayanrao with defendant No. 1 under the same roof as husband and wife and the treatment meted out to defendant No. 1 by Narayanrao as his legitimate wife and to defendants 2 to 7 as his legitimate children

(emphasis supplied)

iv) In ***Lalsa –vs- District IVth Upper District Judge, Basti & Ors. [AIR 1999 All 342]*** wherein the railway employee and the female, co-habitants of about 40 years, the omission to mention the female as wife of the concerned employee in the family register the Hon'ble Court found that entry in family register could not be treated as clinching evidence to deny status of wife to the female in question.

v) In ***Bhilaji Bandu Sutar & Lohar –vs- Rangarao Shankar Sutar & Ors. [AIR 2015 (NOC) 519 (BOM)]*** in regard to presumption as to marriage Hon'ble Court held :

> *"Woman was staying with man for about 22 years till his death. In ration card and voters list she was described as his wife. After his death her name was entered in Gram Panchayat records as owner of suit house. Ration card and voters list were prepared during life time of man and to his knowledge. Electoral roll being public document and prepared by public servant in discharge of his public duty is relevant under Section 35. She would be legally wedded wife of that man."*

5. In view of the legal propositions supra, ld. Counsel would argue that long cohabitation raised a presumption of a valid marriage and the marriage of the employee with the applicant could only be nullified by a competent Court of Law. It was not proper for the authorities to deny her settlement dues of her late husband since her co-habitation with the employee for years together, begetting children out of the wedlock/relationship and admission of her status by the employee himself, would make her entitled to grant of settlement dues in her favour. In this connection ld. Counsel would draw my attention to the application form filled in by Siyaram Rajbanshi on 27.5.91 where he duly acknowledged Sushila Devi as his wife.

6. On the question of presumption of marriage the following decisions were noticed by Hon'ble Apex Court in ***Chanmuniya vs Virendra Kumar Singh Kushwaha [2010 INDLAW SC 845]*** as set out hereunder:

"12. On the question of presumption of marriage, we may usefully refer to a decision of the House of Lords rendered in the case of Lousia Adelaide

Piers & Florence A.M. De Kerriguen v. Sir Henry Samuel Piers [(1849) II HLC 331], in which their Lordships observed that the question of validity of a marriage cannot be tried like any other issue of fact independent of presumption. The Court held that law will presume in favour of marriage and such presumption could only be rebutted by strong and satisfactory evidence.

13. In Lieutenant C.W. Campbell v. John A.G. Campbell [(1867) Law Rep. 2 HL 269], also known as the Breadalbane case, the House of Lords held that cohabitation, with the required repute, as husband and wife, was proof that the parties between themselves had mutually contracted the matrimonial relation. A relationship which may be adulterous at the beginning may become matrimonial by consent. This may be evidenced by habit and repute. In the instant case both the appellant and the first respondent were related and lived in the same house and by a social custom were treated as husband and wife. Their marriage was solemnized with Katha and Sindur. Therefore, following the ratio of the decisions of the House of Lords, this Court thinks there is a very strong presumption in favour of marriage. The House of Lords again observed in Captain De Thoren v. The Attorney-General [(1876) 1 AC 686], that the presumption of marriage is much stronger than a presumption in regard to other facts.

14. Again in Sastry Velaider Aronegary & his wife v. Sembecutty Viagalie & Ors. [(1881) 6 AC 364], it was held that where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary is clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage.

15. In India, the same principles have been followed in the case of A. Dinohamy v. W.L. Balahamy [AIR 1927 P.C. 185], in which the Privy Council laid down the general proposition that where a man and woman are proved to have lived together as man and wife, the law will presume, unless, the contrary is clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage.

16. In Mohabbat Ali Khan v. Muhammad Ibrahim Khan and Ors. [AIR 1929 PC 135], the Privy Council has laid down that the law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for number of years.

17. In the case of Gokal Chand v. Parvin Kumari [AIR 1952 SC 231], this Court held that continuous co- habitation of man and woman as husband and wife 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.

18. Further, in the case of Badri Prasad v. Dy. Director of Consolidation & Ors. [(1978) 3 SCC 527], the Supreme Court held that a strong presumption arises in favour of wedlock where the partners have lived together for a long spell as husband and wife. Although the presumption is rebuttable, a heavy burden lies on him who seeks to deprive the relationship of legal origin.

19. Again, in Tulsa and Ors. v. Durghatiya & Ors. [2008 (4) SCC 520], this Court held that where the partners lived together for a long spell as husband and wife, a presumption would arise in favour of a valid wedlock."

7. In ***Rameshwari Devi –vs- State of Bihar & Ors. [(2000) 2 SCC 431],*** where Rameshwari Devi the first wife of deceased Narain Lal tried to prevent the authorities from disbursing the death benefits of Narain Lal to children of Yogmaya Devi the second wife. The Hon'ble High Court at Patna had ruled in favour of the children. The Hon'ble Apex Court upheld the judgment saying as follows :

"Rameshwari Devi has raised two principal objections : (1) marriage between Yogmaya Devi and Narain Lal has not been proved, meaning thereby that there is no witness to the actual performance of the marriage in accordance with the religious ceremonies required for a valid Hindu marriage and (2) without a civil court having pronounced upon the marriage between Yogmaya Devi and Narain Lal in accordance with Hindu rights, it cannot be held that the children of Yogmaya Devi with her marriage with Narain Lal would be legitimate under Section 16 of the Hindu Marriage Act. First objection we have discussed above and there is nothing said by Rameshwari Devi to rebut the presumption in favour of marriage duly performed between Yogmaya Devi and Narain Lal. On the second objection, it is correct that no civil court has pronounced if there was a marriage between Yogmaya Devi and Narain Lal in accordance with Hindu rights. That would, however, not debar the State Government from making an inquiry about the existence of such a marriage and act on that in order to grant pensionary and other benefits to the children of Yogmaya Devi. On this aspect we have already adverted to above. After the death of Narain Lal, inquiry was made by the State Government as to which of the wives of Narain Lal was his legal wife. This was on the basis of claims filed by Rameshwari Devi. Inquiry was quite detailed one and there are in fact two witnesses examined during the course of inquiry being (1) Sant Prasad Sharma, teacher, DAV High School, Danapur and (2) Sri Basukinath Sharma, Shahpur Maner who testified to the marriage between Yogmaya Devi and Narain Lal having witnessed the same. That both Narain Lal and Yogmaya Devi were living as husband and wife and four sons were born to Yogmaya Devi from this wedlock has also been testified during the course of inquiry by Chandra Shekhar Singh, Rtd. District Judge, Bhagalpur, Smt. (Dr.) Arun Prasad, Sheohar, Smt. S.N. Sinha, w/o Sri S.N. Sinha, ADM and others. Other documentary evidence were also collected which showed Yogmaya Devi and Narain Lal were living as husband and wife. Further, the sons of the marriage between Yogmaya Devi and Narain Lal were shown in records as sons of Narain Lal."

(emphasis supplied)

In the said case it could be noticed there were two rival claimants to the death benefits of Narain Lal were his first wife, namely Rameswari Devi and Yogmaya Devi, the second wife, fighting for the rights of her children. It was not a case where two widows fighting for family pension and the Hon'ble High Court had ruled in favour of first wife and children of the second wife. Rights of second wife were neither the issue nor decided upon. In the present case the second wife of the deceased

employee has come forward claiming family pension and other death benefits. The rival claimant is son of first wife.

8. Recently Hon'ble Apex Court in ***Khursheed Ahmad Khan -vs- State of U.P. & Ors. [2015 (2) AISLJ 274]*** has ruled that contracting second marriage in the lifetime of the first wife is a misconduct. But there again a proceeding was initiated against the employee and he was removed from service which dismissal was upheld by the Hon'ble Apex Court while answering the question whether the impugned Conduct Rule which required permission of Government for contracting a second marriage would be violative of Article 25 of the Constitution.

The Hon'ble Court relied upon ***Javed -vs- State of Haryana [2003 (8) SCC 369]*** where it held that

> *"what was protected under Article 25 was the religious faith and not a practice which may run counter to public order, health or morality. Polygamy was not integral part of religion and monogamy was a reform within the power of the State under Article 25. This Court upheld the views of the Bombay, Gujarat and Allahabad High Courts to this effect. This Court also upheld the view of the Allahabad High Court upholding such a conduct rule. It was observed that a practice did not acquire sanction of religion simply because it was permitted. Such a practice could be regulated by law without violating Article 25.*
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> Xxx xxx xxx xxx
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> *54. Rule 21 of the Central Civil Services (Conduct) Rules, 1964 restrains any government servant having a living spouse from entering into or contracting a marriage with any person. A similar provision is to be found in several service rules framed by the States governing the conduct of their civil servants. No decided case of this Court has been brought to our notice wherein the constitutional validity of such provisions may have been put in issue on the ground of violating the freedom of religion under Article 25 or the freedom of personal life and liberty under Article 21. Such a challenge was never laid before this Court apparently because of its futility. However, a few decisions by the High Courts may be noticed.*

The Hon'ble Apex Court held as follows :

> *"In view of the above, we are unable to hold that the Conduct Rule in any manner violates Article 25 of the Constitution."*

9. In the present case the employee was never penalised on the charge of 'bigamy'. He entered service long after contracting second marriage and therefore as a "Government employee" he did not violate the Conduct Rules of not obtaining permission etc.

10. In the case at hand this Bench is therefore confronted with the question whether, having failed to dismiss the employee on the ground of bigamy, in absence of a decree of nullity of the marriage with the second wife, in absence of any prosecution by the first wife and conviction of the employee for bigamy, the authorities could deny family pension and other death benefits of the employee to the second wife when, as enumerated hereinabove, it has been consistently held that co-habitation for years together and presence of contemporaneous documents in proof of marriage and parentage of the issues would raise a presumption of a valid marriage.

11. Since the spouses in question are governed by Hindu Marriage Act an insight into the codified provisions of the Act would be necessary in order to find whether second marriage during subsistence of the first one was void ab initio and could be regarded as such to deny pensionary benefits to the second wife.

Section 5 of the Act supra lays down "Condition for a Hindu Marriage". It introduces 'monogamy' which is essentially the voluntary union for life of one man with one woman to the exclusion of all others. It enacts that neither party must have a spouse living at the time of marriage. The expression 'spouse' would mean the lawful married husband or wife. Section 5 is extracted hereunder for clarity :

*"**Conditions for a Hindu marriage**. —A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:—*

(i) neither party has a spouse living at the time of the marriage;

(ii) at the time of the marriage, neither party—

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity

(iii) the bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;"

Section 11 of the Act reads as under :

*"**Void marriages**. —Any marriage solemnised after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto [11] [against the other party], be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5."*

It lays down that non-fulfilment of any of the conditions as enacted in Section 5 clauses (i), (iv) & (v) solemnised after commencement of the Act would render the marriage a nullity and void from its inception and either party can obtain a decree of nullity from the Court. In order to get a decree of nullity it is the first wife of the employee who would require to file a regular suit that the marriage of her husband with another woman is a nullity. She, however, cannot file a petition under the Section ***(Harmohan Senapati vs Smt. Kamala Kumari Senapati [AIR 1979 Orissa 51]), (Smt. Ram Pyari vs Dharam Das & Ors. [AIR 1981 Allahabad 42]) and (Rajeshbai & Ors. vs Shantabai [AIR 1982 Bombay 231]).***

The decree of nullity may also be passed by the Court at the instance of either party to the marriage solemnised after the commencement of the Act, on the ground that the marriage was in contravention of any of the three conditions mentioned in the Section. A third party cannot apply under the Section for a decree of nullity and if such a party has any right it would be enforceable by a suit. ***(Lakshmi Ammal vs Ramaswami Naicker & Anr. [AIR 1960 Madras 6]).***

In A Subhas Babu –vs- State of Andhra Pradesh [AIR 2011 SC 3013]: [2011 (7) SCC 616]) it was held that "non-filing of a complaint under Section 494 of IPC by the first wife does not mean that the offence is wiped out". It was held

"Having regard to the scope, purpose, context and object of enacting Section 494 IPC and also the prevailing practices in the society sought to be curbed by Section 494 IPC, there is no manner of doubt that the complainant second wife should be an 'aggrieved person'."

Relying upon ***Gopal Lal –vs- State of Rajasthan [(1979) 2 SCC 170]*** Hon'ble Court held

"In order to attract the provisions of Section 494 IPC both the marriages of the accused must be valid in the sense that the necessary

ceremonies required by the personal law governing the parties must have been duly performed."

It was further held that declaration of nullity must be made by a competent Court as contemplated under this section. Until such declaration is made the second wife continues to be a wife within the meaning of Section 494 of the Indian Penal Code and is entitled to maintain a complaint against her husband.

Nevertheless, it has also been held that a marriage which does not fulfil the three conditions is not marriage at all being void *ipso jure* and it is open to the parties even without recourse to the Court to treat it as a nullity. Neither party is under any obligation to seek declaration of nullity under the section though such declaration may be asked for the purpose of protection or record. If a spouse of such a union marries during the subsistence of earlier void marriage it cannot be classified as a plural union ***(M.M. Malhotra vs Union Of India And Ors. [AIR 2006 SC 80]).***

In Ramesh Ch. Daga –vs- Rameshwari Daga [2004 (10) JT 366] it was held that spouse of a null and void union, entered into during the pendency of an earlier marriage is entitled to maintenance, on the passing of a decree of nullity. Under the general law, the children born of a marriage void ab initio would be illegitimate and would not become entitled to any rights of a legitimate child. Section 16 of the Act, however, operates in favour of children born of such a marriage and in terms, lays down that even in case of a marriage void under the present section, the children begotten or conceived of the parties to such void marriage are to be deemed to be their legitimate children, notwithstanding any decree that may be passed by the Court declaring the marriage to be null and void.

In view of the aforesaid enumerations it is obvious and axiomatic that in order to 'declare' a marriage as null and void, a decree of nullity has to be obtained by the affected spouse against the offender spouse

and it is not open for any third party to give such a declaration or treat it as such and so long such declaration is not obtained, no third party can declare it or treat it null and void.

12. Section 17 of the Hindu Marriage Act prescribes punishment for bigamy in the following words :

"**Punishment of Bigamy :** *Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and the provisions of sections 494 and 495 of the Indian Penal Code (45 of 1860), shall apply accordingly.*"

Accordingly, if a person marries for a second time during the lifetime of his wife such marriage apart from being void under Section 11 and 17 of the Act would also constitute an offence under Section 495 of the Indian Penal Code. But it has also got to be shown that the first marriage was a valid marriage duly solemnised ***(Priya Bala Ghosh vs Suresh Chandra Ghosh [AIR 1971 SC 1153])*** and the onus would have to be heavily discharged.

13. Therefore apart from the presumption of a valid marriage as elaborated supra, the enumerations hereinabove would demonstrate the following :

i) The second marriage unless declared to be null and void by a competent Court of Law, the second wife continues to be regarded as a wife, entitled to maintain a complaint against her husband under Section 494 of IPC a right co-equal to that of a first wife;

ii) A petition, suit or criminal proceedings in order to declare the marriage a nullity or to penalise the offending spouse can be brought only at the instance of the affected spouse/party and not by a third party;

iii) In order to succeed in establishing that the second marriage was a nullity due to existence of first wife it has to be shown that the first marriage was a valid marriage, duly solemnised and both the marriages were duly performed;

iv) In absence of any declaration from a competent Court of Law the marriage cannot be treated as null and void by a third party. Only the spouse of such marriage can regard the same as a nullity in order to move forward in life and enter into subsequent marital relationship. Therefore it could well be said that upon the death of the first wife, if such marriage was valid and duly solemnised, the husband regardless of the second marriage entered into during the subsistence of first marriage which was void *ipso jure* could validly enter into another marital relationship. Both the parties of such a marriage void *ipso jure* could ignore such a union even without a formal declaration of it as void.

v) Therefore, under no circumstances, it was open for the government to declare the second marriage of the employee as null and void or to treat it as such in order to deny family pension to the second wife in absence of any declaration as such at the behest of the first wife.

14. In a judicial system governed by precedents, it could be noted that Hon'ble Apex has always ruled in favour of second wife in the matter of maintenance under Section 125 of Code of Criminal Procedure. In ***Chanmuniya –vs- Virendra Kumar Singh Khuswaha [2010 INDLAW SC 845]*** Hon'ble Apex Court referred to the following decisions :

> *20. Sir James Fitz Stephen, who piloted the Criminal Procedure Code of 1872, a legal member of Viceroy's Council, described the object of Section 125 of the Code (it was Section 536 in 1872 Code) as a mode of preventing vagrancy or at least preventing its consequences.*
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> *21. Then came the 1898 Code in which the same provision was in Chapter XXXVI Section 488 of the Code. The exact provision of Section 488(1) of the 1898 Code runs as follows:*
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> > *"488. (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding five hundred rupees in the whole as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs."*

agir Kaur & Anr. v. Jaswant Singh [AIR 1963 SC 1521], the Court observed with respect to Chapter XXXVI of Cr.P.C. of 1898 sions for maintenance of wives and children intend to serve a urpose. Section 488 prescribes forums for a proceeding to enable a d wife or a helpless child, legitimate or illegitimate, to get urgent

. In Nanak Chand v. Chandra Kishore Aggarwal & Ors. [1969 (3) SCC 02], the Supreme Court, discussing Section 488 of the older Cr.P.C, virtually came to the same conclusion that Section 488 provides a summary remedy and is applicable to all persons belonging to any religion and has no relationship with the personal law of the parties.

24. In Captain Ramesh Chander Kaushal v. Veena Kaushal and Ors. [AIR 1978 SC 1807], this Court held that Section 125 is a reincarnation of Section 488 of the Cr.P.C. of 1898 except for the fact that parents have also been brought into the category of persons entitled for maintenance. It observed that this provision is a measure of social justice specially enacted to protect, and inhibit neglect of women, children, old and infirm and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. Speaking for the Bench Justice Krishna Iyer observed that- "We have no doubt that sections of statutes calling for construction by courts are not petrified print but vibrant words with social functions to fulfill. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it is to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advance the cause- the cause of the derelicts."

In ***K. Vimal –vs- K. Veeraswamy [1991 SCR (1) 904]*** Hon'ble Apex Court succinctly and authoritatively held as under :

"Section 125 of the Code of Criminal Procedure is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. When an attempt is made by the husband to negative the claim of the neglected wife depicting her as a kept-mistress on the specious plea that he was already married, the court would insist on strict proof of the earlier marriage. The term wife' in Section 15 of the Code of Criminal Procedure includes a woman who has been divorced by a husband or who has obtained a divorce from her husband and has not remarried. The woman not having the legal status of a wife is thus brought within the inclusive definition of the term 'wife' consistent with the objective. However, under the law a second wife whose marriage is void an account of the survival of the first marriage is not a legally wedded wife and is, therefore, not entitled to maintenance under this provision. Therefore, the law which disentitles the second wife from receiving maintenance from her husband under Section 125, Cr. P.C., for the sole reason that the marriage ceremony though performed in the customary form lacks legal sanctity can be applied only when the husband satisfactorily proves the subsistence of a legal and valid marriage particularly when the provision in the Code is a measure of social justice intended to protect women and children. We are unable to find that the respondent herein has discharged the heavy burden by tendering strict proof of the fact in issue. The High Court failed to consider the standard of proof required and has proceeded on no evidence whatsoever in determining the question against the appellant. We are, therefore, unable to agree that the appellant is not entitled to maintenance."

(emphasis supplied)

Apex Court in ***Savitaben Somabhai Bhatiya versus State of Gujarat [AIR 2005 SC 1809]*** has also ruled in favour of such second wife to be treated as a legally wedded wife for the purpose of claiming maintenance under Section 125 of Cr.PC.

Later on Hon'ble Apex Court held,

"At least for the purpose of claiming maintenance under Section 125 of Cr.P.C. (Criminal Procedure Code), such a woman is to be treated as the legally wedded wife."

Justice Sikri, rejecting the argument that the second wife should have no claim to alimony as her marriage was illegal due to the existing first marriage of her husband, said *"Thus, while interpreting a statute, the court may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to suppress."*

In ***Prabhubhai Ranchhodbhai Tailor –vs- Mrs. Bhartiben Prabubhai [2004 (3) Mh. LJ 487],*** Hon'ble Bombay High Court in a case where second wife sought for maintenance u/s 125 Cr.PC held, although on the date of second marriage the first marriage of the husband was subsisting, within two years thereafter, the first marriage had come to an end by way of divorce. In that circumstance, it was held that even though the second marriage of the husband during the subsistence of the first marriage was null and void, on dissolution of the first marriage, if the parties to the second marriage continued to live together as husband and wife, there was no impediment in conferring the status of "**wife**" to the second wife. This would mean that the second wife had assumed the status of legally wedded wife on the date she applied for maintenance.

The second wife was therefore also allowed to seek maintenance from the husband if the latter neglected her and her marriage could assume a legal status on the death of the first wife as ruled by Hon'ble Bombay High Court.

15. Apart from the aforesaid enumerations, it could be noted that the **Protection of Woman from Domestic Violence Act, 2005** was enacted for more effective protection of rights of women guaranteed under the

Constitution for factors of violence of any kind occurring within the family and for matters "connected therewith or incidental thereto". It was introduced to provide for the women who were or even in a relationship with a man where both parties lived together "in a shared household" and were related either through a marriage or "relationship in the nature of marriage" as well as in regard to relationship with the family members living together as a joint family.

It provides for rights of women to secure housing, to reside in their matrimonial home or shared household whether or not she has any title or rights in such home or household.

Under the said Act "economic abuse" is included as deprivation of all or economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a Court or otherwise or which an aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children if any, *shtridhan*, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance. It also includes prohibition or restriction to continued access to resources or facilities "which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household".

In ***Sardanand Sharma –vs- State of Bihar & Anr. Cr. Revn. 1306 of 2010***, Hon'ble High Court at Patna held, with reference to the Domestic Violence Act, *"a relationship in the nature of marriage" is akin to a common law marriage. Common Law marriages require that although not being formally married :*

a) *the couple must hold themselves out to society as being akin to spouses;*

b) *They must be of legal age to marry;*

c) *They must be otherwise qualified to enter into a legal marriage, including being unmarried;*

d) They must have voluntarily co-habited and held themselves out to the work as akin to spouses for a significant time.

Hon'ble High Court held :

In our opinion a "relationship in the nature of marriage" under the 2005 Act must also fulfil the above requirements, and in addition the parties must have lived together in a "shared household" as defined in Section 2(s) of the Act. Merely spending weekends together or a one night stand would not make it a "domestic relationship".

In the present case all the aforesaid ingredients were met.

16. Coming to Pension Rules governing the subjects, no differentiation between a first wife and a second wife or any express prohibitions in regard to family pension to second wife could be noticed. On the contrary Section 75(7)(i)(a) & (b) of the Railway Servants (Pension) Rules that govern the subjects, clearly and unambiguously spell out that family pension could be shared by the "widows" or their children. There cannot be more than one first wife. Therefore the Rules do not specifically debar family pension to a second wife. The related provision would read as under:

"(7)(i)(a) Where the family pension is payable to more widows than one, the family pension shall be paid to the widows in equal shares.

(b) On the death of a 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 the family pension shall not lapse but shall be payable to the other widows in equal share, or if there is only one such other widow, in full, to her."

Taking shelter of Pension Rules to debar the applicant, therefore could not be countenanced.

In view of the express provisions supra the share of Putul Devi (the first wife) would bestow upon her children, if they were still eligible in terms of pension rules governing the employee, and as such they could very well share it with the present applicant in 50% share.

17. That apart it could be noted that Railways had introduced a circular in 1992 recognising the rights of "widows" (i.e. other than first wife) to share family pension with the first wife or her children. The circular [No. E (NG) II/91/RC-I/136 dated 02.01.1992; RBE 1/92] would read as under :

"It is clarified that in the case of Railway employees dying in harness, etc. leaving more than one widow along with children born to the second wife, while settlement dues may be shared by both the widows due to Court orders or otherwise on merits of each case, appointments on compassionate grounds to the Second widow and her children are not to be considered unless the administration has permitted the second marriage, in special circumstances, taking into account the personal law, etc.

2. The fact that the second marriage is not permissible clarified in the terms and conditions advised in the offer of initial appointment.

3. This may be kept in view and the cases for compassionate appointment to the second widow or her wards need not be forwarded to Railway Board".

18. The respondents have not denied that the present applicant got married to the employee, she co-habited with him and begotten children out of the said wedlock, she was declared by the employee himself as his wife and was known publicly as his wife and enjoyed her status with dignity and honour for years together. It is not the case of the respondents that she belonged to a family of ill repute or she was a woman of loose morals or she was kept as a mistress.

19. The present applicant is therefore admittedly and indubitably the second wife of the deceased employee, who had shared with him his bed and board, his happiness and his sorrow, his care, protection and love for so long. She was held out to the society as a spouse for a significant time and so in terms of the Domestic Violence Act, 2005 she was legally entitled to share the accommodation with him (the employee) and to be maintained by him during her lifetime. As such she could not be deprived of her financial resources which she required out of necessity. Such a widow who was bound to be maintained for life by the husband alike his first wife should not be deprived by the Government of her

family pension that she would need for her sustenance after the death of her husband. The deprivation in the manner it has been done in the present case is shocking. The applicant has been deprived of economic or financial resources to which she was entitled to as a wife of the deceased employee during his lifetime which she required out of necessity along with her daughter. When the Act of 2005 was meant to give so much protection to such woman who have co-habited for significant time even without a valid marriage and held out as a spouse, for the purpose of securing housing and other financial resources, then by no stretch of imagination such rights that too of a second wife could be taken away by the employer in the garb of exercise of powers under Pension Rules or Conduct Rules. In absence of her husband a second wife could not be left to lurch, in penury and dire distress. If pension is a property for the first wife it would well be the property of a second wife.

20. While the laws of our country being ever progressive, opened up new vistas to achieve social objects to give protection to the women folk to save them from abuse of any kind, vagrancy and destitution, it could not be countenanced why the Government would still stick on to its age old tradition of depriving and denying the widows of second marriage of their limited financial resources available to them as family pension, by simply issuing Government orders when neither Pension Rules nor any other rule expressly debar such family pension to such second wives/widows.

21. In view of the enumerations hereinabove, even going by phantasmagorical thoughts the manner of declaration or treatment of a marriage as null and void and consequential deprivation of family pension to the widow, the second wife of the deceased employee could not be visualised, comprehended and countenanced. In my considered opinion such a widow had to be treated with honour and dignity and allowed to live as such. Denying family pension to her only because she

was married during the lifetime of the first wife, was at a height of perversity.

22. In the aforesaid backdrop the impugned order denying family pension to the second wife i.e. the present applicant, is quashed. Consequently the respondents are directed to disburse to the applicant, the second wife of the deceased employee, her pensionary dues in accordance with Section 75(7)(i)(a) & (b) ibid, with arrears and interest @ 8% per annum, within two months from the date of receipt of the copy of this order.

23. The OA is accordingly allowed."

The said decision would squarely apply to the present factual matrix as the present applicant was married to the employee after the first wife deserted him and remarried. No rival claimants could also be noticed.

10. The provisions in regard to payment of DCRG, as the Railway (Pension) Rules envisage, are the following : (extracted to the extent relevant and germane to the lis)

> ***"70 - Retirement gratuity or death gratuity –***
>
> *(1)(a) In the case of a railway servant, who has completed five years qualifying service and has become eligible of service gratuity or pension under rule 69, shall, on his retirement, be granted retirement gratuity equal to one-fourth of his emoluments for each completed six monthly period of qualifying service subject to a maximum of sixteen and one-half times the emoluments and there shall be no ceiling on reckonable emoluments for calculating the gratuity.*
>
> ***Xxx xxx xxx xxx***
>
> ***70(5)** - For the purpose of this rule, rules 71, 73, 74 "<u>family</u>", in relation to railway servant, means -*
>
> *(i) <u>Wife or wives</u> including judicially separated wife or wives in the case of a male railway servant;*
>
> *(ii) Husband including judicially separated husband in the case of a female railway servant;*
>
> *(iii) <u>Sons including step-sons and adopted sons;</u>*
>
> *(iv) Unmarried daughters including step-daughters and adopted daughters;*
>
> *(v) Widowed daughters including step-daughters and adopted daughters;*

(vi) *Father } including adoptive parents in the case of individuals whose personal law permits adoption;*

(vii) *mother }*

(viii) *brother below the age of eighteen years including step brothers;*

(ix) *unmarried sisters and widowed sisters including step sisters;*

(x) *married daughters; and*

(xi) *children of pre-deceased son.*

71 - Persons to whom gratuity is payable -

(1)(a) *The gratuity payable under rule 70 shall be paid to the person or persons on whom the right to receive the gratuity is conferred by making a nomination under rule 74;*

(b) *If there is no such nomination made does not subsist, the gratuity shall be paid in the manner indicated below: -*

(i) *If there are one or more surviving members of the family as in clauses* ***(i), (ii), (iii),(iv) and (v)*** *of sub-rule (5) of rule 70, to all such members in equal shares;*

(ii) *If there are no such surviving members of the family as in sub-clause (i) above, but there are one or more members as in clauses* ***(vi), (vii), (ix), (x) and (xi)*** *of sub-rule (5) of rule 70 to all such members in equal shares.*

The provisions in regard to payment of family pension, as Rule 75 of Railway (Pension) Rules stipulate, are the following :

75(6) *- The period for which family pension is payable shall be as follows:*

(i) *in the case of a widow or widower, up to the date of death or re-marriage, whichever is earlier;*

(ii) *in the case of an unmarried son, until he attains the age of twenty-five years*

75(7)(i)(a) *- Where the family pension is payable to more widows than one, the family pension shall be paid to the widows in equal shares.*

(b) *On the death of a 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 the family pension shall not lapse but shall be payable to the other widows in equal share, or if there is only one such other widow, in full, to her.

(ii) *Where the deceased railway servant 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 railway servant or pensioner:*

Provided that on the share or shares of family pension payable to such a child or children or to a widow or widows ceasing to be payable, such share or shares not lapse but shall be payable to the other widow or widows or 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.

(iii) Where the deceased railway servant or pensioner is survived by widow but has left behind child or children from a divorced wife or wives, such child or children if they satisfy other conditions of the eligibility for payment of family pension shall be entitled to the share of family pension which the mother would have received at the time of death of the railway servant or pensioner had she not been so divorced :

Provided on the share or shares of family pension payable to such a child or children or to a widow or widows ceasing to be payable, such share or shares shall not lapse but shall be payable to the other widow or widows or to the child or children otherwise eligible, in equal shares, or if there is only one widow or child, in full, to such widow or child

75(8)(i) *Except as provided in clause (d) of sub-rule (6) and clause (I) of sub- rule (7), the family pension shall not be payable to more than one member of the family at the same time."*

A bare perusal of the provisions supra would exemplify and demonstrate that the wife would be entitled to family pension upto her death or remarriage ad thereafter the son (including step son and adopted son) till he attained 25 years of age, while DCRG would be shared by the widow and the son (including step son and adopted son)

11. In view of the enumerations hereinabove e the OA is allowed.

12. The respondents are directed to disburse the DC RG and family pension to the applicant and other legal heirs of the deceased in accordance with the law, w.e.f. the date the same was due, to be released within two months from the date of receipt of a copy of this order.

13. Since the dues were withheld without any valid reason the same should be visited with a penalty of interest @ 8% per annum on the dues, to be calculated from the date the dues became payable.

14. No order is passed as to costs.

(BIDISHA BANERJEE)
MEMBER (J)

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