
(2016) 08 BOM CK 0085
In the Bombay High Court
Case No : Writ Petition No. 767 of 2014

Mrs. Banu Shaikh

APPELLANT

Vs

State of Goa

RESPONDENT

Date of Decision : 24-08-2016

Acts Referred:

Central Civil Service (Pension) Rules, 1972 — Rule 54(7)(a)(i)
Central Civil Services (Conduct) Rules, 1964 — Rule 21
Portuguese Civil Procedure Code, 1867 — Article 1058, 1072, 1073

Citation : (2017) 1 AIRBomR 400 : (2017) 1 ALLMR 875 : (2016) 5 MhLJ 909

Hon'ble Judges : F.M. Reis and Nutan D. Sardessai, JJ.

Bench : Division Bench

Advocate : Ms. W. Coutinho, Advocate, for the Petitioner; Shri Pravin N. Faldessai, Additional Government Advocate, for the Respondents No. 1 and 3; Shri Iftikar Agha, Advocate, for the Respondent No. 4

Final Decision : Allowed

Judgement

Nutan D. Sardessai, J.—Heard Ms. W. Coutinho, learned Advocate for the petitioner, Shri I. Agha, learned Advocate for the respondent no.4 and Shri P. Faldessai, learned Additional Government Advocate for the respondents no. 1 and 3.

2. Ms. W. Coutinho, learned Advocate for the petitioner, submitted that she was the legally married wife of the deceased who was working as a Bull Attendant and had retired from the services voluntarily on 4.6.1996. Her late husband had expired on 29.4.2009 but during his lifetime he had married the respondent no.4. She was married to the deceased on 21.6.1975 and her marriage was duly solemnized and registered in accordance with the law under the regime of communion of assets as she was his legally wedded wife with whom she had seven children out of the wedlock. Her husband had married the respondent no.4 without her consent and knowledge on 18.11.1983 and had three children out of the said union, all of whom were now major in age. The marriage was not valid

and contrary to the family laws operating in the State of Goa and even otherwise the Civil Service (Conduct) Rules, 1964 did not permit a second marriage during the subsistence of the first marriage apart from attracting the offence under Section 494 IPC.

3. Ms. W. Coutinho, learned Advocate adverted to the Articles 1072, 1058 and 1073 of the Family Laws, further reiterated that her late husband had to obtain permission from his employer before entering into a second marriage while in service and during the subsistence of the first marriage and therefore the respondent no.4 who was not the legally married wife of the deceased was not entitled to claim any pensionary benefits on his demise. Rule 54 (7) (a) (i) of the CCS (Pension) Rules could also not be pressed into service and since she was the sole beneficiary as his widow. She relied in *Rameshwari Devi v. State of Bihar and others* (2000) 2 SCC 431, *Yamunabai Anantrao Adhav v. Anantrao Adhav* and another AIR 1988 SC 644, *Draupada @ Draupadi Jaydeo Pawar v. Indubai d/o Kashinath Shivram Chavan* and another (First Appeal No.577 of 2015) and *Smt. Sirazun Nessa v. The State of Assam and others* Writ Petition No. 168/2010, in support of her case.

4. Shri I. Agha, learned Advocate for the respondent no.4 adverted to the paper book and submitted that the factum of the second marriage was not disputed and the issue was whether a person could contract the marriage outside Goa during the subsistence of the first marriage. The factum of the second marriage not being disputed and adverted to the findings of the Department that she too was entitled to the pension, the deceased having declared both the wives and his children in Form no. 7 of the CCS Pension Rules; the respondent no.4 was entitled to half the pension apart from the petitioner who was entitled to other half. He relied in *Shri Kamlakant Pandurang Chibde and others v. Smt. Sushila Pandurang Chibde and others* 1990(2) Goa L.T.185. Shri P.Faldessai, learned Additional Government Advocate referred to the Form No.7 filled by the deceased during his lifetime declaring both the petitioner and the respondent no.4 as his wives and therefore, as per the notings of the Law Department, Rule 54(7)(a)(i) had to be considered for the payment of pension to both the wives in equal shares. Ms. W.Coutinho, learned Advocate for the petitioner, in reply relied in *Smt. Violet Issaac and others v. Union of India and others* (1991)1 SCC 725 to buttress a case that the family pension could not be bequeathed by the Will.

5. There was no singular dispute of the fact that the late husband of the petitioner had contracted a second marriage with the respondent no.4 during the lifetime of the petitioner and without taking any permission from his employer which was apparently contrary to the Conduct Rules. The petitioner was married to the deceased under the regime of communion of assets and her marriage was duly registered in the office of the Sub-Registrar on 21.6.1975. Her late husband would therefore be bound by the Family Laws prevailing in the State of Goa. Admittedly the marriage of the deceased with the respondent no.4 was not registered before the Civil Registrar and, therefore, it was not a legal marriage

for all purposes and effects. Article 1072 clearly provides that the marriage between a non-Catholic Portuguese subject shall also have the civil effects where the essential requirements of the contracts, the provisions of Article 1058 and the following Articles are satisfied. Article 1073 provides that the following shall not be a contract marriage: namely (1) relatives by consanguinity or affinity in a direct line; (2) relatives in the second degree in a collateral line; (3) relatives in the third degree in a collateral line except if they obtain exemption; (4) males below the age of fourteen years and females below the age of twelve years; and (5) those joined by another marriage, not yet dissolved.

6. Article 1074 provides that the contravention of the provision of the preceding Article gives rise to a nullity of the marriage. The Civil Services (Conduct) Rules, 1964 and Rule 21 in particular deals with the restriction regarding the marriage and provides that no Government servant shall enter into, or contract a marriage with a person having a spouse living; and no Government servant having a spouse living shall, enter into, or contract, a marriage with any person; provided that the Central Government may permit a Government servant to enter into, or contract, any such marriage as is referred to in clause (1) or clause (2) if it is satisfied that, (i) such marriage is permissible under the personal law applicable to such Government servant and the other party to the marriage; and (ii) there are other grounds for so doing.

7. Therefore, to all intents and purposes, as rightly submitted by Ms. W. Coutinho, the learned Advocate for the petitioner, she was legally married to the deceased and governed by the Family Laws and would alone be entitled to the pensionary benefits upon the death of her husband and not the respondent no.4 with whom he had contracted a marriage not only during the subsistence of the first marriage but in violation of the CCS (Pension) Rules and for which action was even contemplated against him but for his voluntarily retirement foreclosing such a course of action as borne out from the records.

8. Rule 54 of the Central Civil Services (Pension) Rules, 1974 makes a provision for the pension to be payable to the Government servant. Rule 7(a) (i) reads that where a family pension is payable to more widows than one, the family pension shall be payable to the widows in equal shares and (ii) on the death of a widow, her share of the family pension shall be payable to her eligible child. This Rule cannot be read to confer the right to half the pension on the respondent no.4 inasmuch as this Rule would have to be read along with Rule 21 of the CCS (Conduct) Rules which prohibits the second marriage during the subsistence of the first unless expressly permitted by the Government and in the circumstances enumerated therein. The marriage between the deceased and the respondent no.4 was performed as per the personal law which to all intents and purposes was as if there was no marriage at all between the deceased and her and therefore, she would not assume the character of a legally wedded wife of the deceased. Thus, the respondent no.4 could not be held entitled to any pensionary benefits even by recourse to Rule 54(7)(a)(i) of the CCS (Pension)

Rules, 1974.

9. Kamalakant Chibde (supra), the original defendant challenged the judgment and decree delivered by the Civil Judge Senior Division, Mapusa. Smt. Sushila Chibde was the original plaintiff No.1 being the widow of Pandurang while the plaintiffs no.2 to 6 were their children. The first wife of Pandurang was Satyavati and the defendants no.1 and 3 were the sons from the first marriage. After the death of Satyavati and the death of Pandurang's parents, Inventory proceedings were held and the suit property was allotted exclusively to the share of Pandurang bearing the distinct Land Registration number. Pandurang contracted the second marriage with the plaintiff no.1 in the year 1950 which was solemnized as per the Hindu religious rites at Sawantwadi and thereafter they lived together till the death of Pandurang on 24.9.1969. After his death the Inquiry Officer entered the names of the defendants no.1 and 3 to the suit property which gave rise to the suit before the Senior Civil Judge, Mapusa.

10. In Kamalakant Chibde (supra), the plaintiffs claimed that the property exclusively belonged to Pandurang and upon his death, it was inherited by the plaintiffs and the defendants had no right or title in the suit property and the relief of declaration of the title and perpetual injunction was accordingly sought against the defendants. The suit was resisted by the defendants claiming that the plaintiff no.1 was not legally wedded to Pandurang and the plaintiffs no.2 to 6 were not their children but they did not dispute that Pandurang was married to the plaintiff no.1 in accordance with the Hindu religious rites but claimed that the marriage was not registered in accordance with the Portuguese Law and, therefore, it was treated as null and void and of no consequence. The trial Court based on the issues and the evidence held in favour of the plaintiffs concluding that mere non-registration of the factum of the marriage could not invalidate the marriage between the plaintiff no.1 and the deceased Pandurang and upon his death, the suit property was inherited by the plaintiffs as well as the defendants no.1 and 3 and therefore they were the co-owners of the suit property giving rise to the appeal under challenge.

11. In Pandurang Chibde (supra), in the facts at large, the factum of the marriage was not in dispute nor that the plaintiff no.1 and Pandurang lived together from 1950 till his death in 1969 as husband and the wife and that the plaintiffs no.2 to 6 were born out of the wedlock. Their Lordships of this Court considered Article 245 of the Code of Civil Registration dealing with the registration of the marriages of Portuguese born in the Portuguese State of India and performed abroad before the foreign authorities and that the plaintiff not having adhered to the said pre-requisite of Article 245 the marriage should be treated as null and void. Their Lordships found that it was not possible to accede to these submissions inasmuch as Article 245 did not prescribe that failure to register the marriage would invalidate the factum of the marriage or that it was null and void.

12. In Pandurang Chibde (supra), Their Lordships also observed that it would be

extremely harsh and unjust to treat the plaintiff no.1 as a concubine or the mistress of Pandurang only because the factum of the marriage was not registered and observed that they could not overlook the provisions of Section 114 of the Indian Evidence Act which enables the Court to accept the validity and legality of the marriage when the parties have lived together for almost twenty years as husband and wife and the children are born out of the wedlock and in the ultimate summarily dismissed the appeal holding that there was no need to interfere with the view taken by the trial Judge. This judgment is clearly distinguishable inasmuch as it was absolutely silent on whether the plaintiff no.1 had contracted the marriage with Pandurang during the lifetime of his first wife. The issue was also not at large as in the present case where the respondent no.4 was claiming right to the pension upon the demise of late Shaikh Ismail. Besides the issue here was totally different inasmuch as Pandurang had acquired the right in the suit property due to the allotment in the Inventory proceedings and that by a judicial decision the trial Court held that the plaintiffs as well as the defendants were the co-owners of the suit property and granted the relief of declaration alone.

13. The deceased, in our case no doubt, had filled up the particulars of the petitioner as well as the respondent no.4 along with their children as the dependents entitled to the pensionary benefits on his death. However, his declaration per se cannot confer a legal right on the respondent no.4 when as earlier observed, it has been held that she was not the legally wedded wife of the deceased, he having contracted the marriage during the subsistence of his marriage with the petitioner and not having obtained any permission of his superiors to contract such a second marriage. Therefore, he could not have simpliciter conferred any right on the respondent no.4 and/or her children by incorporating their names in the Pension Form forming a part of the record.

14. Smt. Violet Issaac and others (supra), held that the family pension cannot be bequeathed by a Will as it does not form a part of the estate of the employee. Only the designated persons namely the widow and the minor - unmarried children of the deceased employee are entitled to the family pension under the Rules. Hence, the claim of the brother of the deceased employee for the family pension on the basis of a Will made by the deceased in his favour was not sustainable. This judgment would squarely support the contention on behalf of the petitioner that even accepting that the deceased had nominated the respondent no.4 as one of the beneficiaries of the pension, she was still not entitled to the same in the absence of any legal right accrued in her favour pursuant to her religious marriage with the deceased.

15. Draupada Pawar (supra), was an appeal directed against the judgment and order passed by the Senior Civil Judge, Sangli. She and the respondent Indubai claimed to be the wives of the deceased Jaydeo and filed the Misc. Applications for Succession and heir-ship Certificate in their favour. According to Draupada, her marriage was solemnized with Jaydeo in 1979 and five children were born

out of the said wedlock who died on 10.7.2003. However, prior to his death, he had executed a Will dated 17.5.2002 and bequeathed the entire property in her favour. She applied for the Letters of Administration and claimed that he had married her in 1979 and the second marriage with Indubai allegedly solemnized in 1981 and she had no claim in the pension or other pensionary benefits of Jaydeo. Indubai had claimed that her marriage with Jaydeo was solemnized on 22.6.1981 and she had one daughter out of the said wedlock. A few years after the marriage Jaydeo neglected her and her daughter Shubhangi and she filed an application for maintenance under Section 125 of the Code of Criminal Procedure which was decided in her favour and Jaydeo was ordered to pay maintenance.

16. In *Draupada Pawar (supra)*, the parties led evidence and the learned Judge held that Draupada failed to prove her valid marriage with Jaydeo in 1979 but believed the marriage of Jaydeo to Indubai. During the pendency of the applications Draupada died. The learned Judge directed the issuance of the Succession Certificate in the name of Indubai to enable her to receive the arrears of family pension and the future family pension subject to the payment of the share of the family pension amount if the children of Draupada were found entitled to these amounts and which was challenged by her children in the appeal. The points for determination were formulated: (i) Whether Draupada was the legally wedded wife of Jaydeo? (ii) Whether the family pension is an Estate of the employer which could be bequeathed by a Will and (iii) Whether under the Maharashtra Civil Services Rules, 1982 the family pension was payable equally to the second widow, when the first widow was alive of the Government Servant?

17. In *Draupada Pawar (supra)*, the learned Single Judge on an assessment of the evidence found that the testimony of the witness Rangrao was inspiring and could not be dislodged in the cross-examination. She also found that the witness examined by Indubai to establish her claim of marriage rather supported the case of Draupada with Jaydeo. The learned Judge considered the Full Bench Judgment of the Hon'ble Supreme Court in *D.S.Nakara and others v. Union of India* (1983) 1 SCC 305 which discussed the object of pension and held that:

"The pension is neither a bounty nor a matter of grace depending upon the sweet will of the employer, nor ex gratia payment. It is a payment for the past service rendered. It is a social welfare measure rendering socio-economic justice to those who in the hey-day of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in the lurch. Pension is a retirement benefit and in consonance with and furtherance of the goals of the Constitution. It creates a vested right and is governed by the statutory rules such as the Central Civil Services (Pension) Rules".

18. In *Draupada Pawar (supra)*, the learned Single Judge also considered the case of *Smt. Violet Issaac (supra)*, and held that the pension was not an estate or property and cannot be disposed off and to that extent the portion in the Will regarding the bequeathal in favour of Draupada was against the law. The learned Single Judge also considered the third issue for determination whether in terms

of the Maharashtra Civil Services (Pension) Rules, 1982 the family pension was payable equally to the second wife after the death of her husband and considered the Apex Court judgment in Rameshwari Devi (supra), where the husband who was in the Government service had left behind two wives, one Rameshwari Devi and another Yogmaya Devi. There was a dispute about the payment of family pension and the retirement benefits between the two wives. The Hon''ble Supreme Court held that the marriage of the deceased husband and Rameshwari Devi was valid and the marriage between the deceased and Yogmaya Devi was in contravention of Clause (i) of Section 5 of the Hindu Marriage Act and was a void marriage though the children born out of the void marriage were legitimate. The Hon''ble Supreme Court held that Yogmaya Devi could not be called as his widow as her marriage to him was void and denied her entitlement to get pensionary benefit on this ground. In the ultimate, the learned Single Judge held that the second wife who was not possessed of the status of the legally wedded wife was not entitled to the benefit of pension.

19. Yamunabai (supra), was a Criminal Revision before the Full Bench on a Reference by the Division Bench on the question whether a Hindu woman, whose marriage was null and void under Section 11 of the Hindu Marriage Act, 1955 by reason of the contravention of Section 5(i) of the said Act, namely the person with whom she had undergone a marriage had a wife living at the time of the said marriage, was entitled to claim the maintenance under section 125 of the Code of Criminal Procedure from such a person on the basis that she was his wife. Yamunabai had married the respondent no.1 on 16.6.1974 as per the Personal Law of the parties and which was also registered under the Hindu Marriage Act, 1955. However, the wife of the first respondent Lilabai was alive at the time the said marriage was subsisting. She stayed with the respondent no.1 for a week after the marriage and thereafter at his village with his first wife Lilabai and her mother and after some time on account of the alleged ill-treatment left the house followed by an application to the Magistrate under Section 125 CrPC. The Magistrate dismissed the application on the ground that she was not the wife of the respondent since her marriage to him was null and void under Section 11 read with Section 5(i) of the Hindu Marriage Act. The revision preferred in the Sessions Court against the said order was dismissed by the learned Additional Sessions Judge relying on the judgment of this Court in Bajirao v. Tolanbai (1979) MhLJ 693. The matter came up before a learned Single Judge, who in view of the decision in Bajirao's case (supra), referred it to the Division Bench and the Division Bench referred it to the Full Bench as it disagreed with the view taken by this Court in Bajirao's case (supra).

20. In Yamunabai (supra), the decision of the Division Bench in Bajirao's case was considered which held that the term "wife" in Section 125 CrPC only meant a legally wedded wife. The Full Bench held that the marriage of Yamunubai with the first respondent was under Section 11 of the Act null and void, as if it had not taken place and in the absence of such a legal and valid marriage, as earlier observed that the parties had lived together as husband and wife to the

knowledge of the public or otherwise could not confer on such woman the status of a wife. Ultimately, the Full Bench held that the view taken by this Court in Bajirao's case appeared to be correct. The term "wife" appearing in Section 125(1) of the Code meant only a legally wedded wife and dismissed the appeal.

21. In *Sirazun Nessa* (supra), a short but an important question of law involved in the Writ Appeal was whether the second wife of a Mohammedan employee was entitled to any share in the family pension of her late husband. The issue being answered in the negative by the learned Single Judge, the petitioner had challenged the judgment and order in the Writ Petition. In the brief facts, the appellant had married Tapadar during the subsistence of his marriage with the respondent no.8. He had eight children through the first wife and three through the second wife. The appellant started living separately from her husband since 1985 due to matrimonial discord and sought maintenance and ultimately the case culminated in a compromise when he agreed to pay maintenance to her as well their children. It was pleaded in the petition that after the retirement from the service he had submitted an application before the concerned Department requesting the inclusion of her name as a nominee to receive 50% pensionary benefits after his death.

22. In *Smt. Sirazun Nessa* (supra), he retired from the service on 31.12.2003 and died on 1.10.2006 and thereafter the appellant and the respondent no.8 had staked their claim for the retiral benefits. It was contended on her behalf that as the deceased was a Mohammedan by faith, he was permitted under his Personal Law to marry the appellant even during the subsistence of his marriage with the first wife and therefore she was legally entitled to inherit the proportionate family pension. Their Lordships considered Rule 143 (iii) vis-a-vis Rule 26(i) of the Conduct Rules and found that under Rule 143 (i) there was no indication of entitlement of the family pension by more than one wife and in the Note appended to the Rule 143(ii) definitely pointed out the consideration of the claim for the family pension by two or more widows. At the same time, the Rule had not ruled out taking into the consideration the valid marriage of two or more wives by a Mohammedan employee. Their Lordships also found that though the Conduct Rules had put certain preconditions for contracting a second marriage, they did not totally prohibit a second marriage provided it was permitted under the personal law and custom of the concerned Government employee and the only rider was to obtain permission from the Government. In the ultimate it was held that the petitioner was entitled to a proportionate family pension. The judgment in *Smt. Sirazun Nessa* (supra), is clearly distinguishable inasmuch as unlike the petitioner therein, the petitioner in our case is governed under the Family Laws applicable in the State where there is a bar to the second marriage during the subsistence of the first marriage. Hence, considering the law on the point vis-a-vis the Pension Rules and the Family Laws applicable to the State, the petitioner alone is entitled to the pension and accordingly she is held entitled to a direction to quash and set aside the decision of the respondent-authorities holding the respondent no.4 entitled to a half share in the family pension. It goes

without saying that the petitioner alone is entitled to a writ to the respondents to pay the petitioner each month the entire amount of the family pension that is due and payable upon the demise of her late husband.

23. In the result, we allow the petition. Rule is made absolute in terms of prayer clause Nos.(i) and (ii) to the petition. There shall be no orders as to costs.