

FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**FIRST APPEAL NO.577 OF 2015
WITH
CIVIL APPLICATION NO.1770 OF 2015**

Office Notes, Office Memorandum of Coram, appearances, Court's orders or directions and the Registrar's orders	Court's or Judge's orders
	Mr. C.M. Kothari, Advocate for the Appellants/applicants. Mr. Mahindra Deshmukh, Advocate for respondent nos. 1 and 2.

CORAM: MRS.MRIDULA BHATKAR, J.

DATED: 12th FEBRUARY, 2016

P.C.

. The application is made for speaking to the minutes.

2. The learned counsel for the Appellant submits that in the order dated 10th February, 2016 the First Appeal was heard and disposed of at the stage of admission by consent and therefore, it is to be mentioned in the order.

3. In view of this submission, the following line is to be added at the beginning of the order.

“Admit. The learned counsel for the

Respondents waives service. By consent, the Appeal is heard finally and disposed of at the stage of admission.”

4. Accordingly, the correction is to be made in the original order.

(MRS.MRIDULA BHATKAR, J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.577 OF 2015
WITH
CIVIL APPLICATION NO.1770 OF 2015

Draupada @ Draupadi Jaydeo Pawar
and Others ... Appellants

vs.

Indubai d/o. Kashinath Shivram Chavan
and Another ... Respondents

Mr. C.M. Kothari, for the Appellants and Applicants.
Mr. Mahindra Deshmukh, for Respondent Nos. 1 and 2.

CORAM	: MRS.MRIDULA BHATKAR, J.
RESERVED ON	: 5th JANUARY, 2016
PRONOUNCED ON	: 10th FEBRUARY, 2016

JUDGMENT:

. Admit. The learned counsel for the respondents waives service. By consent, the Appeal is heard finally and decided at the stage of admission.

2. This Appeal is directed against the judgment and order dated 17th February, 2010 passed by the Joint Civil Judge, Senior Division, Sangli while disposing of Misc. Application Nos. 168 of 2003 and 131 of 2006 by a common judgment.

3. Draupada Jaydeo Pawar and Indubai Jaydeo Pawar both claimed to be wives of the deceased Jaydeo Pawar, have filed these Misc. applications separately for succession and heir-ship certificate in their favour. *(In order to avoid confusion, both the parties are addressed by their names).*

4. As per the case of the Draupada, her marriage was solemnized with Jaydeo Pawar in the year 1979 and five children were born out of the said wedlock. Jaydeo died on 10th July, 2003 at village Ainwadi, Tal. Khanapur, Sangli. Before death Jaydeo had executed a Will dated 17th May, 2002 and he bequeathed the entire property in favour of his wife Draupada. After death of Jaydeo, Draupada applied for the Letters of Administration and on that basis she claimed that Jaydeo had married to her in the year 1979 and the second marriage with Indubai allegedly performed was solemnized in the year 1981 and therefore Indubai has no claim in the pension or other pensionary benefits of Jaydeo.

5. Per contra, Indubai claims that her marriage with Jaydeo was solemnized as per Hindu rites & ritual on 22nd June, 1981 & out

of their wedlock she gave birth to one Shubhangi who is one of the applicant in these applications for succession certificate. It is the case of Indubai that after few years of marriage, Jaydeo neglected her and her daughter Shubhangi. Therefore she had filed an application for maintenance under Section 125 of Code of Criminal Procedure before the J.M.F.C., Sangli vide Misc. Application No. 225 of 1989. The said application was decided in favour of Indubai and the Court ordered Jaydeo to pay maintenance to her.

6. Miscellaneous Application No. 131 of 2006 for heirship was filed by Draupada and Miscellaneous Application No. 168 of 2003 for heirship was filed by Indubai. Both the parties adduced oral as well as documentary evidence to prove their respective claims as legally wedded wife of Jaydeo. The learned Judge of the trial Court appreciated the evidence and held that Draupada failed to prove her valid marriage with Jaydeo in the year 1979 however, the fact of marriage of Jaydeo with Indubai is believed by the trial Court and partly allowed the application filed by Draupada. During the pendency of the applications, Draupada died. In Miscellaneous Application No. 168 of 2003, the learned Judge directed to issue

succession certificate in the name of the applicant Indubai to enable her to receive arrears of family pension and future family pension subject to payment of share of family pension amount if applicant Nos. 2 to 6 i.e. children of Draupada in Misc. Application No. 131 of 2006 are found entitled to those amounts. This order is challenged by applicant Nos. 2 to 6 in Misc. Application No. 131 of 2006 i.e. children of Draupada.

7. At the time of hearing the Appeal, the points of determination are formulated as under:

- 1) Whether Draupada was legally wedded wife of Jaydeo ?*
- 2) Whether family pension is an Estate of the employer which can be bequeathed by Will ?*
- 3) Under Rule 116(6)(a)(i) of Maharashtra Civil Services Rules, 1982 whether the family pension is payable equally to the second widow, when first widow is alive of Government servant ?*

8. The learned counsel for the Appellants has submitted that Draupada got married with Jaydeo in the year 1979. In support of her

case, many documents were filed by the Appellants. He submitted that Jaydeo before his death had executed a Will on 17th May, 2002 at Ainwadi, Tal. Khanapur. Therefore Draupada has filed Application No. 143 of 2004 for Letters of Administration and the learned Civil Judge, Senior Division, Sangli by its order dated 22nd August, 2005 issued the Letters of Administration in favour of Draupada about movable and immovable properties. He relied on the Will which is marked Exhibit 16 by which Jaydeo has bequeathed the entire property in favour of Draupada. The learned counsel submitted that the learned Judge of the trial Court ought to have consider the documents produced by Draupada. There are many documents issued by Talathi of Ainwadi. He submitted that Jaydeo was serving as a 'Teacher' in New English School, Kupri, Hatkanangale, Kolhapur which was run by 'Rayat Education Society'. He relied on the evidence of Mr. P.B. Pawar, a colleague of Jaydeo who deposed about the marriage with Draupada. The learned counsel submitted that Jaydeo has mentioned the name of Draupada as his nominee in his pension papers. He submitted that the learned Judge has committed error in accepting the evidence of Indubai and her witnesses. The trial Judge ought not to have relied completely on the findings given by the criminal Court in the

maintenance application.

9. The learned counsel submitted that status of Indubai as a second wife is illegal and her marriage with Jaydeo was void. She has no right in the property or pension of Jaydeo. In support of his submission, he relied on the judgment in the case of “Smt. Nanda Santosh Shirke vs. Smt. Jayashree Santosh Shirke and Another”¹. He also relied on the ratio in the judgment of “State of Punjab vs. K.R. Erry and Sobhag Rai Mehta”². He further relied on the judgment of full bench in the case of “D.S. Nakara and Others vs. Union of India”³

10. The learned counsel for the Respondents has supported the judgment passed by the trial Court. He submitted that the other benefits are given to the Appellants but Indubai has rightful claim over the pension which is recognized by the trial Court. He submitted that Indubai got married on 22nd June, 1981 with Jaydeo and one daughter namely Shubhangi was born out of their wedlock. He submitted that the documents and entry of marriage which are

1. 2011(3) ALL MR 365.
 2. AIR 1973 SUPREME COURT 834.
 3. (1983) 1 Supreme Court Cases 305.

produced by Draupada are forged and manipulated and therefore those documents are rightly disbelieved by the learned Judge of the trial Court. He further argued that Indubai was compelled to file a criminal case under Section 125 of the Code of Criminal Procedure and in reply, Jaydeo has admitted his marriage with Indubai and did not say a single word about his first marriage with Draupada. He further submitted that this admission given by Jaydeo of his marriage with Indubai supports the claims of Indubai as legally wedded wife of Jaydeo over pension and pensionary benefits. He further argued that if there would have been prior marriage with Draupada, then Jaydeo ought to have mentioned about the first marriage. However, there is no whisper about it. He supported the reasoning and finding given by the trial Judge. He submitted that the Will executed by Jaydeo is challenged by Indubai. It is a forged document and Indubai was not made a party in that proceeding when the application for Letters of Administration was made by Draupada. He submitted that pension is not an “*estate*” of any employer which can be disposed of by Will. Therefore, the bequeath of pension by Jaydeo in favour of Draupada in the said Will is not legal and the property can not be disposed of by Jaydeo in this manner.

11. In support of his submission, he relied on the judgment of the Hon'ble Supreme Court in the case of *Violet Issaac vs. Union of India*⁴. He further relied on the ruling of “*Jodh Singh vs. Union of India*”⁵. He further relied on the judgment of “*Sundariya Bai Choudhary vs. Union of India and Others*”⁶. He submitted that as per Rule 116(6)(a)(i) of Maharashtra Civil Services (Pension) Rules, second wife is entitled to equal shares in the pension. He relied on the judgment of the Single Judge of Bombay High Court, Aurangabad Bench in **Kantabai w/o. Dhulaji Shriram vs. Hausabai Dhulaji Shriram** in Civil **Revision Application No. 72 of 2013 dated 25th October, 2013**

12. I deal with first point of determination whether Draupada is legally wedded wife of deceased Jaydeo. Miscellaneous Application No. 131 of 2006 for heirship was filed by Draupadabai. She tendered oral as well as documentary evidence. Witness Rangrao Bajirao Pawar who was working as a teacher along with deceased Jaydeo Pawar was examined. He has stated that he attended the marriage between Draupada and Jaydeo on 23rd May, 1979. He has stated that

4. 1991 DGLS (Soft.) 68.

5. 1980 DGLS (Soft.) 437

6. AIR 2008 MADHYA PRADESH 227.

the name of Draupada has been mentioned in the service record by Jaydeo as his nominee. He produced marriage invitation card of Draupada and Jaydeo. He has deposed that wherever Jaydeo was transferred, Draupada had accompanied him. In the cross-examination though the witness has expressed ignorance in the year 1979, 1981 and 1984 about the postings of Jaydeo, however, he maintained that he had attended the marriage and produced invitation card of their wedding. Another witness Rajaram Raghunath Pawar gave evidence that he is resident of Inewadi, i.e., native place of Jaydeo Pawar and he has participated in the pre-wedding preparation of Jaydeo and Draupada. He made lists of the gifts which were to be exchanged between the families of Jaydeo and Draupada and he identified that the said list is in his handwriting. He also identified the signature/thumb impressions of fathers of Draupada and Jaydeo. He claimed that he witnessed the marriage of Jaydeo and Draupada and they have two sons and three daughters out of this wedlock. His evidence could not be dislodged in the cross-examination by putting mere denials.

13. On the other hand, in Miscellaneous Application No. 168 of

2003, the heirship application of Indubai, she examined witness Ganesh Sukhdev Kumbhar to establish her claim of marriage with Jaydeo. He was working as a Gram Sevak at Inewadi and on the basis of the record, he has stated that in the register, Gram Sevak had made entry that in the year 1979 when enquired, two marriages of Jaydeo had taken place. Thus, this evidence, on the contrary, supports the case of Drupadabai of her marriage.

14. Moreover, the will dated 17th May, 2002 at Exhibit 10 was executed by Jaydeo Pawar and the said will was proved by examining the two witnesses signed below the will in Miscellaneous Application No. 143 of 2004 and in the said will Jaydeo has mentioned that Draupada is a legally wedded wife and he married Draupada on 23rd May, 1979 and he did not marry Indubai and denied his relationship with her. However, he has stated that he has filed Miscellaneous Petition No. 45 of 1995 against Indubai and by that will, he bequeathed his pension to his wife Draupada.

15. In the present case, Indubai had filed criminal case for maintenance under section 125 of Cr. P.C. In the written statement,

Jaydeo has admitted his marriage with Indubai and he did not state anything about his marriage with Draupada. On the basis of evidence tendered in the said case, the learned Magistrate held that fact of marriage between Draupada and Jaydeo is proved and held that she was entitled to maintenance and awarded the same. Thus, under that order, Jaydeo was paying maintenance to her during his life time. The learned Judge of the trial Court has erred in accepting the finding of the learned Magistrate as a final word while determining the issue of valid marriage of Indubai and Draupada with Jaydeo. Draupada has four children out of this wedlock. The trial under section 125 of Cr. P.C. conducted before the learned Magistrate was in absence of Draupada. The suppression of the fact of first marriage by Jaydeo was obvious because he was in Government service and if he would have stated about the first marriage, then he would have been charged for misconduct under Rule 26 of the Maharashtra Civil Services (Conduct) Rules and that might have been affected adversely on his service. Thus, silence of Jaydeo about his first marriage with Draupada in the written statement cannot be given any weightage and a circumstance against Draupada. His efforts to hide the fact of first marriage from Court was successful and therefore, Indubai was

declared to be entitled to receive maintenance and which she was receiving during his lifetime. The learned Judicial Magistrate First Class in that maintenance application gave the correct finding on the basis of the evidence available to him. Draupada was never before him to plead her case. Under such circumstances, if one wife does not come before the Court to plead her case and the fact of two marriages are never brought before the Court, then the finding given and judgment passed in respect of validity of one marriage is always a subject of challenge before the Civil Court and in that event, the Civil Court has to consider the evidence independently of both the parties and is required to give its verdict.

16. After assessing the evidence tendered by both the wives on the point of valid marriage, the evidence led by Draupada is found consistent and reliable. A fact that Draupada and Jaydeo have 5 children out of this wedlock also corroborates the evidence. Thus, I hold that the finding given by the learned trial Court that Draupada could not establish valid marriage is erroneous and it is set aside and it is held that Draupada was the first legal wedded wife.

17. The second point is can family pension be disposable by the employer by will.

18. The learned counsel for the appellant submitted that Jaydeo has bequeathed his pension to his wife Draupada by will dated 17th May, 2002 and it was probated by the Court.

19. The learned counsel for the respondent/Indubai has vehemently opposed the legality of such bequeath.

20. The pension is paid towards the services rendered by the Government employee as provided under the Service Rules. Thus, such payment is a creation of statute. A person can dispose of the property which is owned by him and which exists when he makes a will. The Government employee is never in control or possession over the amount of pension because it is paid monthly as per the rules.

21. In the case of “*D.S. Nakara and Others vs. Union of India*”³ wherein the full bench of the Hon'ble Supreme Court has discussed

3. (1983) 1 Supreme Court Cases 305.

about 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 lurch. Pension is a retirement benefit 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.”

22. The Government employee cannot dispose of his family pension to a third person other than the members covered under “family” under the Rules. For understanding, the word 'family' under Rule 9(16) of the Maharashtra Civil Services (General Conditions of Services) Rules, 1981 is relied.

“Rule 9(16) - “Family” means a Government servant's wife or husband, as the case may be, residing with the Government servant and legitimate children or step-children residing with and wholly dependent upon the Government servant. It includes, in addition, parents, sisters and minor brothers if residing with and wholly dependent upon the Government servant.”

23. Thus, the payment of pension is strictly governed by the service rules and, therefore, it cannot be an 'estate' disposable by will. Though the Government employee has right to receive the pension, it cannot be treated as a 'property'. On this point, I rely on the case of **Jodh Singh** (*supra*). In the said case, the officer bequeathed his movable and immovable property to his father during his life time and nominated his parents for the Provident Fund, as his relation with his wife was not cordial. The Hon'ble Supreme Court while dealing with the issue held that the pension is a retirement benefit and is not payable in the life time of the employee and what is not payable during the life time of the deceased over which he has no power of disposition and cannot form part of his estate. It is the event of his death that provides the eligibility qualification for claiming special family pension.

24. In the case of **Sundariya Bai Choudhary** (*supra*), the Division Bench of Madhya Pradesh High Court has taken a similar view that the pension of deceased cannot be said to be an estate and it is not transferable and cannot be bequeathed by Will. However, other pensionary benefits like Provident Fund, Gratuity etc. and other

retiral dues or extra remuneration would be estate of the deceased and that can be bequeathed by him.

25. In the case of **Violet** (*supra*), the Hon'ble Supreme Court had an opportunity to deal with Railway Family Pension Rules and held that pension cannot be bequeathed by will since it is not a part of estate of the employee but it is for monetary benefit of wife and children.

26. After going through the facts of the cases and law laid down therein which are referred above, it is pertinent to note that in these cases, husbands have disposed of the property by will to other family members by denying the claim of the wife and, therefore, the Courts have taken a view that wife has prime claim over the pension of the husband and that cannot be denied. In the present case, Jaydeo has bequeathed his pension to his first wife only. It is a settled position of law that pension is not a estate and so it cannot be bequeathed by will, so to that extent, i.e., the portion of bequeath of pension in favour of Draupada is bad in law, however, the statements made in the will about the status of Draupada and his final wish that Draupada alone has right over his pension corroborates a fact of valid

nomination of Draupada as a first wife.

27. Thus, it is held that pension is not a estate or property and cannot be disposed of and to that extent, the portion in the will regarding bequeath is against the law.

28. The third issue for determination is whether under Rule 116(6) (a)(i) of Maharashtra Civil Services (Pension) Rules, the family pension is payable to second wife after the death of her husband/Government servant.

29. Rule 116(6) of the Maharashtra Civil Services (Pension) Rules, 1982 reads as under:

"(6)(a) (i) Where that Family Pension is payable to more widows than one, the Family Pension shall be paid to the widows in equal shares;

(ii) 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 shares, or if there is only one such other widow, in full, to her.)

(b) Where the deceased Government 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 Government 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 shall not lapse but shall be payable to the other widow or widows and or to 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).

(c) Where the deceased Government servant or pensioner is survived by a widow but has left behind eligible child or children from a divorced wife or wives, the eligible child or children shall be entitled to the share of Family Pension which the mother would have received at the time of the death of the Government servant or pensioner had she not been so divorced.

(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 shall not lapse but shall be payable to be other widow or widows and/or to 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)."

30. This issue had come up earlier before different Benches of the Bombay High Court, so it is necessary to refer and state the decisions given by the respective Benches on interpretation of Rule 116 of Maharashtra Civil Services (Pension) Rules -

- (i) The learned Single Judge of Bombay High Court, Aurangabad Bench in **Kantabai w/o. Dhulaji Shriram vs. Hausabai Dhulaji Shriram** in Civil **Revision Application No. 72 of 2013 dated 25th October, 2013** has decided this issue.
- (ii) The Judgment of Division Bench of Bombay High Court, Nagpur Bench in Union of India & Ors. vs. Jaywantabai w/o. Ramarao Kewoo in **Writ Petition No. 4467 of 2014 decided on 20th November, 2014,** reported in (2015) 2 MH L.J. 328 is on the same issue.
- (iii) The Division Bench of Bombay High Court, Nagpur Bench in Chanda Hinglas Bharati vs. The State of Maharashtra & Ors. In **Writ Petition NO. 1251 of 2015 decided on 26th November, 2015** has also decided the same issue.

31. The learned Single Judge of the Bombay High Court, Aurangabad Bench in the case of “**Kantabai w/o. Dhulaji Shriram vs. Hausabai Dhulaji Shriram**”, has referred the case of **Rameshwari Devi vs. State of Bihar**, AIR 2000 SC 785 which is relied before me also. In the case of **Rameshwari Devi** (*supra*), the husband who was in Government service had left behind two wives, one Rameshwari

Devi and another Yogmaya Devi. There was a dispute about the payment of family pension, retirement benefit between the two wives. The Hon'ble Supreme Court held that marriage of deceased husband and Rameshwari Devi was valid and the marriage between deceased and Yogmaya Devi was in contravention with Clause (i) of Section 5 of the Hindu Marriage Act and was a void marriage. However, under section 16 of this Act, children born out of void marriage are legitimate. The Hon'ble Supreme Court held that Yogmaya Devi cannot be called a widow of Narain Lal, as her marriage with deceased Narain Lal being void. The Supreme Court denied the entitlement of Yogmaya Devi to get the pensionary benefit on this ground and it upheld the judgment of Division Bench of Patna High Court that the children of Yogmaya are entitled to share the family pension till they attain majority. The learned Single Judge of this Court in **Kantabai** (*supra*) discussed the facts and law in **Rameshwaridevi** and held that verdict of the Supreme Court is based on Central Civil Services Conduct Rules especially Rule 21 as well as The Bihar Government Services Conduct Rules, 1976 especially Rule 23, under which a Government servant is prohibited from contracting a marriage with a person having a spouse living.

The learned Single Judge held that Rule 116 of the Maharashtra Civil Services (Pension) Rules is a specific provision under which more than one widows are entitled to pension in equal shares of their deceased husband and rule akin to Rule 116 of Maharashtra Civil Services Rules was not pointed out or was not a matter of consideration before the Apex Court and, therefore, the learned Single Judge has distinguished the case of Rameshwari Devi from the case before him. The learned Single Judge has observed thus:

25. Upon going through the phrasology of the said Rule 116 and its sub clauses, I am of the view that the rules are drafted with an element of certainty and with a definite object. It cannot be viewed to be a directory provision pertaining to widows more than one. It cannot be interpreted to mean that the said Rule is a mere expression of plural tense of a widow and that it cannot be looked beyond such a simple impression as is contended by the respondents. The learned counsel for the respondents has contended that just because the said phraseology was used in the Pension Rules under the Bihar Government Services Conduct Rules, 1976, no further importance ought to be given to the meaning of more than one widow since the Hindu Marriage Act introduced in 1955, has changed the concept of marriage thereby prohibiting a second marriage and rendering a second marriage null and void. I am not in agreement with such contentions and I do not desire to accept such an interpretation to the extent of Rule 116.

Thus, the learned Single Judge held that the case of second wife is squarely covered under Rule 116 and so both the wives are entitled to

equal share of the family pension.

32. Same issue cropped up before the Division Bench in **Jaywantabai's** (*supra*) case. In the said case, the deceased was a railway employee, so his pension was covered under Railway Service Pension Rules, 1993. The claim of the second wife was denied by the Union of India, so challenge was given by the second wife. The Division Bench considered sub-rule (5) of Rule 70 wherein it is stated that “For the purpose of this Rule, Rules 71, 73 and 74 “Family”, in relation to railway service means - (i) wife or wives including judicially separated wife or wives in the case of a male railway servant. Rule 75 deals with “Family Pension Scheme for Railway Servants” and under sub-rule 7(i)(a) it is stated that where there are more widows of a deceased railway employee, family pension shall be paid to the widows in equal share. The Division Bench had considered Section 5 and Section 11 “Void Marriages” under the Hindu Marriage Act. However, the Division Bench has said that “We cannot be oblivious to what is going on in the Society and further fact that during subsistence of first marriage, the husband performs a second marriage by practicing fraud and indulging in cheating the

second woman, who thus falls an easy prey to such person for no fault of her”. The Division Bench relied on Article 15 and article 39(a) of the Constitution and held that provision of giving pension to second widow is fully in consonance with this constitutional provisions and has complemented the Indian railway. It appears that the judgment of single Judge of this Court in **Kantabhai Shriram** (*supra*) was not placed before the learned Judges of Division Bench.

33. It is necessary to point out and refer to the decision of Hon'ble Supreme Court dated 8th May, 2015 in **Petition for Special Leave to Appeal (C) No. 11491 of 2015 in Union of India & Anr. vs. Jaywantabai**. The judgment in **UOI vs. Jaywantabai Kewoo** passed by the Learned Judges of Division Bench of Nagpur Bench dated 20th November, 2014 was challenged by the Union of India by filing SLP. The Hon'ble Supreme Court dismissed the SLP, however, kept the issue open. The relevant portion of the said order hence reproduced as under:

“We are not inclined to interfere in the matter at all, however it now appears that “the first wife -Saraswatibai” has passed away and from that matrimony no children are alive. In these circumstances “the Second wife – Smt. Jaywantabai” would prima facie

be entitled to the entire pensionary benefits.

Special Leave Petition is dismissed with these observations leaving the question of law open as to whether a Second wife can lay claim to the pensionary benefits or any part thereof, despite Rule 21 of the Railway Services (Conduct) Rules, 1966.”

34. Thus, the Hon'ble Supreme Court left open the issue of interpretation of Rule 116(6)(a)(i) of the Maharashtra Civil Services (Pension) Rules. Later on, an identical issue came before another Division Bench of Nagpur Bench in the case of **Chanda Hinglas Bharati**. The said Division Bench referred the decision given by the earlier Division Bench in the case of **Jaywantabai Kewoo** and observed that in the said case, the earlier Division Bench has dealt with the Railway Act and the decision in **Jaywantabai** is per incuriam and took a different view that the family pension cannot be payable to a woman who marries a Hindu Government servant during the subsistence of his marriage and during the life time of his wife after Hindu Marriage Act came into force on 18th May, 1955. Incidentally, I found that the order passed by the Hon'ble Supreme Court dated 8th May, 2015 while dismissing the SLP against the order in the case of **Jaywantabai** was not placed before the Division Bench at the time of

hearing the case of Chanda Hinglas Bharati. Coincidentally, the Hon'ble Supreme Court though upheld the decision of the Division of Bombay High Court, Nagpur Bench in the case of Jaywantabai and directed the Union of India to pay pension to second wife of Hindu Government employee, the Supreme Court, as mentioned earlier, has kept the issue of payment of pension to second wife open and, therefore, the judgment of Division Bench in the case of **Chanda Hinglas Bharati** wherein the learned Judges of Division Bench have thoroughly interpreted the said rule and the issue therefore is not a res-integra.

35. During the course of arguments of **Chanda Hinglas Bharati** (*supra*) in November, 2015 the counsel of second wife placed heavy reliance on the earlier judgment of the Division Bench in the case of **Jaywantabai**. The judgment of learned Single Judge in the case of “**Kantabai**” was not placed before the Division Bench. The learned Judges of the Division Bench in the case of **Chanda Hinglas Bharati** have considered number of judgments. The ratio laid down by the Division Bench is specific and clears all the doubts in respect of interpretation of Rule 116(6)(a)(i) of Maharashtra Civil Services

(Pension) Rules and Rule 26 of Maharashtra Civil Services (Conduct) Rules. The Division Bench has referred and relied the cases of **Rameshwari Devi** (*supra*) and **Vidyadhari & Ors. vs. Sukhrana Bai & Ors.**, reported in MANU/SC/0629/2008. The Division Bench has held thus:

“The Maharashtra Civil Services (Pension) Rules were brought into force in the year 1982. Rule 116 (6)(a)(i) opens with the clause, “Where the Family Pension is payable to more widows than one”. The provisions of Sub Rule 6(a)(i) of Rule 116 of the Rules would apply only in a case where the family pension is payable to more widows than one. The primary question would be, whether the family pension is payable to more widows than one. When would a second widow or more than one widows be entitled to pension. In our considered view, more widows than one would be entitled to pension only if the Hindu employee has married the woman (widow) before the coming into force of the Hindu Marriage Act on 18.5.1955 and in case of employees where such marriage is permissible under the personal law applicable to the said employee or Government servant and the other party to the marriage. It appears from the provisions of Maharashtra Civil Services (Conduct) Rules that the marriage during the life time of a spouse could be accepted only if the marriage is permissible under the person law applicable to both the parties to the marriage.”

Thus, Rule 116(6)(i)(a) opens with words “where the family pension is payable” which specifies the payability of the pension in respect of a particular class of widows. The word “where” is very significant and by using the word “where”, the legislation wanted to carve out a

section of widows in which a pension is payable to more than one widow. Thus, the word “where” indicates an exception from the general principle of application to all the widows, i.e., a departure from the general rule of payability of the pension to only one widow.

36. In the said judgment, the Division Bench has rightly linked up meaning of widow to the status of wife who is a legally wedded wife. It considered Section 5 which speaks about 'Conditions of Valid Marriage and Section 11 on 'Void marriages and Section 17 wherein 'Punishment for bigamy' is stated. It also took into account provisions of Sections 494 and 495 of the Indian Penal Code pertaining to bigamy and also relied on Rule 26 of the Maharashtra Civil Services (Conduct) Rules, 1979, which states thus:

“26. Contracting of marriages

(1) No Government servant shall enter into, or contract, a marriage with a person having a spouse living; and

(2) No Government servant, having a spouse living, shall enter into or contract, a marriage with any person; Provided that the Government may permit a Government Servant to enter into, or contract, any such marriage as it referred to in clause (1) or clause (2), if it is satisfied that -

(a) such marriage is permissible under the personal

law applicable to such Government servant and the other party to the marriage; and

(b) there are other grounds for so doing.”

Thus, the legislation, keeping in mind Section 26 of the Maharashtra Civil Services (Conduct) Rules, Sections 5, 11 and 17 of the Hindu Marriage Act and also Sections 494 and 495 of the Indian Penal Code, has enacted this Rule with opening word “where” which indeed maintains harmony in all these legal provisions and the interpretation of Section 116(6)(i)(a).

37. The reasoning given by the Division Bench is consistent with the other provisions of law as mentioned above wherein the second marriage is held void. The Indian legal system has adopted monogamy as a legal structure of the marriage institution and, therefore, occasional fractures of second marriage in subsistence of first marriage are held void in law. The second woman cannot be given a status of a legally wedded wife and, as rightly observed by the Division bench, she is not a widow in true and legal sense. A wrong may exist in the Society on a large scale, however it cannot be justified as a righteous custom because of its magnitude. In order to

buttress this point, it will not be out of place to give example of give and take of dowry which throws light on the wide gap between the legality and the reality. To take lenient view towards the wrong doers is contrary to law laid down by the legislature. Thus, gap should not be widened by the decision of the Court but it is to be bridged. It is mandatory for the Court to interpret a law which gives true effect to the legislative intent. The Division Bench in the case of **Chanda Hinglas Bharati** has referred to the relevant provisions under different acts regarding the consequences of second marriage and the status of second woman.

38. It was argued by the learned counsel for the respondent that a second wife was deceived by deceased husband and she begotten a daughter from the deceased and therefore, it is necessary for the Court to take a gender protectionist view and grant her pension. This argument of the learned counsel for the respondent is one sided and may appear convincing superficially, but it does not stand to reason after close scrutiny. The Courts have empathy for a woman who is deceived by a man, however, she may take recourse under the other enactments for redressal. So far as husband is a Government servant

and matter is covered under the rules, then the Court cannot take other view than permissible in law. The Division Bench in the case of **Chanda Hinglas Bharati** has made a reference to similar argument and has rightly observed that “showing sympathy to a woman like the petitioner would result in depriving a legitimate wife of her right to receive full family pension. This is the gender positive view towards the legally wedded wife. The case of second wife may be unfortunate but I am of the view that Court cannot pass verdict in her favour. While doing justice, injustice should not be caused to a person having a rightful claim.

39. Thus, I fully rely on the ratio laid down in the case of **Chanda Hinglas Bharati** and hold that marriage contracted with second lady in subsistence of first marriage or spouse is living, then second lady from the Hindu/Christians cannot claim as a widow entitled to pension subject to personal law or as stated in Rule 26 of Maharashtra Civil Services (Conduct) Rules. The First Appeal filed by Draupada is allowed. In view of this, Civil Application does not survive and the same is accordingly disposed of.

40. The learned counsel for the respondents prays that the operation of this order be stayed for four weeks, as he wants to challenge this order before the Hon'ble Supreme Court. In view of this, the operation of this order is stayed till 14th March, 2016.

(MRS.MRIDULA BHATKAR, J.)