

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.665 OF 2013**

Mrs. Swaroopa Naik Vaigankar,
major,
widow of Prakash Naik Vaigankar
presently R/o H.No.64, Patto,
Ribandar, Goa.

... Petitioner

Versus

1. The Board of Trustees of
The Port of Marmagao,
Through its Secretary,
Marmagao Harbour,
Mormagao Goa.
2. Shri Kalidas Prakash Vaigankar,
major,
Son of late Prakash Naik Vaigankar,
r/o House No.138, D. N.
C/o Basu Dipu Naik,
Rua de Maria, Sancoale,
Marmagao, Goa.
3. Mrs. Deepa Prakash Naik,
major,
House No.138,D. N.,
c/o Basu Dipu Naik,
Rue de Maria, Sancoale,
Marmagao Goa.

... Respondents

Ms. Maria Caroline Collasso, Advocate for the Petitioner.

Mr. Y. V. Nadkarni and Mr. S. Kamat, Advocates for the Respondent
No.1.

**Coram:- M. S. SONAK &
SMT. M. S. JAWALKAR, JJ.
Date:- 30th March 2021**

ORAL JUDGMENT (Per M. S. Sonak, J)

Heard Ms. Caroline Collasso, learned counsel for the Petitioner, and Mr. Y. Nadkarni learned counsel for Respondent No.1.

2. Though, Respondent Nos. 2 and 3 have been duly served in this matter, but they are neither present nor represented.

3. This petition concerns the apportionment of retiral benefits accrued on the demise of late Prakash Naik on 13.04.1996. Mr. Prakash Naik was admittedly the employee of Mormugao Port Trust (MPT) i.e. Respondent No.1.

4. The Petitioner is the second wife of Prakash Naik. Ms. Deepa-Respondent No.3 is the first wife and Kalidas - Respondent No.2 is the son of Prakash Naik from their first marriage.

5. Ms. Deepa and Mr. Kalidas had instituted Special Civil Suit No.61/1996 seeking a declaration that the marriage between the Petitioner and Prakash was null and void and therefore, the entire pensionary benefits should be made over to them alone to the exclusion of the Petitioner. The suit was decreed and even the First Appeal against the same was dismissed.

6. However, in Review Petition No.9 of 2009, this Court by its

order dated 13.04.2010 held that though the marriage between Prakash and the Petitioner may have been void, following the principles set out in Articles 1235 read with 1109 of the Civil Code, 1867, the pensionary and other retiral benefits will have to be distributed amongst the parties in the following manner:-

- i) Ms. Deepa (first wife)..... $\frac{1}{2}$
- ii) Kalidas (son from first marriage)..... $\frac{3}{8}$ th
- iii) Swaroopa (Petitioner- second wife)..... $\frac{1}{8}$ th

7. The Petitioner's execution application seeking enforcement of $\frac{1}{8}$ th share was allowed by the Executing Court. However, the Petitioner's application seeking 50% of the benefits was not allowed by the Executing Court holding that this is a matter for the High Court to decide.

8. On hearing the parties, this Court on 18th December 2013 made the following order :

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*Coram:- B. R. GAVAI &
F. M. REIS, JJ.*

Date:- 18th December, 2013

ORAL ORDER

Rule. Respondents waives service.

2. Heard the parties on the question of granting interim relief.

3. The Petitioner has approached this Court for a direction to the Respondent no. 1 to grant the entire pensionary benefits to the Petitioner on the death of deceased Prakash Vaigankar, who was in the service of Respondent no. 1. The Petitioner has in the alternative prayed to the Respondent

no. 1 to grant pensionary benefits to the Petitioner on the death of Shri Prakash Vaigankar.

4. The Petition arises out of peculiar facts and circumstances. The deceased Prakash was initially married to the Respondent no. 3 herein, Smt. Deepa. The deceased Prakash was employed with the Respondent no. 1. The marriage between the deceased Prakash and the Respondent no. 3 was solemnised on 17.05.1978. According to the Petitioner, the marriage between the deceased Prakash and Respondent no. 3, was short lived for over a year.

5. It is the case of the Petitioner that on 17.07.1983, deceased Prakash married the Petitioner. It is her case that she was not informed about his first marriage with the Respondent no. 3 by the deceased Prakash and therefore she married deceased Prakash under the impression that it was his first marriage. It is the case of the Petitioner that the deceased Prakash and the Petitioner lived together until the death of the deceased Prakash on 13.04.1996. Upon the death of the deceased Prakash, the Petitioner made a Deed of Succession on or about 24.06.1996 claiming to be the only heir to the estate of deceased Prakash. The same was contested by the Respondent nos. 2 and 3 herein.

6. A suit was also filed by the Respondent nos. 2 and 3 herein for direction to the Respondent no. 1 herein to pay the entire benefits upon the death of the deceased Prakash to them and for a declaration that they were the sole and universal heirs of the said deceased Prakash. The suit was resisted by the Petitioner herein. The learned Judge, before whom the suit was pending, declared the Respondent nos. 2 and 3 herein to be the sole and universal heirs of the deceased Prakash vide Judgment dated 26.09.2003. The learned Judge further declared the marriage of the Petitioner and the deceased Prakash as void.

7. The Petitioner preferred First Appeal no. 9 of 2004, being aggrieved thereby. The learned Single Judge of this

Court, dismissed the First Appeal. As such, a Review Application came to be filed by the present Petitioner being Civil Application (Review) No. 9 of 2009. The learned Single Judge of this Court vide Order dated 13.04.2010, allowed the Review Petition and held that the first wife was entitled to half share from the estate of deceased, the son was entitled to 3/8th share and the Petitioner herein was entitled to 1/8th share.

8. However, during the pendency of the Review Application, upon dismissal of the First Appeal, the entire amount which was entitled on the death of the deceased Prakash, came to be paid by the Respondent no. 1 to the Respondent nos. 2 and 3, herein. The execution proceedings filed by the Petitioner for the payment from the Respondent nos. 2 and 3, are pending before the executing Court and the Orders passed in the execution proceedings are subject matters of challenge before the learned Single Judge of this Court.

9. In the meantime, the Petitioner also filed an application before the Civil Judge, Senior Division, at Vasco da Gama, under Execution Application for direction to the Respondent no. 1 herein to grant pension to the Petitioner. The learned Civil Judge, vide Order dated 19.08.2011, held that the Judgment of this Court did not exclude pensionary benefits to the Petitioner and, therefore, held that the Petitioner also be entitled to 1/8th share in the pension. The same has not been challenged before this Court.

10. The present Petition is strenuously resisted by the Respondent no. 2, who appears in person for himself and also for Respondent no. 3, his mother. He states that the issue regarding correctness of the Order passed by the executing Court is very much pending before this Court. He further submits that in accordance with the Rules governing the service condition of the employees of the Respondent no. 1, it is only the first widow who is entitled to the pensionary benefits and, as such, the Petition is liable

to be dismissed.

11. Shri Nadkarni, learned Counsel appearing on behalf of the Respondent no. 1, has informed us that there was correspondence between the Respondent no. 1 and Respondent no. 2 herein. He submits that a communication was addressed to the Respondent no. 2 to the effect that in view of the Orders passed by this Court, he was entitled to 3/8th share of the pension. Respondent no. 2 has addressed a letter on 29.02.2012 stating therein that he was entitled to pension only from 14.04.1996 to 27.05.1997 i.e. till the completion of 18 years and thereafter the entire pension should be paid to his mother as per the Rules. A Communication dated 29.02.2012 is also placed on record addressed to the Respondent nos. 1 and 2 thereby calling upon him to give in writing that after 27.05.1997, he has no objection to disburse the entire amount in favour of his mother, the Respondent no. 3 herein. It is informed by Shri Nadkarni, that there is no response to this communication. Shri Nadkarni, further informs that an amount of Rs.4,53,405/- has been paid towards terminal benefits, due on the death of deceased Prakash, to the Respondent nos. 2 and 3 herein. He further states that fixed deposit receipts in the sum of Rs.92,018/- and Rs.1,26,242/-, are also encashed by the Respondent nos. 2 and 3 herein.

12. The Petitioner has already filed Execution Proceedings for recovery of her 1/8th share as per the Orders passed in Review Application by this Court, before the executing Court. A Civil Revision Application arising out of the Order passed by the learned executing Court has been filed by Respondent nos. 2 and 3 in this Court and in the said proceedings as per the Order of this Court, the Registry has determined the amount to be received by the Petitioner as Rs.1,69,074/-. The said amount is seriously disputed by the Respondent no. 2.

13 However, since the Civil Review Application is pending

before the learned Single Judge of this Court, it would not be appropriate for us to make any comment thereof.

14. It is not in dispute that in the execution proceedings 1/8th share was directed to be paid to the Petitioner. Though Respondent nos. 2 and 3 were directed to pay 1/8th share of the Petitioner, the Respondent no. 2 has chosen not to pay the amount and has chosen to enjoy judicial custody for a period of ten days. It is not in dispute that the Respondent no.2 has now become a medical graduate and is employed with the State of Goa as a Medical Officer. It is a different matter that now Respondent no. 2 is also pursuing his studies in law.

15. No doubt, as per the Rules, it is only the first widow, who is entitled to the pensionary benefits. However, while exercising jurisdiction under Article 226, the Court cannot keep its eyes closed to the circumstances that appear in the matter. To a pertinent query to the Respondent no. 2 as to who had performed the last rites of his deceased father, the Respondent no. 2 clearly states that at the time of death of his father, the divorce proceedings between his mother and the deceased had reached a final stage and, therefore, he was advised by his Lawyer not to attend the funeral proceedings. It is thus clear that the Respondent no. 2 who claims to be the son of the deceased Prakash, on legal advise, has chosen not to remain present for performing the last rites of his father. He, now, when the Order is being dictated, attempts to correct himself and states that he was also not sure as to whether the news of his father's death was correct or not. Be that as it may, it appears that he has not even taken pains to find out as to whether the news was correct or not.

16. The Petitioner is a victim of unfortunate circumstances. She had married the deceased Prakash after a period of about four years when the marriage between the deceased Prakash and the Respondent no. 3 failed. Had the divorce proceedings which were initiated at the instance of the deceased Prakash reached finality before his death, then in

all probabilities it is the Petitioner who would have been entitled to the terminal benefits. In any case, she would have been entitled to the entire pensionary benefits since she would have been the only widow of the deceased.

17. The Respondent no. 2, at one hand, is not even abiding by the Orders passed by this Court in a Review Petition and paying the amount of Rs.1,69,000/- to the Petitioner and has chosen to remain in Judicial Custody foregoing his medical career, though he and Respondent no.3 have received huge amount from Respondent no. 1. In any case, now even the Respondent no. 2 is not entitled to any share in the pensionary benefits. In that view of the matter, we find that this is a fit case wherein this Court by invoking its inherent powers, direct the Respondent no. 1 by an interim Order to pay 50% of the pension to the Petitioner. We, therefore, by an interim Order, direct the Respondent no. 1 that the family pension on account of the death of deceased Prakash shall be paid in equal shares to the Petitioner and the Respondent no. 3. The aforesaid Order shall take effect from 01.01.2014.

18. Needless to state, the observations made herein above would not come in the way of the Respondent no. 2 agitating his claim before the learned Civil Judge in the Civil Revision Application.

19. Leave to amend. Amendment to be carried out forthwith.”

9. In terms of the interim order, there is no dispute that the Petitioner has been paid 50% of the pension with effect from 01.01.2014.

10. Ms. Collasso however submits that the Petitioner is entitled to the entire pensionary benefits because it is the Petitioner who lived with the deceased Prakash and took care of him during his last days. She

submits that to date Ms. Deepa and Mr. Kalidas have not even claimed the pensionary benefits from Respondent No.1. She submits that the entire pensionary benefits be therefore paid to the Petitioner.

11. Ms. Collasso in the alternate submits that at least the arrears with effect from 27.05.1997 to the extent of 50% be paid to the Petitioner because from this date Mr. Kalidas attained majority and was not entitled to receive any further pensionary benefits from Respondent No.1. She submits that this amount of arrears has neither been claimed nor be paid to Respondent Nos.2 and 3 and there is no justification for Respondent No.1 to retain this amount.

12. Mr. Nadkarni, learned counsel for Respondent No.1 submits that the decrees of the Civil Courts, including the order made in the review, make it clear that the marriage between the deceased Prakash and the Petitioner was null and void. He refers to the pension Rules entitled to Mormugao Port Employees (Pension and Gratuity) Regulations, 1966 (the said Regulation) to submit that only the lawful widow is entitled to the pension. He, therefore, submits that no pension is payable to the Petitioner. In the alternate, he submits that in terms of the decrees of the Civil Courts the pension to the maximum extent of 1/8th share may be payable to the Petitioner.

13. Mr. Nadkarni submits that presently he has no instructions as to whether the arrears for the period between 27.05.1997 and 01.01.2014 have been paid to Respondent Nos.2 and 3 or not. He submits that under no circumstances the Respondent No.1 may be called upon to pay any double payment to any of the parties. He submits that the Petitioner has not established any legal right and therefore this

petition ought to be dismissed.

14. We have considered the rival contentions and perused the material on record.

15. According to us, even at the stage of the final hearing, we will have to adopt the reasoning contained in the interim order dated 18.12.2013 because no material has been placed before us to take a different view in the peculiar facts and circumstances of the present case. Besides, even the prayer of the Petitioner for arrears from 27.05.1997 till 01.01.2014 will have to be considered in the peculiar circumstances of the present case provided the arrears has not already been paid to the Respondent Nos. 2 and 3 in the meantime.

16. Though, it is true that there are observations even in the order dated 13.04.2010 by which the Petitioner's review petition was partly allowed to the effect that the Petitioner's marriage with late Prakash was void, such observations, will have to be considered along with the observations found in the later part of the order referring to the provisions of Articles 1235 and 1109 of the Civil Code, 1867. There is clear finding that the marriage was bonafide and in the peculiar circumstances, the Petitioner ought not to be deprived of at least the portion of the pensionary benefits on account of retirement or consequent demise of Prakash.

17. Now there is no dispute that the Rules provide that once the son i.e. Kalidas attained majority he was not entitled to receive any further pensionary benefits with effect from 27.05.1997. Based upon this, by an interim order dated 18.12.2013, this Court directed the

payment of his share to the Petitioner herein so that, both the Petitioner (second wife) and Respondent No.3 (first wife) secured 50% of the pension amount. This Court has taken into account the circumstance that the first wife had already filed divorce proceedings and she along with her son were not even staying with the deceased Prakash for quite some time before his demise.

18. As noted earlier, there is no case made out to depart from the equitable order made by this Court on 18.12.2013 in the peculiar facts and circumstances of the present case.

19. On the aspect of 50% arrears from 27.05.1997 to 01.01.2014, we feel that this amount has not already been paid to either Respondent Nos.2 or 3 till date then, such arrears should be paid to the Petitioner. This is on the principle explained in the interim order dated 18.12.2013. However, if this amount is already paid to Respondent Nos.2 and 3 then, it will not be appropriate at this stage to require Respondent Nos.2 and 3 to refund this amount or to pay this amount to the Petitioner. The equities in such a situation will have to be balanced.

20. Accordingly, for all the aforesaid reasons as also the reasons set out in our interim order dated 18.12.2013 which, we now reiterate, the interim order dated 18.12.2013 is itself made absolute. Also, we direct Respondent No.1 to pay to the Petitioner the arrears corresponding to 50% of the pensionary benefits that may have been accumulated for the period from 27.05.1997 and 01.01.2014. This amount is to be paid to the Petitioner within three months from today provided this amount, to date has not already been paid to Respondent Nos.2 and/or Respondent No.3.

21. If the amount is not paid within three months, then, the entire amount will carry interest at the rate of 6% per annum to be assessed with effect from 01.06.1997 till the date of its actual payment.

22. We are conscious that the interim order dated 18.12.2013 was made in the context of the particular factual position in this matter. So also, this final order is made in the context of particular factual circumstances and to balance the equities between the parties.

23. Rule is partly made absolute in the aforesaid terms. There shall be no order as to costs.

24. All concerned to act based on the authenticated copy of this order.

SMT. M. S. JAWALKAR, J.

M. S. SONAK, J.

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