IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10745 OF 2019

Kanta Anant Dhayarkar
Age: 82 years, Occ: Nil
Residing at: Virag, 18, Ganesh Mala,
Sinhagad Road, Pune-411 030. ... Petitioner

Versus

1. State of Maharashtra
Through, The Secretary,
Higher & Echnical Education Department
Mantralay, Mumbai-40032;

2. The Director,
Directorate of Technical Educational
3, Mahapalika Marg,Mumbai 400 001.

3. The Principal,
Cusrow Wadia Institute of Technology,
Pune 411 001:

4. The Accountant General,
(Accounts & Entitlements)-I
old CGO Building, 101, Maharshi Karve Road,
Mumbai-400 020. ... Respondents

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Mr. Anilkumar R. Joshi, Advocate for petitioner.
Mr. N. C. Walimbe, AGP for State-respondents no. 1, 2 and 4.
Mr. S. R. Ronghe, Advocate for respondent no. 3.
Mr. R. Shankarnarayan Pillai, Sr. Accounts Officer

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CORAM: R. D. DHANUKA AND
ABHAY AHUJA, JJ.

DATE : 1ST DECEMBER , 2021

JUDGMENT:-(R.D. DHANUKA, J)

1. Leave to amend is granted to impugn the communication dated 30th June 2014 from the Senior Accounts officer from the office of Principal Accountant General addressed to the Administrative Officer, Directorate of Technical Education, Maharashtra State with a copy to the petitioner. Amendment to be carried out within two days from today in the petition as well as in the copy served upon the respondents.

2. Rule. Rule made returnable forthwith.

Learned AGP waives service for respondents no. 1,2 and 4.

Mr. Ronghe, learned counsel waives service for respondent no.3.

By consent of the parties, petition is heard finally.

3. By this petition filed under Article 226 of the Constitution of India, Petitioner seeks a writ of certiorari for quashing and setting aside the order dated 30th June 2016 and for quashing of the communication dated 30th June 2014.

4. Some of the relevant facts for the purpose of deciding the petition are as under:-

It is the case of the petitioner that the petitioner was married to

Shri Anant L. Dhayarkar on 8th December 1954 while his first marriage solomenized with Kamala was in existence. On 18th May, 1955 Hindu Marriage Act, 1955 came in force. On 30th September 1984, Shri Anant L. Dhayarkar, husband of the petitioner retired on superannuation from Cusro Wadia institute of Technology, Pune, the respondent no.3 herein. He was granted pension and other retirement benefits under the provisions of the Maharashtra Civil Service (Pension) Rules, 1982. The husband Shri Anant L. Dhayarkar expired on 11th September 2007. The first wife of said Shri Anant L. Dhayarkar expired on 5th May, 1995 during the life time of the said Shri Anant L. Dhayarkar.

5. Petitioner thereafter applied for family pension to the office of the respondents no. 1, 2 and 4. Petitioner also produced a copy of the marriage certificate of the petitioner with the said Shri Anant L. Dhayarkar which was solemnized on 8th December 1954.

6. It is the case of the petitioner that the said application, however, was not considered by the respondents no. 1,2 and 4 on one or the other grounds. Petitioner was made to run from pillar to post though the petitioner had submitted all relevant documents as demanded.

7. The petitioner also obtained the succession certificate by filing an application being Miscellaneous Application no. 855 of 2009 in the Court of 6th Joint Civil Judge, Senior Division, Pune under Section 372 of the Hindu Succession Act, 1956 in respect of the debt and securities left by the said deceased Shri Anant L. Dhayarkar, who died on 11th September 2007 at Pune. By an order dated 20th April 2010, the learned Joint Civil Judge, Senior Division, Pune granted succession certificate in favour of the petitioner in respect of family pension from respondent no. 3.

8. By the said certificate the petitioner was also empowered to collect the said pension, if any, or to negotiate or to transfer the said amount left behind by the said deceased Shri Anant L. Dhayarkar. It is the case of the petitioner that the petitioner submitted a copy of the said succession certificate also before the respondents no. 1, 2 and 4 for consideration. However, no family pension was granted in favour of the petitioner, though petitioner was entitled as a legally wedded wife of the deceased. Petitioner thus, filed this petition for various reliefs.

9. The petition is opposed by the State Government by filing affidavit in reply. Insofar as respondent no. 3-employer of the deceased is concerned, no affidavit in reply is filed. It is, however,

placed on record that the proposal for payment of family pension to the petitioner was forwarded by respondent no. 3 to the respondents no. 1,2 and 4 for processing the said claim and for payment.

10. Mr. Joshi, learned counsel for the petitioner invited our attention to the various correspondence annexed to the petition and also the documents including the marriage certificate of the petitioner showing the marriage between the petitioner and the said deceased Shri Anant L. Dhayarkar solemnised on 8th December 1954. He also strongly relies on the succession certificate issued by the learned 6th Joint Civil Judge, Senior Division, Pune and would submit that the respondents no. 1, 2 and 4 ought to have considered the factum of the marriage of the petitioner with deceased Shri Anant L. Dhayarkar solemnised prior to the date of enactment of the Hindu Marriage Act, 1955.

11. Learned counsel invited our attention to the avarements made by the State Government in the affidavit in reply and also to the impugned communication dated 30th June 2014 from the senior Accounts Officer from the office of the Principal Accountant General to the administrative officer, Directorate and Technical Education, Maharashtra State, thereby rejecting the family pension claimed by the petitioner on two grounds i.e. (i) Smt Kanta married Shri Anant

L. Dhayarkar, when his first wife Smt. Kamal was alive and not divorced, hence, this marriage is not legal and not entitled to family pension and (ii) family pension is admissible only to a legally wedded wife.

12. It is submitted by the learned counsel that both these reasons are totally erroneous and contrary to the marriage certificate produced by the petitioner showing the marriage of the petitioner with the said deceased Shri Anant L. Dhayarkar solemnised on 8th December 1954 i.e. prior to the date of enactment of Hindu Marriage Act on 18th May 1955. He submits that the marriage of the petitioner solemnised prior to the date of enactment of the Hindu Marriage Act was valid, though first wife of Shri Anant L. Dhayarkar was alive on the date of her marriage. Respondents no. 1, 2 and 4 thus could not have rejected the claim for family pension made by the petitioner on the ground that there was no divorce between first wife of the said Shri Anant L. Dhayarkar and his first wife Smt. Kamala prior to the date of solemnisation of the marriage between petitioner and Shri Anant L. Dhayarkar. It is submitted that since the marriage was solemnised prior to the date of Hindu Marriage Act, 1955 having come into effect, the petitioner was also legally wedded wife of the said deceased Shri Anant L. Dhayarkar.

13. It is submitted by the learned counsel that in any event the petitioner has produced the succession certificate granted by the competent Court under Section 372 of the Indian Succession Act, 1925 which has clearly recognised the rights of the petitioner and granting authority to the petitioner to collect the amount of pension payable by respondent no. 3.

14. Learned counsel for the petitioner submits that since there was gross delay on the part of respondents no. 1, 2 and 4 to sanction and pay the family pension to the petitioner, the petitioner is also entitled to get interest at the rate of 10% per annum under Rule 1 (9)(b) of the Maharashtra Civil Services (Pension) Rules, 1982. He relied upon the judgment of the Hon'ble Supreme Court in the case of **S. K. Dua Vs. State of Haryana and Anr., 2008 AIR (SC) 1077** and particularly paragraph 11.

15. Mr. Ronghe, learned counsel for respondent no.3 submits that though his client has not filed any affidavit in reply, his client does not dispute that the proposal to process the payment of family pension was forwarded by respondent no.3-employer of her husband to the authority to release pension.

16. Mr. Walimbe, learned AGP for respondents no. 1, 2 and 4 on the other hand invited our attention to the various averments made in the petition and in affidavit in reply filed by Shri Mahendra Keshaw Dawane, incharge Deputy Director of Technical Education, Maharashtra State, Mumbai. He submits that as per Form-3 Rule 116 (14) of the MCS (Services Condition) Rules, 1982 the said deceased Shri Anant L. Dhayarkar had nominated four persons which included his first wife Kamal Anant Dhayarkar and three sons. He submits that the deceased had not nominated the petitioner in the said Form-3 and thus, the petitioner is not entitled to claim any family pension.

17. In paragraph 8 of the said affidavit in reply, it is contended that it was not placed on record that alleged marriage was solemnized with the consent of the earlier wife or first wife and correspondence is prior thereto i.e. after the demise of the employee Shri Anant L. Dhayarkar. It is contended that after the retirement of the said Shri Anant L. Dhayarkar on 30th September 1984, the proposal for pensionery benefits was submitted by the office of Director of Technical Institution on 21st December 1985, which proposal was accepted and approved by the Accountant General. The first wife of the said deceased, however, expired on 5th May 1985, during the life time of the said deceased husband Shri Anant L. Dhayarkar.

18. In paragraph 12 of the said affidavit in reply it is admitted by the respondents no. 1, 2 and 4 that the petitioner had obtained succession certificate on 24th April 2010 from the learned 6th Civil Judge, Senior Division, Pune in Misc. Application No. 855 of 2009. Thereafter, the Administrative Officer, Desk-8, Office of the Administrator, Technical Education, M. S., Mumbai has intimated certain requisitions and short-falls in the application. The said proposal was resubmitted on 10th March 2011. It is stated that the Administrative Officer, Directorate of Technical Education, M. S. Mumbai vide letter dated 20th July 2011 had forwarded the proposal of the petitioner for family pension with his recommendation to the Accountant General office and forwarded therewith all the documents including succession certificate and other documents.

19. A perusal of the impugned order dated 30th June 2014 clearly indicates that the claim for payment of family pension made by the petitioner was rejected only on the ground that: (i) when the first wife Smt. Kamal of the said deceased was alive and that there was no divorce and thus, petitioner was not entitled to get family pension; (ii) The family pension is admissible only to a legally wedded wife. No other reasons are recorded in the impugned order.

20. Learned AGP did not dispute that the petitioner was already married to deceased Shri Anant L. Dhayarkar as far as back on 8th December 1954, much prior to Hindu Marriage Act, 1955 came in to force i.e. on 18th May, 1955. No doubt, the first wife of the said deceased Shri Anant L. Dhayarkar was alive on the date of the marriage of the petitioner solemnized with the deceased on 8th December 1954. The fact remains that the marriage of the petitioner and the said Shri Anant L. Dhayarkar was solemnized prior to the date of the Hindu Marriage Act, 1955 having come into effect. The marriage certificate produced by the petitioner at Exh.A to the petition is not disputed by the State Government in the affidavit in reply. In our view, since the marriage between the petitioner and said deceased Shri Anant L. Dhayarkar was already solemnized prior to the date of the Hindu Marriage Act having come into effect, the petitioner was also legally wedded wife of the said deceased Shri Anant L. Dhayarkar. In our view, both the reasons recorded in the impugned order are thus, totally erroneous and contrary to the provisions of the Hindu Marriage Act, 1955.

21. Be that as it may, after the demise of the first wife of the said deceased Shri Anant L. Dhayarkar during the life time of the said deceased, petitioner had applied for the succession certificate under Section 372 of the Hindu Succession Act before learned 6th Civil

Judge, Senior Division, Pune. Perusal of the said succession certificate clearly indicates that the said certificate was applied for claiming family pension from respondent no.3. The said certificate came to be granted in favour of the petitioner empowering her to collect pension, if any, or to negotiate or to transfer the said amount left behind by the said deceased Shri Anant L. Dhayarkar. The Said succession certificate has not been impugned by any of the other family member of the deceased husband of the petitioner. Perusal of the record indicates that the said certificate was also forwarded by the office of the Directorate of Technical Education to the office of respondent no.4 for consideration alongwith recommendation. The office of respondent no.4, however, did not bother to consider the effect of the succession certificate issued by the competent Court under Section 372 of the Hindu Succession Act.

22. In our view, the claim of the petitioner, being widow, on the basis of the succession certificate granted under Section 372 of the Hindu Succession Act,1925, cannot be taken away. The first wife of the deceased had already expired during the life time of the said deceased. The petitioner was the only wife surviving on death of the said deceased and was thus, entitled to family pension.

23. Further, in our view, respondents no. 1, 2 and 4 cannot be allowed to supplant the reasons for rejecting the claim for family pension by recording these reasons in affidavit in reply.

24. Be that as it may, the said succession certificate obtained by the petitioner under Section 372 of the Hindu Succession Act. 1972 from the competent Court was binding on respondents no. 1, 2 and 4 for the purpose of granting family pension to the petitioner.

25. The fact that petitioner was not nominated for Form-3 submitted by husband of petitioner during his life time would, therefore, no longer to be relevant as after the death of the nominee the nomination becomes null and void. The counsel for respondents Mr. Ronghe, relies upon Rule 117(6)(a) of the Maharashtra Civil Services (Pension) Rules, to submit that the use of the word "Except" clearly suggests the mandatory nature of the Rule and that without being nominated as per prescribed Form no claim to family pension can be made by petitioner. Rule 117 (6), 117 (7) and 117 (8) are quoted as under:-

> *"117 (6) (a) Except as may be provided by nomination under sub-rule (7), the Family Pension sanctioned under this rule shall be payable-*
> *(i) to the widow, and if there are more widows than one, to the eldest surviving widow, if the deceased was*

a male Government servant, or to the husband, if the deceased was a female Government servant;

Explanation:-

The expression "eldest surviving widow" shall be construed with reference to the seniority according to the date of the marriages of the surviving widows and not with reference to their age;

(ii) failing a widow or husband, as the case may be, to the eldest surviving son;

(iii) failing(i) and (ii) above, to the eldest surviving unmarried daughter;

(iv) failing (i), (ii) and (iii) above to the eldest surviving widowed daughter.

(b) If there are no surviving members of the family as in clause (a), the family pension may be granted-

(i) to the father;

(ii) failing (i) above, to the mother;

(iii) failing (i) and (ii) above, to the eldest surviving brother below the age of eighteen years;

(iv) failing (i), (ii) and (iii) above, to the eldest surviving unmarried sister;

(v) failing the above, to the eldest surviving widowed sister.

(7) (a) A Government servant shall on his confirmation indicating a service or post, make a nomination in Form 4 indicating the order in which a Family Pension should be paid to the members of his family and, to the extent it is valid. The Family Pension shall be payable in accordance with such nomination:

Provided that the persons concerned satisfy the requirements of sub-rule (5) on the date from which such pension may fall due.

(b) In case the person concerned does not satisfy the requirements of sub-rule (5), the family pension shall be granted to the person next lower in the order shown in the nomination.

(c)The provisions of sub-rules (5), (7) and (8) of rule 115 shall apply in respect of nominations made under this sub-rule.

(8) (a) A Family Pension granted under this rule shall not be payable to more than one member of a Government servant's family at the same time.
(b) If the Family Pension granted under this rule ceases to be payable on account of death or marriage of the recipient or other causes, it shall be regranted to the person next lower in the order mentioned in sub-rule (6) or to the person next lower in the order shown in the nominations made under sub-rule (7) as the case may be, who satisfies the other provisions of this rule."

26. No doubt the above Rule 117(7)(a) prescribes the procedure of nomination in order to enable the nominee(s) to claim pension upon the death of the person nominating but that is an arrangement in the interregnum and nominee holds in trust/custody for the rightful claimant. In this context, the decision of this Court in the case of **Shakti Yezdani and Anr. Vs. Jayanand Jayant Salgaonkar and Ors., (2017) 1 Bom CR 319** is relevant where it has been observed by this Court that the nominee does not get an absolute title to the property subject matter of nomination and the nomination is only to ensure that the estate of the rights of the deceased subject matter of the nomination are protected till the legal representatives of the deceased take appropriate steps. It has also been held in the said decision that nomination does not override the law in relation to testamentary or intestate succession. Paragraph-42 of the said decision is apt and is quoted as under:-

"42. The provisions relating to nominations under the various Enactments have been consistently interpreted by the Apex Court by holding that the nominee does not get absolute title to the property

subject matter of the nomination. The reason is by its very nature, when a share holder or a deposit holder or an insurance policy holder or a member of a Co-operative Society makes a nomination during his life time, he does not transfer his interest in favour of the nominee. It is always held that the nomination does not override the law in relation to testamentary or intestate succession. The provisions regarding nomination are made with a view to ensure that the estate or the rights of the deceased subject matter of the nomination are protected till the legal representatives of the deceased take appropriate steps. None of the provisions of the aforesaid Statutes providing for nominations deal with the succession, testamentary or non-testamentary. As observed by the Apex Court, the legislative intention is not to provide a third kind of succession....."

27. In the case at hand, pursuant to the duly issued succession certificate by a competent Court, Petitioner's right to family pension has been legally endorsed as the rightful claimant. Rule 117 (6)(a) relied upon by the counsel for respondents, in our view, does not mandate a nomination when using the word "Except" as the use of this word cannot be construed to be a non-obstante in view of our above discussion.

28. Further a Division Bench of this Court in case of **Chanda Hinglas Bharati Vs. The State of Maharashtra and Ors** delivered on 26th November 2015 in Writ Petition No. 1251 of 2015 has held that a legally wedded wife is entitled to claim family pension. In that case

also this Court had considered Rule 116 (6) (a) (i) of the Maharashtra Civil Services (Pension) Rules and has held that pension is liable to be paid to the widows in equal shares under sub Rule (6)(a)(i) of Rule 116 of the Rules only where the family pension is payable to more widows than one. In this case, there is only one widow of the said deceased i.e. is the petitioner on the date of demise of the said Shri Anant L. Dhayarkar. The petitioner is, thus, entitled to get family pension under the said Rule 116.

29. A Division Bench of this Court in a judgment delivered on 31st January 2019 in a case of **Kamalbai Venkatrao Nipanikar Vs. State of Maharashtra and Ors. In Writ Petition No. 9933 of 2016** has considered and construed Rule 116 of Maharashtra Civil Services (Pension) Rules, 1982 and held that in the cases where Maharashtra Civil Services (Pension)Rules, 1952 apply, the family pension can be claimed by a widow who was legally wedded wife of the deceased employee. Second wife, who had not legally wedded, is not entitled to family pension. In this case, the petitioner's marriage was solemnized with the deceased husband prior to date of the Hindu Marriage Act, 1955 having come into effect and is a legally wedded wife and thus, entitled to claim family pension under the Maharashtra Civil Services (Pension) Rules. The judgment of this Court in case of Kamalbai (supra) applies to the facts of this case. We are respectfully bound by

that judgment.

30. Insofar as the claim of interest made by the petitioner is concerned, a perusal of the record indicates that since 2008 the petitioner was made to run from pillar to post for claiming the family pension. The affidavit in reply filed by respondent no.1,2 and 4 and the correspondence addressed by the petitioner also indicate that the petitioner had made various representations from time to time for claiming family pension but on one or the other ground the same was not considered.

31. The order which was passed by the office of Senior Accounts Officer on 30th June 2014 itself was passed after several years of the said claim made by the petitioner. In our view, there was a gross delay on the part of respondents no.1, 2 and 4 in releasing the payment of family pension to the petitioner.

32. Perusal of the record indicates that the succession certificate obtained by the petitioner on 20th April 2010 was already served upon the respondents no.1, 2 and 4 for processing the claim of pension. This fact is admitted by respondents no. 1,2 and 4 in the affidavit in reply filed before this Court. Respondents no. 1 ,2 and 4 could not have withheld the pension on any ground. In our view, respondents

no.1,2 and 4 are, thus, liable to pay interest at the rate of 10% per annum. The question that arises for consideration before this court is the period from which the petitioner shall be awarded the claim for interest.

33. Though the petitioner has made claim for family pension in the year 2008, petitioner submitted the succession certificate in the year 2010. We may consider 6 months time as the reasonable period for sanctioning and releasing the payment of family pension. In our view, the petitioner is entitled to claim interest at the rate of 10% under the Rule 25(B) of the Maharashtra Civil Services (Pension) Rules, 1982 with effect from 1st January 2011 till date.

34. We accordingly pass the following order:-

(i) The impugned order dated 30th June 2014 passed by the senior Accounts Officer, from the Office of the Principal Accountant General is quashed and set aside.

(ii) It is declared that the petitioner is entitled to recover family pension from respondent no.3 from 1st January 2011 with interest at the rate of 10% per annum.

(iii) Respondents no. 1, 2 and 4 are directed to release the arrears of family pension to the petitioner with interest, within four weeks from today, without fail.

(iv) It is made clear that in view of the proposal of the family pension in favour of the petitioner submitted by respondent no.3 and is restored to file, we direct the respondents no. 1, 2 and 4 to release the payment on the basis of the same proposal submitted by the respondent no.3 and shall not insist for a fresh proposal.

(v) Any obstruction, if created, by respondents no. 1,2 and 4 in releasing payment, would be viewed seriously by this Court.

(vi) Insofar as regular family pension payable to the petitioner is concerned, the same shall be paid by the treasury incharge for making such payments on the due date.

35. Writ petition is allowed in the above terms with no order as to costs. Rule is made absolute accordingly.

36. Parties to act upon an authenticated copy of this order.

[ABHAY AHUJA, J.] **[R. D. DHANUKA, J.]**

NIKITA YOGESH GADGIL Digitally signed by NIKITA YOGESH GADGIL Date: 2021.12.08 11:03:41 +0530