
(2010) 04 BOM CK 0076
In the Bombay High Court
Case No : First Appeal No. 291 of 2007

Mr. Antonio Joao Fernandes	Vs	APPELLANT
The Assistant Provident Fund Commissioner and Others		RESPONDENT

Date of Decision : 06-04-2010

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 10, 10(2), 5, 5(1), 5(IA)
Insurance Act, 1938 — Section 39
Provident Funds (Amendment) Act, 1946 — Section 2(1)

Citation : (2010) 3 ALLMR 599 : (2010) 4 BomCR 208 : (2010) 127 FLR 849 : (2010) 4 LLJ 460

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : S.G. Dessai and V. Parsekar, for the Appellant; J. Vaz, Central Government Standing Counsel for Respondent No. 1, Sudesh Usgaonkar and V.A. Lawande, for the Respondent

Final Decision : Dismissed

Judgement

N.A. Britto, J.—The appellant herein is plaintiff in Civil Suit No. 60/2005. This appeal has been filed by him against judgment/decreed dated 7/08/2007, by which the suit filed by him has been dismissed by the learned District Judge, Panaji.

2. Some facts are required to be stated to dispose of the present appeal. The parties hereto shall be referred to in the names as they appear in the cause title of the said Civil Suit.

3. The plaintiff is a cousin of one Joazinho Dias, whose sister is defendant No. 3 Smt. Libania Dias. The said Joazinho Dias was employed with defendant No. 2, Goa Shipyard Ltd., as a welder. He voluntarily retired from service on 31/10/2001. The said Joazinho Dias had filed his nomination and declaration form as required under the Employees' Provident Fund Act, 1952 and the

Scheme framed thereunder. In the first nomination dated 29/05/1998, the plaintiff nominated his sister, the defendant No. 3. In the second nomination, dated 23/02/2001, he nominated the plaintiff and defendant No. 3 as persons entitled to receive the amount due, upon his death. By virtue of the said nomination, the plaintiff and defendant No. 3 were required to receive the amounts due in the said provident fund on 50:50 basis.

4. The said Joazinho Dias expired on 9/12/2001. After his death, the plaintiff and defendant No. 3 submitted a joint letter on or about 15/01/2002, claiming that the payment be made to them on 50:50 basis. However, the fact remains that a sum of Rs. 2,80,909/- from the provident fund of Joazinho Dias was exclusively paid on 19/06/2002 to defendant No. 3, being the sister of the deceased Joazinho Dias.

5. A sum of Rs. 72,179.50 was paid to the plaintiff by the employer, the said Goa Shipyard Ltd., on account of revised salary due to the deceased Joazinho Dias.

6. The Plaintiff therefore filed the said suit claiming that he was entitled to receive 50% of the said dues in the provident fund account of the said Joazinho Dias and so also half of the pension amount, which was already paid to defendant No. 3. It was contended on behalf of defendant No. 3, Smt. Libania Dias that the nominee had a limited right to receive the amount as a trustee on behalf of the heirs and that her right was not ousted by nominating the plaintiff to receive half of the amount due in the provident fund account. The defendant No. 3 had also raised a counter claim for the recovery of the said amount of Rs. 72,179.50 received by the plaintiff but that counter claim has been dismissed as time barred and defendant No. 3 has not filed any appeal against the same.

7. The only point which remains to be considered by this Court is whether the plaintiff would be entitled for 50% amount paid to defendant No. 3, by virtue of the nomination filed by the deceased Joazinho Dias on 23/2/2001 and that question in fact has been answered in the negative by the learned District Judge. It appears that the entire dues in the provident fund account was paid to defendant No. 3 by defendant No. 1 based on the earlier nomination made by the said Joazinho Dias on 29/05/1998.

8. There is no dispute that in terms of the general law of succession and particularly Article 1969 of the Civil Code, 1867 defendant No. 3 would be entitled to succeed to the estate of the deceased Joazinho Dias as he had neither descendants or ascendants, she being the sister of the deceased and the plaintiff being excluded therefrom, being only a cousin.

9. The Provident Funds Act, 1925 had Section 5 which dealt with the rights of nominees and Sub-section (1) thereto provided that;

Subject to the provisions of this Act, but otherwise (1) Notwithstanding anything contained in any law for the time being or in any disposition, whether testamentary or otherwise, by subscriber to or deposition in, a Government or

Railway Provident Fund of the sum standing to his credit in the Fund, or of any part thereof, where any nomination, duly made in accordance with the rules of the Fund, purports to confer upon any person the right to, receive the whole or any part of such sum on the death of the subscriber or depositor occurring before the sum has become payable are before the sum having become payable, has been paid, the said person shall, on the death as aforesaid of the subscriber or depositor, become entitled, to the exclusion of all other persons, to receive such sum or part thereof, as the case may be shall be deemed to confer such right absolutely.

10. It appears that before the learned trial Court certain decided cases were cited including the judgment of this Court in the case of Komalsing Kuwarsing Vs. Krishnabai, and the District Judge held, and, in my view rightly, that there was no provision similar to Section 5 in the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and, as such, the said cases were not applicable. Section 5 was substituted w.e.f. 18/04/1946 and it reads as follows;

5. Rights of nominees - (1) Notwithstanding anything contained in any law for the time being in force or in any disposition, whether testamentary or otherwise, by a subscriber to or depositor in, a Government or Railway Provident Fund of the sum standing to his credit in the Fund, or of any part thereof, where any nomination, duly made in accordance with the rules of the Fund, purports to confer upon any person the right to receive the whole or any part of such sum on the death of the subscriber or depositor occurring before the sum has become payable are before the sum having become payable, has been paid, the said person shall, on the death as aforesaid of the subscriber or depositor, become entitled, to the exclusion of all other persons, to receive such sum or part thereof, as the case may be, unless-

(a) such nomination is at any time varied by another nomination made in like manner or expressly cancelled by notice given in the manner and to the authority prescribed by those rules, or

(b) such nomination at any time becomes invalid by reason of the happening of some contingency specified therein,-

and if the said person predeceases the subscriber or depositor, the nomination shall, so far as it relates to the right conferred upon the said person, become void and of no effect:

Provided that where provision has been duly made in the nomination in accordance with the rules of the Fund, conferring upon some other person such right in the stead of the person deceased, such right shall, upon the decease as aforesaid of the said person, pass to such other person.

(2) Notwithstanding anything contained in [the Indian Succession Act, 1925], or the Bombay Regulation VIII of 1827, any [person, who becomes entitled as aforesaid, may be granted] a certificate under that Act, or that Regulation, as the

case may be, entitling him to receive payment of such sum or part, and such certificate shall not be deemed to be invalidated or superseded by any grant to any other person of probate or letters of administration to the estate of the deceased.

(3) The provisions of this section as amended by Sub-section (1) of Section 2 of the Provident Funds (Amendment) Act, 1946, shall apply also to all such nominations made before the date of the commencement of that Act:

Provided that the provisions of this section as so amended shall not operate to affect any case, in which before the said date any sum has been paid, or has under the rules of the Fund become payable in pursuance of any nomination duly made in accordance with those rules.

11. Then came the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (Act of 1952, for short) which does not have a provision similar to Section 5 as it stood originally in the Act of 1925 nor in the manner it was substituted by Act of 11 of 1946 w.e.f. 18/04/1946. The said Act of 1952 in terms of Section 2(1) defines "Scheme" to mean the Employees Provident Fund Scheme framed u/s 5. Section 10 of the Act of 1952 deals with protection against attachment and Sub-section 2 of Section 10 provides that;

(2) Any amount standing to the credit of a member in the Fund or of an exempted employee in a provident fund at the time of his death and payable to his nominee under the Scheme or the rules of the provident fund shall, subject to any deduction authorised by the said Scheme or rules, vests in the nominee and shall be free from any debt or other liability incurred by the deceased or the nominee before the death of the member of the exempted employee and shall also not be liable to attachment under any decree or order of any court.

11.1 Section 5 deals with Employees' Provident Fund Scheme. In terms of Section 5, the Government has framed the Employees' Provident Funds Scheme, 1952 (Scheme, for short). Section 5(IA) provides that the Fund shall vest in, and be administered by, the Central Board constituted u/s 5A. Sub-section (IB) provides that subject to the provisions of this Act, a scheme framed under Sub-section (1) may provide for all or any of the matters specified in Schedule II.

11.2 Para 2(g) of the Scheme inter alia defines family to mean in the case of a male member, his wife, his children, whether married or unmarried, his dependent parents and his deceased son's widow and children. Para 33 of the Scheme provides for declaration to be made by persons already employed at the time of the institution of the Fund. It further provides that every person who is required or entitled to become a member of the Fund shall be asked forthwith by his employer to furnish and shall, on such demand, furnish to him, for communication to the Commissioner, particulars concerning himself and his nominee required for the declaration form in Form 2. Such employer shall enter the particulars in the Declaration Form and obtain the signature of thumb-impression of the person concerned. Para 61 of the Scheme deals with

nomination. Sub-para (1) of para 61 of the Scheme further provides that each member shall make in his declaration in Form 2, a nomination conferring the right to receive the amount that may stand to his credit in the Fund in the event of his death before the amount standing to his credit has become payable, or where the amount has become payable before payment has been made. Sub-para (2) of para 61 of the Scheme further provides that a member may in his nomination distribute the amount that may stand to his credit in the Fund amongst his nominees at his own discretion, and, sub-para (3) thereof further provides that if a member has a family at the time of making a nomination, the nomination shall be in favour of one or more persons belonging to his family. Any nomination made by such member in favour of a person not belonging to his family shall be invalid. Sub-para (4) provides that if at the time of making a nomination the member has no family, the nomination may be in favour of any person or persons but if the member subsequently acquires a family, such nomination shall forthwith be deemed to be invalid and the member shall make a fresh nomination in favour of one or more persons belonging to his family.

11.3 Sub-para (5) of para 61 also provides that a nomination made under subparagraph (1) may at any time be modified by a member after giving a written notice of his intention doing so in Form 8 annexed hereto. If the nominee predeceases the member, the interest of the nominee shall revert to the member who may make a fresh nomination in respect of such interest.

11.4 Para 70 of the Scheme deals with persons to whom accumulations of a deceased member are to be paid and it provides that on the death of a member before the amount standing to his credit has become payable or where the amount has become payable before payment has been made-

(i) if a nomination made by the member in accordance with Paragraph 61 subsists, the amount standing to his credit in the Fund or that part thereof which the nomination relates, shall become payable to his nominee or nominees in accordance with such nomination; or

(ii) if no nomination subsists or if the nomination relates only to a part of the amount standing to his credit in the Fund, the whole amount or the part thereof to which the nomination does not relate, as the case may be, shall become payable to the members of his family in equal shares:

11.5 And lastly Para 72 deals with payment of Provident Fund, and sub-para (1) of para 72 provides that when the amount standing to the credit of a member, or the balance thereof after any deduction under paragraph 69 becomes payable, it shall be the duty of the Commissioner to make prompt payment as provided in this scheme. In case there is no nominee in accordance with this Scheme or there is no person entitled to receive such amount under subparagraph (ii) of paragraph 70, the Commissioner may, if the amount to the credit of the Fund does not exceed Rs. 10,000/- and if satisfied after inquiry about the title of the claimant, pay such amount to the claimant.

11.6 Sub-para 2 of para 72 further provides that if any portion of the amount which has become payable, is in dispute or doubt, the Commissioner shall make prompt payment of that portion of the amount in regard to which there is no dispute, or doubt, the balance being adjusted as soon as may be possible.

11.7 Para 72 of the Scheme also deals with some other situations of making payment but we are not concerned with the same in the present appeal.

12. The controversy at hand appears to have been settled with the decision of the Apex Court in Smt. Sarbati Devi and Another Vs. Smt. Usha Devi, notwithstanding the fact that the said judgment was delivered with reference to Insurance Act, 1938. Shri Dessai, the learned Senior Counsel appearing on behalf of the plaintiff and placing much emphasis on the provisions of Section 10(2) and, particularly, the expressions "vests in the nominee" and "distribute" in sub-para 2 of para 61 of the Scheme and relying on a Division Bench judgment of the Calcutta High Court in the case of Smt. Usha Majumdar and Others Vs. Smt. Smriti Basu, has tried to contend that the plaintiff being one of the nominees in terms of the nomination filed had a right to receive 50% of the amount lying in the Fund. Learned Senior Counsel further submits that the Act of 1952 substantially differs from the provisions of the Insurance Act, 1938 and the nominee under the Insurance Act had only right to receive the money on behalf of heirs entitled to the sum, but no right to the money qua to the nominee but under the Provident Funds Act, 1952 the nominee had not only the right to receive the money, but also had a right to money.

13. The Division Bench in Smt. Usha Majmudar and Ors. v. Smt. Smriti Basu (supra) held that the principle laid down by the Apex Court in the case of Sarbati Devi (supra) would not be applicable and that was in view of the language used in paras 70 and 61(2) of the scheme.

14. The Division Bench in Smt. Usha Majmudar and Ors. v. Smt. Smriti Basu (supra) held that the word "distribute" in sub-para 2 of para 61 of the Scheme means divide, apportion, allot, dispense and therefore when the member has been empowered "to distribute the amount amongst his nominees at his discretion" it certainly means that thereby he would be giving the amount to them and a concept of distribution as envisaged in para 61(2) of the Scheme cannot by any stretch of imagination mean that the member was distributing the right to receive the money amongst his nominees. The learned Division Bench also held that by such distribution the nominee acquires ownership to the money and this has again been made explicitly clear by the word "interest" appearing in sub-para (5). The word "interest" obviously means the right to the money that accrued in favour of the nominee consequent upon its distribution by the member. It is of course true that the member may modify his nomination even during his lifetime and thereby extinguish a nominee's interest but then ultimately the nominee, whoever he may be, acquires an interest in the money.

15. With respect, it is not possible for me to agree with the view expressed by

the learned Division Bench of Calcutta High Court nor the submissions made by the learned Senior Counsel. The controversy has now been set at rest by other decisions as well, particularly, that of this Court in the case of Nozer Gustad Commissariat Vs. Central Bank of India and Others, relied upon by the learned advocate Shri Usgaonkar. Shri Vaz, learned Counsel appearing on behalf of defendant No. 1 has also placed reliance on the case of (1999) 5 SCC 237, G.L.Bhatia v. Union of India which dealt with a nomination in relation to family pension under CCS (Pension) Rules, 1972. It has been held by the Apex Court that a nomination by the deceased contrary to the Statute was inoperative and cannot be defeated by making a nomination to the contrary. That was a case where the husband and wife were residing separately and the expression "family" was inter alia, defined to mean the wife in the case of a male government servant, or husband in the case of a female government servant. In the case of Shri Vishin N. Kanchandani and Another Vs. Vidya Lachmandas Khanchandani and Another, the Apex Court held with reference to the Government Savings Certificate Act, 1959 that the nominee was entitled to receive the sum due on the savings certificates, yet he retains the same for the persons entitled to it under the relevant law of succession. The contention that the non obstante clause in Section 6 entitles the nominee to utilise the sum so received by him, in the manner he liked, was rejected. 16. As already seen, Section 5(IA) of the Act of 1952 provides that the Fund shall vest in, and be administered by, the Central Board constituted u/s 5A. Likewise, Section 10(2) on which strong reliance was placed on behalf of the plaintiff, speaks of amount vesting in the nominee. The word "vests" has different connotations. In the case of Nozer Gustad Commissariat v. Central Bank of India and Ors. (supra), this Court referred to the Fruit and Vegetable Merchants Union Vs. Delhi Improvement Trust, , to find out the meaning of the word "vests". The Apex Court stated in the aforesaid decision that;

The expression "vests" has a variety of meanings and that in all cases it did not mean that the property was owned by the person or the authority in whom it vested. It may vest in title, or it may vest in possession, or it may vest in a limited sense, as indicated in the context in which it may have been use in a particular piece of legislation. It was held in terms in that case that in the context the word "vest" may mean mere possession of property for a particular purpose.

This Court further held that the word "vests" is a word of variable import as shown by provisions of various Indian statues and further held that the use of the word "vest" in Section 10(2) of the Act of 1952 does not clothe a nominee with absolute title or beneficial title in respect of provident fund amount lying to the credit of the deceased. This Court further held that the nominee is merely authorized to receive the amount for the benefit of heirs of the deceased. In other words, vesting of the amounts in the nominee is for limited purpose of receiving the amount from employer and handing over the same to the heirs entitled thereto. This Court also referred to the case of Smt. Sarbati Devi v. Smt. Usha Devi (supra) which was in relation to the interpretation of Section 39 of

Insurance Act, 1938 and reiterated that the Apex Court held that the nomination only indicated the hand which was authorised to receive the amount, on the payment of which the insurer gets a discharge of its liability under the policy and noted that it was held by the Apex Court that the amount can be claimed by the heirs of the assured in accordance with law of succession governing them. This Court also took note of two dissenting judicial opinions expressed in Shaik Dawood and Others Vs. Mahamood Begum and Others, and Smt. Usha Majumdar v. Smt. Smriti Basu (supra) and ultimately came to the conclusion that the principle laid down by the Hon"ble Supreme Court in the case of Smt. Sarbati Devi v. Smt. Usha Devi (supra) are applicable to the cases under the Provident Funds Act also and that it was not correct view to hold that the principles laid down in this case are liable to be restricted to cases u/s 39 of the Insurance Act only. The Court also noted that the nomination in that case was invalid as no nomination could be made under the Provident Funds Scheme in favour of a person who is not a member of the family as defined in para 2(g) of Employees' Provident Fund Scheme, 1952 and further held that brother was not a member of the family within the meaning of the word family as defined in the Scheme and came to the conclusion that the nominee has no title whatsoever in respect of the provident fund amount lying to the credit of deceased merely by virtue of his nomination and the provident fund amount belongs to the petitioner minor and forms part of estate of the deceased. Accordingly the said amount including all other amounts forming part of the estate of the deceased must be made available to the petitioner on issue of succession certificate.

17. Shri Lawande, learned Counsel on behalf of defendant No. 3 has also relied upon Om Wati v. Delhi Transport Corporation New Delhi and Ors. 1988 (1) CLR 596 wherein it is held that a "right to receive" the provident fund amount by a nominee under the Provident Funds Act of 1952 does not confer a nominee a right to receive the amount to the exclusion of other heirs whether testamentary or otherwise. Learned Counsel has also been quick to rely upon the case of Panjuman Hassomal Advani Vs. Harpal Singh Abnashi Singh Sawhney and Others, in support of the preposition that the case of Nozer Gustad Commissariat v. Central Bank of India and Ors. (supra) being the decision of a Coordinate Bench is required to be followed.

18. On the other hand, Shri Dessai, the learned Senior Counsel referring to The Regional Manager and Another Vs. Pawan Kumar Dubey, has submitted that the decision in the case of Nozer Gustad Commissariat v. Central Bank Of India and Ors. (supra) stood on its own facts and would be inapplicable to the case at hand and has further submitted that one additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.

19. In my view, the effort made by learned Senior Counsel is an effort to distinguish something which is indistinguishable. In my opinion, the principle laid down in Nozer Gustad Commissariat v. Central Bank of India and Ors. (supra) as

well as *Om Wati v. Delhi Transport Corporation New Delhi and Ors.* (supra) are required to be followed and they are in consonance with the law laid down by the Apex Court in *Smt. Sarbati Devi v. Smt. Usha Devi* (supra).

20. The entire amount due in the Provident Fund Account of the deceased has been paid to defendant No. 3. It is she alone who was entitled to succeed to the estate of the deceased. Plaintiff being her cousin is not entitled to any share. Even if he had received 50% of the amount due, he was liable to pay the same to defendant No. 3 as the successor of the deceased Joazinho Dias.

21. Considering the above, I find there is no merit in this appeal and, consequently, the same is hereby dismissed.