(1992) 12 BOM CK 0038

In the Bombay High Court

Case No : Notice of Motion No. 2258 of 1992 in Petition No. 513 of 1992

Nozer Gustad Commissariat APPELLANT

Vs

Central Bank of India and Others RESPONDENT

Date of Decision : 02-12-1992

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 10(2)

Citation : (1993) 2 BomCR 8 : (1993) 95 BOMLR 4 : (1993) 2 LLJ 98 : (1993) 1 MhLj 228

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : Z.A. Irani, for the Appellant; Harihar Bhave, for the Respondent

Judgement

1. Notice of Motion is made absolute is terms of prayers (a), (b) No order as to costs. The Prothonotary and Senior Master shall expeditiously take steps for issue of Succession Certificate subject to all office requisitions being complied with by the petitioner the interest of the petitioner minor being properly and adequately safeguarded.

2. The petitioner is a minor. The petitioner is the only son of late Shri Gustad Rustomji Commissariat, hereinafter referred to as "the deceased". The deceased had divorced Freny D. Irani, natural mother of the petitioner, sometime in the year 1985. The deceased was an employee of the Central Bank of India. On divorce being obtained as aforesaid, the deceased nominated respondent No. 4, his brother, for purpose of provident fund etc. The petitioner has filed this petition for issue of Succession Certificate in respect of certain debts and assets belonging to the deceased by his next friend, mother and natural guardian the said Freny Irani. There is no dispute that the petitioner is the minor son of the deceased and the petitioner is his only heir.

3. The assets of the deceased include a sum of Rs. 1,95,167/- lying to the credit of the deceased in the Provident Fund Account bearing No. 2590. The deceased died on October 4, 1992.

4. The respondent No. 4 has filed an affidavit in reply to this notice of motion contending that the deceased had nominated respondent No. 4 in respect of the provident fund dues. The respondent No. 4 resists this notice of motion on the ground that the respondent is absolutely entitled to provident fund amount by virtue of the said nomination. The respondent No. 4 contends that the said amount does not form part of estate of deceased and no injunction and/or other relief can be granted in respect thereof. The respondent No. 4 has not raised any other contention in respect of any other assets of the deceased or otherwise. In substance, the respondent No. 4 resists grant of application for issue of succession certificate in respect of Provident Fund Amount lying to the credit of account of deceased.

5. In view of the contention urged on behalf of the respondent No. 4, it is necessary to decide the above referred controversy finally and once for all.

6. Two important questions arise for consideration of the Court at the hearing of this notice of motion :

1. Whether the "nominee" has absolute title to the Provident Fund Amount lying to the credit of the deceased employee by virtue of his nomination under the Provident Fund Scheme i.e. Employees'' Provident Funds Scheme, 1952.

2. Whether the Provident Fund Amount lying to the credit of the employee forms part of the estate of the employee and is available for distribution amongst heirs of the deceased notwithstanding the nomination subject to special provision contained in Employees'' Provident Funds Scheme, 1952 :

7. Miss Irani, the learned counsel for the petitioner, has raised a further contention to the effect that no nomination can be made by the subscriber to the Provident Fund except in favour of a member of the family as specifically provided in para 61(3) of Employees'' Provident Funds Scheme, 1952. Para 61(3) of the Employees'' Provident Funds Scheme, 1952 reads as under :

"(3) 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."

The expression "family" is defined for purpose of the said scheme in Para 2(g) of Employees'' Provident Funds Scheme, 1952 as under :-

"family'' means -

(1) 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;

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXX"

The learned counsel for the petitioner has contended that the deceased could nominate only his wife or child or his dependent parents, if any, and no one else. The expression "family" as defined under the Scheme does not include brother. The learned counsel for the petitioner, therefore, contends that the nomination of respondent No. 4 by the deceased is accordingly invalid. The learned counsel has also relied on Provident Fund Scheme framed by the Central Bank of India. There is considerable force in this submission of learned counsel. I accept the submissions correct.

8. The Employees'' Provident Funds Scheme, 1952 has a legislative history of considerable significance. Prior to amendment by Act XI of 1946, Section 5 of the Provident Funds Act, 1925 provided as under :

"Any nomination which purports to confer upon any person the right to receive the whole or any part of such sum on the death of the subscriber shall be deemed to confer such right absolutely."

By the Amending Act XI of 1946, Section of the Provident Funds Act, 1925 was amended and the expression "absolutely" occurring hitherto in Section 5 was omitted and for a good reason. Section 10(2) of Employees'' Provident Funds and Misc. Provisions Act, 1952 i.e. the Succession Act reads as under :-

"(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, vest 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."

9. The expression "vest" was authoritatively interpreted by the Apex Court of the country in the case of Fruit and Vegetable Merchants Union Vs. Delhi Improvement Trust, . Sinha, J. speaking for the Bench of the Hon''ble Supreme Court held in the above referred case that :

"The expression "vest" has a variety of meanings. The Supreme Court held the word "vest" did not mean in all cases 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 used in a particular piece of legislation. It was held in terms in this case that in the context the word "vest" may mean mere possession of property for a particular purpose".

It was held by the Apex Court that the word "vest" is a word of variable import as shown by provisions of various Indian statutes. Sinha, J. illustrated the subject matter by referring to Section 56 of the Provincial Insolvency Act (5 of 1920). The said section provides that the property vests in the receiver for purpose of administering the estate of the insolvent for the payment of his dues after realising his assets. It was held by the Apex Court that it is obvious from this section that the property of the insolvent vested in the receiver not for all purposes but only for the purpose of the Insolvency Act and the receiver has no interest of his own in the property. It was held by the Court that the property in question vested in the Improvement Board only for purpose of executing improvement scheme and vesting of the property in Board did not clothe the Board with title to the property. In my opinion the use of the word "vest" in Section 10(2) of the Employees'' Provident Funds and Misc. Provisions Act. 1952 does not clothe a ''nominee'' with absolute title or a beneficial title in respect of provident fund amount lying to the credit of the decreased. The nominee is merely authorised to receive the amount for 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.

10. It appears to me to be of considerable significance to refer to the judgment of Tayyebji, C.J. in the case of Noormohammed v. Must. Sardar Khatoon, AIR 1949 Sind 38. In this case the learned Chief Justice observed as under :-

"The word ''vest'' has very well defined meaning. Vesting in relation to property means the acquisition of the legal right of immediate possession and dominion over property. It means nothing more. The ..... words" the sum shall vest in the nominee" do not connate anything more than that in law the legal right to immediate possession of and dominion over the property shall pass from trustees of the fund to the nominee and do not mean that the full rights of ownership including the right to the beneficial enjoyment of the property shall pass to the nominee".

The heir of heirs of the deceased or the legatee or legatees under the will of the deceased alone have title to the provident fund nominee. If the law of provident fund restricts the category of such heirs or legatees to the relatives like wife, children, dependent parents, special provisions contained in law of provident fund or scheme shall have to be given effect to. I am in respectful agreement with the view taken in this case. In my judgment, the same principles would apply while interpreting Section 10(2) of the Act. Section 10(2) of the Act provided ex-major cautela that the provident fund amount shall be free from any debt or other liability incurred by the deceased or the nominee before the death of the member of the provident fund etc. It does not follow therefrom that on death of subscriber the nominee becomes owner of the provident fund amount to the exclusion of heirs or legatees and the fund does not form part of estate of the deceased. The history of law of provident fund and its object of rendering social justice to widow or children of deceased or some such very close relatives cannot be ignored while interpreting Section 10(2) of the Act.

11. I must now refer to the leading judgment of the Hon''ble Supreme Court in the case of Smt. Sarbati Devi and Another Vs. Smt. Usha Devi, . The said judgment pertains to interpretation of Section 39 of Insurance Act (4 of 1938). It was held by Venkataramia, J. speaking for the Bench, that a mere nomination

made u/s 39 of the Act i.e. Insurance Act, 1938 did not have the effect of conferring on the nominee any beneficial interest in the amount payable under the Life Insurance Policy on the death of the assured. It was held by the Apex Court that the nomination only indicates the hand which is authorised to receive the amount, on the payment of which the insurer gets a discharge of its liability under the policy. 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.

12. It was held by the High Court of Kerala in the case of Narayanan Pai Vs. Aesha, that the rights of a nominee of a provident fund are analogous to the rights of a nominee u/s 39 of the Insurance Act. The High Court of Punjab took the same view in the case of Hardev Kaur Vs. Jodh Singh, . I respectfully agree with the Kerala view and hold that the rights of a nominee of a Provident Fund are analogous to the rights of a nominee u/s 39 of Insurance Act and the principles laid down by the Hon''ble Supreme Court in case of Smt. Sarbati Devi (supra) are applicable to our case also. There is nothing in language of Section 10(2) of Provident Funds Act or in the context of other provisions of the Act so as to support the construction put forward by learned counsel for respondent No. 4.

13. I shall now refer to the conflict of judicial opinion between the two leading judgments cited before me i.e. the judgment of High Court of Andhra Pradesh in the case of Shaik Dawood and Others Vs. Mahamood Begum and Others, and judgment of High Court of Calcutta in the case of Smt. Usha Majumdar and Others Vs. Smt. Smriti Basu, .

14. In the abovereferred Andhra Pradesh judgment in the case of Shalikh Dawood v. Mahmooda Begum (supra) it was held by the Division Bench of High Court of Andhra Pradesh that the Provident Fund amount remains the property if the deceased subscriber and is available for distribution amongst his heirs in accordance with their personal laws. It was held by the Division Bench of the High Court of Andhra Pradesh in this case that the nominee of a provident fund has the exclusive right to receive the fund but his rights are similar to that of a nominee u/s 39 of the Insurance Act. i.e. without any beneficial interest therein and without any title thereto. In a given case if he sets up a title adverse or hostile to the heirs of the deceased subscriber, the nominee can be restrained from relying on the nomination and receiving the amount of provident fund. In this case, Ramachandra Raju, J. after referring to large number of cases traced the history of relevant provisions concerning law of Provident Fund very convincingly came to the conclusion that the nominee had no title in respect of the provident fund amount. The Division Bench of the High Court of Andhra Pradesh overruled an earlier judgment of Andhra Pradesh reported in the case of Koruprolu Taluppulu v. Dasetti Narasamma, AIR 1967 A.P. 10 and dissented from the view taken by the High Court of Orissa in the case of M. Malati and Others Vs. M. Dharma Rao and Another, . This Judgment of High Court of Andhra Pradesh is based on the principles deduced from the judgment of the Hon''ble Supreme Court in Smt. Sarbati Devi''s case (supra) 346. As against this, the

Division Bench of High Court of Calcutta took a different view in the case of Smt. Usha Majumdar v. Smt. Smriti Basu, (supra). In this case, the Hon''ble Division Bench of the High Court of Calcutta came to the conclusion that the judgment of the Hon''ble Supreme Court in Sarbati Devi''s case (supra) interpreting Section 39 of the Insurance Act had no relevance for purpose of interpreting Section 10(2) of the Employees'' Provident Funds and Misc. Provisions Act, 1952. It was held by the Court that the terminology used in Section 10(2) of the 1952 Act should leave no doubt in the mind of the Court that the nominee has absolute title to the amount of provident fund. I have read and re-read the Calcutta High Court''s judgment as well as various other judgments. I am in respectful disagreement with the view taken by the High Court of Calcutta and the cases supporting the Calcutta view. I have already held that the use of the word ''Vest'' in Section 10(2) of the Act does not mean vesting of absolute title or beneficial interest in the nominee. I respectfully agree with the view taken by the Division Bench of the High Court of Andhra Pradesh in the abovereferred case reported in Shaik Dawood and Others Vs. Mahamood Begum and Others, , appeals to my sense of equity, justice and reason and is not contrary to language used in Section 10(2) of the Act. The object of nomination is not to clothe the nominee with title. Even if two views are possible, I would prefer Andhra view. No direct Supreme Court or Bombay judgment is cited before me on the subject.

15. To my mind, the principles laid down by the Hon''ble Supreme Court in the case of Sarbati Devi (supra) are applicable to the cases under the Provident Funds Act also. It is not correct view to hold that the principles laid down in this case are liable to be restricted to cases u/s 39 of Insurance Act only.

16. There are two main points of distinction, which have to be kept in mind while considering the submission concerning literal interpretation of Section 10(2) of the 1952 Act as appears to have been done by the High Court of Calcutta. The question to be asked is why the word "absolutely" hitherto before existing in Section 5 of the Employees'' Provident Funds Act, 1952 was deliberately omitted by the Amending Act XI of 1946. Was it the intention of the Legislature that even after omission of the said word from the said provision, the nominee must be held to have an absolute right to the provident fund amount lying to the credit of the deceased employee. Even prior to 1946, some of the High Courts had interpreted the provision to mean that the nominee of provident fund had no title to the amount belonging to the deceased subscriber. The object of Amending Act, 1946 by directing omission of word ''absolutely'' from Section 5 of the Act of 1925 was to make it clear beyond doubt that the nominee would have no title to the amount. Section 10(2) of the Act of 1952 does not use the word "absolutely". It appears to me that the Supreme Court judgment highlighting various meanings of the word "vest" in the case of The Fruit and Vegetable Merchants'' Union v. The Delhi Improvement Trust, (supra) and holding that the word ''vest'' in the context could mean mere possession for specific purpose without any title was not cited before the Hon''ble High Court of Calcutta. If the various English and Indian cases noticed by Hon''ble Justice Sinha of the Supreme Court in the

abovereferred judgment are to be considered and applied having regard to the context and object of the Act, it would follow that the use of the word "vest" in Section 10(2) of the Act merely meant that the nominee is merely entitled to collect the amount for benefit of heirs of the deceased coupled with exemption thereof from attachment and subject to category of heirs being restricted as specified in Provident Funds Scheme. I, therefor, hold that the provident fund amount forms belonging to the estate of the deceased and the petitioner is solely entitled thereto. Having regard to the facts of this case, the respondent No. 4 is liable to be restrained from collecting the said amount from the former employer of the deceased. It is the duty of this Court to pass appropriate orders so as to safeguard the interest of petitioner minor and pass order of injunction against respondent No. 4 having regard to the above. I am supported in the view which I have taken on interpretation of Section 10(2) of the Employees'' Provident Funds and Misc. Provisions Act, 1952 and also by judgments of High Court of Delhi in the case of Smt. Om Wati v. Delhi Transport Corporation, 1988 Labour and Industrial Case 500 and also the recent judgment of the High Court of Gujarat in the case of Lalitaben Bhanabhai d/o Bhanabhai Malabhai b. Laliben Bhanabhai w/o Bhanabhai Malabhai, 1992 I CLR 164.

17. I have no hesitation in accepting the submission of Miss Irani that the nomination itself is invalid. No nomination can be made under the Provident Funds Scheme in favour of a person who is not a member of the family a defined in para 2(g) of Employees'' Provident Fund Scheme, 1952. Brother is not a member of the family within the meaning of the word ''family'' as defined in the Scheme. In the result, I have come 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. No other contentions were urged at the hearing of this motion.

18. Having regard to the gross facts of this case, it is necessary that the issue of succession certificate must be expedited. The Prothonotary and Senior Master is directed to issue the Succession Certificate expeditiously. The Prothonotary and Senior Master shall take adequate care for investment of the amounts in issue as the petitioner is a minor. The Prothonotary and Senior Master shall also address a letter to the Central Bank of India enquiring from the Central Bank of India as to what are other amounts like gratuity etc. which are lying to the credit of the deceased employee. If necessary, permission be granted to amend the schedule to the petition.

19. The Prothonotary and Senior Master shall endeavor to issue the Succession Certificate to the petitioner by January 31, 1993, as far as possible. In the event of there being any difficulty, report be made to this Court for extension of time.

20. In view of the complicity of the law points involved, there will be no order as to costs.

21. The Prothonotary and Senior Master to act on ordinary copy of this order duly authenticated by the Associate of this Court.

22. Issue of certified copy is expedited.

