
(1992) 03 MAD CK 0049
In the Madras High Court

Shailesh N. Shah

APPELLANT

Vs

The Regional Commissioner, Employees Provident Fund

RESPONDENT

Date of Decision : 09-03-1992

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1993) 1 MLJ 328

Hon'ble Judges : Raju, J

Bench : Division Bench

Judgement

Raju, J.—The above writ petition has been filed for a writ of mandamus directing the respondents to accept the fresh nomination made by the deceased K. Raman, nominating the petitioner as a fresh nominee as early as on 7.2.1976, thereby enabling him to claim the amount due since the father's whereabouts were not known to the deceased for more than ten years, it was presumed that he was dead and therefore the deceased K. Raman was obliged to send fresh nomination on 7.2.1976 to the Regional Provident Fund Commissioner, Madras, nominating the petitioner to receive the provident fund amount due to him. On receipt of such nomination the Regional Provident Fund Commissioner was said to have returned the papers asking the deceased to state his relationship to the petitioner and the deceased appears to have informed the Commissioner that the relationship between him and the petitioner was "friend". It is the contention for the petitioner that though as early as on 7.2.1976 another nomination was sent in the place of K. Krishnan Nair, no communication was received by the deceased during his life time whether the fresh nomination submitted was accepted or not and that therefore the deceased K. Raman, bona fide believed that the fresh nomination submitted by him was accepted. It is also contended that the deceased appointed the petitioner as nominee to receive the gratuity amount due under the Payment of Gratuity Act, 1972 and on the strength of such nomination the petitioner already received the amount from the company where he was employed, after the death of Mr. K. Raman, on 20.12.1981 The petitioner appears to have moved the Regional Provident Fund Commissioner, who in his

reply dated 6.7.1982 has stated that the change in the nomination should have been made only in Form No. VIII not in Form No. II and that therefore, the petitioner was asked to obtain a Succession Certificate before the Court of Law. The writ petitioner would also claim that when he moved this Court on the Original Side for issue of a Succession Certificate in his favour, the same was returned with an endorsement that since the nomination of the petitioner is in dispute and he is not the heir of the deceased, until it was declared legally that he is the proper nominee, he is not entitled to file the petition under the provisions of the Indian Succession Act. In the above circumstances, the writ petition came to be filed with the relief prayed as referred to supra.

2. Reliance is placed on paragraphs 61(1) (5) and (6) of the Employees Provident Fund Scheme, 1952 to claim the relief prayed for. The respondent has filed a counter affidavit contending that during his life time the deceased K. Raman nominated his father in Form No. II on 13.8.1962, that he submitted another Form No. II dated 21.12.1978 nominating the petitioner as his nominee to receive the Provident Fund amount, that the said renomination was not in accordance with Paragraph 61(8) of the Employees Provident Fund Scheme, and therefore, it cannot be accepted. It is also contended placing reliance upon paragraph 2(g) of the Scheme that a member is required to nominate only members of "family" as defined, and inasmuch as the original nomination in favour of the father was accepted and the same was still in force, the petitioner's claim that he is the nominee of the deceased member, cannot be treated as valid and that the settlement of provident fund account has to be regulated under paragraph 70(ii) of the scheme. With that object, it is claimed that the petitioner was required to get a Succession Certificate from a Court of law to ensure payment to the proper legal heirs of the deceased and that instead of obtaining such a Succession Certificate or orders confirming his entitlement for the said accumulated provident fund amount, the petitioner has approached this Court with the above writ petition.

3. The respondent also claimed in the counter affidavit that the deceased member died on 20.12.1981 as a bachelor, that the nomination of "his father on 13.8.1962 was acceptable and though the member has nominated the petitioner in December, 1978 the change of nomination in favour of the petitioner, who was only a friend could not be countenanced in accordance with the statutory provisions and that therefore the petitioner does not fall within the provisions envisaged under para. 61(1) of the scheme. It is also claimed that any nomination made by a member of the scheme in favour of the person not belonging to his family is invalid and that therefore the renomination made cannot be accepted and the nomination made originally in favour of his father is subsisting and more so because the petitioner could not produce any documentary evidence to prove the death of the original nominee at the time of execution of another nomination. It is stated that the mere declaration of the member regarding "no family" and appointing his friend to receive the provident fund proceeds cannot be accepted, unless it is proved that the original nominee

had expired. It is also slated, the fact that the petitioner was the son of the manager of the establishment in which the late member was lastly employed create suspicion in the mind of the respondent and there was a room for admitting the bona fides of the nomination, since no Last Will of the deceased was produced by the petitioner. The respondent further specifically averred that "the averment that the late member Raman, made attempts to trace his father, is not acceptable and a valid fact to be relied upon. Had it been true, the deceased member would have stated so while executing another nomination." The respondent further contends that in the peculiar circumstances of the case the petitioner has to satisfy himself beyond doubt, that no other family member of the deceased member is alive and the nomination in question cannot be immediately accepted. The fact relating to the nomination and payment under Gratuity Act is said to be not a relevant consideration for the issue raised under the Provident Fund Scheme and the petitioner should have at any rate try to obtain a Succession Certificate issued by the competent Court of law and in the absence of valid orders of the Court of law, the claim of the petitioner for the release of the provident fund amount of deceased Raman is not sustainable in law and on facts. Reliance is also placed on para. 70(ii) as well a para 61 and the various sub-paragraphs incorporated in the said paragraph. That apart the respondent contended that the claim of the petition could not be countenanced in law.

4. The learned Counsel for the petitioner while reiterating the stand taken in the affidavit contended that inasmuch as the whereabouts of the father of the deceased was not known for more than ten years, and he should be presumed to be dead, the nomination in favour of the petitioner must be construed as a fresh nomination though the case is not one falling within the category of modification of an existing nomination and that in any event, the non-filing of modification in Form No. VIII is a mere irregularity and is curable too, and that by keeping silent during the period of the life time of the deceased, the respondent has disabled the petitioner of the scope and opportunity to file an appropriate nomination in the paper form and manner and that inasmuch as the petitioner has moved the Civil Court and has been told that a Succession Certificate cannot be issued at his instance, the petitioner had no other go except to file the above writ petition.

5. Mr. P. Narasimhan, learned Counsel appearing for the respondent while reiterating the stand taken in the counter affidavit contend that there are no material on record to demonstrate the claim that the father of the deceased was dead and that in such circumstances and for the said reason only a nomination in favour of the petitioner had been made. The learned Counsel also would contend that in the light of the provisions contained in paras. 61 and 70 and the scheme, the objection taken by the respondent was well merited and that in the absence of any Succession Certificate, the petitioner could atleast produce proper declaration of the competent Civil Court that he is entitled to recover the money from the respondent, which is lying to the account of the deceased K. Raman and that therefore, the claim now made in these proceedings cannot be

countenanced.

6. I have carefully considered the submissions of learned Counsel appearing on either side. The relevant portion of para 61 of the Employees' Provident Funds Scheme, 1952, necessary for the case on hand reads as hereunder:

61(1) 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. (2) 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.

(3) If a member has a family at the time of making 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.

(4) 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.

(5) A nomination made under Sub-paragraph (1) may at any time be modified by a member after giving a written notice of his intention of 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.

(6) A nomination or its modification shall take effect to the extent that it is valid on the date on which it is received by the Commissioner.

Paragraph 70 of the Scheme reads as under:

70. On the death of a member before (he 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 to 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;(Proviso omitted)

The learned Counsel for the respondent made available the file containing the nomination form referred to supra and also the Contribution Cards. Neither in the Form No. II dated 21.12.1978 nor in any separate communication as such any

reason is disclosed by the deceased subscriber as to the reason for the second nomination, be it be treated as modification or fresh nomination. It is only in the affidavit of the writ petitioner that the reason, namely, the deemed death of the father is pleaded to justify the nomination in favour of the petitioner in 1978 as fresh nomination. Having regard to the plea for the petitioner that on the deemed death of the deceased Raman's father, the nomination in his favour had become ineffective and rendered non-existent thereby facilitating, according to the petitioner the fresh nomination without resorting to the filing of the modification form in Form No. VIII. The first question that would arise for consideration in the background of the above facts and the governing provisions under the scheme would be as to whether the death of the father of the deceased subscriber could be presumed inasmuch as only on such presumption coming into operation the nomination of the petitioner can be countenanced.

7. Section 107 of the Evidence Act lays down that-

When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

Equally Section 108 of the Evidence Act lays down that-

When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is (shifted to) the person who affirms it.

8. A careful analysis and consideration of the above provisions would go to show that if a person was shown to be alive within 30 years, the factum of death is to be proved and the burden lies upon the person who claims that such a person was dead. Likewise, when it is proved that a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that such a person is alive is on the person who affirms it. There is nothing on record before the Court to show that the person concerned namely, the father of the deceased K. Raman, who was shown or admitted to be alive within 30 years, to be dead. Likewise there are no facts to prove that the whereabouts of the father of the deceased Raman was not heard of for seven years by the said Raman or anybody who would naturally have heard of him. The petitioner, at any rate, could not claim to be such a person and his plea has no relevance. In the absence of any concrete material to attract the presumption postulated under the above two provisions contained in the Evidence Act, it is not possible for this Court to countenance the plea that the father of the deceased subscriber should be deemed to have died and it is only on that basis the second nomination in 1978, in favour of the petitioner was made. The respondent therefore cannot be found fault with for taking the stand that so long the earlier nomination was kept alive particularly in the absence of or without any proper modification of the same by filing Form No. VIII the

nomination in favour of the petitioner cannot be legally accepted or countenanced and action taken to pay the amount lying to the credit of the deceased to the petitioner as claimed by him.

9. The next aspect that would require to be considered is as to what is the further course of action. The learned Counsel for the petitioner would contend that in the light of the advice given by the respondent to secure a Succession Certificate, the petitioner genuinely moved this Court on the Original Side and that the matter has been returned with an endorsement that no action would lie at the instance of the petitioner to secure a Succession Certificate, he being not a designated legal heir. In my view, the objection, if any, taken to the maintainability of the application for Succession Certificate per se does not lead to the inevitable consequence of a recommendation of the claim by this Court in these proceedings under Article 226 of the Constitution of India. If the petitioner cannot and is not eligible to secure a Succession Certificate, it does not preclude the petitioner either to file a suit for recovery of the money or for getting appropriate declaration from the competent Civil Court as is permissible in law declaring his entitlement to the amount and whatever may be the course that has to be adopted lawfully to get the money from the account of the deceased K. Raman, the course adopted by moving this Court under Article 226 of the Constitution of India cannot be approved, in the light of the existing provisions of the Scheme, to which reference has already been made. So long as there is no proof before this Court to show that the father of the petitioner was no more, the claim cannot be countenanced on a due consideration in these proceedings under Article 226 of the Constitution of India, since these proceedings will be more inappropriate to give any such declaration either on the issue of the deemed death of the father of the deceased K. Raman or on the consequential entitlement of the petitioner to the amount lying to the account of the deceased subscriber in the Scheme in question.

10. For all the reasons stated above, I see no reason to interfere in the matter by issuing a writ of mandamus as prayed for and the writ petition therefore fails and shall stand rejected. The rejection of the writ petition as well as the observations if any made are for the purpose of considering the validity of the nomination under Article 226 of the Constitution of India and shall not preclude in any manner the petitioner from vindicating his right in accordance with law and as and when any such move is made, the claim of the petitioner shall be considered by the appropriate forum or court influenced by any of the observations made in this order. The writ petition is rejected. No costs.