

**IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 68 OF 2006**

Mr. Milton D'Mello,
son of Francis D'Mello,
Major , Bachelor, service,
Residing at H.No.957, Manguerar,
Carambolim, Tiswadi-Goa.

... Appellant

Versus

1. The Board of Trustees,
Mormugao Port Trust,
Headland Sada, Mormugao – Goa.

2. Smt. Conceicao D'Mello,
Major, Housewife,
Residing at Vollant,
Vasco-da-Gama, Goa.

....Respondents

Mr. S.D. Lotlikar, Senior Advocate with Mr. P. Lotlikar, Advocate for the Appellant.

Mr. Y.V. Nadkarni with Ms. D. Shirgam, Advocates for Respondent No.1.

Coram:- F. M. REIS, J.

Date:- 21st August, 2015

ORAL JUDGMENT :

Heard Mr. S.D. Lotlikar, learned Senior Counsel appearing for the appellant and Mr. Y.V. Nadkarni, learned Counsel appearing for respondent no.1.

2. The above appeal came to be admitted by order dated 4/10/2006 on the following substantial questions of law:

(i) Whether the Suit instituted by the Appellant, could have been dismissed as premature, as also as barred by limitation?

(ii) Whether the mere fact that the Appellant in his plaint had pleaded that the cause of action arose on 27/11/2002 on the death of Alberto Jose D'Mello and the Suit was instituted on 17/07/2003, it could be concluded that the Suit would be barred by limitation, without ascertaining as to when the cause of action could be said to have arisen as a matter of law, given the fact that the Appellant had instituted the Suit upon the failure of the Respondent No.1 to hand over the amounts standing to the credit of Alberto Jose D'Mello?

(iii) Whether in view of the prayers in the Suit, the Suit could be dismissed as a whole against both the Respondents, and whether on a true and proper construction of the plaint, it could be said that the Courts were justified in concluding that the Respondent No.2 was merely proforma party and the Respondent No.1 the main party, and whether a proper reading of the plaint, would show that the Respondent no.2 was the main party and the Respondent no.1 a proforma party?

3. Mr. S.D. Lotlikar, learned Senior Counsel appearing for the appellant has taken me through the impugned judgment dated 14/03/2006 of the learned District Judge, South Goa, Margao and order dated 28/07/2005 of the learned Civil Judge, Vasco and pointed out that the learned Judge has erroneously come to the conclusion that the suit is premature as the suit was filed before the statutory notice period in terms of Section 120 of the Major Port Trust Act. The learned Senior Counsel further points out that these two situations cannot coexist and, as such,

on this ground alone the impugned order deserves to be quashed and set aside. The learned Senior Counsel further submits that even assuming the provision of Section 120 of the Major Port Trust Act is applicable, the suit is to be filed within 6 months from the date of cause of action. The learned Senior Counsel further submits that merely because the plaintiff has made an averment in the plaint that initial cause of action arose at the time of death of deceased, by itself, would not justify the Court to come to the conclusion that such cause of action had in fact arisen as on that date. The learned Senior Counsel further submits that though the appellant had served a notice in terms of the said provision in June, 2003 and the suit was filed in July, 2003, this itself would suggest that the suit was filed within the time prescribed. The learned Senior Counsel further points out that though the suit has been dismissed on the basis of the preliminary issue as there were disputed questions of fact to ascertain as to when the cause of action arose the Courts below were not justified to dismiss the suit without recording of evidence. The learned Senior Counsel, as such, points out that both the Courts below have misconstrued the provision of Section 120 of the Major Port Trust Act and have erroneously dismissed the suit filed by the appellant.

4. On the other hand, Mr. Y.V. Nadkarni, learned Counsel appearing for the respondent no.1 has pointed out that even assuming that the

notice issued in June, 2003 is accepted to be in terms of Section 120 of the Major Port Trust Act, as the suit was filed before 30 days from the date of such notice, the learned Judge was justified to come to the conclusion that the suit was premature. The learned Counsel further points out that in the plaint itself there is an averment by the appellant to the effect that cause of action arose on the death of the employee of the respondent no.1 and considering such date the suit was hopelessly barred by limitation. The learned Counsel further pointed out that, as such, the Courts below were justified to dismiss the suit filed by the appellant. The learned Counsel further pointed out that the suit itself is misconceived as according to him, the appellant is not entitled to service emoluments including gratuity, provident fund, etc. as the appellant is not a member of the family in terms of the said regulation. The learned Counsel has thereafter taken me through the regulation 2(5) of the Mormugao Port Employees' (General Provident Funds) Regulations of 1964 and pointed out that the "Family" would include the wife and the appellant is claiming only on the basis that he is a nominee of the deceased. The learned Counsel has thereafter taken me through the regulation 6(1) of the said Regulation to point out that if there is a member of the family any nomination stands lapsed. The learned Counsel further pointed out that the learned Judge has also taken a view that there is no cause of action for the appellant to file the present suit. The learned Counsel, as

such, submits that the appeal be rejected.

5. I have carefully considered the submissions of the learned Counsel appearing for the parties and have also gone through the records. On perusal of the definition of "Family" in terms of regulation 2(5) of the said Regulation of 1964, I find that the "Family" includes the wife of the employee. It is not disputed that the deceased employee was married to respondent no.2. On perusal of the averments in the plaint, it is alleged by the appellant that as the respondent no.2 had left the deceased, she ceased to be the wife of the appellant. This allegation of the appellant is patently erroneous as it is well settled that unless the marriage is legally dissolved in terms of law, such marriage would continue to be in place. Admittedly, the marriage was not annulled or dissolved during the life time of the deceased. On the basis of such allegation the question of claiming that appellant is entitled for the benefits such as Provident Fund, gratuity, etc. cannot be accepted. Apart from that, merely because the appellant was appointed as nominee, in terms of regulation 6(1) of the said Regulation, as the respondent no.2 is a member of the family, any such nomination would stand lapsed. Consequently, I find that the suit itself is misconceived and, as such, the learned Trial Judge was justified to come to the conclusion that on the basis of allegation in the plaint there is no cause of action for the appellant to file the present suit.

6. With regard to the other contention of Mr. Lotlikar, learned Senior Counsel appearing for the appellant, I find that in terms of Section 120 of the said Act such suit has to be filed within 6 months from the date of the cause of action. The cause of action arises when the right to sue arises. In the present case, though the appellant might have claimed to have a right as on the date of the death of the deceased, nevertheless, the cause of action would arise only after there was a refusal on the part of the respondent no.1 to effect the payment to the appellant. Apart from that, this question is a mixed question of fact and law which can be decided only after recording of evidence. Hence, the learned Judge was not justified to come to the conclusion that the suit is barred by limitation in terms of Section 120 of the Major Port Trust Act without giving an opportunity to both the parties to lead evidence.

7. Considering the view I have taken in the first part of the judgment to the effect that the plaint itself does not disclose a cause of action on the basis of the averment therein, I find that there is no case for interference in the impugned judgments as the claim of the appellant is only on the basis that he was appointed as a nominee by the deceased. The appeal stands accordingly rejected. Needless to state, that in case the appellant is entitled for any amount in terms of Law of Succession as in

force in the State of Goa, the appellant would have to take independent proceedings in accordance with law.

F. M. REIS, J.

NH/-