For reasons stated above, while dismissing the petition of Shri Budha Mal, in so far as he has impugned the Government notification, dated 23rd of March, 1967, (Annexure A) and while holding that the nomination papers of respondents 7 to 10 were improperly rejected and thereby, the result of the election as a whole had been materially affected, I direct a writ of *mandamus* to issue to respondent No. 1, the State of Punjab, requiring it to comply with the provisions of the Municipal Election Rule 69. I further direct that a new election be held in the double-member constituency from ward No. 1 for the Municipal Committee, Dinanagar. Respondent No. 1 may direct that a new election be held in the constituency within three months. In the circumstances, I will leave the parties to bear their own costs.

B.R.T.

CIVIL MISCELLANEOUS

Before A. N. Grover, J.

JODH SINGH CHOWDHARY,—*Petitioner*

versus

HARDEV KAUR,—*Respondent*

Probate Case No. 2 of 1966

September 4, 1967

Provident Funds Act (XIX of 1925)—S. 5—Defence Services Officers' Provident Fund Rules (1931)—Rule 9(viii)(b)—Person entitled to receive the amount of provident fund under—Whether acquires rights of ownership therein or holds it in the capacity of receiver or trustee for the lawful heirs of the deceased.

Held, that although in accordance with rule 9(viii)(b) of the Defence Services Officers' Provident Fund Rules the widow is entitled to receive the amount of the provident fund of her deceased husband, she cannot be in a better position than that of a nominee and cannot by virtue of the provisions of the Provident Fund Act of 1925 or Provident Fund Rules of 1931 maintain that she is entitled to the beneficial interest in the money or has become its owner. She certainly has the right to receive the provident fund under the Act and the Rules but such right to receive is subject to the rights of others under the law or arising out of any disposition made by subscriber, namely, the will in the case.

Petition for Probate of the Will of the deceased under sections 222, 276, 279, 280, 281, 273 and 300 of the Indian Succession Act.

K. L. KAPUR, ADVOCATE, for the Appellant.

ATMA RAM, ADVOCATE, for the Respondent.

ORDER.

GROVER, J.—This is a petition by Jodh Singh Chowdhury, the father of Flt.-Lt. Panj Rattan Singh, who died in an air craft accident on 17th June, 1966, for grant of probate of a will of the deceased. It has been alleged in the petition that the last will and testament executed by the deceased Panj Rattan Singh, on 14th May, 1959 was got registered by him with the Sub-Registrar, Jamnagar on that very day. The petitioner has been named executor in the will. The details of assets likely to come to the petitioner's hand have been given in an affidavit of valuation, the total amount being Rs. 36,143.49 Paise.

The citation of the aforesaid petition was ordered to be published in the Tribune, the date of hearing being fixed for 3rd November, 1966. Smt. Hardev Kaur, the widow of Panj Rattan Singh deceased, has contested the grant of the probate. According to her, the will, dated 14th May, 1959, is not the last will and testament of the deceased. It has been denied that the petitioner could lay any claim to the provident fund of Rs. 23,529 or any other amount mentioned in Annexure "A" on the basis of the alleged will, dated 14th May, 1959. It has further been stated in the reply filed by Smt. Hardev Kaur that the petitioner and his wife Sardarni Gurbachan Kaur, mother of the deceased, had been jointly and severally making applications to the Indian Air Force authorities for obtaining the various amounts in question. They laid their claim to the provident fund on the basis of a nomination made in their favour on 5th March, 1960. As regards the Benevolent Fund, it has been pointed out that under the Rules and the Regulations of the Air Force, the amount of Rs. 1,500 which is lying in that fund, could be paid only to the widow of the deceased and not to anyone else.

Jodh Singh; Chowdhury, filed Civil Miscellaneous No. 3523 of 1966, dated 17th September, 1966 praying that the provident fund be not paid to Smt. Hardev Kaur: who was claiming to be the wife of the deceased having entered into a form of marriage with him on 16th November, 1958. The parties had; however, separated and had never met or seen each other since April 1959, and the petitioner had given a petition for nullity of marriage. She was, therefore, not entitled to the amount left by the deceased. A reply was filed on behalf of Smt. Hardev Kaur, in which it was reiterated that the

petitioner could not have any claim to the provident fund amount or to the other amounts mentioned in Annexure "A" on the basis of the alleged will, dated 14th May, 1959. It was asserted that a valid marriage had taken place between her and the deceased and that the petition which had been filed for nullity of marriage had been withdrawn on 13th March, 1962 with permission to file a fresh application which was never made. It was claimed that the respondent was the widow of the deceased having been lawfully married to him and that there had never been any separation between the two spouses. She was thus entitled to all the benefits and amounts due to her from the Indian Air Force authorities.

The will, Exhibit A. 1, of which probate is sought is a short document. The main body consists of typed matter in which the blanks have been filled up in writing. By means of it, the testator gave and bequeathed to his father, S. Jodh Singh Chowdhury, his heirs, executors or administrators for his use and benefit, absolutely and for ever all his property, both movable and immovable, whatsoever, wheresoever and of what nature and quality soever. Jodh Singh Chowdhury was appointed the sole executor of the will. It was executed at Jamnagar on 14th May, 1959 and was attested by three officers of the Indian Air Force two of whom have appeared as witnesses. Flt.-Lt. D. P. Singh, No. 5503, who appeared as A. W. 1, has stated that he knew Flt.-Lt. Pani Rattan Singh, deceased and that the will Exhibit A. 1, was executed by him in his presence by appending his signatures. He further stated that he attested the will in the presence of the deceased and that Flt.-Lt. C. L. Gupta and Sqn.-Leader Y. N. Kapur, both attested the will as witnesses in his presence as also in the presence of the deceased. According to the statement of Flt.-Lt. Y. N. Kapur, No. 5061 (A.W. 2), the will was executed in his presence and it bore his signatures as an attesting witness. The deceased signed the will in his presence. The other two witnesses were also present at that time. The deceased filled up the blanks in Exhibit A. 1 in his presence. The third attesting witness, Flt.-Lt. C. L. Gupta, No. 5027, does not appear to have been examined but although there was cross-examination of these two witnesses on other points, there was no challenge on the execution and attestation of the will. There is no reason to suppose that these responsible officers had any reason to make a wrong statement. There is hardly any evidence in rebuttal on this point and I have no doubt that the provisions of section 63 of the Indian Succession

Act have been fully satisfied, Moreover, the will was got registered and according to the Sub-Registrar's endorsement, it was presented by Panj Rattan Singh, deceased himself. There is nothing to indicate that the deceased was not of a sound disposing mind at the time of the execution of the will and although Mr. Atma Ram, counsel for the respondent, endeavoured to raise this question at the stage of arguments, he could not point to any pleading of the respondent or to any other facts or evidence which would throw any doubt on the factum of the deceased being of a sound disposing mind at the material time. I would, therefore, hold that the execution and attestation of the will has been duly proved in accordance with law.

The main controversy, between the parties has centred on the following first three items of cash amounts in Annexure "A":—

"(1) Provident Fund of the deceased in D.S.O. Provident Fund Account No. O.F./18273, with Controller of Defence Accounts, Meerut. ... Rs. 23,529

(2) Amount lying under compulsory Deposit Scheme with Controller of Defence Accounts, Meerut ... Approx. Rs. 200

(3) Payable by Director of Personal Services, A.I.R. Hd. Qrs., New Delhi and O.C.I.A.F. Central Accounts Office, New Delhi :—

(a) Gratuity ... Approx. Rs. 5000

(b) Pay Allowances and Bounty ... Approx. Rs. 1,000

(c) Benevolent Fund payable by Secretary Staff Benevolent Fund, Air Hd. Qrs., New Delhi ... Approx. Rs. 1,500

... Rs. 7,500".

As regards the first item of the provident fund, the deceased had originally designated his mother as the nominee. This was before he got married. Then he revised the nomination on 5th March, 1960 by means of which he nominated his father and his mother as his nominees. Mr. Atma Ram, for the respondent, submits that the nomination made on 5th March, 1960 was tantamount to execution of a will and, therefore, no probate could be granted of the will,

Exhibit A. 1, which should be deemed to have been revoked or cancelled by the subsequent document, executed on 5th March, 1960. This position, however, is altogether unsustainable because the conditions laid down for attestation and execution of a will under section 63 of the Indian Succession Act have not been shown or proved to have been complied with in regard to the document by which nomination was made on 5th March, 1960, The alternative argument of Mr. Atma Ram is based on the provisions of the Defence Services Officers' Provident Fund Rules which were promulgated by the Governor-General-in-Council on 1st April, 1931, which are practically on the same lines as the Provident Fund Rules made under the provisions of the Provident Funds Act, 1925. It is common ground, and Mr. K. L. Kapur for the petitioner, does not dispute, that according to these Rules, the provident fund of the deceased in the present case was receivable only by the widow and not by the petitioner or the mother of the deceased in spite of the fact that the nomination was made in their favour. The true position has been stated in *Subhadrammal* v. *Kannammal* (1), with reference to the equivalent rule 17, Note 1, of the Provident Fund Rules, that the main purpose of such Rules is to preserve for the members of the depositor's family the right to receive the provident fund. It is equally not disputed that the widow of the deceased, namely, the respondent would be entitled to receive the amount of the provident fund and not anyone else. The departmental witnesses, who have appeared, also made it clear that under the Rules the petitioner and his wife could not receive payment due on account of the aforesaid fund. Mr. S. N. Nayyar, Assistant Accounts Officer, Controller Defence Accounts Office, Meerut Cantonment, (R.W. 1) referred to rule 9 (viii) (b) of the Defence Services Officers; Provident Fund Rules, in connection with the same. Mr. Shanti Parkash Gupta, Officer-Supervisor, Personal Services Directorate, Air Headquarters, (R.W. 2), has stated that after the marriage of an Air Force Officer any nomination made by him in regard to the disbursement of the Defence Services Officers' Fund are invalid if they exist in favour of relations other than the "family". The word "family" means the wife or wives and children of a subscriber and the widow, or widows, and children of a deceased son of the subscriber. It is quite clear, therefore, that so far as the nomination in favour of the petitioner

(1) A.I.R. 1940 Mad. 590.

and his wife is concerned, it is wholly ineffective and invalid and the amount of the provident fund cannot be received by them as nominees of the deceased.

The question still remains whether a person, who is entitled to receive the amount of the provident fund under the Act of 1925 or the Defence Services Officers' Provident Fund Rules of 1931, acquires any rights of ownership in such amount which is received or holds it in the capacity of a receiver or trustee for the lawful heirs of the deceased. In *Aimai* v. *Awabai Dhanjishaw Jamsetji* (2), one D. Master joined the service of the Karachi Port Trust and was allowed the benefit of provident fund in respect of which the Port Trust framed rules. He had nominated his daughter Aimai to receive the provident fund. He, however, married a second wife and had several children from her. He died intestate. The widow took out Letters of Administration to the estate. The amount of the provident fund at the credit of the Master was, however, paid to the nominee Aimai under the Rules. The widow claimed that the amount of the provident fund belonged to the estate of the deceased and she was entitled to recover it from Aimai as being administratrix. A friendly suit was consequently filed and finally the matter came up to the Sind Court. It was held that the nomination paper could not be considered as a will. It was further observed that the object of the nomination system was to designate some person to whom the provident fund could be paid over and obtain a valid quittance. It was also held that nomination did not create a trust. The view that prevailed was that the provident fund or the right to recover it was a part of the estate of the deceased and that the person entitled to it was the administratrix. The Sind case was followed by Addison, J., in *Hardial Devi Ditta* v. *Janki Das* (3), who held that a nomination of a person to receive Provident Fund money was not a will, a gift or a trust in favour of the nominee and on the subscriber's death the Fund formed part of his undisposed of estate. In *Mt. Amna Khatoon* v. *Abdul Karim* (4), it was held that section 5 of the Act of 1925 referred merely to the persons who were nominated to receive the provident fund from the authority in question and the right to receive such fund on the death of the subscriber was absolute and

(2) A.I.R. 1924 Sind. 57.
(3) A.I.R. 1928 Lahore 773.
(4) A.I.R. 1937 All. 562.

could not be questioned by such authority but the nomination was itself subject to any disposition, testamentary or otherwise, which might have been made by the subscriber. It followed accordingly that the mere fact that a certain person had been declared to be the nominee under section 5 of the Act of 1925 for the purpose of receiving the provident fund was not necessarily the sole person entitled to appropriate the amount as the owner, legatee or heir. In *In the Goods of Stanley Austin Cardigan Martin* (5), Sen, J., took a different view and relying on the language of section 5(1) of the Act he held that any nomination duly made in accordance with the rules of the Fund, which purported to confer upon any person the right to receive the whole or any part of such sum on the death of the subscriber, would be deemed to confer such right absolutely until such nomination was varied and that the disposition by the testator in the will could not affect the amount of the Fund and further that such sum did not form part of the estate of the deceased and could not be disposed of by him in his will. In *Noor Mahomed* v. *Mt. Sardar Khatun* (6), a Bench of the Sind Court presided over by Tyabji, C.J., went into the proper scope and effect of section 5 of the Act at great length. The ratio of this decision is that the effect of the provident fund vesting in the nominee is that an immediate right to possession and dominion over the amount is conferred on the nominee without affecting in any manner the beneficial rights of the actual owners, whoever they may be, either as heirs or legatees. If the dependent nominee happens to be the only heir or legatee and is, therefore, also entitled to the beneficial rights, the entire ownership rights would vest in him. The Act further makes the provident fund free from liability to creditors and assignees to the extent provided in the Act, and in certain cases makes it vest in the dependent on the death of the subscriber, but it does nothing further. The provident fund passes on the death of the subscriber by a succession as the rest of the subscriber's property. The conclusion may be stated in the words of the learned Chief Justice :—

> "We are of the view that the Provident Funds Act confers on the nominee, even when the nominee is a dependent, nothing more than the right to receive the amount. It

(5) A.I.R. 1939 Cal. 642.
(6) A.I.R. 1949 Sind 38.

does not confer on the nominee the full rights of an owner, and does not touch the rights of those entitled to the sum as heirs or legatees, under the law applicable to the case."

The next decision in which there is an exhaustive discussion on the point is of the Madhya Pradesh Court in *Union of Madhya Bharat* v. *Mst. Asha Bi* (7), in which the judgment of the Division Bench was delivered by Hidayatullah C.J. (as he then was). After discussing numerous cases and setting out the two rival views which had prevailed with the Court and referring to section 5 of the Act, this is what was observed at page 83 :—

"In my opinion, this last provision cannot be read as making the nominee the owner of the fund. It only gives him the right to demand it unconditionally."

It was further said that so long as the nomination stood, the nominee was required only to prove that he was the person nominated by the subscriber and he could then receive the amount without any conditions being imposed on him, but there was nothing in section 5 which made the money belong to him after he had received it, and indeed, there was nothing in those words which showed that even before the death of the subscriber the nominee was entitled to a beneficial interest in the money. Even in England there had been difference of opinion and the view of Farwell, J. in Barnes Ashenden v. *Heath* (8) greatly influenced the decision of the Madhya Pradesh Court. In the aforesaid case Farwell, J. dissented from the decision of Phillimore, J. (as he then was) and laid down that the nomination was in its nature testamentary and being ambulatory the death of the nominee in the lifetime of the subscriber defeated the nomination, so that on the death of the member his legal personal representative was entitled to the property and not the legal representative of the nominee.

Sub-section (1) of section 5 of the Act of 1925 was substituted by section 2 of Act 11 of 1946 for the original sub-section. There has been some change in language which now reads:—

"(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

(7) A.I.R. 1957 M.P. 79.

(8) 1940-1 Ch. 267.

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 or 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—

* * * * * *

* * * * * *"

It does not seem to me that the change in the opening part of subsection (1) of Section 5 would make any material difference to the legal position which has been accepted in the Madhya Pradesh case which I would respectfully follow. I would, therefore, hold that although in accordance with rule 9(viii)(b) of the Defence Services Officers' Provident Fund Rules the respondent is entitled to receive the amount of the provident fund of her deceased husband, she cannot be in a better position than that of a nominee and cannot by virtue of the provisions of the Act of 1925 or the aforesaid Rules maintain that she is entitled to the beneficial interest in the money or has become its owner. She certainly has the right to receive the provident fund under the Act and the Rules but such right to receive is subject to the rights of others under the law or arising out of any disposition made by the subscriber, namely, the will in the present case.

Coming next to the amount of gratuity which approximately is Rs. 5,000 it has been clearly stated by R.W. 3 that the family pension and gratuity had been sanctioned by the President of India in favour of the respondent who is the widow of the deceased officer. So far as the pension is concerned, that does not find any mention in the list of assets as contained in Annexure "A" and, therefore, Mr. K. L. Kapur has quite properly agreed that it cannot be included among the assets in respect of which probate of the will is to be granted. Gratuity could not form part of the assets of the deceased and Mr. Kapur has been unable to show anything to the contrary. According to *Mt. Hanifabai* v. *Karachi Port Trust* (9), a succession certificate

(9) A.I.R. 1929 Sind 177.

cannot be granted in case of gratuity which does not form part of the assets of the deceased but was merely a sum paid to particular persons who are not necessarily the heirs of the deceased. The amount of gratuity, therefore, has to be excluded from the list of assets in respect of the assets of the deceased. Similarly, it has been conceded by Mr. Kapur that the amount of Rs. 1,500 payable as Benevolent Fund could not form part of the assets of the deceased and has to be excluded from the list of the assets.

Mr. Atma Ram for the respondent has not raised any serious contest with regard to the sum of Rs. 200 being the amount lying under the Compulsory Deposit Scheme with the Controller of Defence Accounts and the amount of Rs. 1,000 shown against pay, allowances and bounty.

The result would be that the amounts of Rs. 5,000 and Rs. 1,500 would be excluded from the list of assets of the deceased in respect of which probate is being granted. The petitioner shall be entitled to the grant of a probate with regard to all the other assets shown in Annexure "A", to have effect throughout India and I order accordingly. The necessary court-fee shall be paid by the petitioner within a month. There will be no order as to costs of this petition.

B.R.T.

REVISIONAL CIVIL

Before Prem Chand Pandit, J.

MAHANT RAM PARKASH AND ANOTHER,—*Petitioners*

versus

SHANKARI AND OTHERS,— *Resondents*

Civil Revision No. 660 of 1966
Civil Miscellaneous No. 2933 of 1967

September 15, 1967

Code of Civil Procedure (Act V of 1908)—Order 22 Rule 5—Dispute as to who is the legal representative of the deceased—Whether must be decided by the Court before proceeding with the suit.