

(1945) 01 CAL CK 0019
In the Calcutta High Court

Jitendra Nath Sur and Others

APPELLANT

Vs

Amarendra Nath Sur

RESPONDENT

Date of Decision : 24-01-1945

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 66

Citation : AIR 1945 Cal 458

Hon'ble Judges : Ellis, J;B.K. Mukherjea, J

Bench : Full Bench

Judgement

B.K. Mukherjea, J.—This appeal is on behalf of the plaintiff and defendants 2 to 14 and it arises out of a suit for partition and accounts commenced by the plaintiff in respect of properties both moveable and immovable left by his father, one Surendra Nath Sur, who was a Hindu resident of Maniktala within the jurisdiction of the Alipore Court and died on 13th January 1935. It appears that Surendra, though not born of rich parents, did acquire considerable properties in his lifetime. He started his life as a maker of gold ornaments and then took to the more profitable business of purchasing and selling lands and houses and increased his wealth to a great extent by lending money at high rates of interest on pledge of ornaments and jewellery. He married three wives in succession. By his first wife he had an only son named Amarendra, who is defendant 1 in the suit and the sole respondent in this appeal. The second wife died soon after her marriage leaving a daughter named Bidyut Lata who was married during the lifetime of Surendra and does not figure as a party in this litigation at all. The third wife Annapurna who survived her husband is defendant 10 in the suit. By this wife Surendra had nine sons and four daughters. The eldest of these sons, Jitendra, is the plaintiff in the suit, the other sons being defendants 2 to 9, while the four daughters who are all unmarried figure as defendants 11 to 14. The plaintiff Jitendra claimed a 1/11th share of the properties, moveable and immovable left by Surendra which were described in the various schedules attached to the plaint of these, two items of immovable property--one a vacant plot of land "in the city of Calcutta being premises No. 227B, Upper Circular

Road, and the other a mourashi mokarari Jalkar named Beri Bangor situated at Gobardanga in the District of Jessore, which were described as items (D) and (B) of Sen. A to the plaint -- did, according to the plaintiff, belong to Surendra and were acquired with his own money though the purchases were made in the benami of Amarendra, defendant 1. Of the moveable properties again in regard to which partition was prayed for, item (G) of Schedule G and items (D), (G) and (H) of schedule D stood in the name of Amarendra. The first was a loan on an equitable mortgage purporting to be advanced by Amarendra to Surendra Nath Dutta, The second was the amount, due under a decree made by the Original Side of this Court in Suit No. 1840 of 1930, on the basis of a promissory note executed by one Prafulla Kumar Sur in favour of Amarendra. Items 8 and 4 were monies due on promissory notes one of which was executed by Butto Kristo Neogi and the other by Prafulla Kumar Sur and in both of them Amarendra figured as the ostensible lender. The plaintiff's case was that Amarendra had no property of his own and all these monies belonged to Surendra and were advanced by him in the name of Amarendra. The plaintiff further claimed accounts from Amarendra on the allegation that the latter being the eldest of the brothers managed the joint estate as karta of the family and had not only collected large sums of money in satisfaction of debts and decrees but also realised rents in respect of immovable properties. Lastly, the plaintiff prayed for an order of the Court setting apart appropriate sums of money for the maintenance and marriage expenses of his four unmarried sisters who were impleaded as defendants 11 to 14 in the suit.

2. The suit was contested by Amarendra, defendant 1 alone. The other defendants did not file written statements though some of them prayed for separate allotment of their shares in the joint property. The material defence raised by defendant 1 was of a three, fold character. His first and main contention was that the two items of immovable property as well as the decree and loans specified in the plaint schedules which stood in his name were his own self acquisitions. They did not appertain to the estate of late Surendra Nath Sur and were not divisible amongst his heirs. In the second place, his case was that there were several other properties which belonged to Surendra and hence formed the joint properties of the parties though they were not included by the plaintiff in his plaint. These properties were set out in Schedule 2 attached to the written statement and consisted of the following items: (a) premises NO. 1/4B, Kanta Pukur Lane in the city of Calcutta, purchased by Surendra in the name of the plaintiff; (b) undivided half share of a plot of maurashi mokarari garden together with pucca structures situated at Bally in the district of Howrah; (c) money due on a promissory note executed by Phani Bhusan Bose, Solicitor, in favour of Surendra Nath Sur, the money being realised by the plaintiff; (d) a sum of Rs. 1601 obtained by the plaintiff Jitendra by assignment of an agreement for purchase of a plot of land in Calcutta, the agreement being really entered into by Surendra during his lifetime in the name of Jitendra and the earnest money paid by him; (e) amount due on a promissory note executed by Sailaja Nath Roy in

favour of Surendra on hypothecation of certain jewellery and ornaments; (f) ornaments and jewellery hypothecated by various debtors which became the property of Surendra or still remained as pledged articles; (g) residue of the stock in trade of the jewellery and goldsmith business of Surendra still lying in the hands of the plaintiff; (h) furniture of the goldsmith shop; and (i) utensils and furniture for domestic use.

3. It was further averred by the defendant in this connexion that a sum of Rs. 9000 which was due under three life insurance policies of Surendra Nath Sur and which were paid after his death to Annapurna as being the nominee mentioned in the contracts of insurance, could not be legally claimed by her and this money really appertained to the estate of Surendra Nath Sur and was liable to be partitioned amongst his heirs. The third material defence taken by defendant 1 was that he never assumed the position of a karta in the family and never managed the ejmali estate; on the other hand, it was Jitendra, the plaintiff, who got hold of the account papers, cash and jewellery after the death of the father and it was he who collected the rents and profits of the joint estate. The entire liability to account was thus on the plaintiff and not on defendant 1 who was literally turned out of the house by Jitendra and his brothers. The suit was heard by the Subordinate Judge, third Court, Alipore, and by his judgment dated 25th April 1941, a preliminary decree for partition and accounts was passed by the learned Judge. The findings arrived at by him on the points in controversy between the parties are as follows:

(A) :- The two items of immovable property described in paras. (D) and (E) of Schedule A to the plaint and which stood in the name of Amarendra were held to be his self-acquired properties. With regard to item (B) which is the Jalkar property, it was further held that the plaintiff's claim in respect of the same was not entertainable in view of Section 66, Civil P.C. The loan advanced to Surendra Nath Dutta on equitable mortgage was held to belong to Amarendra while in regard to the other loans and decree which were referred to in paras. (D), (G) and (H) of Schedule D to the plaint, it was held that the money belonged to Surendra and not to defendant 1.

(B):--Item (a) of schedule 2 of the written statement was admitted by the plaintiff at the close of the hearing of the suit to be the property of his father though the document was in his name and it was found by the Court to be joint property and as such it was held liable to partition. Item (b) was excluded from the suit as persons other than those who were parties to this suit were interested in it. Items (c) and (d) were found to be joint property. Regarding items (e) to (i) which included pawned jewellery as well as furniture and stock in trade, the Court held that these matters should be enquired into by an accounts commissioner as it was not possible without proper investigation of accounts to ascertain the nature and extent of these properties. As regards the sum of Rs. 9000 due under the life insurance policies of Surendra, the Court found that the money was paid to Annapurna and no part of it was retained by Amarendra.

Annapurna, however, as a nominee under the policies was not legally entitled to the money which belonged to all the heirs of Surendra. It was held therefore that this money was available for partition amongst the co-owners.

(c):--On the question of liability to account, the Subordinate Judge was of opinion that the plaintiff Jitendra took possession of the account books, the ornaments, jewellery and the keys to the chest and almirahs after the death of Surendra. It was Jitendra who looked after the construction of premises No. 1/4B, Kanta Pukur Lane and realised rents from the tenants occupying the various rented premises. Amarendra was also found to have made some collections; and he was held to have taken part in the succession certificate proceedings and the sradh ceremony of Surendra along with the plaintiff. Both the plaintiff and defendant 1 were held liable for accounts in respect of collections and disbursements made by each one of them. The preliminary decree was made by the Subordinate Judge on the basis of these findings. The plaintiff and defendant 1 were held entitled each to 1/10th share of the properties found to be joint and a survey commissioner was directed to be appointed for carrying on the partition. It was further directed that a separate commissioner would be appointed for taking accounts and investigating the matters relating to pawned jewellery and other things mentioned in the judgment. It is against this decree that the present appeal has been filed by the plaintiff and all the defendants except defendant 1. Defendant 1 has preferred a cross objection attacking that part of the decree which is against him.

4. Although only one appeal was filed by the plaintiff and defendants 2 to 14 jointly, there was separate representation of different sets of appellants at the hearing of the appeal. Mr. Gupta argued the appeal on behalf of defendants 4 to 14, while Mr. Bhut Nath Chatterjee appeared for the plaintiff and raised some special points on behalf of his client. Mr. Chandra Narayan Laik appearing for defendants 2 and 3 adopted the arguments of Mr. Gupta and contended that his clients should have been given separate allotments on partition. Mr. Gupta has contended in the first place that on the evidence in the record the Court below ought to have held that the two items of immovable property, namely, the jalkar Beri Bangor and premises No. 227B, Upper Circular Road, were acquired by Surendra Nath Sur with his own money in the benami of defendant 1, and that the latter was not the sole owner of these properties. It was also argued that Section 66, Civil P.C., did not bar the plaintiff's suit so far as it related to the jalkar Beri Bangor. The second ground taken by Mr. Gupta relates to the sum of Rs. 2000 advanced on equitable mortgage to Surendra Nath Dutta. It is said that the Court below while negating the case of defendant 1 that the money lent belonged to him erred in holding that this was an advancement by the father to the son for the benefit of the latter. The third ground put forward by Mr. Gupta is that the Court below is wrong in holding that the sum of Rs. 9000 due under the life insurance policies of Surendra could not be legally claimed by Annapurna, his widow and he has challenged also the findings of fact arrived at by the trial Judge that the money was actually paid to Annapurna. In the last place, Mr.

Gupta has argued that the directions given by the learned Judge as regards the taking of accounts are neither proper nor adequate and that the Subordinate Judge was wrong in not allowing any share to the widow and not making any provisions for the maintenance and marriage expenses of the unmarried daughters.

5. On behalf of the plaintiff-appellant Mr. Chatterji has taken two additional grounds: the first is that the sum of Rs. 1601 which the plaintiff obtained by assignment of an agreement for purchase of certain land should have been held to be his exclusive property and not liable to partition. The other ground is that the finding of the Court below that the plaintiff is guilty of misappropriating the pledged ornaments and jewellery is a baseless finding which is not supported by any evidence on the record. We will take up these points in their proper order. The first point for consideration is whether the learned Judge was right in holding that the two items of immovable property namely items (D) and (E) of Schedule A to the plaint as well as the money advanced to Surendra Nath Dutta on equitable mortgage which has been described in para. (G) of Schedule C are the properties of Amarendra and not the joint properties of the parties. We will begin with the jalkar Beri Bangor in regard to which a considerable mass of evidence has been adduced by the parties.

6. This property is a fishery of some value situated at Gobardanga in the district of Jessore. It was held by one Gunendra Krishna Mallik as a permanent tenant under Annada Prasanna Mukherji of Gobardanga at a fixed rental of Rs. 615 a year. Gunendra had borrowed money from Surendra Nath Sur on certain promissory notes and as security for the loan he pawned certain jewellery and ornaments with Surendra and had also deposited with him the title deeds of this Jalkar. On 19th June 1923, Surendra Nath Sur got a decree for Rs. 15,100 against Gunendra on the basis of the promissory notes in the original side of this Court (vide Ex. 2). Annada Prasanna, the landlord of the jalkar also got a decree for rent in respect of the jalkar against Gunendra Krishna Mallik and in execution of the decree Gunendra's interest in the fishery was put up to sale and it was purchased on 19th February 1924 by Amarendra, defendant 1, for the price of Rs. 5000. The sale certificate is Ex. 1 in the suit. The main question for our consideration is whether Amarendra, the ostensible purchaser was the real purchaser or it was Surendra who purchased the property in the benami of his son. Amarendra was about 22 years of age at the time when the sale took place. The learned Subordinate Judge has laid stress on the fact that Amarendra was a motherless child and it was not unnatural that Surendra had considerable affection for him.

7. This fact, in our opinion, is not very material for our present purposes as the defendant did not attempt to make out any case of advancement by the father. As the sale certificate stands in the name of Amarendra the Court is certainly bound to presume that he is the real owner of the property and the burden lies upon the plaintiff to rebut the presumption and show that the apparent state of

affairs is not the real state. We will have to see whether the plaintiff has been able to discharge this burden satisfactorily. The plaintiff attaches great weight to the fact that Amarendra was a mere dependent of his father at the time when the property was purchased; he had no money of his own and consequently was not in a position to pay the sum of Rs. 5000 which was the price of the property. The case of Amarendra is that his mother had ornaments worth about Rs. 2500 which he inherited on her death. These ornaments were sold and the sale proceeds were in the hands of his father and invested by him and with this money the property was purchased. That Amarendra's mother had some ornaments can certainly be conceded. In fact, in the interrogatories served by the plaintiff upon defendant 1 one of the questions specifically put to the defendant was whether the ornaments belonging to the mother of the defendant were given over to the plaintiff's mother at the time of her marriage, Bejoy Neogi (D.W. 5) who is a relation of the parties has given in his evidence a list of ornaments which Amarendra's mother had; and another witness of the defendant, namely, Prafulla Sur (D.W. 4) says on oath that Surendra's first wife had ornaments of the value of Rs. 2000. It appears that the father of Amarendra's mother was once in affluent circumstances and the story that the lady had no ornaments given to her at the time of her marriage cannot possibly be believed. Prafulla Sur says expressly that he personally knew that these ornaments were sold and invested by Surendra and that the investment produced a good income which remained in the hands of Surendra till 1920. We agree with the Subordinate Judge in holding that although Amarendra had not acquired any earning capacity in the year 1924 he had certainly some money which he inherited from his mother. This money lay all along with his father who carried on a business in money-lending and it was not improbable in these circumstances for Amarendra to have at his disposal a sum of Rs. 5000. There is absolute absence of any positive evidence coming from the plaintiff's side indicating the source from which the purchase money came. The best thing for the plaintiff would have been to produce the account papers of Surendra which would have thrown considerable light on this point. These however are not produced and the presumption being in favour of defendant 1 and the circumstances and probabilities not being against such presumption we cannot say that the Court below was in error in holding that the price of the jalkar was paid out of the money belonging to Amarendra. Phanindra Nath Bose, the solicitor of Surendra who was examined as P.W. 8 says in his deposition that he advised Suren Babu to purchase the jalkar at the rent sale though he did not advise him to make the purchase in the name of Amarendra. It appears from the evidence that the surplus sale proceeds amounting to about Rs. 3000 were lying to the credit of Gunendra Mallik after satisfying the dues under the rent decree. Gunendra had in the meantime been adjudged insolvent and his properties had vested in the Official Assignee. We have in this case a letter from the Official Assignee (EX. 19) dated 7th March 1924, intimating to Surendra that he has no objection to the latter's withdrawing the surplus sale proceeds in part satisfaction of his decree against Gunendra.

8. Mr. Gupta's argument in substance is that though there is no direct evidence adduced in this case to show that the consideration money was paid by Surendra yet the way in which the property was treated and rents paid and realised and the conduct of the landlord and of Surendra himself would prove beyond doubt that it was a case of benami purchase. Several rent receipts have been filed in the case showing how rents were paid to the zemindar of Gobardanga in regard to this jalkar. They are Ex. 5 series. In all these rent receipts the name of Amarendra appears as the tenant but the rents were invariably paid through Surendra and on two occasions the payments were made by cheques. Regarding realisation of rents and profits of this jalkar, the evidence is that Surendra used to hold khas baich regularly for the purpose of catching fish and on such occasions he was usually though not necessarily accompanied by Amarendra. The jalkar was in charge of a gomasta named Rajendra Lal Mukherji. From the letters addressed by Rajendra to Surendra it appears that in all matters relating to management of this property the gomasta acted according to the advice and directions of Surendra. The chalans (Ex. 11 series) show that the realisations from the jalkar used to be sent direct to Surendra. All these certainly indicate that the property was under the direct control and management of Surendra but they are not necessarily inconsistent with the view that Amarendra was the owner of the property but he being young and inexperienced and himself remaining under the care and control of his father it was the father that was managing the property on his behalf. Here again we have no evidence as to the way in which the accounts of the jalkar were kept.

9. Mr. Gupta in course of his arguments referred to certain letters written by the zemindar to Surendra Babu (Exs. 13a and 18d) which would show according to him that Surendra and not Amarendra was treated as the real tenant in respect of the jalkar by the superior landlord. There is no doubt that Surendra used to do everything in connexion with the jalkar and the zemindar it seems was very familiar with him and used to write to him in matters relating to payment of rent and other things. Such letters used to be addressed to Amarendra also (vide Exs. B1, B2, B4 and B5) and we cannot say that they are all formal letters. It appears that there was an agreement between Surendra and the landlord regarding the removal of water-hyacinth from the fishery. The zemindar promised to contribute a sum of us. 500 towards the cost of removing water-hyacinth and on 9th May 1983 a sum of Rs. 200 was paid by the landlord by setting it off against his claim for rent in respect of the jalkar. The agreement is embodied in Ex. 27 which is the counterfoil rent receipt granted by the Gobardanga estate regarding this sum of Rs. 200, Surendra Nath Sur, it is said, gave a receipt also acknowledging payment of Rs. 200 out of the contribution of Rs. 500 promised by the landlord. The receipt has been produced as evidence in this case and has been marked Ex. 28. There is a recital at the beginning of this document that it was in respect of jalkar Beri Bangor carrying a jama of Rs. 615 recorded in the name of Amarendra Nath Sur,. the son of Surendra Nath Sur.

10 On behalf of the plaintiff considerable stress was laid on this recital and it was

said that it amounted to an assertion by Surendra himself that the jalkar was his own property held in the benami of his son. The learned Subordinate Judge after a good deal of discussion came to the conclusion that this document was fabricated by or in the interest of the plaintiff. We do not think that such inference is legitimate or proper. The fact that there was an agreement between the Gobardanga zamindar and Surendra regarding the cost of removal of water-hyacinth is not at all disputed. As a sum of Rs. 200 was paid by the zemindar by setting it off against his claim for rent it is quite natural that the zemindar must not only grant a rent receipt for the said sum but the tenant also would give an acknowledgment in token of his having received a portion of the promised contribution. The body of the receipt is undoubtedly not in the handwriting of Surendra but the signature appears to be his. In our opinion, the evidence on the record does not justify us in finding that the receipt is not a genuine one. But even though genuine we do not think that it carries the plaintiff's case very far. The fishery, as we have said already, was entirely under the management and control of Surendra and it was he who figured in all affairs connected with it. There is nothing unnatural in his filing the receipt in acknowledgment of the payment of RS. 200 and the statement in the receipt that it was given in respect of jalkar Beri Bangor recorded in the name of Amarendra does not in our opinion amount to an assertion by Surendra that it was his property held in the benami of his son. It will be pertinent to point out that after the death of Surendra there was a proceeding for taking out succession certificate and in this application for certificate not only Amerendra but the plaintiff, his mother and the major brothers also joined. Amarendra had to execute a security bond under orders of the Court and in the affidavit containing the list of properties owned by him (Ex. 16a) it is expressly stated that he was 16 annas owner of Beri Bangor and of premises No. 227B, Upper Circular Road. This statement was a clear and open assertion of his title in the presence of the plaintiff and the other brothers who were interested in the property and nobody it seems raised any objection to it. On the whole, it seems to us that the evidence that has been adduced by both sides in this case is inconclusive and does not lead to any definite conclusion either one way or the other. In these circumstances, the presumption that arises in law in favour of defendant 1 cannot be said to be rebutted and we cannot say that the decision of the Court below is wrong.

11. The learned Subordinate Judge has further held that so far as the plaintiff's claim to Beri Bangor is concerned, the suit is barred u/s 66, Civil P.C. The propriety of this decision has been challenged by Mr. Gupta on behalf of the appellants. Section 66 provides that no suit shall be maintained against a certified purchaser in an execution sale on the ground that the purchase was made on behalf of the plaintiff. It is conceded by Mr. Gupta that in view of later decisions on this point it cannot be maintained that Section 66, Civil P.C., is confined to suits for possession only. He contends however that the section is to be construed strictly and it only applies where the plaintiff in a suit is bound to aver and prove for the purpose of obtaining relief that the defendant who is a

certified purchaser is his benamdar. It is said that in a suit for partition this very question could have been raised by any of the defendants also. As the question of benami purchase could have been raised in the suit by the defendants other than Amarendra and in that event the bar u/s 66, Civil P.C, could not have been invoked. Mr. Gupta argues that Section 66, Civil-P.C., Cannot be made applicable to partition suits at all where every one of the parties occupies the position of both plaintiff and defendant. On the side of the respondent it is argued that in the case before us the question has been raised by the plaintiff and not by the other defendants and it is not material at all to consider as to what the position would have been if the question had not been raised by the plaintiff. The point undoubtedly is of some importance and requires careful consideration but as in the present case we have already held on evidence that defendant 1 is not the benamdar, it is not at all necessary for us to express our opinion on this question of law.

12. We have now to consider whether in regard to premises No. 227B, Upper Circular Road, the learned Subordinate Judge was right in holding that Amarendra was the real owner and not a mere benamdar of his father. This property is a small plot of vacant land measuring a little over two cottas and is a part of a bigger plot having an area of 15 to 16 bighas. There was admittedly an agreement for purchase of the entire plot of 13 bighas by and between Surendra and the owners of the property at a price of Rs. 1200 per cotta, and it is also proved that earnest money under this agreement of purchase was paid by Surendra to the vendors. From the deposition of Mr. P. Bose, the solicitor of Surendra, we gather that the agreement fell through as the solicitor was not satisfied with the title of the vendors. Mr. Bose says that although he did not advise Surendra to purchase this property because of the defective title he asked him to approach Mr. N. K. Roy Choudhury, the solicitor of the vendors, if he wanted to complete the purchase. It is difficult to understand how approaching the vendors' solicitor could improve the position if really there was defect in the title. Be that as it may, we find that on 27th March 1931, only two cottas odd of land was sold by one of the proprietors and the price was only Rs. 600 a cotta. The kobala stands in the name of Amarendra and Amarendra says that he purchased this property with his own money. Here again we have got no direct evidence as to the source of the consideration money. The learned Subordinate Judge has held that Amarendra got dowry at the time of his marriage amounting to about Rs. 2000 and with this money he made the purchase. Two of the defence witnesses namely, Prafulla Sur (D.W. 4) and Manmatha Neogi testify to the fact that at the time of Amarendra's marriage he received a cash dowry of Rs. 2000 in addition to the ornaments which were presented to his wife. There is no reason to disbelieve this story and it was not impossible therefore for Amarendra to purchase this property out of the money which he received at the time of his marriage. The municipal bills and tax receipts are all in his name. The plot being a vacant plot no definite acts of possession were exercised by anybody which might throw any light on the question of ownership. Mr. Gupta lays stress

on a letter written by Mr. N.K. Roy Chowdhury dated 28th February 1931 to Surendra Nath Sur telling the latter that he could erect a boundary wall on the land at his own cost and if necessary he could obtain police help in the matter. It is difficult to say whether it refers to the bigger plot in regard to which there was this original agreement or to the smaller plot which was eventually purchased by Amarendra. The circumstances relating to the erection of the boundary wall and the necessity of having police help in the matter have also not been cleared up by any evidence. Mr. N. K. Roy Choudhury is dead but nobody in his office has been examined on behalf of the plaintiff nor has his day book been called for. On the other hand from the evidence of Mr. Phani Bhusan Bose, the plaintiff's solicitor, it can be gathered that after the cancellation of the bairanama entered into by Surendra the latter got back the earnest money from the vendors and consequently it cannot be said that the earnest money paid by Surendra constituted the whole or any part of the consideration for which this property was purchased by Amarendra. As only Rs. 1300 was necessary for purchasing the property it is not improbable that the purchase was really made by Amarendra though he acted certainly under the advice of his father. As stated already, this is one of the properties which was stated in the affidavit (Ex. 16-A) filed in the succession certificate proceeding to be the sole and exclusive property of Amarendra himself. Taking all these facts into consideration we are of opinion that with regard to this property also the plaintiff has failed to rebut the presumption which is in favour of defendant 1 and consequently the decision of the Court below must be upheld. The first point raised by Mr. Gupta is thus decided against the appellants.

13. The second point raised by Mr. Gupta relates to the sum of Rs. 2000 which was lent to Surendra Dutta on equitable mortgage. The learned Subordinate Judge has held that there is no evidence to show that Amarendra had any separate fund of his own at the time when the money was advanced, but he holds nevertheless that this amount was really an advance by the father for the benefit of Amarendra. This finding obviously cannot stand. There is no presumption of advancement in this country and no case of advancement was sought to be made out by any evidence in this case. Mr. Chandra Sekhar Sen, appearing on behalf of the respondents, attempts to support the decision of the Subordinate Judge on the ground that Amarendra had money of his own by reason of the dowry which he received at the time of his marriage and it was not impossible for him to advance this money by way of loan to Surendra Dutta. We do not think that we can accept this argument as sound. The case was sought to be made that Amarendra purchased the Circular Road property with the money obtained by him at the time of his marriage. As the sum was only Rs. 2000 certainly he had not sufficient surplus left, out of which this loan could be advanced to Surendra Nath Dutta. On the other hand, Amarendra admits in his deposition that Surendra Dutta was in the habit of receiving loans from his father. In these circumstances, we think it must be held that this sum of Rs. 2000 advanced to Surendra Nath Dutta was money belonging to Surendra Nath

Sur and it was not the exclusive property of Amarendra.

14. On the question of title to the sum of Rs. 9000 which was payable under the insurance policies on the life of Surendra, we are clearly of opinion that the decision of the Court below is not correct. The learned Sub ordinate Judge is of opinion that the mere fact that a person has been made a nominee by the assured does not entitle him or her to receive the money as no trust is created in favour of the nominee in such cases and he cannot sue on the contract. This was undoubtedly good law prior to the introduction of Act 3 of 1923. By that Act however the Married Women's Property Act has been amended and it has been made applicable to Hindus and some others in respect of policies effected after 1st April 1923. It is conceded by Mr. Sen that the insurance policies in the present case were all taken after 1st April 1923 and consequently the nomination being in favour of the wife she would rank as a beneficiary and would be entitled to the policy money. Mr. Sen has fairly conceded that this must be the legal position and the learned Judge was wrong in applying the law which would have been applicable had the policies been created prior to 1923. Mr. Gupta further says that the evidence on the record is not sufficient to show that the entire sum of RS. 9000 was actually paid to. Annapurna. It appears that the insurance company gave one cheque to Annapurna for the entire sum of Rs. 9000. This cheque was endorsed by Annapurna to Messrs. J. Sur and Co., and Fanindra Nath Sur who has been examined as a witness in this case says that in lieu of this cheque the firm of J. Sur and Co., gave two bearer cheques in the name of Amarendra, one for Rs. 5000 and the other for RS. 4000. Both these cheques, it is said, were cashed and the entire money paid to Annapurna by Amarendra in the presence of this witness. The plaintiff's story on the other hand is that out of this RS. 9000 a sum of Rs. 4000 was taken as a loan by Amarendra for the purpose of depositing the stamp in the succession certificate proceeding. The story of a loan is utterly unreliable and has been justly disbelieved by the learned Subordinate Judge. It seems however that very soon after the cheque of Rs. 4000 was drawn by J. Sur and Co., in the name of Amarendra a sum of RS. 3000 odd was actually deposited in the succession certificate proceeding. It may be that this sum was actually used for this purpose, but we have no hesitation in holding that no part of it was retained by Amarendra and he is not answerable for this money, or any portion of it, to Annapurna. As the money belonged to Annapurna alone, if she advanced it voluntarily for meeting the expenses of the succession certificate proceeding, she might have a legitimate claim against all the heirs of her husband for the money that she might be proved to have actually advanced. This is not a matter which arises for our consideration in the present case and we need not express any opinion on this point. We can only say that we agree with the learned Subordinate Judge in holding that no part of this sum of Rs. 9000 was retained by Amarendra and he is not in any way answerable for it. The sum of Rs. 9000 certainly would not be treated as joint property and would not be available for partition amongst the heirs of Surendra.

15. It now remains for us to consider the last and the fourth point raised by Mr.

Gupta. We have no doubt in our mind that the directions regarding the taking of accounts are not quite adequate, and it may be necessary for the commissioner of the parties to seek further directions from the Court from time to time as the investigation proceeds. We may consider in this connexion the second point raised by Mr. Chatterji on behalf of the plaintiff-appellant. As has been pointed out already, the Subordinate Judge has ordered that the matter relating to pawned jewellery and ornaments would be investigated by the commissioner who would be appointed to take accounts. The learned Subordinate Judge has in course of his judgment recorded a finding that the pawned jewellery and ornaments have been misappropriated by the plaintiff, In our opinion, the plaintiff is right in his submission that as the matter is still to be investigated and as the commissioner has not looked into the accounts as yet, it is not quite proper and certainly premature to say that the plaintiff himself has been guilty of misappropriating all or any of the ornaments. There is evidence on the record to show that some at least of the pledged jewellery were given by Surendra as presents to his wife Annapurna. In our opinion, the entire thing will be open for consideration by the commissioner, and the Judge should record his findings on this point after the commissioner's report is received and considered and the parties are given the opportunity to say what they have got to say on this point. It is conceded by the learned lawyers appearing for all the parties that the directions given by the Subordinate Judge regarding the partition of the joint properties are defective and to some extent erroneous. In the first place, the learned Subordinate Judge should have allotted 1/10th share of the joint properties to Amarendra and then directed that the remaining 9/10th should be divided equally amongst the other nine sons and the mother Annapurna herself. The Subordinate Judge was wrong in thinking that Annapurna was not entitled to a share and he was wrong also in allowing the plaintiff a 1/10th share of the entire property. It is also necessary we think that proper directions should be given regarding the maintenance allowances and the marriage expenses of the four unmarried daughters. But these things, as conceded by Mr. Gupta, should more properly be embodied in the final decree when the value of the total assets would be known and the accounts properly investigated.

16. The next thing that we have got to consider is the first ground raised by Mr. Chatterji on behalf of the plaintiff and this relates to the sum of Rs. 1601, which the plaintiff obtained by assigning an agreement of purchase which he had entered into with certain vendors in respect of a plot of land in Calcutta and for which earnest money to the extent of Rs. 101 only was paid by him. We think the Subordinate Judge had no materials before him to hold that Jitendra, the plaintiff, could not have procured this sum of Rs. 101 which was paid as earnest money for this agreement. This little sum he could have even collected out of the allowances which he received by working as an apprentice in the firm of J. Sur and Co. Mr. C.S. Sen, appearing for the respondent, has not really contested this point and in our opinion the sum of Rs. 1601 should be regarded as the exclusive property of the plaintiff and it would not be brought into the hotchpot and

treated as joint property of the parties. The appeal is thus disposed of. The cross-objections, we think, are without any substance. They relate to the two items of loan and one decree specified in paras. (D), (G) and (H) of Schedule D of the plaint, with regard to which the exclusive title of Amarendra has been negated by the Court below. As has been said already, there is no evidence to show that Amarendra had any separate fund of his own save and except the ornaments of his mother and the money which he received at the time of his marriage and, consequently, it cannot be held that the monies which were advanced on the promissory notes mentioned above really belonged to him. The result therefore is that the cross-objections are dismissed and appeal is allowed in part. The preliminary decree made by the Court below is modified in the following manner:

(1) The sum of RS. 9000 paid under the insurance policies of Surendra should not be treated as joint property and would not be liable for partition. This would be taken to be the property of Annapurna Sur and in valuing the share which is to be allotted to her this sum as well as any other stridhan property which she might have got should be taken into consideration.

(2) The sum of Rs. 1601 which the plaintiff obtained by assigning his agreement of purchase should be treated as his own exclusive property and would not be liable for partition.

(3) The loan advanced to Surendra Nath Dutta on equitable mortgage shall be treated as joint property of the parties and will be available for partition. Defendant 1 will have only the two immovable properties, namely, premises No. 227B, Upper Circular Road and the jalkar, Beri Bangor, as his self-acquisitions and they will not be partitioned.

(4) Specific allotments should be given not only to the plaintiff and defendant 1 but also to defendants 2 to 10. Provisions for the marriage expenses of the daughters and also for their maintenance will be made after the commissioner's report is received and will be embodied in the final decree.

(5) The parties as well as the commissioner for accounts will have the liberty to apply to the Court for directions from time to time as the examination of the accounts proceeds and the finding of the Court below that the plaintiff has misappropriated the ornaments will remain open.

(6) We make no order as to costs of hearing of this appeal. The entire paper book costs in this appeal have been advanced by the mother, defendant 10. We direct that these costs will be apportioned amongst the cosharers according to their respective shares.

(7) The receiver already appointed will continue to be in possession till the final decree is made, and the Court below will be at liberty to direct the Receiver to pay certain sums of money from time to time as may be necessary for the maintenance of the co-sharers including the mother as well as of the unmarried daughters.

Ellis, J.

17. I agree.