

(1966) 06 CAL CK 0013

In the Calcutta High Court

Case No : Appeal from Original Decree No. 42 of 1960

Kanailal Mondal

APPELLANT

Vs

Dhirendranath Mondal

RESPONDENT

Date of Decision : 03-06-1966

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 6

Citation : 70 CWN 880

Hon'ble Judges : P.N. Mookerjee, J;B. Mukherji, J

Bench : Division Bench

Advocate : B.C. Deb and Saroj Kumar Chatterjee, for the Appellant;Sibkali Bagchi, for the Respondent

Final Decision : Dismissed

Judgement

Bijayesh Mukherji, J.—This is an appeal by Kanailal Mondal, the sole defendant in a suit for partition and accounting, which was raised on August 5, 1952, by his younger brother Dhirendra Nath Mondal, now the sole respondent before us, and which a learned subordinate judge, 24-Paraganas, decreed in a preliminary form on September 12, 1959. The grievance of the appellant is that the preliminary decree so entered does not include the joint family properties comprising a house and three specified sums of money set out below :

1. The house at 1/4/E Kashi Nath Datta Road, Cossipore.
2. A sum of Rs. 2,799.25 paise in the savings account of Lloyds Bank left by the father of both, Lalit Mohan Mondal, who died on December 10, 1950.
3. A sum of Rs. 205.82 paise or thereabouts (Rs. 205-13as.-3 pies in terms of the old currency) similarly left in deposit by their deceased father in the savings account of the United Bank of India, Kidderpore branch.
4. A sum of Rs. 212.25 paise lying deposit with the authorities of the Orphange Market at Kidderpore.

Mr. Dev, the learned advocate appearing for the appellant, has addressed us only on this point and on no other.

2. The Cossipore house is taken up first. Exhibit A is the certified copy of the relative sale deed from which it appears inter alia that this house in controversy was purchased by the respondent Dhirendra Nath Mondal on March 11, 1940, from the then owner, one Manmatha Nath Bhattacharya, for the consideration of Rs. 5,999. A sale as this was preceded by a bainanama, an agreement for sale, on January 31, 1940, when Lalit, the father of the two litigating brothers, had paid, and the vendor Manmatha had received a sum of Rs. 101 by way of earnest. The balance of Rs. 5,898 purporting to have been paid by the respondent Dhirendra on March 11, 1940, "in full satisfaction of the entire consideration money" agreed upon, the sale deed came to be executed. In other words, whereas the agreement for sale was between the father (Lalit) and the vendor, the sale deed was between the son (Dhirendra) and the same vendor. Not that any illegality lurks here. It is only a factual statement of the true position as recited in the sale deed itself and as admitted by Dhirendra himself in his cross-examination.

3. But is the apparent state of affairs the real state of affairs too ? If it is, the respondent Dhirendra is plainly right. The Cossipore house is then his and his alone. And it cannot therefore be brought into the hotchpot. Nor can the suit, out of which this appeal arises, fail, being bad for partial partition. Unfortunately for the respondent Dhirendra, however, the whole of the evidence completely satisfies us that things are not what they seem. We proceed to set out much the most important reasons why we are satisfied so.

4. Dhirendra, a dependant of his father till his death on December 10, 1950, was aged 36 on August 10, 1959, when he was giving evidence at and during the trial:

"My father used to maintain me up to the time of his death. My present age is 36.": vide his cross-examination at page 40 of the paper-book, part 1.

So, on March 11, 1940, when the sale deed was executed in his favour, he was 16 and a little more, but below 17, Now, how could such a one--a lad of 16 or thereabouts pay the heavy sum of nearly Rs. 6,000 as the consideration money for the sale deed ? The fact that he was dependent on his father till his death on December 10, 1950, that is to say, for more than 10 years after the execution of the sale deed on March 11, 1940, even though he had by then grown from adolescence to youth -- a youngman of 26 or 27 does not bespeak his affluence with some Rs. 6,000 to spare. Even worse than that, the explanation he gives for having been in fund to that extent, :

"While I was a.....boy I used to get some money as tiffin cost..... Jal khabar babat (on account of tiffin). I used to keep those amounts in deposit with my mother.": vide his cross-examination at page 41 of the paper-book, part 1--

carries its own refutation. However generous the tiffin allowance, Dhirendra could not have amassed so much (Rs. 5,898) at the age of 16 or 17. Nor does a periodic allowance, if that, of Rs. 100 a month from 1938 or 1939 Dhirendra speaks of (page 41 *ibid.*) explain the accumulation of Rs. 6000 nearly, on March 11, 1940, the date of purchase of the Cossipore house. This is not all. His mother Khargeswnri died on November 9, 1938, as is evidenced by the certified copy of the extract from the Register of Deaths, ext. 9. So, it could not simply be that his father had taken the money from his mother with whom it was lying in deposit and had purchased the Cossipore house in his name. But this is just what he says:

That amount belonging to me was in deposit with my mother. My father took that amount from my mother and purchased the property in my name.: page 41 *ibid.*

On March 11, 1940, his mother was no more. She had "died one year before the purchase of" the Cossipore house, as Dhirendra himself admits, though, to be exact, she had died one year four months and two days before the purchase. Realizing this, he changes his evidence :

After my mother's death money remained with me. I then gave the amount to my father to purchase the property (volunteers).: vide his cross-examination again at page 41 *ibid.*

Thus, the respondent Dhirendra has two versions to narrate in his sworn testimony. One is that his father took the money (Rs. 5,898) from his mother "and purchased the property (Cossipore house) in my name." Another--the one he volunteers -- is that, on his mother's death, more than a year ahead of the purchase, he kept the money with him only to hand it over to his father at the time of the purchase. By any standard, this ranks as a material contradiction which instructs the greatest caution in accepting what the respondent Dhirendra wants the Court to accept. To this be added a lad of 15 or thereabouts -- Dhirendra was just so when his mother died on November 9, 1938 -- keeping with him since then right up to March 11, 1940, the date of purchase of the Cossipore house, the large sum of nearly Rs. 6,000 with him, even though he was living under the tutelage of his father upon whom he was solely dependent. On top of this, the story of Dhirendra having accumulated so much from so little, namely, savings from his tiffin expenses (which could not but have been paltry) is such that it is difficult even for credulity to swallow it. So, on the important test: what is the source of the consideration money for the purchase of the Cossipore house, the respondent Dhirendra cannot score a point. The appellant Kanai does, even though his evidence that his mother died four or 5 years after the purchase of the Cossipore house (page 49 of the paper-book, part I) carries neither sense nor truth, or that he had seen his father taking money from the shop to buy the said house (page 49 *ibid.*) may savour of exaggeration bordering on falsehood.

5. There is another matter, equally, if not more, important than the test just applied, with a view to finding out the true character of the Cossipore house

whether the exclusive property of the respondent Dhirendra, in whose name the sale deed stands, or a joint family property, owned by him as much as by the appellant Kanai. That is the admission of Dhirendra before Hari Sankar Adhikari, the third witness at the trial for the defendant Kanai, and the preceptor of Lalit, the father of the two litigating brothers, who, in spite of their disagreements and disputes, are united in referring to him as Gurudeva. That one in such a privileged position would try to effect an amicable partition between the two sons of his deceased disciple Lalit was only to be expected and was so becoming of him too. And that is what he did. But unfortunately the success he was a partial one. Through the Gurudeva's good offices, sought and lent, the two groceries at the Orphangunge market, Kidderpore, were partitioned. More, a partition as that was embodied in a written agreement, dated July 4, 1951, exhibit 5, over the signatures of the two brothers, and attested to by three witnesses -- Gurudeva Hari Sankar Adhikari, one Jogesh Chandra Roy Chowdhury and the scribe, Birendranath Kanthal. The Gurudeva's success did not end here. By sale of part of gold and silver his disciple Lalit and left behind him, by realization of the dues, by withdrawals from two banks--Llyods Band and United Bank -- and by pressing into service the money in the till of the grocery, he could collect a sum of Rs. 7,377 as detailed below :

By sale of gold & silver ..

Rs.

3,845.00

Realized from the school

Rs.

102.00

Cash balance in the shop

Rs.

30.00

Withdrawal from Lloyds

Bank account

Rs.

3,000.00

Withdrawal from United

Bank account

Rs.

4,00.00

Total:

Rs.

7,377.00

Out of the amount so collected, he paid off Lalit's creditors' dues, bazar debts, as he says, running to Rs. 7,372.0.6 pies. In a contemporaneous document made by him, all such dues are listed with the names of the different creditors and the amount due shown against each. Are listed too the varieties of gold and silver sold. Furthermore, the credit balances in the two banks at the time of the withdrawals are noted. Here are the figures:

Credit

Amount

Balance after

balance.

withdrawn.

withdrawal

Lloyds Bank:

Rs. 5,799-4-0

Rs. 3,000

Rs. 2799-4-0

United Bank :

Rs. 605-13-3

Rs. 400

Rs. 205-13-3

Such a contemporaneous document, prepared by the Gurudeva, goes into evidence at the trial as the Court's exhibit and is marked alpha, the character of this Greek alphabet being wrongly taken as L and printed as such in the paper-book : page 44, part II, of the paper-book. The Gurudeva succeeded too in providing for maintenance of the sisters and the grand-mother of the two litigating brothers, as is the admission of Dharendra himself : page 41, part I, *ibid.*, also paragraph 3 of the plaint at page 13 *ibid.* But his success, it seems, could go no further in this arduous task of effecting a partition between the two "warring" brothers. Still the importance of such a one could not but have been felt, preparatory to the trial. So the plaintiff-respondent Dharendra was summoning him through Court on March 13, 1958, "to produce all documents, papers and books of the estate of Late Lalit Mohan Mondal made over to you

early in 1951 by the sons of the deceased" : vide Dhirendra's application of that date at pages 29-30 of the paper-book, part I. The summons which actually went out is a little differently worded. But it, the Gurudeva was informed that his attendance was required "to produce documents." But there it did not stop. It proceeded. :

You are hereby required personally to appear before this court on the 21st day of March 1958 at 10 O'clock in the forenoon and to bring with you all documents, books and papers of the estate of Lalit Mohan Mondal made over to you early in 1951 by the sons of the deceased : page 30 *ibid*.

If the Gurudeva was being summoned to produce documents only, it would have been sufficient compliance with the summons if he had caused such documents to be produced instead of having attended personally to produce the same, as is the mandate of order 16, rule 6, of the Code of Civil Procedure. Be the position as it may, that was the summons issued upon the Gurudeva at the instance of the plaintiff-respondent Dhirendra, who, however, says in his evidence:

I did not cite him (the Gurudeva) as a witness in this suit : page 42 *ibid*--

which Mr. Dev makes a point of. Perhaps, Dhirendra means that he did not cite the Gurudeva to give evidence. But he did cite him to produce documents, and, what is more, to appear personally before the Court, bringing with him all documents he was entrusted with early in 1951 by the two litigating brothers. This is all that Dhirendra did in the matter. The defendant-appellant Kanai went the whole hog and cited the Gurudeva not only to bring "the documents that were made over to you by the plaintiff (Dhirendra) and (are) lying with you for the purpose of partition relating to the estate of Late Lalit Mohan Mondal", but also "to give evidence" : pages 32 & 33 *ibid*. This fosters the contention by Mr. Dev : "here is a common witness, cited by both the parties, and hence the evidence of such a one should carry the greatest weight." If by witness is meant one who has been summoned to give evidence, it may not be using accurate language to say that he is a common witness. As a matter of fact, the appellant examines him as his witness ; the respondent does not. If, however, by witness is meant not only one who is called upon to give evidence, but also one who is summoned to produce documents--and Or. 16 of the Code is captioned : summoning and attendance of witness -- the Gurudeva may well be regarded as a common witness. Such splitting of the straw apart, upon all we see here, we are satisfied that the Gurudeva, because of his status and of the role that devolved upon him after the death of his disciple Lalit, is a witness whose honesty and integrity remains unsullied, even though a suggestion of partisanship in favour of the appellant Kanai is attributed to him in the course of his cross-examination. A suggestion *simpliciter* is not proof. And, upon the whole of the evidence, it has not even a vestige of the slightest probability ; the more so, because of the Gurudeva's denial which rings true :

It is not a fact that I am siding with Kanai at present. Both parties are equal to

me. I tried my best to settle their dispute amicably. But they did not agree to that. So many attempts failed. : page 52 ibid.

6. Such then is the witness who says on oath in his evidence-in-chief:

Both parties admitted before me that (the) Cossipore house belonged to their father Lalit Mondal. But they did not give (the) title deed of that house to me page 51 ibid.

In cross-examination, he reiterates this :

The parties verbally admitted before me that (the) Cossipore house belonged to their father. : page 52 ibid.

He confesses, he did not "demand any written admission to that effect from them." The words -- did not -- are not there in the recorded evidence which therefore reads :

I demand any written admission to that effect from them. : page 52 ibid.

It is agreed on all hands before us that the words -- did not -- appear to have been inadvertently dropped by the recording judge. In the context, appearances are in favour of such a slip. A Gurudeva is a Gurudeva. No lawyer is he. So, simply because he did not take a written admission such an omission does not detract from his evidence. We leave it at that.

7. Mr. Bagchi, the learned advocate for the respondent, then strenuously argues that the evidence of the Gurudeva, even though he is the Gurudeva, is vitiated by a patent untruth. The way in which Mr. Bagchi develops his contention is this. Cross-examined, the Gurudeva says:

The documents (of the estate of Lalit) were given to me in Jaistha. It was probably in 1358 B.S. But I am not definite about the year. : page 52 ibid.

Jaistha of 1358 B.S. would correspond to mid-May to mid-June 1951. His evidence in cross-examination also bears:

(The) Pass book of Lloyds Bank was given to me by both parties and not by Kanai (the defendant-appellant) alone.

They gave that pass book to me when I made arrangement for repayment of Bazar debts (of Lalit). The pass book was with me since then. I got it one day before or after the date of execution of a deed of agreement : page 52 ibid.

The deed of agreement referred to is exhibit 5 : paragraph 6 ante and page 37 of the paper-book, part II. It is dated July 4, 1951, which corresponds to Asarh 19, 1358 B.S. So, if the passbook of Lloyds Bank remained with the Gurudeva right from July 1951, how is it that it was brought up to date up to May 12, 1952, as the pass-book itself reveals ? Herein lies the patent falsehood Mr. Bagchi contends about. Strictly speaking, the pass-book is not evidence. It has been marked Y for identification only. But we make no point of it. We treat it as

evidence instead, and proceed. The Gurudeva was giving evidence on August 11, 1959, of events which were taking place more than eight years back. Precision is therefore hardly to be expected. He lays no claim to precision either :

The documents were given to me in Jaistha. It was probably in 1358 B.S. But I am not definite about the year.

The word probably is significant. Is significant too his confession that he is not definite about the year. Is he definite then about the month of Jaistha he speaks of ? One day before or after the execution of the agreement, ext. 5, would make it Asarh 18 or 20, 1358 B.S. So, he is still less definite about the month which would not be Jaistha, in any event, but Asarh. And that is still more significant. That is so natural too. Unless one is endowed with superabundance of memory, he cannot speak of such matters with exactness. Most of us are not endowed so. Hence, evidence as this should not be weighed in scales of gold. True, the whole of the evidence coupled with the entries in the pass-book goes to show that the pass-book could not have been with the Gurudeva from July 3 or 5, 1951. But that he says obviously under a mistake. And who will not make a mistake in the circumstances speaking from memory of an eight-year-old event ? That the Gurudeva made provisions for payment of Lalit's debts is admitted by the plaintiff-respondent Dharendra who would not however speak of the debts, at a firm sum, which indeed is surprising. He would put the amount of his father's debts at a "liquid" sum varying from Rs. 4,000 to Rs. 5,000. Again, he would attribute the payment of such debts to the sale-proceeds of ornaments as the result of a sale under the auspices of the Gurudeva. (See page 42 *ibid.*). The Gurudeva's evidence however is that he could collect Rs. 7,377 by sale of ornaments etc. and also by withdrawal from Lloyds Bank and United Bank : vide pages 51 and 52 *ibid*, read with exhibit alpha, contemporaneously made, at pages 44 and 45 of the paper-book, part II. "I asked Dhiren," says the Gurudeva, "to withdraw Rs. 3,000 out of (the) balance of Rs. 5,799/4 and to utilize that amount towards payment of debts" : page 52, part I, of the paper-book. The pass-book of Lloyds Bank does show withdrawal by Dharendra of Rs. 2,000 on July 16, 1951, and of Rs. 1,000 on July 23 following. The payments to several creditors of Lalit, listed in the note, exhibit alpha, contemporaneously prepared by the Gurudeva, were made on Asarh 32, 1358 B.S., according to the Bengali calendar, corresponding to July 17, 1951 (vide exhibits 7, 7(t), 7(u), 7(z/8), to 7(z/15) etc) and also on July 17, 1951 according to the English calendar (vide exhibits 7(a), 7(b) etc.). Exhibits 7 series are receipted bills of different creditors. As Dharendra, the plaintiff-respondent, himself says, on being recalled :

We got these receipts from creditors on payment of their dues after (the) death of our father (Exts. 7 to 7(z/16)): formal proof dispensed with) : page 42 *ibid*. All these receipts do not bear the dates of payment. Many do, as just noticed. In some are recorded on their reverse 17.7.51 in Hindi : exhibits 7 (n) to 7(s). But Dharendra's evidence is that all these receipts, exhibits 7 to 7(z/16), were had

from the creditors on payment. So payment was there for each of these receipts. The total of payments as shown by the Gurudeva comes to Rs. 7,372-0-6 pies. The names of all the creditors listed by the Gurudeva and the amounts due to each of them agree, on the whole, with the names and amounts in the receipts produced by Dhirendra, save the following :

Rs.

as.

ps.

SurenSrimani

..

..

258

8

0

Pratap Co.

..

..

198

14

0

MahanandaDutt

..

..

249

11

0

Pramatha Pal

..

..

638

00

0

Rent for the shop

..

..

112

4

0

No suggestion even is put to the Gurudeva that these creditors were not paid, even though the account prepared by him is marked alpha as a Court exhibit and his evidence in cross-examination bears:

I showed the parties this account paper at the time of partition. : page 52 ibid.

In the circumstances, the Gurudeva's evidence cannot be rejected and the above account cannot be challenged as spurious or fabricated. The Gurudeva's accounting note, exhibit alpha, therefore stands, in spite of five items just mentioned not having been found in the receipts, exhibits 7 series, produced by Dhirendra. Upon all we see, we may very well presume that Dhirendra who brought so many receipts into evidence, only after being recalled, has not produced all the receipts.

8. Upon the whole of the evidence, therefore, emerge certain important facts. One, the creditors were paid on July 17, 1951 and presumably beyond. Two, Lalits debts amounted to, not Rs. 4000 or 5000 as Dhirendra says, but over Rs. 7,000 as the Gurudeva says and as his contemporaneous accounting note records. Three, the sale of gold and silver could secure only Rs. 3,845 as the said account, exhibit alpha, shows. The cash memos, exhibits 4 and 4/1, of Sakshi Gopal Boral & Co., Bullion Merchant, of Nalini Set Road, in token of the sale of the ornaments show six annas more than what the Gurudeva puts in his account:

Rs.

as.

ps.

Exhibit 4

130

7

6

Exhibit 4a

3,714

14

6

3,845

6

0

And these are the cash-memos which Dhirendra got into evidence, like the receipts, exhibits 7 series, on his recall : page 42, part I, of the paper-book. Dhirendra also admits that such sale was had by him and his elder brother (the appellant Kanai) in the presence of the Gurudeva for the purpose of collecting funds to pay off the debts : page 40 *ibid*. Thus, does the accounting note of the Gurudeva received striking corroboration from Dhirendra's evidence, oral and documentary.

9. On these facts, it is plain to be seen that Dhirendra did withdraw from the account in Lloyds Bank Rs. 2,000 on July 16, 1951, and Rs. 1,000 seven days later, that is to say, on July 23, in all Rs. 3,000 as he was asked to by the Gurudeva. Surely, with the sale-proceeds of the ornaments, Rs. 3,845-6 as., the total debt of Rs. 7,000 and more could not be paid. Hence, the passbook must have been with Dhirendra who had had up-to-date entries made by Lloyds Bank for withdrawal on July 16 and 23, 1951 as also on November 26 1951 and May 12, 1952 inclusive of an entry of interest on April 30, 1952. The pass-book could not have been therefore on July 3 or 5, 1951, with the Gurudeva who apparently falls into an error -- quite a natural thing in the circumstances -- when he says that the pass-book, which was filed by him in Court on August 11, 1959 vide the list of documents at pages 31 and 32 *ibid*., has been with him ever since July 3 or 5, 1951. In such evidence, we see just that -- an error, a venial error -- not a patent falsehood, as Mr. Bagchi does. Indeed, for all we see, one like him can have no reason to give false evidence concerning the properties of his disciple's sons, to partition which he laboured so much, and with not a negligible success, as admitted by Dhirendra himself. (See paragraph 6 *ante*). And his was a labour of love.

10. The Gurudeva's evidence therefore stands. Stands too the admission before him by Dhirendra that the Cossipore house belonged to his father. And the impossibility of Dhirendra having purchased the house with his own money -- the price paid was a little less than Rs. 6,000 -- when he was no more than a lad of 16 or so, is always there. (See paragraphs 3 to 5 *ante*). In order to get rid of these features which tell, Mr. Bagchi contends that Lalit, the father, was one of the attesting witnesses to the sale deed of March 11, 1940, exhibit A, by which the Cossipore house was purchased. So what ? He, having been a party to the prior agreement for sale, had to subscribe himself as an attesting witness with a view to avoiding a future dispute about his rights in terms of the aforesaid agreement. And this cannot rebut the finding we have come to, on the benami

character of the transaction, relying upon Dhirendra's admission, no less upon the fact that the consideration money of nearly Rs. 6,000 could not have been paid by him. In vain has Mr. Bagchi referred us to Dhirendra's possession of the Cossipore house. Such possession, even if exclusive, has been the possession of a co-owner and is presumed in law to be the possession of the other co-owner as the appellant Kanai undoubtedly is. Nothing like any adverse possession can it be, unless it has been established by clear evidence of undoubted authenticity that there has been disclaimer of Kanai's title by open assertion of a hostile title by Dhirendra or express ouster or repudiation of Kanai's title to his knowledge. We do not find such evidence. Mere non-participation of profits and exclusive possession cannot be conclusive.

11. Having regard to the foregoing considerations, the conclusion we have come to is that the Cossipore house is a joint family property, and not the exclusive property of the respondent Dhirendra.

12. The second item, Listed in paragraph 2 ante, is now taken up. In view of all that goes before, it is manifest that a sum of Rs. 2,799.25 paise remained in the Lloyds Bank account after withdrawal by Dhirendra, at the suggestion of the Gurudeva, of Rs. 3,000 -- Rs. 2,000 on July 16 and Rs. 1,000 on July 23 of 1951 -- out of the total credit balance of Rs. 5,799.25 paise. (See paras. 6, 9 & 10 ante).

The account is no doubt in the name of the respondent Dhirendra. But that matters little. Because, the whole of the evidence furnishes indicia, clear and loud, that this sum of Rs. 2,799.25 paise is not the money of Dhirendra alone. First : the account was opened on December 20, 1943, as the application, exhibit 1, by Dhirendra for opening an account with Lloyds Bank goes to show. Dhirendra was then 19 or thereabouts. Rs. 305 is the modest sum the account was opened with. There is nothing in it, even though Handa, the second witness for the plaintiff and a clerk of Llyods Bank, cannot say who the amount was actually deposited by. A lad of 19 could have that much. So, that by itself does not matter. What matters is : from December 20, 1943 to April 30, 1948 when Dhirendra was hardly 23 or 24, the total deposits made ran to five figures : Rs. 24,352 which includes small sums on account of interest. But Dhirendra was wholly dependent on his father right up to his death on December 10, 1950. So, the account could not be his, in reality. Second : were the account his and his alone, why did he withdraw Rs. 3,000, as noticed and found, to pay off the debts of his father ? If he was discharging the moral obligation he owed to his father, it would indeed be commendable. But he does not say so. Nor does the evidence show him to be made of that stuff. Third : the very fact that he had handed over the pass-book to the Gurudeva who was acting as a mediator and who had filed it (pass-book) in Court on August 11, 1959, militates against the account being his and his alone. In truth, he was a name-lender only. Dhirendra's explanation in the seventh paragraph of his affidavit (pages 26 to 28 of the paper-book, part I) that Kanai "grabbed" the pass-book when a peon had come from Lloyds Bank

to give delivery thereof has only to be stated in order to be rejected. A totally false explanation, in view of the Gurudeva's evidence which we unhesitatingly accept. More, Dharendra does not say so in his substantive evidence. Nor is anything like it put to Kanai.

13. In the circumstances, the finding must be that this sum of Rs. 2,799.25 paise belongs to the joint family, not to Dharendra alone

14. The third item, listed in paragraph 2 ante, is now taken up. It is a sum of Rs. 205-13-3 pies in terms of the then currency, lying in deposit in the United Bank of India where there was a joint account in the names of the respondent Dharendra and his father Lalit. That is the admission of Dharendra who admits as well:

Rs. 205 was lying in our credit after partition of the shop between me and my brother (the appellant Kanai). At the time of my father's death Rs. 1,000 was lying in our credit. I used to draw from time to time for our joint business from that account. : page 39, part I, of the paper-book.

Presumably for the money having been spent so : for the joint business, the appellant lays no claim to Rs. 1,000. He lays claim instead only to Rs. 205 odd, to which the credit in the account had dwindled, as the joint family fund. Whose money was this in the joint account of Lalit and Dharendra in the United Bank of India ? It could not have been Dharendra's. For one thing, he was maintained by his father till his death on December 10, 1950, as is his own admission. What money would such a one own, on his own, for making a deposit in the bank ? For another, he (Dharendra) had expended money from this very account, even after his father's death, for the joint business, which he could not and would not have done, had this money been exclusively his own. He would have pressed into service instead such joint family funds he could have laid his hands on. For still another withdrawal was made of Rs. 400 from this very account to liquidate the debts of Lalit, proclaiming thereby that it was joint family fund. (See paragraph 6 ante.) The learned subordinate judge also finds as much : page 56 of the paper-book, part I. But he erroneously concludes that the whole of the money has been withdrawn for payment of debts left by Lalit. Dharendra's admission is that he had taken the balance of Rs. 205 in his share : page 39 *ibid*.

15. Thus, one conclusion is so: that the money in this account was not Dharendra's, but his father's. Still another conclusion is that no gift was intended by Lalit to his son, Dharendra, there is not a shred of evidence to that end. No gift to Dharendra can be presumed either. In our law there is no presumption of an intended advancement as there is in England. In the circumstances, the rule laid down by Lord Parmoor in *Guranditta v. T. Ram Ditta*, (1928) 32 C. W. N. 817: L. R. 55 I. A. 235, and reiterated, explained and extended by Lord Porter in *Pandit Shambhu Nath Shivpuri v. Pandit Pushkar Nath*, (1944) 49 C. W. N. 27, will receive effect. And the rule is that a deposit by a Hindu husband of his money in a bank in the joint names himself and his wife, on terms that it is

payable to either as survivor, does not, in absence of proof of a contrary intention, constitute a gift by him to his wife. This is a rule, which, as Lord Porter explains in the above case and as conceded by learned counsel there, "is of universal application, whatever the property and whatever the relationship," and "not confined to assets in the joint names of the deceased man and his wife" only. No proof of contrary intention is here in the instant case. What is here instead is proof of the money in this account being Lalit's. Therefore, this item (Rs. 205.82 paise) was the property of Lalit and must be included in the partible property.

16. The fourth and last item, set out in paragraph 2 ante, is now reached. It is another paltry sum of Rs. 212.25 paise lying as security deposit with the authorities of the Orphange market. A decision on this point is concluded by the respondent Dhirendra's admission in his evidence which bears :

My father had two shops at Kiddepore. Security deposit for those shops were deposited by our father during his lifetime.

We both brothers are entitled to get back the amount in equal shares. : page 40, part I, of the paper-book.

This property is therefore partible too and must have to be included as such.

17. After such illuminating materials which clearly sustain Mr. Dev's contention set out in paragraph 2 ante, it is impossible to say, as Mr. Bagchi, does, that the learned subordinate judge was unable to find the true character of these four properties and was therefore right in keeping some of the matters open. The fact is that had the learned judge taken the trouble of looking into the evidence a little more closely, he would have had no difficulty in coming to the conclusion we have come to. On the contrary, he took almost all this to be outside the scope of inquiry in the suit he was seized of -- a view which Mr. Dev rightly challenges as unsound. If what falls or does not fall within the partible assets falls outside the scope of a partition suit, what then is such a suit for ? It is indeed now settled law that the question of title or benami can and should be determined in a partition suit. (See, for example. *Ranjit Kumar Pal Chowdhury v. Murari Mohan Pal Chowdhury and others*, (1957) 62 C.W.N. 390, out of a crowd of decisions which cluster round the subject).

18. In view of the findings come to, it is clear that the suit, out of which this appeal arises, is bad for partial partition. But Mr. Bagchi assures us that his client, the respondent Dhirendra, will apply for amendment of the plaint including therein the four properties listed in paragraph 2 ante, if we give him an opportunity to do so. For all we see, the relationship between the two brothers is strained to a degree, without any particle of the softening influence of mutual esteem. Indeed, all affection for one another seems to have entirely left them. Hence, the sooner the partition is effected, the better for them both. We shall, therefore, give the respondent Dhirendra the opportunity his learned advocate prays us for, on his behalf.

19. In the course of his arguments, Mr. Bagchi nursed a grievance of the learned judge's refusal to grant the respondent Dhirendra anything with a view to reimbursing himself of the expenses for the ornaments given to his sisters when they were married. But no cross-objection is there. We granted a postponement to enable Mr. Bagchi to file it with an explanation for the delay. But on the postponed date we are informed by his learned junior that no cross-objection will be filed. So, there the matter should rest. In the result, the appeal succeeds and is allowed. The judgment and decree, appealed against, are set aside. The suit is remitted to the Court below. The records be sent down expeditiously. Within three months from service of the notice of arrival of records in the Court below, the plaintiff Dhirendra Nath Mondal shall apply for amendment of the plaint incorporating therein the four items of properties set out in paragraph 2 ante of this judgment. On such an application being made, the Court below will allow it, proceed in accordance with law and directions contained hereinbefore, and record a fresh preliminary decree. Should such an application be not made as directed, the suit shall stand dismissed with cost here and below. Save as stated hereinbefore, there will be no order for costs here or below.

P. N. Mookherjee , J.

I agree.