(1989) 08 CAL CK 0048

In the Calcutta High Court

Case No : Suit No. 312 of 1984

Smt. Kusum Debi Jhinjhani APPELLANT

Vs

Smt. Pushpa Devi Khurda RESPONDENT

Date of Decision : 21-08-1989

Acts Referred:

Arbitration Act, 1940 — Section 14, 30, 33
Civil Procedure Code, 1908 (CPC) — Section 9
Hindu Succession Act, 1956 — Section 8
Transfer of Property Act, 1882 — Section 5

Citation : AIR 1990 Cal 204

Hon'ble Judges : Baboo Lall Jain, J

Bench : Single Bench

Judgement

1. The plaintiff and the defendant are two sisters, Ram Kumar Changil, father of the parties, died intestate on 12th day of January, 1978. The two daughters, who are the plaintiff and the defendant in this suit are the only heiresses and/or legal representatives under the Hindu Succession Act, 1956. The suit as initially instituted was for partition of several other assets also and for claiming an equal half share in all the properties and assets left by the said deceased.

2. It is not disputed that the plaintiff and the defendant were and are entitled to one equal half share each in the properties left by the said deceased excepting two items of property as mentioned hereunder. The parties are also agreeable that a decree be passed for partition of all such assets mentioned in the said Schedule ''A'' and ''B'', save and except the said two items as mentioned hereunder:--

1. Seven shares in Embassy Co-operative Housing Society Limited, 4, Shakespeare Sarani, Calcutta-700017.

2. All that the flat bearing No. 3 C on the 3rd floor of the building known as Embassy building at No. 4, Shakespeare Sarani, Calcutta-17, containing an area of 1250 sq.ft. and comprising two bed rooms with attached bath rooms, two

store rooms, dining hall, verandah and kitchen.

3. The case of the plaintiff is that the said Ram Kumar Changil was a member of the Embassy Co-operative Housing Society Limited and had purchased/acquired the flat bearing No. 3 C on the 3rd floor of the said premises No. 4, Shakespeare Sarani Calcutta, upon payment of full consideration for the. same. The plaintiff further states that since before the death of the mother of the plaintiff and defendant, Sm. Shanti Debi Changil, in 1972, the defendant had been residing at the said flat at No. 4, Shakespeare Sarani and has continued to do so. According to the plaintiff, after the death of Ram Kumar Changil, the defendant assumed exclusive occupation and enjoyment the said flat at No. 4, Shakespeare Sarani, Calcutta. Despite requests by the plaintiff, the defendant refused to permit the plaintiff to occupy and enjoy any portion of the said flat.

4. The further case of the plaintiff is that the plaintiff came to know on enquiry that the defendant has even got her name mutated in the records of the said Embassy Co-operative Housing Society, in respect of the said flat, at Embassy building, purportedly as the nominee of the abovenamed Ramkumar Changil. According to the plaintiff such nomination does not constitute a valid disposition of the said flat in favour of the defendant and the parties as legal heirs are equally entitled to the said flat. According to the plaintiff under the Bye-laws of the said Society a member is entitled to make a nomination in favour of any person to whom or to whose credit his share or interest in the society would on his decease, be paid or transferred by the society but the said provision only, authorises and empowers the society to transfer the share of the deceased member to the nominee but does not and cannot have the effect of altering the succession to the property left by the deceased including the right title and interest of the society in the Co-operative Society and/or the said flat. Since the patties, inspite of requests by the plaintiff, could not come to an amicable settlement in respect of the said flat and/or the shares in the said co-operative, the dispute still subsists and the relief is claimed in respect thereof in the instant suit.

5. The case of the defendant in the written statement is that the father of the parties became a member of the Embassy Co-operative Housing Society Limited (hereinafter referred to as ''the said Society''). The said Society was the sponsor of the multi-storied building known as Embassy and the father became a member thereof for the purpose of acquiring a flat in the said building, subject to the terms and conditions set out in the Bye-laws of the said Society. According to the defendant, every member of the said Society is bound by the said Bye laws and the same is binding upon his successors and assigns. The further case of the defendant is that on or about 29th June and 30th June, 1972, the said Ramkumar Changil was allotted 7 ordinary shares, in the said Society being the share certificates No. 171 and 192 granted by the Society. The said Bye-laws of the said Society inter alia provided that only a registered member of the said society is entitled to acquire and hold a flat in the said Embassy building. The

defendant relies on Rules No. 7A and B of the said Bye-laws which read as follows:--

"7.a) Every member must hold at least one share in the society."

"7.b) Every member holding an ordinary share of the society must purchase on ready payment, tenement/flat plot of land allotted to him by the society and shall occupy the same within 3 months, when the building/ flats are ready for occupations, but the time may be extended by the managing committee with approval of Registrar Failure on the part of the member to comply with this Primary condition will exclude him from membership and also lead to the forfeiture of his share money by way of compensation."

6. The further case of the defendant is that pursuant to the said bye-laws the said society allotted the said flat No. 3C, Shakespeare Sarani in the said Embassy building to Ramkumar Changil, as holder of the said share upon payment of the agreed value fixed by the said society. According to the defendant the said flat is attached to the said 7 shares and only the member for the time being holding the said shares and none-else is entitled to hold the said flat. According to the defendant the said Ramkumar Changil resided in the said flat along with the defendant and her daughter, until his death on or about 12th January, 1978. It is alleged that the defendant looked after the said Ramkumar Changil in his old age. It is further alleged that the said Ramkumar Changil, bore great love and affection for the defendant and her. daughter Kumkum. According to the defendant the husband of the defendant is not a well to do person and his income is meagre. It is further alleged that the said Ramkumar Changil was worried about the future of the . defendant, and decided to give the said flat to the defendant exclusively for the purpose of making provision for the defendant and her daughter Kumkum. It is further alleged that pursuant to the said desire, the said Ramkumar Changil, nominated the defendant as his successor to the membership in the said society as also in respect of the said flat. Such nomination according to the defendant was endorsed by Ramkumar in the Register of the Members of the said Society in his own hand in the complianc''e with the Bye-laws of the said Society. The said nomination according to the defendant was made for the exclusive benefit of the defendant, to the exclusion of the other relations. The defendant relies on Rules 8 and 9 of the said Bye-laws which are, inter alia, as follows:--

"A member may, by writing under his hand deposit with the society during his life time, or by a statement made in any book kept thereat, nominate a person or persons to whom or to whose credit his share or interst in the society or the value of such share or interest or so much thereof as is specified in such nomination shall, on his decease, be paid or transferred under, and subject to the provisions of the Act and the rules."

"A nomination so made and registered by the Society may from time to time be revoked or varied by any similar writing or statement under the hand of the nominator''deposited or made as aforesaid and similarly registered. In case the nominee of the member dies, the member forthwith report the death to the Society."

"The Society shall maintain a Register of all persons, if any, so nominated."

A nomination made at the time of applying for membership shall be recorded free of charge but for the recording of every nomination subsequently made or of a revocation or variation a fee of Re. one shall be paid."

"1. When any member of the society dies, his share and interest in the society shall subject to the provisions of Section 50 and 68, be transferred:

(a) to the person or persons, if any, nominated in accordance with Bye-law No. 8 (1);or

(b) if there is no person so nominated, or if the existence and residence of such nominee cannot be ascertained by the managing committee or if for any unreasonable delay, to the person who appears to the committee to be entitled in accordance with the rule to possession of such share or interest as part of the estate of the deceased member; or

(c) on the application of the person referred to in the clause (b) above within 3 months of the death of the deceased member, to any person specified in the application.

"(2) If the share" or interest of the deceased cannot be legally transferred in accordance with the provision of sub-s. (1) or if the person to whom the share or interest is payable under that sub-section within one year of the death of the deceased member, claims payment of the value of such share or interest or if the Society in accordance with the rules or the Bye-laws wants to proceed according to this , sub-section-

"the share shall be transferred to some other person qualified under transferee, on receipt from such persons of the value thereof, and

"the value so received shall be paid to the nominee or to the person entitled as aforesaid, after deducting from the amount any sum payable under the Act to the Society from the estate of the deceased member.

"The Society may pay all other moneys due to the member from the society to such nominee heir or legal representative as the case may be.

"All transfers and payments made by the society in accordance with this Bye-law shall be valid and effectual against any demand made upon the Society by any other person."

7. On or about 5th April, 1980 the defendant applied to the said Society requesting it to transfer the said 7 shares of the said Ramkumar Changil as also the said flat in favour of the defendant. Pursuant to the said application the managing committee of the said Society passed a resolution on its meeting held

on 10th April, 1980. The text of the resolution reads as hereunder:--

"The Committee considered Mrs. Puspa Devi Kundan''s letter dated 5th April, 1980, regarding the transfer of flat No. 3C, to her name from that of her deceased father. The Committee examined the Register of Members and unanimously agreed that the deceased Ram Kumar Changil had himself recorded the name of his daughter Mrs. Puspa Devi Kundan as his nominee. It was therefore necesary to carry out the Transfer to her name as soon as all the dues to the society have been fully settled."

8. The Managing Committee of the said society held another meeting on 9th December, 1980 in which it was resolved as follows:

"Vide Minutes of the meeting dated 10th April, 1984 it was agreed to transfer flat 3C and the relevant shares from Late Ram Kumar Changil to his daughter Mrs. Puspa Devi Kundan as soon as all the dues to the Society had been fully settled. It was now further confirmed that the transfer could be made effective from the date of receipt of all dues from Mrs. Puspa Devi Kundan."

9. It has been alleged by the defendant that the defendant paid the entire dues of the said Society and thereafter the said Society by its letter dated I5th Dec. 1980 acknowledged such payment of its dues and further rcorded that the said 7 share along with the said flat stood transferred to the defendant with effect from that date and requested the defendant to produce the share certificate for necessary endorsement. Thereafter the defendant produced the said certificate of the said 7 shares to the office of the said Society and the transfer was duly endorsed on the back of the certificates on beh''alf of the said Society. According to the defendant exclusive owner of the said fiat as well as of the said 7 shares and as such the defendant has been residing in the said flat. At the time of trial the following issues were framed.

ISSUES

1. Has the plaintiff one-half share in the properties mentioned in item No. 9 of the Schedule ''A'' and Schedule ''B'' of the plaint?

2.a) was the defendant nominated by Ram Kuamr Changil in relation to flat No. 3C of the Embassy Building?

(b) If so, did the nomination constitute valid disposition of the flat in favour of the defendant?

3. Has the defendant become the sole and absolute owner of the said flat as well as 7 shares as alleged in paragraph 1(p) and paragraph 4 of the written statement?

4. Is the suit barred by the West Bengal Co-operative Societies Act, 1973 and/or West Bengal Co-operative Societies Act, 1983 in so far as it relates to the claim in respect of Item No. 7 of Schedule A and the property in Schedule B to the plaint.

5. To what reliefs, if any, is the plaintiff entitled.

10. By consent of the parties a number of documents and correspondence were marked as exhibit ''A'' in the suit and no oral evidence'' was tendered by the parties.

11. The two main questions that arise in this case are as to what was the effect of the nomination of the defendant by Ram Kumar Changil in respect of the said 7 shares owned by Ram Kumar Changil in the said Cooperative Society and in regard to the flat No. 3C in the Embassy Building. Did the same operate as a transfer of the said shares and the property in favour of the defendant to the exclusion of the other heirs or was it a mere nomination without the change of succession? The other question is whether the suit in so far as its relates to the said two items is barred by The West Bengal Co-operative Societies Act, 1973.

12. I shall first take up the question as to whether the suit is barred by virtue of the provisions of The West Bengal Co-operative Societies Act, 1973. Mr. Bhabhra learned counsel appearing on behalf of the defendant relied on Section 86 of the West Bengal Cooperative Societies Act 1973. It is to be noted that according to the parties it is the Act of 1973 which was applicable in this case. However, it was pointed out to me that even the later Act of 1983 also contains similar provisions. Section 86 of the West Bengal Co-operative Societies Act 1973 reads as follows:--

"86. Disputes to be referred to Registrar. -- (1) Any dispute relating to the affairs of a co-operative society or of the liquidator of a society shall be referred to the Registrar if the parties are among the following, namely:--

"(a) the society, its managing committee, any past or present officer; agent or employee or the liquidator of the society or;

"(b) a member, past member or person claiming through a member, past member or deceased member of the society, or

"(c) a surety of a member, past member or deceased member of the society, whether such surety is or is not a member of the society; or

"(d) any other co-operative society or any person including a financing bank having'' transactions with the concerned co-operative society or the liquidator of such society;

"Provided that nothing in this sub-section shall apply to any dispute -

"(a) regarding disciplinary action taken by a society or its managing committee against its paid employees, or

"(b) between a society or its managing committee and its paid employees over terms and conditions of service of such employees and matters incidental or consequential thereto".

"(2) Any dispute mentioned in sub-section (1) other than a dispute relating to the recovery of money shall be referred to the Registrar within one month from the date of the cause of action."

13. The word dispute has been defined in Section 2(q) which reads as hereunder:--

"Dispute means any matter capable of : being the subject of civil litigation and includes a claim in respect of any sum payable ''to or by a Co-operative Society, whether subject claim be admitted or not."

Reliance was also placed on Section 132(2)(d) which reads as hereunder:--

"Save as provided in this Act, no civil or revenue Court shall have any jurisdiction in respect of:--

(d) any dispute required u/s 86 to be referred to the Registrar."

14. It was submitted that the dispute between the parties in so far as it related to the said 7 shares of Ram Kumar Changil and the interest of the said Ram Kumar Changil, in the said flat, which was also an incidence of the said membership of the said Society and a right enjoyed by the member as such; was a dispute between a member and a person claiming through a member, past member or deceased member of the society. It was sub- mitted that the defendant is already a member-of the society and has been recorded as the transferee of the flat and the plaintiff is a person claiming through a past member or a deceased member of the society namely the: said Ram Kumar Changil. It was submitted that the dispute as between the parties was a matter capablel of being subject of civill litigation and as such it was a matter which came within the ambit of the definition of the word dispute as defined in Section 2(q) of the said Act. It was further submitted that the dispute related to the affairs of a co-operative society and as such the same was referable to the Registrar u/s 86(1) of the said Act.

15. Mr. Bhabhra appearing on behalf of the defendant relied on a Division Bench Judgment of this Court reported in Konnagar Samabaya Bank Ltd. Vs. Nilmoni Banerjee and Others, In that case the first opposite party was a member of the K.S. Co-operative Bank Limited. He and his wife the opposite party No. 2 had a joint savings bank account. The oppsoite parties claimed that they had deposited a sum of Rs. 25,000/-in the said Bank. The Bank denied the claim. The opposite parties instituted the suit for recovery of the said sum. In the suit, by consent of the parties the disptue as to the amount claimed was purported to be referred to an enquiry committee whose decision was to bind the parties. The said award was filed u/s 14 of the Arbitration Act with prayer for passing a judgment in terms of the award. The Court having struck off the written statement of the petitioner on the ground that the objection referred by the said petitioner u/s 30 and 33 of the Arbitration Act, 1940 would be barred by limitation, the petitioner preferred a revi-sional application challenging the said order. The case made out was that the subject matter of the reference to the enquiry committee appointed

by both the parties being fully covered by the Section 86 of the West Bengal Co-operative Societies Act, 1973, the entire preceding including the award was null and void. The court ultimately held that the petitioner party''s only remedy in respect of the said award was not to file objection u/s 30 and 33 of the Arbitration Act 1940 as it challenges the entire proceedings as null and void. The Court further held that the dispute in the said case could certainly be the subject matter of the civil litigation and was covered by the expression dispute within the meaning of Section 86 of the West Bengal Co-operative Societies Act, 1986. The court further held that the said dispute having satisfied the ingredients of Section 86(1) of the West Bengal Co-operative Societies Act 1973, it was capable fo being referred u/s 86 of the said Act to the Registrar for a decision u/s 87 of the said act under Clause (d) of sub-section (2) of Section 132 of the said Act, no civil or revenue court shall have any jurisdiction in respect of any dispute required u/s 86 of the Act to be referred to the Registrar. The Court held that the trial Courts jurisdiction which was a civil court had been expressly ousted in respect of the dispute covered by the different clause of sub-section (I) of Section 86 of the said Act and it had no jurisdiction to determine such a dispute in respect of such purported award which had been filed in the trial court. In the instant case also in my opinion the dispute that is outstanding between the parties, relates to the affairs of a Co-operative Society. Furthermore, the parties to the present dispute come within the category of the persons described u/s 86(1) (b), the plaintiff is basing its claim through a deceased member of the society and the defendant is a member or is claiming through a deceased member of the society. It cannot be denied that the dispute between the parties is a matter capable of being the subject of civil litigation and that it comes within the definition of the, word dispute as defined u/s 2(q) of the said Act.

16. Relying on the said judgment Mr. Bhabhra submitted that the entire dispute between the parties related to the affairs of Co-operative Society. The defendant has already been recorded as a transferee of the said shares in the books of the Co-operative Society and the defendant had also been recorded as the transferee of the said flat. The plaintiff was claiming a half share in ownership of the said shares and was also claiming half share in the said flat which was being disputed by the defendant. The ownership of the flat is only available to a member and a non-member cannot be the owner of the said flat as per the rules of the said co-operative society. It was submitted that the plaintiff was claiming the right of membrship of the said society and as such was also claiming the right to an undivided half share in the said flat which was allotted to a past member and thereafter transferred in favour of the defendant as per the nomination. It was also submitted that the entire dispute related to the affairs of a co-operative society and as such was a matter referrable to the Registrar of the co-operative societies and a suit in a civil court was barred.

17. Mr. P.K. Mullick (appearing with Mr. Ranjan Deb) submitted that the dispute did not relate to the affairs of co-operative society. According to Mr. Mullick it was only when the co-operative society was a party to the suit and when a question

of management of the co-operative society was involved that it could be said that the matter related to the affairs of a co-operative society. According to Mr. Mullick a dispute between the heirs of a member with regard to the right to the membership and/or with regard to the title in the property allotted to such member did not come within the ambit of a dispute relating to the affairs of a society.

18. In my opinion who should or should not be a member of the co-operative society is an affair of the society or atleast it relates to the affairs of a society. Furthermore, a dispute as ato whether the recording of ownership in respect of a flat by the co-operative. society, is rightful or wrongful or whether some one else other than the recorded owner, in respect of the flat, should also be the person entitled to the flat, allotted by the co-operative society to its member, is also an affair of the society and/ or at least it relates to the affairs of the society.

19. In that view of the matter, 3 am of the opinion that the subject matter of this suit as is now outstanding as between the parties, is a dispute which was referable to the Registrar of the co-operative societies and as such a civil court with regard to the same in a civil court is barred u/s 132 (2) of the said Act.

20. The next question that arises is with regard to the effect of the nomination and/ or the consequent tranfer in favour of the defendant, Mr. Bhabhra relied on Sections 69-and 70(1) of the said Act which read as follows:--

"69. Nomination of transferee:-- If the bye-laws of a co-operative society so permit, any member of the society may, in accordance with the rules, nominate a person in whose favour the society shall dispose of the share or interest of such member on his death".

"70. Disposal of deceased member''s share or interest -

(1) When any member of a co-operative society dies, his share and interest in the society shall, subject to the provisions of Section 50 and 68 and to the further provisions of this section, be transferred -

(a) to the person, if any, nominated in accordance with the provisions of Section 69; or

(b) if there be no such nominee or, if the existence and residence of such nominee cannot be ascertained by the managing committee, or if for any other cause such transfer cannot be made without unreasonable delay, to the person who (subject to the production by him of probate, letters of administration or succession certificate) appears to the managing committee to be entitled, in accordance with rules, to possession of such share or interest as part of the estate of the deceased member; or

(c) on the application of the person referred to in clause (b) within three months of the death of the deceased member, to any person specified in the application.

21. Reliance was also placed on the bye-laws 7(a), (b) 8(1) and 9(1) which reads

as hereunder:--

"Conditions of Membership"

"(a) Every member must hold at least one share in the society.

(b) Every member holding an ordinary share of the society must purchase on ready payment a tenement/ flat/ plot of land allotted to him by the society and shall occupy the same within 3 months when the building/ flats are ready for occupation but the time may be extended by the managing committee with the approval of Registrar. Failure on the part of a member to comply with this primary condition will exclude him from membership and also will lead to the forteiture of his share money by way of compensation."

"Nomination of Transferee"

"8.(1) A member may, by writing under his hand, deposit with the society during his lifetime, or by a statement made in any book kept thereat, nominate a person or persons to whom or to whose credit his share or interest in the society or the value of such share or interest or so much thereof as is specified in such nomination shall, on his deceased, be paid or transferred subject to the provisions of the Act and the rules."

"Disposal of Deceased Member''s Share of Interest."

"9. (1) When any member of the society dies, his share and interest in the society shall, subject to the provision of Section 50 and 68, be transferred -

(a) to the person or persons, if any, nominated in accordance with bye-law No. 8(1), or

(b) if there is no person so nominated, or if the existence and the residence of such nominee cannot be ascertained by the managing committee or if for any unreasonable delay, to the persons who appears to the committee to be entitled in accordance with the rule to possession of such share or interest as part of the estate of the deceased member, or

(c) on the application of the person referred to in clause (b) above within 3 months of the death of the deceased member, to any person specified in the application."

"(2) If the share or interest of the deceased cannot be legally transferred in accordance with the provisions of sub-section (1), or if the person to whom the share or interest is payable under that sub-section, within one year of the death of the deceased member, claims payment of the value of such share or interest or if the society in accordance with the rules or the bye-laws wants to proceed according to this sub-section -

(a) The share shall be transferred to some other person qualified under transferee, on receipt from such persons of the value thereof, and

(b) The value so received shall be paid to the nominee or to the person entitled as aforesaid, after deducting from the amount any sum payable under the Act to the society from the estate of the deceased member."

"(3) The society may pay all other moneys due to the member from the society to such nominee, heir or legal representative as the case may be."

"(4) All transfers and payments made by the society in accordance with this bye-law shall be valid and effectual against any demand made upon the soceity by any other person."

The defendant also relied on Section 141 of the said Act which reads as follows:--

"141. Overriding effect of the provisions of this Act:-- This Act shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force or in any contract expressed or implied or in any instrument having effect by virtue of any enactment other than this law and notwithstanding any usage or custom to the contrary."

22. It was submitted on behalf of the defendant that the provisions of this Act have an overriding effect and the Disposal and/or transfer of shares and the disposal and/or transfer of interest in favour of the nominee operated irrespective of the provisions of the Hindu Succession Act. It was also submitted that the word used was disposal and/or transfer of the share in favour of the nominee and acceptance of the nominee as the member of the society and also for transfer of the flat in favour of the said nominee. It was also provided in the rules that all transfers shall be valid and effectual against any demand by any other person.

23. The learned counsel on behalf of the plaintiff, however, relies on the judgment of the Supreme Court reported in Smt. Sarbati Devi and Another Vs. Smt. Usha Devi, In the said case the Supreme Corut held as follows (at Pp. 349, 350 and 352 of AIR) :--

"We shall now proceed to analyse the provisions of Section 39 of the Act. The said section provides that holder of a policy of life insurance on his own life may when effecting the policy or at any time before the policy matures for payment nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death. If the nominee is a minor, the policy holder may appoint any person to receive the money in the event of his death during the minority of the nominee. That means that if the policy holder is alive when the policy matures for payment he alone will receive payment of the money due under the policy and not the nominee. Any such nomination may at any time before the policy matures for payment, be cancelled or changed, but before such cancellation or change is notified to the insurer if he makes the payment bona fide to the nominee already registered with him, the insurer gets a valid discharge. Such power or cancellation of or effecting a change in the nomination implies that the nominee has no right to the amount during the life time of the assured. If the policy is transferred or assigned u/s 38 of the Act, the nomination automatically lapees. If the nominee or where there are nominees more than one or the nominees die before the policy matures for payment or the money due under the policy is payable to the heirs or legal representatives or the holder of a succession certificate. It is not necessary to refer to subsection 7 of Section 39 of the Act here. But the summary of the relevant provisions of Section 39 given above establishes clearly that the policy holder continues to hold interest in the policy during his life and the nominee acqures no sort of interest in the policy during the life time of the policy holder. If that is, so on the death of the policy holder, the amount pay-able under the policy becomes part of his estate which is governed by the law of succession applicable to him. Such succession may be testamentary or intestate. There is no warrant for the position that Section 39 of the Act operates as a third kind of succession which is styled as a ''statutory testament'' in paragraph 16 of the decision of the Delhi High Court in Uma Sehgal and Others Vs. Dwarka Dass Sehgal and Others, If Section of the Act is contrasted with Section 38 of the Act which provides for transfer of assignment of the rights under a policy, the tenuous character of the right of a nominee would become more pronounced. It is difficult to hold that Section 39 of the Act was intended to act as a third m&de of succession provided by the statute. The provision in sub-section (6) of the Section 39 which says that the amount shall be payable to nominee or nominees does not mean that the amount shall belong to the nominee or nominees. We have to bear in mind here the special care which law and judicial precedents take in the matter of execution and proof of wills which have the effect of diverting the estate from the ordinary course of intestate succession and that the rigour of the rules governing the testamentary succession is not relaxed even where wills are registered.

"We have carefully gone through the jud-ment of Delhi High Court in Uma Sehgal and Others Vs. Dwarka Dass Sehgal and Others, In this case the High Court of Delhi clearly came to the conclusion that the nominee had no right in the life time of the assured to the amount payable under the policy and that his right spring up on the death of the assured. The Delhi High Court having reached that conclusion did not proceed to examine the possibility of an existence of a conflict between the law of succession and the right of the nominee under the Section 39 of the Act arising on the death of the assured and in that event which would prevail. We are of the view that the language of Section 39 of the Act is not capable of altering the course of succession under law. Second error committed by the reliance placed by it on the effect of the amendment of the Section 60(1)(b) of the CPC 1908 providing that all monies payable under the policy or insurance on the life of the judgment-debtor shall be exempt from attachment by his creditors. The High Court equated a nominee to the heirs and legatees of the assured and proceeded to hold that the nominee succeeded to the estate with all plus and minus points. We find it difficult to treat a nominee as being equivalent to ah heirs or legatee having regard to the clear provision of Section 39 of the Act. Exemption of money payable under a life insurance policy under the amended Section 60 of the CPC instead of ''de-volving'' the earlier decision which upheld the right of a creditor of the estate of the assured to attach the amount payable under the Life Insurance Policy recognises such a right in such creditor which we could have exercised but for the amendment. It is because it was attachable. The CPC exempts it from attachment in furtherence of the policy of parliament in making the amendment. The Delhi High Court has committed another error in appreciating the two decisions of the Madras High Court in Karuppa Gounder and Others Vs. Palaniammal and Others, and in B.M. Mundkur Vs. Life Insurance Corporation of India and Others, .

"Moreover, there is one other strong circumstance in this case which dissuades us from taking a view contrary to the decision of all other High Courts and accepting the view expressed by the Delhi High Court in the two recent judgments delivered in the year 1978 and in the year 1982. The Act has been in force from the year 1936 and all along almost all High Courts in India have taken the view that a mere nomination effected u/s 39 does not deprive the heirs of their rights in the amount payable under a life insurance policy. Yet parliament has not chosen to make any amendment to the Act. In such a situation unless there are strong and compelling reasons to hold that all these decisions are wholly erroneous, the Court should be slow to take a different view. The reasons given by the Dehli High Court are unconvincing. We, therefore, held that the judgments of the Delhi Court in Fauja Singh''s case AIR 1978 Delhi 276 (supra) and in Uma Sehgal and Others Vs. Dwarka Dass Sehgal and Others, do not lay down the law correctly. They are therefore overruled. We approve the views expressed by the other High Courts on the meaning of he Section 39 of the Act and hold that a mere nomination made u/s 39 of the Act does not have the effect of conferring on the nominee any beneficial interest in the amount payable under the life insurance policy on the death of the assured. The nomination only indicates the hand which is authorised to receive the amount on the payment of which the insurer gets a valid discharge of its liability under the policy. The amount however, can be claimed by the heirs of he assured in accordance with law of succession governing them."

24. The learned counsel on behalf of the plaintiff also relied on the judgment reported in 1 CaI LJ 309 (In the Goods of Nisha Sinha) In the said case it was held by this court as follows:--

"What may be the position of law as exists in England in respect of the theory of advancement no suit principle is applicable to India where the condition which attach to family are different and where the social relationship are of an essentially different character. The view seems to be that when a deposit is made in the joint name of husband and wife, payable to either or survior, there is no presumption of advancement in favour of wife and there is no resulting trust in favour of the husband who made the deposit in absence of contrary intention."

"In view of the banking law, on the death of an individual customer, the title to his assets, vests in his legal representatives. It is only after obtaining succession certificate or probate or letters of administration, the legal representatives are entitled to draw upon or otherwise deal with such account. But when the account is a joint account payable to either or survior, and one party diea, the survivor is ordinarily entitled to the whole amount. This is really based on the law of devolution between joint owners or on the customs of bankers or the express or implied agreement."

The learned Judge further held as follows :--

"Whatever might have been the position in 28 as between the husband and wife of these days of social relations, the position has changed rapidly in the last 60 years. Not only the relationship had changed but because of the growing complexities of life, the joint account is opened not because of convenience alone, but with presumed intention to benefit the survivor.

25. The learned Judge held that the survivor wife is entitled to draw the money in her own right.

26. My attention was also drawn to the judgment of the Division Bench of this Court reported in Smt. Usha Majumdar and Others Vs. Smt. Smriti Basu, The question that arose for consideration was as to whether the nominee under the Provident Fund Act, received the amount absolutely to the exclusion of the heirs and legal represenatatives of the deceased account holder or that the nominee was a mere nominee to receive the money on behalf of the heirs and legal representatives of the deceased account holder as was the case under the Insurance Act. It was held in the said case as hereunder (at Pp. 121-122 of AIR):--

"Having given our anixous consideration to the various provisions of the Provident Fund Act and the Scheme we are of the opinion that the status of a nominee under the Provident Fund Act is completely different from his counter-part under the Insurance Act. The most and striking difference about the status of the nominee under the two Acts is clearly discernible from Section 10(2) of the Provident Fund Act quoted earlier which expressly provides that the amount standing to the credit of a member of the Fund at the time of his death shall vest in the nominee and it shall be free from any debt or liability incurred by the deceased or the nominee before the death of the member. From Section 10(2) it is abundantly clear that immediately upon the death of the member the Provident Fund money becomes part of the assets of the nominee whereas under the Insurance Act after the death of the assured, the money continues to be his asset and the money which was standing to the credit of the member becomes free even from the debt or liability incurred by the nominee before the death of the member. Only because the money vested in and thereby became the property of the nominee after the death of the member such a provision was requred to be incorporated as otherwise, being estate of the nominee, it was liable to be attached for debts or laibilities incurred by him prior to the death of the member. That the nominee under the Provident Fund Act, unlike the nominee under the Insurance Act, gets a right to the money, also has been made clear that by the provisions of paras 61 and 70 of the Scheme quoted earlier."

27. In the instant case the language used in the statute is transfer. If the membership of the co-operative society and the flats are transferred in favour of the nominee. They cannot by virtue of the Co-operative Societies Act, be transferred in favour of any other person. Even the property cannot be held by a person, who is not a member of the Society. Furthermore the said Act also provides that the provisions of the said Act will supersede any other law. The intention of the said Act is clear that the right to transfer in respect of the membership and the flat can be exercised during lifetime of the deceased member. In the premises aforesaid my answer to the issues is as follows:--

"Issue No. 1 -- No

Issue No. 2 A -- Yes

Issue No. 2 B -- Yes

Issue No. 3 -- Yes

Issue No. 4 -- Yes

Issue No. 5 -- The plaintiff is not entitled to any reliefs, in respect of the said two items of properties.

28. It was submitted by the parties that so far as the suit relating to the other properties and/or assets as mentioned in the plaint and those in possesison of the Receiver, are concerned, there is no dispute either as to the jurisdiction of this court or as to the share of the parties and that there should be a decree by consent of the parties for partition thereof in equal shares. In that view of the matter, Mr. B. N. Seth, who was appointed as a Receiver at the interlocutory stage, is hereby ordered to continue as such receiver and is also appointed as the Commissioner of Partition. The said Commissioner of Partition will divide the properties equally as between the parties and will submit his return to this court within three months from today. It is also made clear that if the properties are partitioned by consent of the parties then the Receiver will also be at liberty to make over he physical possession of the respective shares so allotted to each of the parties.

29. The Commissioner of Partition will be entitled to an initial remuneration of 100 GMs to come out of the assets in his hand. The Receiver will continue until further orders of this Court.

30. The interim order of injunction as against the defendant in respect of the said shares of the said co-operative society and/ or said flat is vacated.

31. The learned advocate appearing on behalf of the plaintiff prays that the operation of the judgment relating to the flat and the said shares and vacating the order of injunction be stayed for a period of fortnight. Such prayer is rejected.

32. The Receiver, Commissioner of Partition and all parties concerned to act on a signed copy of the operative part of this judgment and order on the usual undertaking.

33. Order accordingly.

