

CALCUTTA HIGH COURT

Life Insurance Corporation of India

Vs.

United Bank of India Ltd

A.F.O.D. No. 62 of 1967, Suit No. 1705 of 1961

(B.C. Mitra and S.K. Mukherjea, JJ.)

13.03.1970

JUDGMENT

S.K. Mukherjea, J.

1. The question which has to be decided in this appeal is whether a nominee under a life insurance policy can validly assign the claim in respect of the policy after the holder of the policy dies but before the policy matures. It also raises a larger question namely whether a nominee can assign the claim under the policy or surrender the policy at all.

2. One Narayan Chandra Ghosh, a person considerably advanced in age, took out a policy of insurance on January 24, 1947, by payment of a single premium of Rupees 15,000/-. Under the policy a sum of Rs. 33,000/- was payable on January 17, 1978 to the assured or his nominees, executors, administrators or other representatives-in-interest as the case might be. It is not without significance that the moneys payable under the policy were payable not on the death of the assured but at a fixed date. Moreover, as only one single premium was payable there was no question of premiums ceasing to be payable on the death of the assured. The policy contained the following clause:

"1. Surrender value. After one year from the within mentioned date of commencement of Assurance this policy will acquire a cash surrender value payable on the surrender of the policy provided there be no legal impediment. The amount of such surrender value will vary with the duration of the policy but will be not less than 80 per cent of the within mentioned single premium."

3. The assured nominated one Nitish Chandra Ghosh, his younger son as his nominee, under Section 39 of the Insurance Act. Soon thereafter, the assured died intestate on August 25, 1952, leaving his widow and two sons, as his heirs and legal representatives.

4. As the policy did not mature on the death of the assured the nominee did not prefer any claim under it. In 1957 the nominee, in order to obtain a loan from the United Bank of India Ltd. by

pledging the policy made enquiries of the Life Insurance Corporation of India as to what surrender value the policy had acquired. By a letter dated December 23, 1957 the Life Insurance Corporation of India hereinafter referred to as the insurer, intimated to the United Bank of India Ltd. that the surrender value of the policy was Rs. 12012/-. Immediately thereafter the nominee assigned the policy to the Bank by way of pledge and secured a loan of Rupees 10,000/- on interest. By a letter dated November 5, 1958 the Bank notified to the insurer that the policy had been assigned to the Bank for valuable consideration and the Bank was the beneficiary of the policy. By a letter dated November 26, 1958 the insurer intimated to the Bank that the assignment had been duly registered. Thereafter by another letter dated December 2, 1958 the insurer made it clear that in registering the notice of the assignment it had not accepted any responsibility for the validity of the assignment and that the policy is payable only on the expiry of the period, i. e. on 17th January, 1978. By another letter dated April 5, 1960 the insurer pointed out that the legal validity of the assignment in favour of the Bank "is not free from doubt" and the matter was, therefore, being referred for legal opinion. By a letter dated December 17, 1960 the insurer, presumably on the basis of legal opinion it had received, wrote:

"Sri Nitish Chandra Ghosh is the nominee under Section 39 of the Insurance Act and nothing more. A nomination of the policy under Section 39 of the Insurance Act gives the right to collect the money only; policy money does not vest in the nominee by mere nomination. We are afraid, therefore, that the assignment made by the nominee is not legally valid and your right to surrender the policy on the basis of assignment is doubtful. Please note in this connection that we simply registered the assignment without expressing any opinion as to the legal validity."

5. It appears from an endorsement on the policy that on December 26, 1957 the nominee purported to assign his right, title and interest in the policy to the United Bank of India Ltd. On the failure of the nominee to repay the loan with interest the Bank brought an action against the nominee Nitish Chandra Ghosh, the defendant No. 1 for Rs. 10,741/- and against the Life Insurance Corporation of India, the defendant No. 2, as the assignee of the policy for Rs. 12,012/- i. e. the surrender value of the policy. The defendant No. 1 did not contest the suit. He gave evidence and submitted to an installment decree. The suit was, therefore, contested only by the defendant No. 2. On July 5, 1966 the learned Judge passed a decree against the defendant No. 1 for a sum of Rs. 10,741/- with interest, payable in certain installments. The decree also provided that in the event of the decretal dues not being paid by the defendant No. 1 in terms of the decree the plaintiff would be entitled to realise from the defendant No. 2 the balance of the decretal sum. It was further provided by the decree that the sum paid to the plaintiff by the defendant No. 2 under the decree should be treated as a loan to be deducted with interest thereon at the rate of 6 per cent per annum from the moneys payable under the policy on the stipulated date i.e. 17th January, 1978.

6. From this decree the defendant No. 2, the Life Insurance Corporation of India, has come up in appeal.

The issues on which the parties went to trial were:

(i) Did the defendant No. 1 have any right, title or interest to assign or pledge the policy

forming the subject-matter of the suit in favor of the plaintiff?

(ii) If so, has the plaintiff any right to surrender the insurance policy? Strictly speaking, neither of these issues arises on the pleadings read in the context of the insurance policy.

7. Although it appears, from the policy that the assured proposed to the insurer to effect an assurance on his life, it is abundantly clear from the terms and conditions of the policy that the policy did not effect a contract of insurance upon human life. It did not, because neither the payment of the sum secured on the policy nor the payment of premiums depended on the duration of any kind of human life. The insurance is not, therefore a life insurance within the meaning of sub-section (11) of Section 2 of the Insurance Act 1938.

8. The holder of the policy purported to nominate a nominee under Section 39 of the Insurance Act. Under that section only the holder of a policy of life insurance can nominate a person or persons to whom the money secured by the policy shall be paid in the event of his death. As the policy is not a life insurance policy the purported nomination is not a nomination under Section 39 and the nominee is not a nominee under the statute. The legal consequences of nomination under Section 39 do not, therefore, arise in the present case.

9. It was said in course of argument that the parties treated the policy as a life insurance policy at the trial and therefore in the appeal we ought not to treat it as anything else. When the court is invited to give effect to a statutory provision which applies only to life insurance and the case to which it is sought to be applied is patently not a case of life insurance. I do not think there is any principle of law under which the court is obliged to shut its eyes and misapply the statute. The parties cannot by their failure to raise an objection to the applicability of a statutory provision compel the court to apply the provision to a case to which it is not applicable.

10. There is also no averment in the plaint that the policy was surrendered or sought to be surrendered nor is there any evidence in that behalf. It is one thing to enquire what the surrender value of a policy is and quite a different thing to surrender it. In the absence of any pleading or evidence of surrender, the question as to whether the assignee of the nominee had any right to surrender the policy assumes a purely academic character.

11. The case could have been disposed of on either of these points. That was not done because the parties tacitly assumed that the policy was a life insurance policy; they also assumed that the policy was surrendered or sought to be surrendered by the plaintiff that is to say, the assignee from the nominee. It must be conceded that a nominee can validly surrender or assign a policy only if he has a title to the moneys payable under it, or in other words, only if he is a beneficiary of the policy. If the right of the nominee is merely a right to collect the moneys from the insurer, such a right cannot confer any title. It is, therefore, necessary to examine the precise nature of the interest of a nominee in the contemplation of Section 39 of the Insurance Act.

12. Sub-section (1) of Section 39 provides that the holder of a policy of life insurance on his own life may nominate the person to whom the money secured by the policy shall be paid in the event of his death. It is not without significance that the sub-section speaks of the transaction of payment and not of any right, title or interest in the money which is payable. In saying that the money shall be paid to the nominee, the sub-section underlines the obligation of the insurer to pay to the nominee and not the right of the nominee to receive payment, though the obligation

and the right are the obverse and reverse of the same transaction. It scrupulously avoids the use of any word implying proprietary right, title or interest such as 'vest', 'transfer' or 'assign'. Sub-section (2) of Section 39 provides that nomination may at any time before the policy matures for payment be cancelled by an endorsement or a will. The sub-section therefore clearly indicates that the nominee does not acquire any title to the money by virtue of the nomination because if he did, he could not have been divested of his right, title or interest by any unilateral act on the part of the holder of the policy who nominated him. Sub-section (4) of Section 39 provides that a transfer or assignment of a policy shall automatically cancel a nomination. It goes without saying that if the nominee had acquired any title by nomination, the policy-holder could not have assigned the policy without his concurrence, far less could the nomination have stood cancelled automatically by reason of assignment or transfer. Sub-section (5) provides that where the policy matures for payment during the lifetime of the person whose life is insured or where the nominee, or if there are more nominees than one, all the nominees die before the policy matures for payment, the amount secured by the policy shall be payable to the policy-holder or his heirs or legal representatives or the holder of a succession certificate as the case may be. Here again, there is clear indication that the nominee does not acquire any title to the money, because if he did, his heirs and not the heirs of the deceased policy-holder should have been entitled to the money when the policy matures. An interesting but speculative argument was addressed to us by Mr. Somenath Chatterjee. He argued that although the sub-section says that the money shall be payable to the heirs and legal representatives of the deceased policy-holder if the nominee dies before the policy matures, it does not say that the money will be payable to the heirs of the policy-holder if the nominee dies after the policy matures. It is, therefore, implied that in a situation where the nominee dies after the policy matures the money will be payable not to the heirs and legal representatives of the policy-holder but to the heirs and legal representatives of the nominee or in other words the money will go to the nominee's estate. He contended that although in the scheme of Section 39 the nominee does not acquire any title to the money before the policy matures, he does so after the policy matures on the death of the policy-holder. In my opinion, the argument is untenable. There is good reason for thinking that sub-section (5) was introduced *ex abundanti cautela*. The first limb of the sub-section prescribed that if the policy matures during the lifetime of the policy-holder the money shall be payable to him. This provision is clearly redundant because sub-section (1) of Section 39 has already provided that the money will be payable to the nominee only in the event of the policy holder's death. The other limb of the sub-section which enjoins payment to the heirs and legal representatives of the policy-holder if the nominee dies before the policy matures may very well be also treated as superfluous. In my opinion, the legal position should have remained the same even if sub-section (5) were not in the statute. Sub-section (6) of Section 39 confirms that the nominee does not acquire any title to the money when the policy matures on the death of the policy-holder. It provides that where the nominee or, if there are more nominees than one, a nominee or nominees survive the person whose life is insured, the amount secured by the policy shall be payable to such survivor or survivors. The sub-section contemplates that the money will not be payable jointly to the surviving nominee and the heirs and legal representatives of the deceased nominee but to the surviving nominee alone. If the money had vested in the nominees, the estate of the deceased nominee should have shared in the proceeds of the policy. On a consideration of sub-sections (1), (2), (4), (5) and (6) of Section 39 the proposition clearly emerges that the proceeds of the policy do not vest in the nominee though they are payable to the nominee in the event of the death of the holder of the policy. They do not, by virtue of nomination under Section 39 alone, become a part of the nominee's estate before or after the policy matures.

13. Nomination under Section 39, like a testamentary disposition speaks only after death but the analogy ends there. No title to the policy moneys passes in praesenti or in future by nomination. If the title passed to the nominee on the death of the policy-holder his legal status would have been indistinguishable from that of an assignee, or a legatee, the assignment or legacy taking effect on the death of the policy-holder. The subject of assignment is dealt with not by Section 39 but by Section 38 of the Insurance Act. Mr. Chatterjee relied on a passage in Halsbury's Laws of England, Third Edition, Vol. 4 Article 996 where it is said: "Legal choses in action are those which can be recovered or enforced by action at law, as, for instance, a debt, a bill of exchange, or a claim on a policy of insurance." On this basis he argued that the right of the nominee to payment of moneys payable under the policy is a chose in action and as such is assignable. In footnote (p) to the paragraph cited by Mr. Chatterjee it is said: "In the Supreme Court of Judicature Act 1873 Section 25 (6) the expression 'legal chose in action' was employed with a special peculiar meaning. That sub-section is repealed by the Law of Property Act 1925 and re-enacted by Section 136 of the Act, the phrase 'legal thing in action' being used." It is unnecessary for our present purpose to go into the technicalities of the concept of a chose in action. Under the Indian Law, an actionable claim is no doubt transferable but it is transferable only by the person who has a title to the property in respect of which the claim lies. The position is the same in English Law. *Nemo dat quod non habet*, no one gives what he does not possess. If the nominee has no title to the policy money he can neither surrender the policy nor can he transfer by assignment any right, title or interest in the moneys payable under the policy. In the contemplation of the statute, the right of a nominee is a mere right to collect the proceeds of the policy and the right has been given only to obviate the inconvenience of obtaining representation to the estate of the deceased policy-holder or a succession certificate.

14. Judicial precedents also do not support the contention that the nominee has any title to the moneys payable under the policy or that they become a part of his estate. In *Krishna Lal v. Pramila Bala Dasi*¹, a case decided before the Insurance Act came into force, the insurer was to pay to the wife of the insured, as his nominee, a certain sum payable under the policy. Negating the claim of the wife that she was beneficially, entitled to the money, the Bench which was presided over by Rankin, C. J. held that the money was a part of the estate of the deceased policy-holder and, therefore, the creditors of the policy-holder's heirs could proceed against the policy money in execution of the decree passed against them. C. C. Ghose, J. who delivered the leading judgment in that case strongly relied on the decision in *Cleaver v. Mutual Reserve Fund Life Association*², where under the policy the money was payable to the insurer's wife, if living, otherwise, to his legal representative. In that case, Lord Esher, M. R. observed: "The husband might have altered the destination of the money at any time and might have dealt with it by will or settlement">. I think that apart from any statute, no interest would have passed to the wife

¹ AIR 1928 Cal518

²(1892) 1 QBD 147

by reason merely of being named in the policy." This case has a peculiar relevance to the facts of this appeal because here, the policy not being a life insurance policy, Section 39 under which the nomination was made, has no application. The nomination must, therefore, be treated as one de hors Section 39 of the Insurance Act as in AIR 1928 Calcutta 518. Later decisions of this Court and other courts agree that the rights of a nominee under Section 39 are no larger.

15. In *Ramballav v. Gangadhar*³, P. B. Mukharji, J. held that a nominee who is nominated under

Section 39 of the Insurance Act does not become the owner of the money payable to him under the policy and the nomination only indicates the person who should receive the money should the owner die. All that sub-section (6) of Section 39 of the Insurance Act does is to confer on the nominee the right to receive the insurance money as between the insurance company and such nominee but it does not provide for the title or ownership of that money in general. The decision of P. B. Mukharji, J. was relied on in a Bench decision of the Madras High Court in *D. M. Mudaliar v. Indian Insurance and Banking Corporation Ltd.*⁴, The court held that nominee as payee is nothing more than an agent to receive the money, which money remains the property of the assured and at his disposal during his lifetime and on his death forms part of his estate. The result is that the nominee takes no beneficial interest in it. Ramaswami, J. in course of his judgment said:

"There are thus important differences between a nomination and an assignment which can be summed up as follows: An assignment of life policy passes to the assignee the right to the insurance money, even though the assignor's interest in the life has ceased before the date of assignment. The life policy forms part of the estate of the assured and may be dealt with at his absolute discretion, sold, charged, settled, etc. Once an assignment is made it cannot be cancelled at the option of the assignor.

It creates a vested right in the assignee who no doubt takes it subject to the equities in the case of assignor, because the assignee cannot have a better title than his assignor. On the other hand, a nomination unless there is a special clause inserted to make it irrevocable, does not deprive the policy-holder of his rights, privileges, options and benefits under the policy including the right to alter the beneficiary."

16. Elsewhere he says:

"A nominee is entitled to receive policy moneys only. There is no statutory trust created by Section 39 in favour of the nominee, nor is he conferred as the nominee under Section 5 of the Provident Funds Act 1925, with the right to receive the moneys absolutely.

"The nominee being only given the right to receive money after the death of the assured, he can neither surrender the policy nor have it converted to be paid up."

17. Similar views were expressed on the nature of the rights of a nominee nominated under Section 39 of the Insurance Act in *M. Brahmamma v. K. Venkataramana Rao*⁵, 757 where Chandra Reddy, J. observed:

³ AIR 1956 Cal 275

⁵ AIR 1957 And Prad

⁴ AIR 1957 Mad 115

"A reading of the relevant provisions of the section can only lead to the conclusion that the holder of a policy continues to have interest in the policy notwithstanding the nomination effected in regard to the policy. It does not divest him of the rights in the policy and he retains disposing power over it. Under sub-sections (2) and (4) it is competent for the holder of the policy to bequeath to somebody or make an assignment of it and this automatically cancels the nomination which implies that a nominee has no vested right in the document.

In fact, under sub-section (5), if the policy-holder survives the nominee, the money is payable to the holder himself and not to the heirs or the legal representatives of the nominee which would not be the case if the nominee had acquired any vested interest in the policy. Therefore, the title does not pass to the nominee by reason of the nomination."

18. In *Shanti Devi v. Shri Ram Lal*⁶, the holder of a decree against the assured put his decree into execution after the assured died and attached the money due under his insurance policy. The widow of the assured made an application for the release of the insurance money which had been attached upon the ground that she had been nominated under Section 39 of the Insurance Act to receive the money. The executing court held inter alia that mere nomination did not create any interest in favour of the nominee and the money still continued to be the property of the assured and was, therefore, liable to attachment as a part of the estate of the deceased. In that view of the matter her objection was dismissed. The widow preferred an appeal. The Appellate Court held that merely because the appellant was nominated to receive the money from the insurance company she did not become the owner of the money; the nomination only dispensed with the necessity of obtaining a succession certificate. The appeal was, therefore, dismissed. The appellant preferred a second appeal to the High Court which was also dismissed. In course of his judgment the learned Judge who spoke for the Court observed at page 572 of the Report:

"If the nomination is made only under Section 39 it is not an assignment but merely gives the right to the nominee to receive the assured amount without creating any interest in the nominee."

19. Mr. Chatterjee relied on a Bench decision of the Allahabad High Court in *Kesari Devi v. Dharma Devi*⁷. There the insurance money was payable 'to the assured, his nominees, executors, administrators, assigns or other representatives as the case may be'. The assured nominated his brother Mannulal under Section 39 of the Insurance Act as his nominee. Shortly thereafter the assured died leaving his widow Sm. Kesari Devi as his heir and legal representative. Before he could collect the insurance moneys, the nominee died leaving his widow Sm. Dharma Devi as his heir and legal representative. She applied for a succession certificate in respect of insurance moneys. Her application was contested by Sm. Kesari Devi, who claimed that she was entitled to the succession certificate as the heir of the assured. The learned District Judge granted the succession certificate to the nominee's widow. Kesari Devi as the heir and the legal representative of the assured appealed to the High Court. The appeal was dismissed. In course of his judgment Desai, C. J. said :-

⁶ AIR 1958 All 569

⁷ AIR 1962 All 355

"Under the insurance policy the money became payable to Mannulal; this means that the company was bound to pay to him. Since he died before it could be paid to him it must be paid to his heir or representative, i. e. to the respondent. It must be paid in such a manner as to amount to payment to him. It is only if it is paid into his estate that it can be

said to be paid to him and the respondent is the person who indisputably represents it. If it had been paid to him as it ought to have been on his death it would have gone to the respondent as part of his estate and the respondent must be placed in the position in which she would then have been."

I am unable to agree with the learned Chief Justice. The nominee's right is the right to receive the money only. Section 39 does not confer on him any title to the money. The right to receive is a personal and not a heritable right. The right is not in the nature of any title to the money and, therefore, the money when receivable or received by the nominee does not become a part of his estate. No doubt, if the nominee had been alive he could have validly laid claim to payment of the money, but on his death his heirs and legal representatives should not have successfully claimed the money as part of the nominee's estate. The learned Chief Justice said that 'the company must pay the money to him, that is to say, to the nominee'. I agree. But when he says 'if he has died in the meanwhile it is payable to his estate, I respectfully disagree. The money is payable to the nominee as receiver of the money but it does not become part of his estate. In so far as the learned Judges of the Allahabad High Court held in that case that insurance moneys payable to a nominee under Section 39 of the Insurance Act becomes a part of the nominee's estate, I am unable to agree. In my opinion, in the facts of that case, on the death of the nominee the insurance money became payable to the heirs or legal representatives of the assured and, therefore, to the appellant Sm. Kesari Devi. The ratio of the Allahabad decision, runs counter to the ratio of the decisions of the Calcutta High Court, Madras High Court, Andhra Pradesh High Court and of the Allahabad High Court itself to which reference has already been made.

20. Mr. Chatterjee in course of his argument contended that the nominee who is a son of the deceased policy-holder is a beneficiary within the meaning of Section 6 of the Married Women's Property Act 1874 and as such he has an absolute and indefeasible title to the money. He was, therefore, legally competent to assign the policy. This is a case neither made in the plaint nor argued at the trial. No mention of it is to be found in the grounds of appeal. The policy is embodied in a printed form. Some of the printed clauses are patently inapplicable to the contract of insurance evidenced by the policy. No doubt, the words "children's endowment" appear at the top of the policy in print. Be that as it may, nowhere is there any indication that the policy is taken out for the benefit of any son of the policy-holder nor is the name of any beneficiary indicated in the policy. All that the assured has done is to have nominated Nitish Chandra Ghosh, under Section 39 of the Insurance Act as his nominee to whom the money is payable. In the plaint it is expressly stated that the nominee assigned his right, title and interest as nominee and not as a beneficiary. In any event, Section 6 of the Married Women's Property Act 1874 applies only to life insurance policies and not to policies of any other description. As the policy in the present case is not a life insurance policy the section can have no application.

21. In the view we have taken we must hold neither the defendant No. 1 nor the plaintiff as his assignee was or entitled to surrender the policy and the surrender, if any, of which there is no evidence, is invalid. If a nominee cannot validly surrender the policy, his assignee cannot do so either. The assignment by the nominee of his right, title and interest in the policy in favour of the plaintiff is also invalid. He has assigned nothing. We are not only unable to uphold the judgment of the learned trial Judge on merits but we are also of opinion that the learned Judge was not justified in passing a decree directing the defendant No. 2 to pay certain sums of money to the

plaintiff and treat the payments as loans. It is nobody's case that any application was made for any loan or that the appellant Life Insurance Corporation is obliged to grant any loan in the facts and circumstances of this case. The learned Judge has passed a decree on the basis that the policy has been validly surrendered and the claim under it validly assigned by the nominee to the defendant Bank and yet at the same time has treated the policy as subsisting and the insurance moneys payable when the policy matures. It is only on that basis that the direction to treat the moneys recoverable from the appellant under the decree as a loan can be explained. It seems to us that there is no warrant for such an order either in the contract of insurance or in the statute.

22. It only remains for us to pronounce the order. The appeal succeeds. The decree of the learned Judge against the appellant, the Life Insurance Corporation of India is set aside and the suit is dismissed as against the said Life Insurance Corporation of India. The respondent No. 1 the United Bank of India, will pay the appellant's costs of the appeal and of the trial.

B.C. Mitra, J.

23. I agree with the judgment and order made by my learned brother but would like to add a few words of my own. The respondent No. 2 is the nominee of an Endowment insurance policy which was taken out by his father who died on August 25, 1952. The appointment of the nominee was made under Section 39 of the Insurance Act, 1938, (hereinafter referred to as the Act.) The policy was single premium policy, the premium being Rupees 15,015. The sum assured was Rs. 33,000 payable on January 17, 1978, on expiry of the endowment period of 31 years.

24. The nominee purported to assign the policy in favor of the respondent No. 1 who filed the suit for recovery of a loan. The question is if the respondent No. 2 as the nominee of the policy had the right to assign the claim under the policy, to the respondent No. 1 so as to enable the latter to obtain a decree against the appellant for recovery of the money due on the policy. On a plain reading of sub-sections (5) and (6) of section 39 of the Act it is clear to me that the only right which a nominee of an insurance policy has is the right to collect and receive the money, if he is alive at the date of maturity and if the policy-holder is dead at that time. If the policy-holder is alive when the policy matures, the nominee has no right whatsoever and the amount secured by the policy is payable to the policy-holder and if he is dead and the nominee is also dead to his heirs or legal representatives or the holder of a succession certificate. Under sub-section (6) of Section 39 of the Act if there are more than one nominee and one or more of such nominees survive the assured, the amount secured by the policy would be payable to the survivor or survivors of the nominees. This position makes it amply clear that a nominee has no proprietary interest in the money payable under the policy. He does not by any means become the owner or proprietor of the sum assured. If he did, the sum assured would have become payable, in a case where there are more than one nominees one of whom survives the other, to the surviving nominee and the heirs and legal representatives of the deceased. But that is not what the statute prescribes. Under the statute, upon the death of a nominee where there are more than one the sum assured becomes payable to the survivor or survivors of the nominees. This provision makes it clear that the only right which a nominee has is a right to receive and to collect the money and if he dies this right passes not to his heirs and legal representatives but to the survivor or survivors of the nominees, where there are more than one. The right which a nominee has is not a heritable interest so as to enable the heirs and legal representatives of a deceased nominee to

claim and enforce such a right.

25. This position has been clearly stated by P. B. Mukharji J. in AIR 1956 Calcutta 275 which was followed by the Division Bench of the Madras High Court in AIR 1957 Madras 115. I respectfully agree with the views expressed in these two decisions and I do not agree with the contrary views expressed in the Bench Division of the Allahabad High Court reported in AIR 1962 Allahabad 355. In my opinion a nominee under Section 39 of the Act takes no beneficial interest in the sum assured and he had no right to assign the policy so as to enable the assignee to recover the money due under the policy and appropriate the same.

26. Assignment under Section 38 and nomination under Section 39 of the Act are two entirely different concepts altogether. The assignment of the policy confers upon the assignee the benefits under the policy and by virtue of the assignment he is the only person who is entitled to such benefit. But a nominee under Section 39 of the Act is not entitled to any benefit under the policy at all. As I said earlier his only right is to receive and collect the money upon maturity of the policy, provided that the policy-holder is dead at the time of such maturity. While a nominee has no right whatsoever by virtue of nomination, if the policy-holder is alive at the time when the policy matures for payment, the assignee under Section 38 is the only person entitled to the benefit of the policy even though the assured is alive at the maturity of the policy. To hold that a nominee is entitled to assign and transfer his rights by virtue of the nomination, would be equating his position to that of an assignee and this in my view will be entirely contrary to the provisions in the statute.

27. The next question is if the policy could be surrendered by the respondent No. 2 as the nominee or by the respondent No. 1 as the assignee of the nominee. In my view the respondent No. 2 as the nominee had no right to surrender the policy and the respondent No. 1 could have no better or higher right than the respondent No. 1 had. But quite apart from the question of the right of the respondent to surrender the policy, there is nothing on record to show that the policy was ever surrendered. By a letter December 23, 1957 the appellant had informed the respondent No. 1 of the surrender value of the policy, no doubt on inquiry made in that behalf. But there is no evidence that the policy was ever surrendered or that intimation of such surrender was given by either of the respondents to the appellant. There is no averment in the plaint that the policy was ever surrendered by either of the respondents and no evidence was tendered on behalf of the respondent No. 1 that there was a surrender of the policy. Even assuming that the assignment of the policy by the respondent No. 2 to the respondent No. 1 is a valid and lawful assignment, which in our view, it is not, the respondent No. 1 would have no cause of action against the appellant until surrender of the policy. and in this case such a surrender has neither been pleaded nor proved. Counsel for the respondent No. 1 contended that the parties proceeded on the basis of a surrender. I cannot accept this contention. In order to succeed in this suit the respondent No. 1 is bound not only to establish a valid and lawful assignment of the policy in his favor but must also prove a surrender of the policy and in my view it has failed to prove either.

28. For these reasons this appeal must succeed and I concur in the order made by my learned brother.

Appeal allowed.