LEGAL POSITION OF A NOMINEE: LEGATEE OR TRUSTEE?

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The position of a nominee, while being of practical significance, has also been the subject matter of substantial litigation. There are various decisions in different areas of law such as insurance law, banking law etc. that appear to take the view that the nominee is a mere trustee and not a legatee. The rule prescribed in the judgment of the Supreme Court in Sarbati Devi v. Usha Devi *which laid down that the nominee in the context of a life insurance policy was a mere trustee and not a legatee has been crystallized through its incorporation into other areas of law. This article argues that though a nominee might be treated as a trustee in situations other than life insurance policies, it is not because of the reasoning in Sarbati Devi but because of specific statutory provisions which clearly define the position of a nominee. It goes on to argue in the context of a life insurance policy, the correct position of a nominee is that of a legatee and not of a trustee and that the decision in Sarbati Devi has hence been wrongly decided.*

I. INTRODUCTION

Provisions with respect to nomination are salient features in many statutes including those concerning banking,[1] provident funds,[2] co-operative societies,[3]

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1 Banking Regulation Act, 1949, No. 10 of 1949.

2 Provident Funds Act, 1925, No. 19 of 1925.

3 Maharashtra Co-operative Societies Act, 1960.

and insurance.[4] A distinct feature of such provisions is that the role of the nominee comes into play on the death of the person who has made the nomination in respect of his properties – whether those properties are policy amounts, provident funds or bank deposits. This characteristic of nomination has engendered substantial litigation on the question, whether such nomination operates as testamentary disposition. This question is of enormous practical significance, because if nomination were to operate as testamentary disposition, then the chosen nominee(s) inherit(s) the relevant properties *to the exclusion of all other heirs*.

The most important judgment of the Supreme Court on the position of a nominee in the context of a life insurance policy is *Sarbati Devi v. Usha Devi*.[5] The Supreme Court held in this case that a nomination made under section 39 of the Insurance 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. Consequently, it was also held that the amount can be claimed by the heirs of the assured in accordance with the law of succession governing them.[6]

This judgment has recently been applied in areas other than insurance as well, where the position of the nominee is in question.[7] For example, in *Ramdas Shivram Sattur v. Rameshchandra Popatlal Shah*,[8] the Bombay High Court, relying on *Sarbati Devi* held that the purpose of nomination under section 30 of the Maharashtra Cooperative Societies Act, 1960 is essentially to provide for the discharge of the societies' obligation and that a nomination does not lay down any special rule of succession of properties of a deceased member overriding the general rules of inheritance prescribed by the personal law of the member of a cooperative society. Similarly, in *Arnab Kumar Sarkar v. Smt. Reba Mukherjee and Ors.*,[9] the Calcutta High Court held, "just as section 39 of the Insurance Act, 1938, the purpose of s. 45Z of the Banking Regulation Act, 1949 is to provide for the discharge of the Bank's obligation."[10] Importantly, the High Court rested its conclusion not

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4 Insurance Act, 1938, No. 4 of 1938.

5 Sarbati Devi v. Usha Devi, AIR 1984 SC 346 (Supreme Court of India).

6 Sarbati Devi v. Usha Devi, AIR 1984 SC 346 (Supreme Court of India), at ¶ 12.

7 Ramdas Shivram Sattur v. Rameshchandra @ Ram Chandra Popatlal Shah and Ors., 2009(3) Bom CR 705 (High Court of Bombay); *See also*, Divya Vasant Desai v. State Bank of India, (2009) 1 GLR 495 (High Court of Gujarat) and Arnab Kumar Sarkar v. Smt. Reba Mukherjee and Ors., AIR 2007 Cal 79 (High Court of Calcutta).

8 Ramdas Shivram Sattur v. Rameshchandra Popatlal Shah, 2009(3) Bom CR 705 (High Court of Bombay).

9 Arnab Kumar Sarkar v. Smt. Reba Mukherjee, AIR 2007 Cal 79 (High Court of Calcutta).

10 Arnab Kumar Sarkar v. Smt. Reba Mukherjee, AIR 2007 Cal 79 (High Court of Calcutta), at ¶ 39.

on the language of the relevant statutes, but on the principle expressed in *Sarbati Devi*. An exception however, is the recent decision of the Bombay High Court in *Harsha Nitin Kokate v. The Saraswat Co-op. Bank Limited & Others*[11] where the Court differentiated from *Sarbati Devi*, relying on the express provision of section 109A of the Companies Act and held that "on the death of the share holder, the nominee would become entitled to all rights in the shares to the exclusion of all other person."[12]

Litigation on this question has come up for consideration time and again. With appeals being preferred against some of these recent High Court judgments, it is likely that the apex court will have occasion to once again evaluate the correctness of the rule in *Sarbati Devi*. Hence, it is important to carefully scrutinize the reasoning in *Sarbati Devi*, to examine whether it is appropriate to extend the decision to fields other than insurance.

I argue that the principle applied by recent High Court decisions – that nomination does not create testamentary rights – may be correct in respect of nominations other than in the case of life insurance. However, this is not because of the decision in *Sarbati Devi* but because the relevant statutes are themselves clear on the position. Ultimately I will suggest that the position of a nominee in life insurance is not that of trustee but is indeed that of a legatee and therefore *Sarbati Devi* which has been acting as precedent, is itself based on a weak foundation.

The paper will first examine the provisions of the various statutes and the reasoning of courts on why a nominee is considered to be merely a trustee and not a legatee. Subsequently, it argues that (at least in the case of life insurance) a nominee must be regarded as a legatee particularly if the assured is governed by the Hindu Succession Act, 1925 (hereinafter "HSA"). In deciding appeals from decisions applying *Sarbati Devi*, the Supreme Court has an excellent opportunity to clarify the position in this respect. In conclusion, this paper will argue that though the recent decisions of the High Courts are justified on the basis of the statutes they were construing, *Sarbati Devi* as a matter of principle is incorrectly decided and should be reconsidered. In other words, nominees should be considered legatees and not merely trustees, unless the relevant statute specifically provides otherwise.

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11 Notice of Motion No. 2351 of 2008 in Suit No. 1972 of 2008.

12 Notice of Motion No. 2351 of 2008 in Suit No. 1972 of 2008, at ¶ 24, 25.

II. Nomination Under Various Statutes:

Provisions with respect to nomination are found inter alia in section 109A of the Companies Act, 1956, section 30 of the Maharashtra Co-operative Societies Act, 1960, section 45ZA of the Banking Regulation Act, 1949, section 5 of the Provident Funds Act, 1925, section 4 of the Government Savings Banks Act, 1873, and section 39 of the Insurance Act, 1939. Except for the Insurance Act, these enactments provide that the nominee is entitled to be paid the sum to the exclusion of all other persons, at the death of the person who has nominated, notwithstanding anything contained in any law for the time being in force, or in any disposition, whether testamentary or otherwise. However, most of these statutes further provide that this provision shall not affect the right or claim which any person may have against the nominee.

Let us see, for example, section 45ZA of the Banking Regulation Act, 1949. It provides as follows:

> (1) Where a deposit is held by a banking company to the credit of a person, the depositor may nominate, one person to whom in the event of the death of the depositor, the amount of deposit may be returned by the banking company.
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> (2) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of such deposit, where a nomination made in the prescribed manner purports to confer on any person the right to receive the amount of deposit from the banking company, the nominee shall, on the death of the depositor, become entitled to all the rights of the depositor, in relation to such deposit to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner. ...
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> (4) Payment by a banking company in accordance with the provisions of this section shall constitute a full discharge to the banking company of its liability in respect of the deposit. Provided that nothing contained in this sub-section shall affect the right or claim which any person may have against the person to whom any payment is made under this section.

It may be seen from these provisions that the provision of nomination in the Banking Regulation Act is clearly incorporated for the *purpose* of discharging the liability of the banking company. The nominee does not receive the sum to the

exclusion of all other heirs and the creditors, heirs etc. and they would still be entitled to claim under the sum that the nominee has received. A similar approach is also seen in the other statutes aforementioned. Thus it can be seen that the statutes themselves are clear on the legal position of the nominee. The courts therefore, have had no difficulty in holding that a nominee is merely a trustee and that his status cannot be elevated to that of a legatee.[13]

In the case of insurance however, the statute does not say that others can claim their right against the nominee. Further, the purpose that a nominee serves in a life insurance policy is not solely to discharge the liability of the insurer. When a person takes a life insurance policy on his own life, he does so for the benefit of his dependents, in order to ensure that their standard of life does not change for the worse after his death, and that they enjoy the same standard of living.[14] The nominee is such person for whose benefit a policy of life insurance is taken.[15] In short, the nominee(s) is the very reason for the contract between the insurer and the insured.

Thus, whereas the role of a nominee in other statutes governing banking or co-operative societies and others is to discharge the liability of the banking company or the co-operative society as the case may be, the role of a nominee in insurance is not merely restricted to discharging the liability of the insurer.

I now turn to the argument that a nominee under section 39 of Insurance Act must be regarded as a legatee different from nominees under various other statutes.

A. Nominee Under Section 39 of Insurance Act

An analysis of section 39 must commence with the background of *Sarbati Devi v. Usha Devi*. In this case, the assured, Mr. Swarup, who was governed by the HSA, died intestate leaving behind his son, his widow and his mother as heirs. He had, during his lifetime, taken out two insurance policies and had nominated his wife (the respondent) under section 39 of the Insurance Act as the person to whom the amount was payable after his death. His mother and minor son (the appellants) filed a suit claiming a two-third share of the amount due under the

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13 Ramdas Shivram Sattur v. Rameshchandra @ Ram Chandra Popatlal Shah and Ors., 2009(3) Bom CR 705 (High Court of Bombay).

14 K.S.N. MURTHY & DR. K.V.S. SARMA, MODERN LAW OF INSURANCE 137 (4th edn., 2002); M.N. SRINIVASAN'S PRINCIPLES OF INSURANCE LAW 408, (7th edn., 2002) [hereinafter "SRINIVASAN"]; Santosh Kumar Gupta v. LIC, AIR 2000 Raj 327, 332 (High Court of Rajasthan).

15 SRINIVASAN, *supra* note 14, at 408.

policies, while the wife resisted the said suit on the ground that she as his nominee became absolutely entitled to the amounts due under the insurance policies by virtue of section 39 of the Insurance Act.[16]

The Court based its decision on the reason that:

> Succession may be testamentary or intestate and that nothing in s. 39 indicates that it operates as a third kind of succession. Also, s. 39(6) which provides that the amount shall be payable to the nominee or nominees does not mean that the amount will belong the nominee or nominees.[17]

The Court correctly held that succession may be testamentary or intestate but never decided the question whether section 39 can operate as a testamentary succession. It only concluded that section 39 cannot be a third kind of succession. The court recognized the possibility that section 39 could be a third kind of succession, and held that it is not, but did not note that section 39 *could itself be a kind of testamentary succession.* It is my submission that a nomination in a life insurance policy is a form of testamentary disposition governed by section 39 of the Insurance Act.

To substantiate this, I will argue first, that the HSA recognizes various forms of testamentary disposition, and secondly, that a comparison of the provisions pertaining to nomination under section 39 with the essential features of testamentary disposition shows that such nomination is indeed a form of testamentary disposition.

i. Section 30 HSA

Section 30 of HSA reads -

> *Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him or by her, in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force applicable to Hindus.* (Emphasis Supplied)

It is a cardinal principle of interpretation that a statute should be read in its ordinary, natural and grammatical sense.[18] As observed by the apex court:

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16 Sarbati Devi v. Usha Devi, AIR 1984 SC 346 (Supreme Court of India), at ¶ 1.

17 Sarbati Devi v. Usha Devi, AIR 1984 SC 346 (Supreme Court of India), at ¶ 5.

18 MAXWELL ON INTERPRETATION OF STATUTES 28 – 9, (12th edn., 1976); CRAIES ON STATUTE LAW 64 – 5, (7th edn., 1999); Corpn. Of the City of Victoria v. Bishop of Vancouver Island, AIR 1921 PC 240, 242 (Privy Council); Harbhajan Singh v. Press Council of India, (2002) 3 SCC 722 (Supreme Court of India).

> In construing a statutory provision the first and foremost rule of construction is the literary construction. All that the court has to see at the very outset is what does the provision say. If the provision is unambiguous and if from the provision the legislative intent is clear, the court need not call into aid the other rules of construction of statutes.[19]

A plain and natural reading of section 30, HSA indicates –

1) that there are ways of testamentary disposition other than a will and that a Hindu 'may' dispose of his property by either a will 'OR' any other testamentary disposition.

2) that testamentary succession can be governed by 'another law' other than the Indian Succession Act, 1925.

While it may be argued that the expression 'any other law' as envisaged by the legislature means a law which is restricted in its application to Hindus or is within the realm of family laws, nothing in this section warrants that conclusion. Moreover, there would have been no other family-related law, outside of the HSA, in the contemplation of the legislature. Thus, there is no reason why effect must not be given to the plain meaning of the provision.

Having established that there may exist a form of testamentary disposition other than a 'will' and governed by a statute other than Indian Succession Act, I now turn to the vital question whether section 39 of the Insurance Act would fall within the scope of the words 'any other law'; and whether nomination in a life-insurance policy is a testamentary disposition of property.

ii. Comparison between Nomination and Testamentary Disposition

There are four important characteristics of a testamentary disposition. Of these, the most important and distinguishing feature is that it reflects the intention of the testator with respect to his property.[20] *Secondly*, the testamentary document comes into effect only after the death of the testator.[21] Consequently, the beneficiary under the document takes no interest under it until the testator dies.[22] *Thirdly*, the

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19 Harbhajan Singh v. Press Council of India, (2002) 3 SCC 722 (Supreme Court of India); Nelson Motis v. Union of India, AIR 1992 SC 1981 (Supreme Court of India).

20 MANTHA RAMAMURTHY'S LAW OF WILLS VOL. 1 19, (7th edn., 2008).

21 WILLIAM, WILLIAMS ON WILLS 14 (4th edn., 1997).

22 Re Currie's Settlement Re Rooper, Rooper v. Williams, [1910] 1 Ch. 329, 334 (Ch.D) (U.K.).

document is until the death of the testator subject to revocation or variation.[23] *Fourthly*, the testator is free during his life to dispose of his property as he pleases and the document operates subject to any such disposition *inter vivos*.[24] These features are common to all jurisdictions; any additional elements such as registration etc. which apply particularly to the valid execution of a will are specific to different jurisdictions.[25]

Having outlined these distinguishing features of a testamentary document, I now turn to section 39 of the Insurance Act which governs nomination in respect of life-insurance policies. A life-insurance policy is in essence a contract between the insurer and the assured, that a certain sum of money becomes payable on the death of the assured.[26] Prior to the Act of 1939, there was no provision pertaining to nomination. Therefore the claimants had to produce a succession certificate before the insurer could pay the insurance money to them. This scenario changed with the 1939 Act, since section 39 provides for nomination in case of life-insurance policies.[27] Now, the person assured has an 'option' to choose a person or persons to whom the policy amount shall be payable on his death.[28] This provision is comparable to the *first* element of testamentary disposition – the intention to give a certain sum of money to a person of one's own choice.

Secondly, we have noted that the legatee, in testamentary disposition, is entitled to the money only on the death of the testator. Similarly the policy amount is payable to the nominee only on the death of the assured.[29] An observation of the Court merits attention at this point. The Court observed that section 39 provides that "money shall be paid to the nominee" and not that it shall belong to the nominee.[30] If this argument is accepted, then section 39(5) where the statute reads that if all nominees die before the policy matures for payment the *amount secured shall be payable to the policy-holder* or his heirs, would mean that the money does not belong to the policy-holder or his heirs but that it is merely paid to them. Thus, the Court clearly overlooked that, the Act does not draw a distinction between the expressions "paid" and "belong." My argument should not be

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23 Vynior's Case (1609), 8 Co. Rep. 81b (King's Bench) (U.K.).

24 Bullock v. Bennett (1855), 7 De G.M & G. 283.

25 For example, The Registration Act, 1908, §18(e) (Registration of will is not compulsory).

26 Dalby v. London and Indo Life Assurance Co., (1884) 15 C.B. 365 (Court of Chancery) (U.K.); *See also* LIC of India v. Vishwanathan Verma, AIR 1995 SC 189, 192 (Supreme Court of India).

27 SRINIVASAN, *supra* note 14, at 497.

28 Insurance Act, 1938, No. 4 of 1938, § 39(1).

29 *Id.*

30 Sarbati Devi v. Usha Devi, AIR 1984 SC 346 (Supreme Court of India), at ¶ 5.

misconstrued to signify that money "paid" is necessarily the same as money "belongs," but the Court is incorrect in saying that the use of expression "paid" necessarily denotes something other than "belong"[31] and the Court's conclusion to this effect, with respect, may require reconsideration.

Thirdly, the element of revocability is clearly present, since a nomination can be cancelled or changed at any time before the policy matures,[32] like a testamentary document can be revoked any time before the death of the testator. *Fourthly*, the effect of assignment of the policy on nomination is analogous to ademption. In testamentary succession, ademption means that if anything specifically bequeathed does not belong to the testator at the time of his death, the legacy lapses.[33] Similarly, when the policy is assigned, the secured money no longer belongs to the policy-holder which explains why a nomination is automatically cancelled.

There are other comparable features as well. For example, it is settled that when the legatee does not survive the testator, the legacy lapses and forms part of testator's property.[34] This is comparable to section 39(5) of the Insurance Act which provides that when all the nominees die before the policy matures, the amount secured is payable to policy-holder or his heirs. At this juncture, it will be apposite to notice the decision in *Kesari Devi v. Dharma Devi.*[35] In this case, the Allahabad High Court observed:

> [s]ub section 5 evidently makes a distinction between a nominee dying before the policy matures and a nominee dying after it matures but before receiving the payment; in the former case the money will be payable to the assured or his heirs or legal representatives, and it impliedly follows that in the latter case the money will be payable to the estate of the nominee.

Further, when a legacy is given to two or more persons jointly and one of them dies before the testator, the surviving legatee takes the whole.[36] Under section 39(6) of the Insurance Act, if there is more than one nominee, the surviving nominee or nominees take the policy amount.

Besides, in a testamentary disposition, there are normally no restrictions on the number of persons to whom a bequest may be made and it may also be

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31 *See* Uma Sehgal v. Dwarkadas Sehgal, AIR 1982 Del 36 (High Court of Delhi).

32 Insurance Act, 1938, No. 4 of 1938, § 39(2).

33 Indian Succession Act, 1925, No. 39 of 1925, § 152.

34 Indian Succession Act, 1925, No. 39 of 1925, § 105.

35 Kesari Devi v. Dharma Devi, AIR 1962 All 355 (High Court of Allahabad).

36 Indian Succession Act, 1925, No. 39 of 1925, § 106.

made in favour of a minor. Similarly, section 39 of the Insurance Act does not place a restriction on the number of nominees. Moreover, section 39 allows a minor to be a nominee. It may be noted that if the nominee was merely a receiver of the money on behalf of the heirs of the assured as held by the Supreme Court, then how could the Act allow for nomination of a minor? On the contrary, where a minor has been nominated, the Act provides for 'appointment' of a person who will *receive* the secured money during the minority of the nominee, and not instead for nomination of an additional nominee,[37] thereby indicating a distinction between a mere receiver and a person entitled to the policy money. Thus, the use of different expressions in the statute points to the conclusion that the nominee was not intended to be a person merely to collect the sum due.[38]

CONCLUSION

In my submission, section 39 of the Insurance Act fulfills all the essentials of testamentary succession. It must also be noted that – as seen above – it is the 'purpose' of nomination that distinguishes the legal position of a nominee under insurance law from other laws. Therefore, in my submission, a nominee (particularly one governed by the HSA) of a life insurance policy under the Insurance Act is akin to a legatee under a testamentary document, entitled to the secured policy amount to the exclusion of other heirs for two reasons – First, that the features of nomination fulfill the essentials of testamentary succession. Secondly, the nominee/nominees is/are the person/persons for whose benefit the policy is taken. Thus, the Supreme Court's decision, which appears to not have examined these considerations, may require reconsideration.

It follows that while the recent High Court decisions are right in concluding that nominees under enactments are not legatees in contexts other than life insurance, this is a conclusion more of chance than of design. In particular, their decision is consistent with the language of the particular statutes they were interpreting. However, in drawing on a principle enunciated in the context of life insurance, these judgments rely on a decision of the Supreme Court that appears to be incorrect. As a matter of precedent, this cannot be faulted. But as a matter of principle, one hopes that the Supreme Court clarifies the position by holding that *Sarbati Devi* was incorrectly decided, and that the High Court decisions are correct in law only because of differences in the relevant statutes.

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37 Insurance Act, 1938, No. 4 of 1938, § 39(1).

38 *See* Uma Sehgal v. Dwarkadas Sehgal, AIR 1982 Del 36 (High Court of Delhi).