
THE BOMBAY HIGH COURT CLEARS AIR ON "NOMINEE" UNDER THE COMPANIES ACT

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Introduction

Nomination of shares under company law and litigation on thereupon has been in the limelight for many years. The law relating to title of shares after the death of the member has been deliberated and litigated in various courts and Tribunals. This article is an analysis of the provisions relating to the "right of nomination" pursuant to section 109A of the Companies Act, 1956 and section 72 of the Companies Act, 2013 in relation to the recent Bombay High Court rulings with necessary reference to the principles laid down by the Supreme Court in other landmark cases.

Section 109A of the Companies Act, 1956 vis-a-vis section 72 of the Companies Act, 2013

Sub-section (1) of section 109A of the Companies Act, 1956 states that every shareholder or debenture holder may, at any time, nominate a person to whom his shares or debentures of the company shall vest in the event of his death. Sub-section (2) states that where the shares or debentures of a company are held by more than one person jointly, then the joint holders may together nominate a person to whom all the rights in the shares or debentures shall vest in the event of death of all the joint holders.

The provisions relating to "nomination" as prescribed in sub-section (3) of section 109A of the Companies Act, 1956 are very crucial and have been interpreted by various High Courts and Tribunals. It states that 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 shares or debentures, where a nomination made purports to confer on any person the right to vest the shares in, or debentures of, the nominee shall

on the death of the shareholder or holder of debentures, become entitled to all the rights in the shares or debentures to the exclusion of all other persons, unless the nomination is varied or cancelled.

Under the Companies Act, 2013, the provisions relating to "nomination" is prescribed in section 72. The provisions of section 72 of the Companies Act, 2013 are similar to the provisions of section 109A of the Companies Act, 1956. The only unique difference is : section 109A of the Companies Act, 1956 refers to the phrase "shares or debentures", whereas, section 72 of the Companies Act, 2013 refers to the term "securities". On the procedural aspect, the form for nomination under the both Acts is also different.

The Bombay High Court (single judge) observation in Harsha Nitin Kokate v. Saraswat Co-operative Bank Ltd.

In 2010, in *Harsha Nitin Kokate v. Saraswat Co-operative Bank Ltd.* [2010] 159 Comp Cas 221 (Bom), the single judge of the Bombay High Court interpreted the provisions of nomination of shares in relation to the term "vest" referred to in section 109A of the Companies Act, 1956. The High Court interpreted the provisions and held that on the death of the member, who has appointed a nominee in accordance with the Companies Act, the nominee would be made beneficial owner and all rights incidental to ownership would follow. The High Court held that (page 229) : "The Act sets out that the nomination has to be made during the lifetime of the holder as per procedure prescribed by law. If that procedure is followed, the nominee would become entitled to all the rights in the shares to the exclusion of all other persons. The nominee would be made beneficial owner thereof. Upon such nomination, therefore, all the rights incidental to ownership would follow. This would include the right to transfer the shares, pledge the shares or hold the shares. The specific statutory provision making the nominee entitled to all the rights in the shares excluding all other persons would show expressly the legislative intent. Once all other persons are excluded and only the nominee becomes entitled under the statutory provision to have all the rights in the shares none other can have it".

The High Court then referred to the provisions of the Depositories Act, 1996 and held that bye-law No. 9.11 of the Depositories Act makes the nominee's position superior to even a testamentary disposition. The non obstante clause in bye-law No. 9.11.7 gives the nomination the effect of the testamentary disposition itself. The High Court ruled that (page 230 of 159 Comp Cas) : ". . . any other disposition or nomination under any other law stands subject to the nomination made under the Depositories Act. Bye-law No. 9.11.7 further shows that the last of the nominations would

With reference to the provisions of section 109A of the Companies Act, 1956 (corresponding to section 72 of the Companies Act, 2013) and bye-law No. 9.11 of the Depositories Act, the High Court held that the intent of the nomination is to vest the property in the shares which includes the ownership rights thereunder in the nominee upon nomination validly made as per the procedure prescribed. The High Court differentiated the provisions of section 109A of the Companies Act, 1956 from section 39 of the Insurance Act, 1938 (which require a nomination merely for the payment of the amount under the Life Insurance Policy without confirming any ownership rights in the nominee) or under section 30 of the Maharashtra Co-operative Societies Act, 1960 (which allows the society to transfer the shares of the member which would be valid against any demand made by any other person upon the society). The High Court ruled that (page 230 of 159 Comp Cas) : ". . . these provisions are made merely to give a valid discharge to the insurance company or the co-operative society without vesting the ownership rights in the insurance policy or the membership rights in the society upon such nominee. The express legislative intent under section 109A of the Companies Act and bye-law No. 9.11 of the Depositories Act is clear".

The Bombay High Court (single judge) observation in *Jayanand Jayant Salgaonkar v. Jayashree Jayant Salgaonkar*

In March 2015, the Bombay High Court (single judge, Justice G. S. Patel) ruled on the same issue of share nomination in *Jayanand Jayant Salgaonkar v. Jayashree Jayant Salgaonkar* [2015] 190 Comp Cas 44 (Bom). The single judge's observations in the judgment were very unique with respect to the concept of "nomination" in relation to the term "vest". The High Court held that it is legal heir and not nominee who shall be ultimately vested with shares of deceased shareholder. The High Court distinguished its co-ordinate Bench ruling in *Harsha Nitin Kokate v. Saraswat Co-operative Bank Ltd.* [2010] 159 Comp Cas 221 (Bom) and held that : "The fundamental focus of section 109A is not the law of succession. The sole intention is to afford the company or depository. A legally valid quit-tance so that it does not remain forever answerable to a raft of succession litigations, but the nominee continues to hold in a fiduciary capacity and is answerable to all claimants under succession law".

The High Court distinguished "nomination" from ordinary law of succession and observed that : "If nomination is considered as statutory testament, then the so-called 'statutory' testament would oust this personal

law entirely, even though there is nothing in either of the corporate statutes to indicate that this was ever the legislative intent". The High Court ruled that the nominations under sections 109A and 109B of the Companies Act, 1956 and bye-law No. 9.11 of the Depositories Act, 1996, cannot and do not displace the law of succession, nor do they open a third line of succession.

The High Court relied on catena of rulings of the Supreme Court and Bombay High Court on the issue relating to "nomination" and held the coordinate Bench ruling in *Harsha Nitin Kokate v. Saraswat Co-operative Bank Ltd.* [2010] 159 Comp Cas 221 (Bom) as "per incuriam".

The Bombay High Court relied on the apex court's ruling in *Sarbati Devi v. Usha Devi* [1984] 55 Comp Cas 214 (SC), where the question was whether a nominee of life insurance policy, on the death intestate of the assured, would be entitled to "the beneficial interest" in the amount received under the policy to the exclusion of all the heirs of the assured. The apex court had held that (page 218) : "It is difficult to hold that section 39 of the Act was intended to act as a third mode of succession provided by the statute. The provision in sub-section (6) of section 39 which says that the amount shall be payable to the 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".

The Bombay High Court also relied on the apex court's ruling in *Vishin N. Khanchandani v. Vidya Lachmandas Khanchandani* [2000] 102 Comp Cas 340 (SC), wherein it was held that the amount in any head can be received by the nominee, but the amount can be claimed by the heirs of the deceased in accordance with law of succession governing them. The apex court had held that "Nomination does not confer any beneficial interest on the nominee . . . Amounts so received are to be distributed according to the Hindu Succession Act, 1956".

The Bombay High Court (Division Bench) observation in *Shakti Yezdani v. Jayanand Jayant Salgaonkar*

The Division Bench of the Bombay High Court (*Shakti Yezdani v. Jayanand Jayant Salgaonkar* [2017] 200 Comp Cas 143 (Bom)), consisting of Justice A. S. Oka and Justice A. A. Sayed, upheld the single judge's judgment which ruled that pursuant to section 109A of the Companies Act, 1956, only the legal heirs, and not nominee, shall ultimately be vested with shares of deceased shareholder. The Division Bench noted that there is no

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material difference between section 109A(3) of the Companies Act, 1956, section 6(1) of the Government Savings Certificates Act, 1959 and section 45ZA(2) of the Banking Regulation Act, 1949 (which have been interpreted by the Supreme Court in several cases) and held that said provisions start with non obstante clause and seek to provide that nomination will override the disposition, whether testamentary or otherwise, and seek to exclude all other persons except the nominee. While interpreting the provisions of the Companies Act, 1956 relating to "nomination", the Division Bench of the Bombay High Court stated that (page 176) : "The reason is by its very nature, when a shareholder or a deposit holder or an insurance policy holder or a member of a co-operative society makes a nomination during his lifetime, he does not transfer his interest in favour of the nominee. It is always held that the nomination does not override the law in relation to testamentary or intestate succession. The provisions regarding nomination are made with a view to ensure that the estate or the rights of the deceased subject matter of the nomination are protected till the legal representatives of the deceased take appropriate steps".

The Division Bench of the Bombay High Court held that the object of the provisions relating to "nomination" is not to either provide a mode of succession or to deal with succession, but the object is to ensure that the deceased shareholder is represented by someone as the value of the shares. The Division Bench noted that various advantages keep on accruing to shareholders (which includes allotment of bonus shares, representation in general meetings, etc.), and the provisions relating to "nomination" are enacted to ensure that the commerce does not suffer due to delay on the part of the legal heirs in establishing their rights of succession and claiming the shares of a company.

The Division Bench of the Bombay High Court relied on the Supreme Court observation (in *Indrani Wahi v. Registrar of Co-operative Societies*¹ and *Sarbati Devi v. Usha Devi* [1984] 55 Comp Cas 214 (SC)) and held that there is no reason to make a departure from the consistent view that so-called "vesting" under section 109A of the Companies Act, 1956, that it does not create a third mode of succession. The Division Bench rightly concluded that creation of third mode of succession is unintended and the Companies Act has nothing to do with the law of succession. The Division Bench ruled that the view taken by its co-ordinate Bench ruling in *Harsha Nitin Kokate v. Saraswat Co-operative Bank Ltd.* [2010] 159 Comp Cas 221 (Bom) is not correct.

Conclusion

The provisions relating to the “nomination” of shares or debentures under the Companies Act, 1956, are corresponding to the provisions relating to “nomination” of securities under the Companies Act, 2013. Therefore, the principles laid down by the Bombay High Court’s single judge and Division Bench in *Jayanand Jayant Salgaonkar v. Jayashree Jayant Salgaonkar* [2015] 190 Comp Cas 44 (Bom) are valid and effective even under the Companies Act, 2013. Though the nominee had limited rights over shares or debentures (which were held by deceased shareholder) was a well established principle in corporate laws, however, the “harmony” in the principle was unsettled by the Bombay High Court’s single Bench ruling in *Harsha Nitin Kokate v. Saraswat Co-operative Bank Ltd.* [2010] 159 Comp Cas 221 (Bom), which has now been held as “not correct”.
