

Power to Nominate (Sec 72)

1. Legislative Background

The note to the clauses of Companies Bill, 2011 reads as “This clause corresponds to section 109A of the Companies Act, 1956 and seeks to provide that every share holder or debenture holder may appoint a nominee or a joint nominee who shall be the owner of the instrument in the event of death of the holder or the joint holder unless the nomination is varied or cancelled.”

This section corresponds to section 109A and 109B of the Companies Act, 1956 and provides a power to every securities holder (all type of securities including shares, debenture etc. for detailed discussion on ‘securities’ please refer the commentary at definition division) to nominate any person as his nominee(s) who shall get the securities vested in the event of death of the holder without out producing probate or letters of administration of successions. At times in case of single securities holder, the transmission would be a practical issue.

2. Department of Company Affairs’ (DCA) Press Release on Nomination under Old Act:

DCA through its press release, dated July 23, 1999:- Under the Companies (Amendment) Act 1999, the shareholders have been allowed to nominate a person for their shares, debentures and deposits. The form in which the nomination has to be filed has been notified by the Department of Company Affairs under the amended Companies Act. Earlier, holder of shares and debentures in a company did not enjoy the nomination facility for shares, debentures and deposits which caused hardships to them. They were required to obtain a letter of succession from the competent authority. The facility of nomination is intended to make the company law in tune with the present day economic policies of liberalization and deregulation. This is also intended to promote investors’ confidence in capital market and to promote the climate for intercorporate investment in the country.

3. ‘The Concept of Nominee’

In Black’s Law Dictionary, 8th edition, a nominee is defined thus:

Nominee (nom-i-nee), n. (1). A person who is proposed for an office, membership, award, or like title or status; an individual seeking nomination, election or appointment is a candidate. A candidate for an election becomes a nominee after being formally nominated. (2). A person designated to act in place of another, usu. in a very limited way. (3). A party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others.

It is the third of these definitions has some meaning for this purpose. That definition makes it clear that the nominee holds title in a fiduciary capacity and none other.

Nomination means an official act of suggesting or choosing somebody as nominee to act for or on behalf of nominating person. E.g. nominee director. The Act does not define the term nominee or nominate. As per purpose of this section one can understand the nomination means as act of securities holder (also known as nominator) to designate other natural person(s) to whom securities shall vest in the event of death. In case of joint securities holders, at their choice both are required to sign the nomination form in favour of natural person(s) to get their securities vested in the event of death of both them.

The facility of nomination provided under section is similar to provisions of section 39 of the Insurance Act, 1938 where the nominee of the holder of policy of life insurance is entitled to receive the proceeds of policy in the event of death of policy holder during currency of the policy. If the policy holder dies before maturity of policy, then the nominee gets right to receive the proceeds of the policy.

Nomination facility is also provided by the banks/ post office and other financial institutions apart from Insurance Companies for regular saving bank account, fixed deposits accounts, recurring deposit account, demat account and other accounts. Nomination facility provided under this section lessens the hardship of legalization of succession in the ownership of securities.

4. The Concept of 'Vesting'

The Supreme Court considered the implications and meaning of the word 'vest' in the context of a local tenancy and land law and revenue records. (In Re. Vatticherukuru Village Panchayat v Nori Venkatarama Deekshithulu & Ors. 1991 SCR (2) 531, 1991 SCC Supl. (2) 228) It said:

The word 'vest' clothes varied colours from the context and situation in which the word came to be used in a statute or rule. In Chamber's Mid-Century Dictionary at p. 1230 defined "vesting" in the legal sense "to settle, secure, or put in fixed right of possession; to endow, to descend, devolve or to take effect, as a right

In Black's Law Dictionary, 5th Ed. 1401, the word, 'vest', to give an immediate, fixed right of present or future enjoyment, to accrue to, to be fixed, to take effect, to clothe with possession, to deliver full possession of land or of an estate. In Stroud's Judicial Dictionary, 4th Edition, Vol. 5 at p. 2938, word 'vested' was defined in several senses'

'Vest' generally means to give the property.

Vesting in the legal sense means, to settle, secure, or put in fixed right of possession; to endow, to descend, devolve or to take effect, as a right in.

5. Person who can nominate

The facility of nomination is provided to only natural persons who are security holders of the Company. This view is suggested by the phrase used in the sub-section (1) & (2) "in the event of death". Only natural persons are mortal and

face the death. All other artificial persons created/ dressed by the law or by a fiction such as body corporate, companies, society, trust, Hindu Undivided Family etc are not eligible to nominate. No artificial/ legal person can act as nominee in favour of any natural person. One can draw this view from phrase use at end of sub-section (4) 'in the event of the death of the nominee...'

6. Power of attorney holder can't sign form SH-13 or SH-14.

The act of nomination can't be delegated in favour of any person including through power of attorney. Nomination has some similar features of 'Will'. As 'Will' or testament is a legal declaration by which a person, the testator, names one or more persons to manage his or her estate and provides for the distribution of his or her property at death. As the Will should be signed by the testator, the nomination forms SH-13 or 14 are required to be signed by securities holder not by his power of attorney holder or others.

7. Nomination can be modified by survivor sole securities holder

In case 'Will' is executed by more than one testators same can't be modified unless all such testators take part in the modification. In the event of death one of testators, the will can't be modified at any cost by survivor testator. Whereas in case of nomination by joint securities holders, in the event of death one of the securities holder, the remaining securities holder shall become a sole securities holder. The sole securities holder being only securities holder can cancel or modify the earlier nomination made by jointly securities holders. The rights of nominee under nomination come into effective only after death of all securities holders. This is the major difference between the "Will" and 'nomination'.

8. Eligibility to become a nominee

As discussed above the nominee is required to a natural person including minor in favour whose securities shall vest in the event of death of securities holders. However in case of nominee is minor, it shall be duty of the holder of securities to appoint such other person to become entitled to the securities in event of death of the nominee during the minority. However all other artificial persons created/ dressed by the law or by a fiction such as body corporate, companies, society, trust, Hindu Undivided Family etc are not eligible to become nominee.

9. Effect of "Notwithstanding anything contained in any other law"

Subsection (3) of this section begins with a non obstante clause 'Notwithstanding anything contained in any other law for the time being in force in any disposition, whether testamentary or otherwise". From a plain reading of this section, it is abundantly clear that the intendment of the Legislature is to override the general law of succession and to carve out an exception in relation to nomination made in respect of securities. The section expressly vests the nominee, who is nominated in the prescribed form, upon the death of the securities holder(s) with full and exclusive ownership rights in respect of the securities of which he is the nominee.

In other words the said provision overrides any other law for the time being in force, whether testamentary or otherwise, and states that in respect of securities of a company, where a nomination has been made which purports to confer on any person the right to receive the securities on the death of the securities holder, the nominee shall be entitled to all the rights in the securities of the company on the death of the securities holder to the exclusion of all other persons unless the nomination is varied or cancelled.

10. Manner of nomination/ variation of nomination

The nomination facility provided under section can be availed by every securities holder of a Company at any time. The securities holder of the company who wishes to make nominate can do so by executing nomination in Form No. SH.13 by specifying the particulars of securities like nature of securities, Folio No. of securities, Cert. No, and distinctive no. and particulars of nominee like name, date of birth, father's name, address, relation with him, and in case of nominee is a minor, then details of guardian. The form SH No.13/14 nomination/ cancellation or variation thereof should be witnessed by at two persons. In case nomination by joint holders of securities, all joint holders shall sign the nomination form. Dully filled nomination form SH-13 is required to be sent to the Company/ registrar and transfer agent (RTA). In case securities holder wishes to cancel or vary the existing nomination, he can do so by submitting form SH-14. Such cancellation or variation shall be effect from date of receipt of form SH-14 by the Company.

11. Duties of the Company

The Company/RTA, on the receipt of duly executed nomination form in SH-13 after verification of details like specimen of signature of nominators, valid details of nominee to identify at later date shall make necessary entries at register of members within 2 months of receipt of the same.

In event of death of securities holder, in case of joint holders, death of all securities holders, upon submission of sufficient evidence like death certificate of securities holder, notice of intimation by nominee, the company/RTA shall register the securities in the name of nominee or transfer the securities in the name of such person as specified by the nominee. The company shall treat the directions of the nominee as if the deceased holder could have given them himself.

12. Duties and rights of nominee

The nominee upon death of securities holder, in case of joint holders, death of all securities holders within 90 days, shall serve a notice in writing along with death certificate of securities holders stating his election to be registered as holder of securities or transfer the shares in name of some other person. If such notice is not served on company within 90 days of death of securities holder, the company shall withhold the payment of all dividends or interests, bonuses or other moneys in respect of such securities till such time the nominee submits his notice.

All the limitation, restrictions and provisions in connection with transfer and registration of transfer under the Act shall be applicable to such transfer as if the death of securities holder has not occurred.

Nominee's rights includes right to get the securities registered in his name upon death of securities holder, to get dividend and other benefits accrued before being registered as securities holder. Upon submission of required notice by the nominee, the company is bound to pass to nominee on all dividend, interest withheld due non-submission of notice. However, in case of shares, nominee is not entitled to exercise any voting rights till date of registration of his name as member of the company.

(To be continued...)

Contents of Geeta Saar, as extracted from ICSI Premier on Company Law, is as per notified law as on 30th September, 2016.