

## Power to Nominate (Sec 72)

*Continued from Geeta Saar 33<sup>rd</sup> edition*

Nomination under Banking Law – Supreme Court said nominee get clothed for occasion but not an owner.

The Supreme Court in case of Ram Chander Talwar V Devender Talwar (2010) 159 CompCas 646, while dealing with section 45AZ(2) of the Banking Regulations Act 1949 which provides a facility of nomination to deposit holders wherein nominee of such deposit holder shall on the death of sole depositor or death of all depositors as the case may be become entitled to all the rights of deposits placed in the bank by nominator by excluding all other persons, held that said section merely puts the nominee in the shoes of the depositor after his death and cloths him with the exclusive rights to receive money of deposits as a trustee but by no imagination the said section does make the nominee as owner of deposit money. Further the Supreme Court observed that “the Banking Regulation Act 1949, is enacted to consolidate and amend the law relating to banking. It is no way concerned with the question of succession. In view of the above, the moneys received by the nominee shall be part of estate of deceased depositor. The law of succession will take care succession of estate. Nominee shall act as trustee. Special law shall prevail over the general law is the established law.

Above rule established by the Supreme Court may also hold good for nomination under the section 72 of the Act despite of using the non-obstante clause and the expression ‘vest’ in this section.

In year 2010 Bombay High Court observed that nomination gives all rights to nominee than legal heirs.

In the case of Harsha Nitin Kokate vs The Saraswat Co-Op. Bank Ltd on [2010] 159, Comp. Cas 221) ( known as ‘Kokate Case’) The Bombay High Court has overturned established practice in the matter of transmission of shares by giving all ownership rights to the nominee rather than the legal heirs.

In this verdict, Justice struck down a petition filed by plaintiff, who was seeking permission to sell some shares held by her late husband. The Court noted that as she was not the nominee, she had no ownership rights over the shares.

Plaintiff’s lawyer had argued that as she was the heir of her husband who had died intestate (without a will), she should have ownership rights of the shares, and be able to do anything with them as she wished. In this case, plaintiff’s husband had nominated his nephew as nominee of the shares. Plaintiff’s lawyer went on to claim that the nominee had no legal ownership rights over shares, and was merely entitled to hold the shares in trust for the estate of the deceased. The learned judge interpreted the word “vest’ as conferring on the nominee exclusive ownership of the shares regardless of claims of legal heirs.

However, Justice noted that under the provisions of the Companies Act and the Depositories Act, Acts which govern the transfer of shares, the role of a nominee was different.

“A reading of Section 109(A) of the Companies Act, 1956 (Now Section 72 of the Companies Act, 2013) 9.11 of the Depositories Act makes it abundantly clear 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, as has been done in this case.”

This excerpt from the judgment makes it clear that since the nomination was done in the proper and prescribed manner, the nomination was valid, and the nominee was entitled to ownership rights of the shares, to the exclusion of the legal heir.

“The Court has re-emphasized and clarified the position in law both in regard to nomination as far as shares in companies, which has an analogous provision, and therefore the ambiguity that used to exist in the minds of legal descendants should now be put to rest.”

In year 2015 Bombay High Court said nomination can't displace the law of succession.

However, in the Case of Jayanand Jayant Salgaonkar v Jayashree Jayant Salgaonkar on 31st March, 2015 the Bombay High Court held that nominations under sections of the Companies Act cannot displace the law of succession or open a third line of succession, the Justice also clarified that nominees can only be trustees of the actual legal heirs and beneficiaries under a will.

The Court declared the judgment of Harsha Nitin Kokate v. The Saraswat Cooperative Bank Ltd, 2010 SCC Bom 615 to be *per incuriam*, which means it had been wrongly decided and does not have to be followed.

Honorable G.S. Patel, J has overturned a judgment by a single bench, which had declared that nominees, and not legal heirs, will get the ownership rights of share certificates. In the Kokate judgment the Court had mistakenly concluded that once a nomination is made, the securities in question automatically get transferred in the name of the nominee upon the death of the holder of the shares and not to the legal heirs.

The Court had considered the provisions of Section 109A of the Companies Act, 1956, and Bye-Law 9.11 under the Depositories Act and held that they do not displace the law of succession. The Court also discussed the purpose of nomination under Section 39 of the Insurance Act and various Supreme Court cases where it has been laid down that although the insurance company would pay the amount due on insured's death to the nominee, they would hold it in “trust” and ultimately only the legal heirs of the deceased could claim the property. Disagreeing with the views of Kokate judgment, the Court observed that it had failed to consider many binding judgments of the Supreme Court including the judgment of Sarbati Devi v Smt. Usha Devi (1984) 1 SCC 424.

The Court held that that the rights of a nominee to shares of a company cannot override the rights of legal heirs of deceased and therefore the amount received by the nominee can be claimed by the legal heirs of the deceased.

The said judgment has cleared the controversy and restored the law to what clearly is the correct position – a nominee is only a convenience to enable the company or bank or insurance company to discharge its obligation. However, the nominee can only hold the proceeds as a trustee for the rightful heirs of the deceased whether under intestate law or under a valid Will. Any other interpretation would render the law of succession to be meaningless.

## **Interpretation of statutes- external and internal aids**

The decision of the Supreme Court in *Utkal Contractors & Joinery Pvt. Ltd & Ors. v State of Orissa & Ors.* (1987 AIR 1454, 1987 SCR (3) 317) reiterates well- settled principles governing the interpretation of statutes. The Supreme Court held:

“In considering the rival submissions of the learned Counsel and in defining and construing the area and the content of the Act and its provisions, it is necessary to make certain general observations regarding the interpretation of statutes. A statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation. The words of a statute take their colour from the reason for it. How do we discover the reason for a statute? There are external and internal aids. The external aids are statement of Objects and Reasons when the Bill is presented to Parliament, the reports of Committees which preceded the Bill and the reports of Parliamentary Committees. Occasional excursions into the debates of Parliament are permitted. Internal aids are the preamble, the scheme and the provisions of the Act. Having discovered the reason for the statute and so having set the sail to the wind, the interpreter may proceed ahead.

No provision in the statute and no word of the statute may be construed in isolation. Every provision and every word must be looked at generally before any provision or word is attempted to be construed. The setting and the pattern are important. It is again important to remember that Parliament does not waste its breath unnecessarily. Just as Parliament is not expected to use unnecessary expressions, Parliament is also not expected to express itself unnecessarily. Even as Parliament does not use any word without meaning something, Parliament does not legislate where no legislation is called for. Parliament cannot be assumed to legislate for the sake of legislation; nor can it be assumed to make pointless legislation. Parliament does not indulge in legislation merely to state what it is unnecessary to state or to do what is already validly done. Parliament may not be assumed to legislate unnecessarily. Again, while the words of an enactment are important, the context is no less important. For instance, “the fact that general words are used in a statute is not in itself a conclusive reason why every case falling literally within them should be governed by that statute, and the context of an Act may well indicate that wide or general words should be given a restrictive meaning’ (see Halsbury, 4<sup>th</sup> edn. Vol. 44 para 874).

## **16. Nomination Vs. Transmission –**

In the case of *Dayagen (P) Ltd. v Rajendra Dorian Punj* it was held that, the company was wrong in transmitting the shares of the deceased shareholder in favour of the nominee, when a registered will of the deceased bequeathing shares in the legal heir’s favor had been presented. The will was undisputed and hence the shares had to be transferred in the legal heir’s favor.

## 17. Nomination Vs Succession / will

In the case of Harsha Nitin Kokate vs The Saraswat Co-Op. Bank Ltd on on 20 April, 2010 The Bombay High Court has overturned established practice in the matter of transmission of shares by giving all ownership rights to the nominee rather than the legal heirs.

In the verdict, Court struck down a petition filed by plaintiff, who was seeking permission to sell some shares held by her late husband. The Court noted that as she was not the nominee, she had no ownership rights over the shares.

Plaintiff's lawyer had argued that as she was the heir of her husband who had died intestate (without a will), she should have ownership rights of the shares, and be able to do anything with them as she wished. In this case, plaintiff's husband had nominated his nephew in favour of the shares. Plaintiff's lawyer went on to claim that the nominee had no legal ownership rights over shares, and was merely entitled to hold the shares in trust for the estate of the deceased.

However, Justice noted that under the provisions of the Companies Act and the Depositories Act, Acts which govern the transfer of shares, the role of a nominee was different.

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This excerpt from the judgement makes it clear that since the nomination was done in the proper and prescribed manner, the nomination was valid, and the nominee was entitled to ownership rights of the shares, to the exclusion of the legal heir.

The Court has re-emphasised and clarified the position in law both in regard to nomination as far as shares in companies, which has an analogous provision, and therefore the ambiguity that used to exist in the minds of legal descendants should now be put to rest.

**(Concluded...)**

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