

Power to Nominate (Sec 72)

Continued from Geeta Saar 32nd edition

13. Some noteworthy points

- Additional securities acquired by the securities holder subsequent to nomination of his existing securities do not fall automatically under purview of nomination unless a separate nomination form for the same is executed by the securities holder.
- In case of joint holders, nomination shall be effective only after death of all joint holders. As per regulation 23 of Table –F to the Act, unless articles of company otherwise provide, on death of one the joint holders, the survivor or survivors shall be the only persons recognized by the company as having any title to his interest in the shares. Accordingly securities will be transmitted in name of survivor(s).
- If the nominee or where there are nominees more than one all the nominees die before death of securities holder (nominator), the heirs or legal representation of nominee are not entitled to such securities. Upon death of such securities holder (nominator) as per regulation 23 of table F to the Act the heirs or legal representation or the holder of a succession certificate of such securities holder (nominator) are alone entitled to such securities.
- In case of nomination the company is not obligated to recognize the legal heirs/ representative of the deceased securities holders.
- Once the company follows the notice of nominee it shall be valid discharge by the company against the legal heir.
- In case of partly paid-up securities, the nominee shall be liable to pay the call money upon registration of securities holder or such other time as demanded by the company.
- The nominee acquires no sort of interest in the securities during the lifetime of the securities holder.
- Where after nomination, securities holder disposes the securities, the nomination shall become inoperative and cancelled. The nomination automatically lapses. A transfer intervivos, for then the securities would no longer be the property of the nominator and, on his death, would not form part of his or her estate.

- It may be noted that rule 11 of the Companies (Acceptance of Deposit) Rules, 2014 also permits a depositor to make a nomination in respect of his deposits.
- In case of securities held in dematerialization form, the provision of this section are not applicable. However, bye-law No. 9.11 made under Depositories Act 1996 provides the similar facility to demat account holders to nominate to whom his securities shall vest in the event of his death.

Other laws having similar provisions

- Regulation 29A of the SEBI (Mutual Fund) Regulations, 1996 for mutual funds
- Section 45-ZA of the Banking Regulation Act, 1949 {In Ram Chander Talwar v Devender Kumar Talwar [2010] 159 Comp. Case 646}
- Section 39 of the Insurance Act, 1938 {Case law Sarabhati Devi V Usha Devi (1984) 55 Comp Cas 214 (SC) 1984}

14. Nomination under OPC Vs Nomination under this section

In case of one person company subscriber to the memorandum of a Company shall nominate a person, after obtaining prior written consent of such person, who shall, in the event of the subscriber's death or his incapacity to contract, become the member of that Company. The name of the person nominated shall be mentioned in the memorandum of the Company

The person nominated by the subscriber or member of the Company may, withdraw his consent by giving a notice in writing to such sole member and to the Company and in that case the sole member shall nominate another person as nominee within fifteen days of the receipt of the notice of withdrawal and shall send an intimation of such nomination in writing to the Company, along with the written consent of such other person so nominated and at the same time the subscriber or member of a Company may, by intimation in writing to the company, change the name of the person nominated by him at any time for any reason including in case of death or incapacity to contract of nominee and nominate another person after obtaining the prior consent of such another person.

The sole member of One Person Company ceases to be the member in the event of death or incapacity to contract and his nominee becomes the member of such One Person Company, such new member shall nominate within fifteen days of becoming member, a person who shall in the event of his death or his incapacity to contract become the member of such company.

ICSI-CCGRT

Main difference in the case of Nominee appointed for One Person Company and under this section

Nomination under section 4(OPC)	Nomination under 72
It is a legal obligation of sole member of OPC to nominate.	It is a legal right of a member of securities to nominate.
Nominee should provide his consent	No such requirement.
Nominee can withdraw his consent at any time	There is no consent. Withdrawal does not arise.
Minor can't be nominee, the person should be competent to enter into a contract.	Minor with along with guardian can become a nominee.
Nomination works for shares.	It works for all kinds of securities.
It is to keep the perpetual succession of a Company by ensuring availability of one member in all cases.	It is a choice given to member of securities to get his securities vest nominee in succession to property in shares without complying applicable personal successional laws.
The Act does not speak about vesting of shares in the name of nominee. The Act says the nominee shall become a member.	Here by complying all transfer procedure the nominee shall become a member and the shares shall vest in the name of the nominee
Regulation 27 of the Table F deals with process of nomination in case of OPCs	Regulation 23 to 26 of table F also deals with in case of nomination as applicable as near thereto circumstances admit.

15. Nomination – relevant case laws:

Under insurance law: Landmark Judgment of Supreme Court: Nominee holds trustee position

In the case of Smt. Sarabati Devi & Anr vs Smt. Usha Devi (1984 AIR 346, 1984 SCR (1) 992) the Supreme Court held that mere nomination made under Section 39 of the Insurance Act, 1938 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. The nomination only indicates the hand which is authorised to receive the amount, on the payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession governing them.

Nomination under Company Law- Delhi High Court - Observations

In the case of m/s Dayagen Pvt. Ltd. vs Mr. Rajendra Dorian Punj & Anr. on 2 July, 2008 Delhi High Court while disposing the case for improper execution (lack of witness to nomination) of nomination form, made the following interesting observations regarding nomination under section 109A of the Companies Act, 1956

- (i) That a shareholder may, at any time, nominate in the prescribed manner a person in whom his shares in the company shall vest in the event of his death.
- (ii) Non obstante clause which overrides any other law for the time being in force or any disposition whether testamentary or otherwise.
- (iii) If a member desires to make a nomination, it is required to be made “in the prescribed manner” by virtue of sub-section (1) of Section 109A and the nomination would have an overriding effect “where a nomination is made in the prescribed manner”. Even the variation or cancellation of an earlier nomination has to be made “in the prescribed manner”

Further the Delhi High Court to explain the “Prescriber manner” took the observation of Supreme Court in Shin-Etsu Chemical Co. Ltd. v. AkshOptifibre Ltd. (2005) 7 SCC 234 while dealing with Section 45 of the Arbitration and Conciliation Act, 1996

“If the requirements of a statute which prescribes the manner in which something is to be done are expressed in negative language, that is to say, if the statute enacts that it shall be done in such a manner and no other manner, it has been laid down that those requirements are in all cases absolute, and that neglect to attend to them will invalidate the whole proceeding.”

- (iv) The submission made based on Sarbati Devi (supra), that a nominee merely holds the estate of the deceased for the benefit of the legal heirs of the deceased, and that the legacy does not vest in the nominee does not appear to be correct, in view of the express language of Section 109A of the Act.
- (v) 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 shares and debentures.
- (vi) Keeping in view the fact that Section 63 of the Indian Succession Act requires an unprivileged “Will” to be attested by at least two witnesses in a particular manner, and that the purport of Section 109A is to override even a “Will” so executed, the requirement of attestation by a witness of a nomination made by a shareholder, in court view cannot be said to be merely procedural or directory.
- (vii) Procedural requirements laid down in the said section, for such overriding effect to be given to have to be strictly adhered to

- (viii) The attestation of the nomination form by two witnesses in my view is an essential requirement which cannot be done away with. Admittedly, in the present case the purported nomination made by late Shri V. P. Punj has not been attested by any witness. Consequently, in my view the said nomination is invalid and would not have the effect of overriding the normal law of succession. The principle laid down in Nazir Ahmed (supra), in my view, squarely applies to the procedure for nomination prescribed under the Act
- (ix) Principle laid at in re Nazir Ahmed vs. King Emperor. AIR 1936 PC 253(2) is wherein it had been held that where a certain thing is prescribed to be done in a certain way, the thing must be done in that way or not at all. A mere statement in a letter stating that someone had been nominated could not be taken cognizance of by 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.
