

ICSI-CCGRT – “GEETA SAAR” – A Brief of Premier on Company Law

One Person Company (OPC)

Formation of OPC

According to clause (c) of sub-section (1) of Section 3, a OPC may be formed by one person by subscribing his name to a memorandum and complying the requirement of the Companies Act in respect of Incorporation. The definition of the “OPC” clearly states that it is a company which has only one person as a member.

Joint Subscribers/ Joint Membership in One Person Company

A question may arise here that whether shareholding in one Person Company can be held as a joint ownership since the Act states that it can be formed only by one person as a member. Austin while defining ownership has focused on the three main attributes of ownership, namely, indefinite user, unrestricted disposition and unlimited duration. One who owns the things has also the right to alienate the same or to waste, destroy or consume the whole or part of it. The right to alienate i.e. right to transfer his right over object to another involves existence of power. Almost all the legal systems provide for alienation is the exclusive right of the owner. In case of joint - holders of shares, while transferring the shares, each joint - holder is required to sign the instrument for transferring the shares. Hence in the light of the above it can be concluded that in joint shareholding there exists two or more owners of the shares whereas the Act clearly provides that the OPC is to be only of one person as a member. Hence it can be concluded that the OPC shall not be eligible to have joint shareholders as members. One further submission is that recognising first holder for receiving communications etc. are nothing but provisions to discharge the company without having to look into inter se matters of the shareholders. Hence, this is a legal fiction and should not be extended beyond the purpose for which it is intended [Supreme Court in Prakash H. Jain vs Ms. Marie Fernandes AIR 2003 SC 4591]

First Proviso to clause (c) of sub-section (1) of Section 3 provides that in case of OPC, the name of Nominee Person shall be in the Memorandum. The written consent of nominee shall be filed with registrar along with incorporation documents. The nominee shall become member of the company in event of subscriber’s death or his incapacity. This nominee may withdraw his consent in prescribed manner. Member of OPC may change nomination by giving notice in prescribed manner and following prescribed procedure. This change in nomination shall not be treated as alteration of the memorandum.

Position of nominee vis-a-vis successor

Provision of nominee under this section does not amount to succession under the personal law. Unlike succession, nominee under this section is required to give consent and create a contractual position with such Company and the sole member of such company. This may be a contract against consideration, gift against love and affection, succession in accordance with personal law of parties or may be an open will, effective after death or incapacity. The considered use of term “nominee” instead of “successor” makes it clear that the Act does not create another law for succession.

In *Smt Sarbati Devi & Another vs. Smt Usha Devi* (1984) 1 SCC 424, the Supreme Court held that a mere nomination does not have the effect of conferring to the nominee any beneficial interest in the amount payable under the life insurance policy, on death of the insurer. The nomination only indicates the hand which is authorised to receive the amount on 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. In this decision, term “mere nomination” has its importance. The nominees in One Person Companies are being conferred with beneficial rights.

In *Vishin N. Khanchandani & Another vs. Vidya Lachmandas Khanchandani & Another* (2000) 6 SCC 724, the Supreme Court held that the law laid down in *Sarbati Devi* (Ibid) holds the field and is equally applicable to the nominee becoming entitled to the payment on account of National Savings Certificates received by him under Section 6 read with Section 7 of the Act who in turn is liable to return the amount to those in whose favour the law creates a beneficial interest, subject to the provisions of Sub-section (2) of Section 8 of the Act.

This was dealt in *Jayanand Jayant Salgaonkar vs. Jayant Salgaonkar and Ors* [822 Of 2014 In Suit No. 503 Of 20145 (1984) 1 SCC 424] (“Salgaonkar case”) and the other being *Nanak S. Ghatalia vs. Swati Shatishchandra Ghatalia* (“Ghatalia case”). The issue that arose was whether all the rights to shares, debentures or other instruments would, upon the death of the holder, pass to the nominee of such shares, debentures or other instruments or would these pass to the legal heirs of the deceased. The judgment only deals with this point of law and upholds the view that the rights of the heirs override those of a nominee. The Salgaonkar case is an action for administration of the estate of the deceased Jayant Shivram Salgaonkar. The deceased had made several investments in Mutual funds and had named two of his heirs as nominee to the bulk of those investments. The remaining heirs contended that the investments formed a part of his estate and were subject to succession laws. The nominee on the other hand argued that by virtue of their nomination that was the rightful owners and these should not form a part of the estate of the deceased.

The Ghatalia case relates to the will of one Urmila Ghatalia. The petitioner who is one of the deceased’s sons sought for the grant of probate whereas his sister was opposed to it. The contentious issue in this case related to the deceased’s investments. The petitioner was named nominee for the investments and hence claimed that all the rights to some of those investments were vested in him. The respondent argued that the investments formed a part of the general estate of the deceased and were to be dealt with in accordance with the Will.

The previous stand taken by the Bombay High Court in *Harsha Nitin Kokate vs. The Saraswat Co-op. Bank Ltd. & Ors* 2010 (112) BomL2014 (“Kokate case”) was that the nominee would be entitled to all the rights in shares and debentures, including ownership rights, to the exclusion of all other persons. The decision relied primarily on Section 109A of the Companies Act, 1956 which expressly mentions the same, namely 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 in or debentures of, the company, where a nomination made in the prescribed manner purports to confer on any person the right to vest the shares in, or debentures of, the company, the nominee shall, on the death of the shareholder or holder of debentures of the company, or as the case may be, on the death of the joint holders become entitled to all the rights in the shares or debentures of the company or, as the case may be, all the joint holders in relation to such shares or debentures of, the company to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.”

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The Salgaonkar- Ghatalia judgment has cleared the controversy and restored the law to the effect that- 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.

Hence, while the nominee will become the member, the legal heir can resort to the Courts to decide the issue of succession to shares.

Premier on Company Law