

Nomination Vs. Succession - Dispute Regarding Mode of Inheritance of Shares

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Abstract

A company is said to have perpetual succession, meaning that a company continues to function for time immemorial and its working would not be affected by any change in membership, death of the owner or insolvency. Collaborating with the same thoughts, the shares of a company will also not have any expiry period insofar as the company remains to be a publicly listed entity. However, the current fad of trading in the open market depicts shares as a movable property that may be transferred from one person to another. ¹Section 44 of the Companies Act, 2013 agrees that "the shares or debentures or other interest of any member in a company shall be movable property and transferable in the manner provided by the articles of the company. The Act legalizes the act of transferring shares in cases of them being bought, or sold in general. However, considering that shares and debentures are movable property, they can be considered familial property that can be inherited by one's children.

The problem of inheriting shares and debentures arises due to the mode by which the parent/guardian chooses to transfer his shares. Section 109A discusses the mode of Nomination of shares where a holder may nominate a person to whom his shares can be vested after his death.² However, the problem arises when the person has stated in his will that particular people in his family will inherit his property and the shares under his name are also included as transferable property under his will. This paper will delve, into these modes of transfer of shares and which one will prevail over the other.

Keywords: Nomination, Succession, The Companies Act, Testamentary, Nominee, Legal Heir

Nomination – A Preview

A nomination is a written mandate given by a shareholder to a company describing a particular person, to whom the shares held in the company shall vest in the event of death of the shareholder. The person mentioned in such a mandate, in whose name the shares would be vested, is known as the nominee. Nomination is a useful procedure that enables a company to pinpoint a single legal representative of a deceased shareholder to transmit his shares and avoids the need to deal with a host of legal heirs who might be reeling under inheritance disputes. The nominee would be the person who would receive the dividends, relieving the company of the burden of contacting and narrowing down the descendants of the deceased owner of these shares.

¹ Section 44, Companies Act, 2013

² Section 109 A, Companies Act, 2013

Succession – An Introduction

Succession refers to the process, wherein one inherits the property/title from his ascendants.

While succession in the past, was governed by customs and traditions wherein the property would be inherited only by the male member of the family, succession laws have slowly evolved in the recent past. Succession laws are enacted and inheritance is guided by these laws when there is an intestate transaction or transfer of property by application of law.

Succession law comes into force when there is the death of the last holder of the property, without making any plan as to the execution of the property such as will, gift or any other mode. If the last holder makes any will allocating the heir for each particular property, the property is distributed as per that will and the rights to those properties are divested to the heir mentioned in the will.

Succession of property varies since laws are diverse accommodating people of various religions and ethnicities. The law for succession of property is uniform throughout the territory, in countries like the United Kingdom and the United States of America. However, in countries like India, the laws are drafted in such a way that they accommodate and enshrine the needs, values, and traditions of each religion to ensure that all are treated equally before the eyes of the law.

Shares and their status as property

The Company law as an act, deals with all the activities and services that come under the purview of a company's undertaking and the law deals with various aspects concerning shares including the nomination of shares of a company. The law is made to be applicable uniformly throughout the country to ensure that the companies do not encounter unnecessary hurdles when it comes to transferring the shares of a deceased person.

However, shares are considered property that is movable and hence will also be covered under succession laws as property that can be inherited and divested according to wills.

Section 44 of the Companies Act, 2013 expressly states that as per the Act, "The shares or debentures or other interest of any member in a company shall be movable property transferable in the manner provided by the articles of the company."

Section 2(h) of The Indian Succession Act, 1925 states that "Will" means the legal declaration of the intention of the testator concerning his property which he desires to be carried into effect after his death."³ It clearly states that it is the declaration of the testator as to which property should be divested to his legal heirs and such properties would be specifically mentioned in the will.

Nomination, Succession and legal provisions

Section 72 of the Act provides that every holder of securities of a company may nominate any person to whom his securities shall vest in the event of his death. The term Securities includes shares of a company. A nominee steps into the shoes of a shareholder after the death of the shareholder. As noted above, he can deal with the shares as if the deceased shareholder has mandated the transaction to the company. A nominee shall be entitled to the same dividends or interests and other advantages as if he had been the original owner of shares.

(3) of S.109A of the Act states that "Notwithstanding anything contained in any other law for the time being in force or any disposition, whether testamentary or otherwise, ... where a nomination made in the

³ Section 2(h) of The Indian Succession Act, 1925

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 ... become entitled to all the rights in the shares or debentures of the company or, as the case may be, all the joint holders, about such shares in, or debentures of the company to the exclusion of all other persons unless the nomination is varied or cancelled in the prescribed manner..⁴

The above-mentioned section clearly states “notwithstanding anything contained in any other law” expressly declaring that shares should be divested only as per the provisions of the Companies Act explicitly violating the provisions of personal laws as in the likes of Hindu Succession Act and is nullified by Section 4 of the succession act which discusses the overriding effect of that personal law. The Hindu Succession Act and Indian Succession Act have been enacted for intestate and testamentary succession and to regulate the succession of a deceased person’s movable and immovable property. Shares can be assigned to be inherited by particular heirs as per the testament/will of the deceased person and in such cases dispute arises as to whether the shares of the deceased person would transfer to the nominee or would be divested as per pre-existing testamentary laws.

The Ever-Lasting Debate

The ownership rights of the nominee vis-à-vis legal heirs of shares transmitted to a nominee had remained a controversy and various judicial decisions dealing with cases establishing the dominance of succession laws over the act of nomination. have been discussed in this paper to understand which prevails over.

Sarbati Devi & Anr vs Smt. Usha Devi

Jag Mohan Swarup died intestate on June 15, 1967, leaving behind his son, Alok Kumar, his widow Usha Devi and his mother Sarbati Devi as his heirs. As he was a Hindu by religion, the legal heirs succeeded his property as per the Hindu Succession Act. He had during his lifetime taken out two insurance policies for Rs. 10,000 each and had nominated his wife Usha Devi as the person to whom the amount was payable after his death. Based on the said nomination, she claimed the absolute right to the amounts payable under the two policies to the exclusion of her son and her mother-in-law. Thereupon Sarabati Devi and Alok Kumar (minor) filed a suit for a declaration to the effect that they were together entitled to a 2/3rd share of the amount due and payable. While this deals with nomination as per The Insurance Act, 1038, the case discusses and contemplates in detail the prevalence of succession laws in divesting property to legal heirs over the rights of the nominee over the property.

The Bench relied on the view taken in the cases of Ramballav DhanJhanian v. Gangadhar Nathmall,⁵ Life Insurance Corporation of India v. United Bank of India Ltd. & Anr.,⁶ and other similar cases which expressly demarcated the role of a nominee. These cases assert that the nominee under section 39⁷ of the Insurance Act is nothing more than an agent to receive the money due under a life insurance policy and that the money remains the property of the assured during his lifetime and on his death forms part of his estate subject to the law of succession applicable to him. The Insurance Act, of 1938 is the predecessor of The Companies Act, of 1956 and accepting the view of precedents, we understand that the nominee is

⁴ Section 109 A, The Companies Act, 2013

⁵ Ramballav DhanJhanian v. Gangadhar NathmallAIR 1966, Cal. 275

⁶ Life Insurance Corporation of India v. United Bank of India Ltd. & Anr, AIR 1970 Cal. 413

⁷ Section 39, The Insurance Act, 1938

only an agent to the property allotted to him and upon the death of the previous owner of the shares, transfer of ownership of those shares would be done as per the will of the deceased person.

The bench in this case declared and held in their judgement that, 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 by the law of succession governing them.⁸

Harsha Nitin Kokate vs The Saraswat Co-Op. Bank Ltd. & ...

The Plaintiff married Nitin Kokate on 3rd December 2004. Her husband expired on 5th July 2007. Nitin Kokate held certain shares in the D- mat Account with Defendant No.1. Her husband executed a nomination in the prescribed form following the prescribed procedure set out by Defendant No.1 Bank in favour of Defendant No.3, his nephew on 11th July 2006. The Plaintiff claims an interest in the said shares as his heir and legal representative.

The Bombay High Court Bench did not accept the view mentioned in the Sarbati Devi case. The Bench states that according to the amendment of the Companies Act. The nomination under Section 109A of the Act does not entail mere payment of the number of shares. It specifically vests the property in the shares in the nominee, in the event of the death of the holder of the shares and hence analogy drawn from the judgment in the case of Sarbati Devi is completely misplaced.

The bench states that Section 109A of the Companies Act is required to be interpreted about the vesting of the shares of the holder of the shares in the nominee upon his death. The act sets out that the nomination must 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 no other can have it. It states that the nomination intends 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 and hence declares that since the nomination is shown to be correctly made by her husband who was the holder of the Suit shares, the Plaintiff would have no right to get the shares of her deceased husband sold or to otherwise deal with the same.⁹

Jayanand Salagaonkar v. Jayasree Jayant Salagaonkar

The issue raised by the Counsel for the Plaintiff in the matter is that he urged that the decision of a learned single Judge of this Court in Harsha Nitin Kokate v The Saraswat Cooperative Bank Ltd & Ors. 1 was per incuriam and not good law. Though the view of the counsel in the previous case was held as an unrelated and misplaced analogy, the Bench, in this case, accepted his view that the nomination only makes a nominee a trustee for the shares. He holds the shares in trust for the estate of the deceased, the deceased died intestate and hence the Plaintiff as the widow would be entitled to the shares to the exclusion of the

⁸ Sarbati Devi & Anr vs Smt. Usha Devi, 1984 AIR 346, 1984 SCR (1) 992

⁹ Harsha Nitin Kokate vs The Saraswat Co-Op. Bank Ltd. & ...

nominee." However, the Bench does not differ from the previous view and on the other hand accepts the view of the Kokate case. Their views, however, put these corporate statutes in direct and irreconcilable conflict with the Indian Succession Act, of 1925. The Bench very firmly expresses that, not only would succession by intestacy be defeated by a corporate provision intended for the protection of the corporate, but, perhaps more significantly, a testamentary disposition would be wholly defeated by a nomination, even if the will in question is made after the nomination and does contain a legitimate bequest of the very securities in respect of a nomination is made. In other words, a nomination not only becomes a testamentary disposition of sorts but stands on a higher pedestal, and, at the same time, is unguarded by any of the checks, balances, and tests against which the validity of a will and its due execution are to be tested. This was not, they say, the intendment of the corporate statutes considered, and this construct of the law is directly contrary to decisions of the Supreme Court and the High Court, each of which was binding on the Kokate Court.

As per the Ghotiala case, the opinion was that the purpose of the Companies Act was to consolidate the law relating to companies and certain other associations. It is not in any sense intended or directed to settled laws of succession or transfer of property, but only the law relating to companies.¹⁰ Therefore, Mr Shah submits, that any provision of the Companies Act must be viewed in context, and there is nothing in this sub-section that can or should be viewed as an amendment in silence of the testamentary and other dispositive laws, ones that concern themselves with the transfers (inter vivos or by inheritance or succession) of all property, including corporate securities. What Section 109A does is to protect the liability of companies vis-à-vis the holders of securities. It does not absolve the nominees of those securities from their fiduciary responsibilities to the heirs or legatees of the original holder of the securities, the nominator. The counsel submitted that no nomination can ever result in a divesting. It is merely a matter of convenience for the company or the depository, not for the nominator and certainly, it does not transfer ownership to the nominee. Through these views and opinions, the Kokate judgement was overruled.¹¹

Dayagen Pvt. Ltd. v. Rajendra Dorian Punj

Late Sh. V.P. Punj was holding 980 equity shares out of the total 1000 Equity Shares issued by the Appellant Company. 2006. According to Respondent No. 1 and 2, he left behind a Will dated 8th April 2005 bequeathing all his assets in favour of Respondent No. 1 herein. Respondent No. 1 approached the Company for transmission of 980 shares in his favour. He was informed that the Late Sh. V.P. Punj had pledged the said 980 shares in favour of Sh. Nilender Prakash Punj who was Respondent No. 2 in the Company petition before the Board, and is Respondent No. 3 in the present appeal. Respondent No. 3 herein had already got the shares transferred in his name and as such Respondent No. 1 was not entitled to transmission of these shares in his name. The appellants also relied upon, what is claimed to be, a nomination made by late Shri V.P. Punj in favour of respondent No.3 herein. The question was whether Respondent 1 was to be given the 980 shares as per the will.

In terms of section 109A of the Act, a nominee of shares becomes entitled to the shares of the deceased and such nomination overrides the law of testamentary and intestate succession. Consequently, based on the "Will" of the late Sh. V.P. Punj, Respondent No. 1 could not make any claim in respect of the 980

¹¹ Jayanand Salagaonkar v. Jayasree Jayant Salagaonkar

shares and he could not be entitled to become a member of the Company and therefore was not entitled to maintain the petition.

The submission 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, given the express language of Section 109A of the Act. From a plain reading of Section 109A, it is abundantly clear that the intendment of the Legislature is to override the general law of succession and to carve out an exception about nomination made in respect of shares and debentures. The section expressly vests the nominee, who is nominated in the prescribed form, upon the death of the share/debenture holder with full and exclusive ownership rights in respect of the shares/debentures of which he is the nominee. Since nominations made under Section 109A purport to override even testamentary succession, the said nomination is invalid and would not have the effect of overriding the normal law of succession.¹²

Shakti Yazdani And Anr vs Jayanand Jayant Salagonkar

The issue that arises for consideration in this group of Appeals is whether the view taken by the learned Single Judge in the case of Harsha Nitin Kokate v. The Saraswat Co-operative Bank Limited and Others¹ is correct. The issue was Whether a bequest made in a Will executed per the Indian Succession Act, 1925 in respect of shares or securities of the deceased supersedes the nomination made under the provisions of Sections 109A and Bye-Law No.9.11 framed under the Depositories Act, 1996.

The Appellant/Petitioner contended that he was a nominee in respect of those investments and because of the nomination, notwithstanding anything stated in the Will, the said investments exclusively belonged to him on the demise of his mother, the deceased testator. According to the learned Single Judge, the Appellant/Petitioner contends that those investments do not form a part of the distributable estate of the deceased testator. the provisions of the Companies Act dealing with the nomination provide for the vesting of shares in nominee and the said provisions override the law of intestate and testamentary succession. the provisions regarding testamentary succession under the Indian Succession Act, 1925 do not apply when the provisions of the testamentary succession as provided in any other law for the time being in force are applicable. The nomination would be always subject to the testamentary disposition by the holder of shares or debentures. The object of the provisions of the Companies Act is not to either provide a mode of succession or to deal with succession. The object of the Section 109A is to ensure that the deceased shareholder is represented by someone as the value of the shares is subject to market forces. It is not intended to create a third mode of succession. The Companies Act has nothing to do with the law of succession. Hence, the judgement was not per in curium and thus overruled.¹³

Aruna Oswal V Pankaj Oswal

As a recent case, it established that an act of nomination cannot override succession law. The case is the outcome of a family tussle. Late Mr Abhey Kumar Oswal, during his lifetime, held as many as 5,35,3,960 shares in M/s. Oswal Agro Mills Ltd., a listed company.

Mr. Abhey Kumar Oswal filed a nomination according to section 72 of the Act in favour of Mrs. Aruna Oswal, his wife. As per the appellant, it was explicitly provided therein that: "This nomination shall

¹² Dayagen Pvt. Ltd. v. Rajendra Dorian Punj

¹³ Shakti Yezdani And Anr vs Jayanand Jayant Salgonkar

supersede any prior nomination made by me/us and any testamentary document executed by me/us." The name of Mrs. Aruna Oswal, the appellant, was registered as a holder on 16.4.2016 against the shares held by her deceased husband. Mr Pankaj Oswal, respondent No.1, filed a partition suit claiming entitlement to one-fourth of the estate of Mr Abhey Kumar Oswal. The main dispute raised as to the inheritance of the estate of the deceased is a civil dispute and could not adjudicated in a company petition filed during the civil suit's pendency. Sub-section (3) of section 72 contains a non-obstante clause in respect of anything contained in any other law for the time being in force or any disposition, whether testamentary or otherwise, where a nomination is validly made in the prescribed manner, it purports to confer on any person "the right to vest" the securities of the company, all the rights in the securities shall vest in the nominee unless a nomination is varied or cancelled in the prescribed manner. It is prima facie apparent that vesting is absolute, and the provisions supersede under a non--obstante clause any other law for the time being in force. Prima facie shares vest in a nominee, and he becomes the absolute owner of the securities on the strength of nomination. The pertinent question needs to be tried in a civil suit and adjudicated finally; it cannot be decided by NCLT in the proceedings in question. ¹⁴

CONCLUSION

Tracing through various judicial decisions, we understand the dispute between corporate legislation and succession laws and how every precedent has a different interpretation to arrive at a decision. However, it has been agreed in consensus that property should be divested as per the will and succession laws and the nomination law takes a back seat when it comes to inheritance of shares if the deceased owner of shares has legal heirs to whom the property is allocated by the will.

¹⁴ Aruna Oswal V Pankaj Oswal