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BOMBAY HIGH COURT - RIGHTS OF SUCCESSORS TO PREVAIL OVER THOSE OF NOMINEES OF SHARES

If you have questions or would like additional information on the material covered in this Newsletter, please contact the authors:

By: Seema Jhingan, Partner
(sjhingan@lexcounsel.in)

Neha Yadav, Principal Associate
(nyadav@lexcounsel.in)

Saniya Kothari, Associate
(skothari@lexcounsel.in)

BOMBAY HIGH COURT - RIGHTS OF SUCCESSORS TO PREVAIL OVER THOSE OF NOMINEES OF SHARES

(Holding the view in the earlier Kokate Case as incorrect, the Division Bench of the Bombay High Court has clarified the position of law with respect to rights of nominees versus those of successors over shares of a company. The Court has held that nomination does not override the law in relation to testamentary or intestate succession, and vesting under Section 109A (of Companies Act, 1956) does not create a third mode of succession.)

Earlier Position – Kokate Case:

The issue of rights of nominees versus those of the successors over shares of a company, upon death of a shareholder, have been a matter of much debate over the last one decade. The single bench of the Bombay High Court in *Harsha Nitin Kokate v. The Saraswat Co-operative Bank Limited and Others*¹ (“**Kokate Case**”) had held that upon death of the shareholder, the nominee, nominated by the shareholder in accordance with the prescribed procedure, will be the beneficial owner of the shares and will be entitled to all the rights in the shares to the exclusion of all other persons. The single judge in this case considered the provisions on nomination under Section 109A and 109B of the (old) Companies Act, 1956 (“**CA 1956**”) and the Bye-Law No. 9.11 framed under the Depositories Act, 1996 (“**DA 1996**”), particularly the non-obstante provisions contained therein.

Broadly, Section 109A of CA 1956 (which now corresponds to Section 72 of the new Companies Act, 2013) entitled the nominee to all rights in the shares upon death of the shareholder, notwithstanding any other dispositions under any other law, testamentary or otherwise. On similar lines, Bye-Law no.

LexCounsel, Law Offices C-10,
Gulmohar Park New Delhi 110 049,
INDIA. Tel.:+91.11.4166.2861
Fax:+91.11.4166.2862

Recommended by:



9.11.7 under the DA 1996 provided that notwithstanding any other disposition, for the purposes of dealing with the securities lying to the credit of deceased nominating security holder, the depository will rely upon the last nomination validly made prior to such demise.

Interpreting the above provisions, the Bombay High Court had held that the nomination would have the effect of a testamentary disposition itself, and the nominee's position would be superior to even a testamentary disposition.

Division Bench overrules the Kokate Case:

The decision in the Kokate case was much criticized and was again considered by another single judge of the Bombay High Court, in *Jayanand Jayant Salgaonkar vs Jayashree Jayant Salgaonkar*², wherein it was held that the view taken in the Kokate Case is *per incuriam*, and that nominations under Sections 109A and 109B of CA 1956 and Bye-Law 9.11 of DA 1996 cannot displace the law of succession or open a third line of succession. Since, this order was passed by a single judge, appeals were placed before the Hon'ble Chief Justice of the Bombay High Court for referral of this issue to a larger/division bench.

Accordingly, the appeals were taken up for final disposal by the Division Bench of the Bombay High Court in *Shakti Yezdani and Ors. Vs. Jayanand Jayant Salgaonkar and Ors.*³ ("**Salgaonkar Case**"), where the Division Bench, on December 1, 2016, finally put the question of correctness of the view in the Kokate Case at rest.

The Court referred to the provisions relating to nomination under various enactments, and various Supreme Court decisions where such provisions have been interpreted, to hold that:

"the nominee does not get absolute title to the property subject matter of the nomination. The reason is by its very nature, when a shareholder or a deposit holder or an insurance policy holder or a member of a Co-operative Society makes a nomination during his life time, he does not transfer his interest in favour of the nominee. It is always held that the nomination does not override the law in relation to testamentary or intestate succession. The provisions regarding nomination are made with a view to ensure that the estate or the rights of the deceased subject matter of the nomination are protected till the legal representatives of the deceased take appropriate steps....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....the provision is enacted to ensure that the commerce does not suffer due to delay on the part of the legal heirs in establishing their rights of succession and claiming the shares of a Company." [Emphasis Supplied]

The Court also placed its reliance on a recent judgement of *Indrani Wahi v. Registrar of Co-op. Societies and Other*⁴, wherein the Supreme Court while dealing with the issue of nomination of a member of a society, had directed the co-operative society to transfer the shares of the deceased member in the name of the nominee. While upholding the right of the nominee, it was observed that it would be open for the other family members of the deceased member to pursue a case for succession or inheritance over such shares in accordance with law.

We may add here that while the aforesaid decision dealt with Section 109A of CA 1956, the Court's observations would be equally applicable in interpreting the (new) corresponding Section 72 of the Companies Act, 2013.

Concluding Remarks:

The Kokate Case, had presented a strange conundrum vis-à-vis nomination versus succession laws, as it was effectively held that nominee's rights would prevail over the rights of legal heirs whether under testamentary or intestate succession. It essentially meant that shareholders would need to ensure that their nomination filings, at all times, are in tandem with the scheme of succession contemplated by them under their will, failing which the will may end up giving rights contrary to the nomination made.

However, the Bombay High Court has now clarified this position, by holding that nomination does not give an absolute right on the shares to the nominee, nor does it override the law in relation to testamentary or intestate succession. Therefore, it appears that the shares only vest in the nominee as a trustee until such time any legal heirs/successor of the deceased shareholder is able to establish his/her rights of succession with respect to such shares.

Endnotes

¹2010(4) ALLMR 51.

²AIR 2015 Bom 296.

³Appeal No. 313 of 2015 in Notice of Motion No. 822 of 2014 in Suit No. 503 of 2014 and Appeal No. 311 of 2015 in Testamentary Petition No. 457 of 2014, Decided On: 01.12.2016.

⁴(2016) 6 SCC 440.

Feedback

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