

MNM

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 2351 OF 2008
IN
SUIT NO. 1972 OF 2008

Harsha Nitin Kokate	...Plaintiff
Vs.	
The Saraswat Co-op. Bank Ltd. & Ors.	...Defendants

Mr. A.K. Maheshwari for Plaintiff
Ms. Shyama Parkar i/b. M.P.Rege & Co., for Defendant No.1
Mr. H.S. Shreepad Murthy for Defendant No.3

CORAM : SMT. ROSHAN DALVI, J.

DATED : 20TH APRIL, 2010

JUDGMENT. :

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

representative. She claims to have them sold.

2. This Suit is not concerned with the reason why she claims the sale of the shares. The Plaintiff must show her legal right, title and interest in those shares. If that is shown, the Plaintiff would be entitled to sell or transfer those shares or to hold them as her own.
3. The Defendant No.3 claims right, title and interest in the shares pursuant to the nomination executed in his favour. The nomination has been executed well prior to the death of the deceased and well after his marriage with the Plaintiff. The Defendant No.1 Bank has stated that the nomination is executed as required and has been so registered with the Depository Participant. The effect of the nomination is, therefore, to be seen. The nomination form itself shows that the rights of transfer and/or the amount payable in respect of the securities held by Nitin Kokate, Defendant No.3 vests in him as the said nominee.
4. The law relating to nomination is set out in 109A of the Companies Act pursuant to the amendment which came into effect on 31st October 1998. It is common knowledge that prior to 1996 shares were not held in dematerialised form. Consequent upon the Dematting of the shares the Share Certificates in physical form are not mandatorily required to be issued by the Limited Companies listed on the Stock Exchanges. Shares can be transferred by word of mouth or on the Internet from person to person. Upon such transfer the membership rights of the holder of the shares changes. Since the share is an intangible movable property it is

bequeathable estate The nomination in respect of the shares is, therefore, important. Section 109A sets out the rights of the holder of shares to nominate as well as the rights of the nominees thus:-

S.109A. Nomination of shares – (1) *Every holder of shares in, or holder of debentures of a company may, at any time, nominate, in the prescribed manner, a person to whom his shares in or debentures of, the company shall vest in the event of his death.*

(2)

(3) *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 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).....

It can be seen from the aforesaid provision that nomination is required to be made in the prescribed manner. Upon such nomination the

shares would vest in the nominee in the event of the death of the holder. Further upon it being made in the prescribed manner the nominee would become entitled to all the rights in the shares of the Company to the exclusion of all other persons. That is the effect of vesting the shares in the nominee.

5. Mr. Maheshwari drew my attention to the Depositories Act 1996. Section 9.11 thereof relates to transmission of securities in the case of nomination. Section 9.11 runs thus:-

9.11. TRANSMISSION OF SECURITIES IN THE CASE OF NOMINATION:

9.11.1. *In respect of every account, the Beneficial Owner(s) (“Nominating Person(s)”) may nominate any person (“Nominee”) to whom his securities shall vest in the event of his death in the manner prescribed under the Business Rules from time to time.*

9.11.2. *The securities held in such account shall automatically be transferred in the name of the Nominee, upon the death of the Nominating Person, or as the case may be, all the Nominating Persons subject to the other Bye Laws mentioned hereunder.*

9.11.3.....

9.11.4. *Beneficial Owner(s) may substitute or cancel a nomination at any time. A valid nomination, substitution or cancellation of nomination shall be dated and duly registered with the Participant in accordance with the Business Rules prescribed therefor. The closure of the account by the Nominating Person(s) shall conclusively cancel the nomination.*

9.11.5. *A Nominee shall not be entitled to exercise any right*

conferred on Beneficial Owners under these Bye Laws, upon the death of the Nominating Person(s), unless the Nominee follows the procedure prescribed in the Business Rules for being registered as the Beneficial Owner of the securities of the Nominating Person(s) in the books of the Depository.

9.11.6. *A nominee shall on the death of the Nominating Person(s) be entitled to elect himself to be registered as a Beneficial Owner by delivering a notice in writing to the Depository, along with the certified true copy of the death certificate issued by the competent authority as prescribed under the Business Rules. Subject to scrutiny of such election, the securities in the Account shall be transmitted to the account of the Nominee held with any depository.*

9.11.7. *Notwithstanding anything contained in any other disposition and/or nominations made by the Nominating Person(s) under any other law for the time being in force, for the purposes of dealing with the securities lying to the credit of deceased Nominating Person(s) in any manner, the Depository shall rely upon the last nomination validly made prior to the demise of the Nominating Person(s). The Depository shall not be liable for any action taken in reliance upon and on the basis of nomination validly made by the Nominating Person(s).*

9.11.8.....

(underlining supplied)

6. Upon such nomination the securities automatically get transferred in the name of the nominee upon the death of the holder of shares. The nomination is required to be dematted duly registered with the Depository Participant (Bank) in accordance with the Business Rules. The nominee is required to follow the prescribed procedure in the Business Rules. Upon the death of the holder of the shares the nominee would be entitled to elect

to be registered as an beneficiary owner by notifying the Bank along with the certified copy of the death certificate. The Bank would be required to scrutinise the election and nomination of the nominee registered with it. Such nomination carries effect notwithstanding anything contained in a Testamentary Disposition or nominations made under any other law dealing with the Securities. The last of the many nominations would be valid.

7. Under the said Section the holders of the shares would nominate any person in whom the securities would vest in the event of his death. This nomination has to be made in the manner prescribed under the Business Rules.
8. It can be seen that since all the shares are held in Demat form with the Depository Participant and the portfolio of the holder may change each day. Hence one nomination is specifically required to be made as provided in the aforesaid legislation. The nomination would have the effect of vesting in the nominee complete title in the shares. He would be entitled to elect to be registered as a beneficial owner of the shares or he would have the right to transfer the shares. These are inter alia the rights of every shareholder of a listed Companies. These rights show that the vesting of the shares is upon the death of the shareholder provided only that the nomination is made as per the procedure set out by the Depository Participant. This procedure is the registration of the form of nomination constituting the nomination of the nominee with his photograph signed by the holder as well as the nominee and witnessed by at least 2 persons and

registered with the Bank. The purpose and object of this Section is clear. It is simplified the procedure relating to the transmission of shares which is otherwise an intangible movable property. As the shares are now held in Dmat form and can be purchased and sold in the market by word of mouth or on the Internet, and no physical share certificates are issued by Companies, only one nomination for all the shares in all the companies need be made. That can be registered only with the Depository Participant who records all the share transactions of the holder of the shares who is mandatorily required to open a Dmat account with the Depository Participant. Hence the legislature has simplified and specified the procedure for vesting of shares by nomination made in the prescribed manner.

9. Mr. Maheshwari on behalf of the Plaintiff contends 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 nominee.

10. Mr. Maheshwari drew my attention to the case of **Smt. Sarbati Devi Vs. Smt. Usha Devi, A.I.R. 1984 SC 346** for which a nomination made under the Insurance Act in respect of the Life Insurance Policy under Section 39 of the Act came to be considered.

Section 39 of the Insurance Act runs thus:-

39. *Nomination by policy-holder – (1) The holder of a policy of life insurance on his own life may, when effecting the policy or at*

any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death.”

11. Under the Insurance Act the nomination entails payment by the Insurance Company to the nominee to obtain a complete discharge. Once the amount under the Policy is paid to the nominee, the nominee would hold it in Trust or the Estate because under the Insurance Act there is no legislative provision that the nominee would obtain any other right.

12. It may be mentioned that the position under Section 30 of the Maharashtra Co-operative Societies Act is similar for nominees in respect of shares in a Housing Society.

Section 30 of The Maharashtra Co-operative Societies Act runs thus:-

30.(1) On the death of a member of a society, the society shall transfer the share or interest of the deceased member to a person or persons nominated in accordance with the rules or, if no person has been so nominated, to such person as may appear to the committee to be the heir or legal representative of the deceased member:

Provided that, such nominee, heir or legal representative, as the case may be, is duly admitted as a member of the society:

Provided further that, nothing in this sub-section or in section 22 shall prevent a minor or a person of unsound mind from acquiring by inheritance or otherwise, any share or interest of a deceased member in a Society.

(2).....

(3).....

(4) All transfers and payments duly made by a society in accordance with the provisions of this section, shall be valid and effectual against any demand made upon the society by any other person.

Hence in a Co-operative Society also the shares of the member can be simplicitor transferred to the nominee which transfer would effectually discharge the Society as against any other person making a demand.

Such a transfer, therefore, cannot and does not result in vesting of the flat in such nominee. Hence such nominee is merely a trustee for the estate of the deceased. The Society is not concerned with the dispute amongst the heirs of the deceased.

13.The provision pursuant to the amendment of the Companies Act is quite the contrary. The nomination under Section 109A of the Co-operative Act does not entail mere payment of the amount 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. The analogy drawn from the judgment in the case of Sarbati Devi is completely misplaced.

14.The meaning and definition of the word “Vest” is required to be considered. Black’s Law Dictionary 8th Edition at page 1594 shows the meaning of “Vest” thus:-

- “Vest:**
1. To confer ownership of (property) upon a person.
 2. To invest (a person) with the full title to property.
 3. To give (a person) an immediate, fixed right of present or future enjoyment.
 4. Hist. To put (a person) into possession of land by the ceremony of investiture.

Vested: *Having become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute <a vested interest in the estate>.”*

Further the meaning of vested right is given in the aforesaid Dictionary at page 1349 thus:-

“Vested right. *A right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person’s consent”.*

15.The meaning of Vested Interest in the said Dictionary is explained at page 829 thus:-

“Vested interest. *An interest the right to the enjoyment of which, either present or future, is not subject to the happening of a condition precedent”.*

16.The meaning of Vested Estate at page 588 is shown thus:-

“Vested estate. *An estate with a present right of enjoyment or a present fixed right of future enjoyment.*

17.Advanced Law Lexicon by P. Ramanatha Aiyar 3rd Edition 2007 at page 2677 when explains the term Vested Legacy thus:-

VESTED LEGACY. *A legacy the interest in which is so fixed as to be transmissible to the personal representative of the legatee.*

18. The judgment in the case of **The Fruit & Vegetable Merchants Union Vs. The Delhi Improvement Trust, A.I.R. 1957 SC 344 at page 353** holds that the word “Vest” can be used differently upon considering the English Law.

19. It is observed that the word “Vest” is a word of variable import even under Indian Statutes. The illustrations given in the judgment are the Insolvency Act which provides that the property vests in the Receiver. Such vesting is held to be temporary and only for the purpose of management of the properties of the insolvent for payment of his debts after distributing his assets. Consequently, the Receiver would have no interest of his own in the property vested in him. The vesting under the Land Acquisition Act is shown to be different. Under that Act the property would vest “absolutely in the Government free from all encumbrances”. Hence upon such vesting the property acquired becomes the property of the Government without any conditions or limitation either as to its title or possession. Consequently, it is held at page 353 runs thus:-

“It would thus appear that the word “vest” has not got a fixed connotation, meaning in all cases that the property is owned by the person or the authority in whom it vests. It may vest in title, or it may vest in possession, or it may vest in a limited sense, as indicated in the context in which it may have been used in a particular piece of legislation.”

20. Hence under that judgment which considered the provisions of the U.P. Town Improvement Act it was held that the land vesting in the Municipal or Legal Body was so vested only for the purpose of managing that land and would not transfer ownership of the property to the Authority.

21. In the case of **Dr. M. Ismail Faruqui Vs. Union of India A.I.R. 1995 S.C. 605** the concept of vesting the property in the Acquiring Authority came to

be considered under the Acquisition of Certain Area at Ayodhya Act (33 of 1993). Considering the pith and substance of the Act, which was for the acquisition of the property at Ram Janma Bhoomi-Babri Masjid site under a legislation, it was held that vesting of the disputed land (Ram Janma Bhoomi-Babri Masjid) was limited to holding it by the Civil Government as Statutory Receiver and vesting of the area in excess of the disputed structure was absolute.

Hence, it is seen that the intention of the Legislature is of primary importance in considering the effect of the term “vest” in a given legislation.

22. In the case of **Municipal Corporation of Greater Bombay Vs. Hindustan Petroleum Corporation (2001) 8 SCC 143** the vesting of watercourse in the Municipal Corporation was held not to be except for entrustment of the duty of the Municipality to maintain them in the manner provided under Section 220A of the Bombay Municipal Corporation Act, 1888.

This would be in consonance with the intention of the legislation – no land can become of the ownership of the Municipality merely because the Municipality is enjoined to maintain it and for which the vesting in possession alone would take place; the ownership would not vest.

23. Considering some of these judgments it has been held in the case of **Bharat Coking Coal Ltd. Vs. Karam Chand Thapar & Bros. 2002 (8) SCALE 388** that the term vest in common English acceptation would mean and imply conferment of ownership of properties upon a person and in

similar vein it gives immediate and fixed right of present and future enjoyment. However, it is observed, following the decision in the case of **Fruit and Vegetables** (supra) and **Dr. M Faruqui** (supra) that the term vest is a word of variable import. In that judgment the right, title and interest of the Coke oven plant which is vested in the Central Government under the Coking Coal Mines (Nationalisation) Act, 1972 was considered. In that case the Appeal of the Company, in which the right, title and interest of the owners of the plants were to have vested under the aforesaid legislation, was dismissed holding that pursuant to the legislation the right, title and interest could not stand transferred to the Government Company since no infraction by the title holders was seen.

24. In the light of these judgments Section 109A of the Companies Act is required to be interpreted with regard to the vesting of the shares of the holder of the shares in the nominee upon his death. The act sets out that the nomination has to be made during the life time 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 none other can have it. Further

Section 9.11 of the Depositories Act 1996 makes the nominee's position superior to even a testamentary disposition. The non-obstante Clause in Section 9.11.7 gives the nomination the effect of the Testamentary Disposition itself. Hence, any other disposition or nomination under any other law stands subject to the nomination made under the Depositories Act. Section 9.11.7 further shows that the last of the nominations would prevail. This shows the revocable nature of the nomination much like a Testamentary Disposition. A nomination can be cancelled by the holder and another nomination can be made. Such later nomination would be relied upon by the Depository Participant. That would be for conferring of all the rights in the shares to such last nominee.

25.A reading of Section 109A of the Companies Act and 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. These Sections are completely different from Section 39 of the Insurance Act set out (supra) which require a nomination merely for the payment of the amount under the Life Insurance Policy without confirming any ownership rights in the nominee or under Section 30 of the Maharashtra Co-operative Societies Act which allows the Society to transfer the shares of the member which would be valid against any demand made by any other person upon the Society. Hence these provisions are made merely to give a valid discharge to the Insurance Company or the Co-operative Society without vesting the ownership rights in the Insurance Policy or the membership

rights in the Society upon such nominee. The express legislature intent under Section 109A of the Companies Act and Section 9.11 of the Depositories Act is clear.

26. 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.

27. Consequently the Notice of Motion is dismissed.

(SMT. ROSHAN DALVI, J.)