PROPERTY HELD IN 'JOINT NAMES' UNDER MAHARASHTRA CO-OPERATIVE SOCIETY

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संयुक्त नावाने धारण केलेली मालमत्ता

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Appeal by Indrani Wahi (Judgment delivered on 10-3-2016)

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1. INTRODUCTION:

A few days back, the Times of India carried a report on the decision of the Honourable Supreme Court in the case of Indrani Wahi vs. Registrar of Coop. Societies & Ors, wherein it had been held that once there is a valid nomination with the society, the society is bound to transfer the share or interest of the deceased member in a cooperative society, to such nominee alone.

Honourable Justices J.S. Khehar and C. Nagappan allowed the appeal filed by Indrani Wahi, and directed the society to transfer the share or interest of the society in her favour.

2. On reading the press report it was not clear why the case so obvious had reached the Honourable Supreme Court. It is a common knowledge that once a Member of the Co-operative Housing Society files a valid Nomination in the prescribed form, then after the member's death if the nominee files the requisite application forms for admission as a member, the Society is bound to admit such nominee and enter his name on its membership roll.

3. When the detailed judgment of the Court delivered on the 10th March 2016 was scrutinized, it was revealed that there were two vital issues involved:

(a) The objection of the brother of Indrani was that on marriage she did not remain a member of "the family" & so the Nomination was invalid,

(b) The Division Bench of the High Court had on Appeal preferred by her mother and brother, held that shares and interest can only be transferred by expressing consent of all the heirs. The Honourable High Court had, inter alia, held:

> "We do not propose to hold that the writ petitioner, in whose favour nomination has been made, shall not be made a member of the said society and having regard to the legislature intent contained in sub-section (4) of Section 69 it may not be possible for us to direct the appellants to be joint members along with the writ petitioner, but to protect the interest of the appellants in the flat which they have inherited, it is necessary for the said Society to record their interest expressly in the share Certificate as well as in its records pertaining to members and, in particular in the register of members so that one of the joint owners merely because of the nomination in her favour cannot transfer either the share, in which she has a part interest, or the allotment, where also she has a part interest, for the same is expressly declared to be transferable and, accordingly, can only be transferred by expressing consent of all the heirs. With the above we dispose of the appeal without, however, any order as to costs."
>
> (Underlining supplied)

4. The aforesaid conclusion & direction to the Society to add in the share certificate expressly the interest of the mother/brother (without adding their names as "joint members"), so that the nominee, one of the joint owners, cannot transfer either the share in which she has part interest or the allotment, without the "consent of all heirs".

The Honourable Supreme Court vacated that direction and asked the Society to transfer the share / interest in the name of the nominee and de-linked the succession, inheritance issue to be agitated separately.

5. This case sparked off an idea of examining the concept of "joint ownership" of the property, and its legal ramifications.

6. On many occasions, one finds that the Bank Deposit Accounts, the Company Share Certificates, the Post Office Accounts or National Savings Certificates and even a Flat in a Co-operative Society being held in "Joint names", which may usually be the husband & wife or the father & son, or the sisters/brothers, or other close relatives like paternal or maternal uncle and at times, in some cases, the property is held jointly by non-relatives.

As long as both the persons, joint-holders of the property, are alive, or they are on good terms, they fully know how they should distribute the income received by way of interest or dividend or the manner in which the liability of maintenance is to be discharged in the case of Society Flat. Such joint-holders may also have a clear idea as to how the proceeds are to be shared on maturity of the Fixed Deposit Receipts or expiry of the other Term Deposits, or on sale / disposal of jointly held property.

But in the event of any dispute or disagreement, the inter-se ownership of the Asset may surface and may even lead to the court of law. Similarly, if one of the persons dies, the question may come-up as to whether the share or interest

of that person is to devolve on his/her legal heirs or whether the joint–holder automatically becomes the sole owner of the entire property.

7. It is, therefore, necessary to examine the matter very critically because there may be some conflicting, contradictory views or opinions floating around, which may not have any sound legal basis.

The Post Office or the Bank or the Company or the Society may either refuse to hand over the property to the persons claiming through the deceased or may saddle the claimant with unwarranted paper work which may be time consuming or costly; and even insist on furnishing documents like indemnity, surety etc. not required as per the law.

8. Lot of ink has been spent in toying with the idea of 'joint ownership' for decades & centuries and many a jurists, legal luminaries have expressed their views convincingly & the statutory rules have been evolved clearly bringing out the dichotomy between the 'joint tenants' and 'tenants-in-common'—the two modes legally recognized for holding the property in "joint names".

9. In this connection a useful reference may be made to the decision of the Honourable Gujarat High Court in the case of Nanalal Girdharlal And Anr. Vs. Gulamnabi Jamalbhai Motorwala [AIR 1973 Guj 131, (1972) GLR 880].

A single Judge made a reference to the Larger Bench posing two questions: one, whether some only out of several co-owners of the property can effectively determine a tenancy by giving notice to quit; and the other, whether a suit to evict a tenant can be filed by one or more co-owners without joining other co-owners in the suit.

The Honourable Court held:

QUOTE:

"2. The first question which falls for consideration is whether in a case where a property owned by two or more co-owners is let out to a tenant, a notice to quit given by some only out of them, is sufficient to determine the tenancy or it is necessary that the notice to quit must be given by or on behalf of all co-owners.

We shall presently examine this question on principle as also on authority but before we do so, we may clear the ground by pointing out **that there are two main forms which co-ownership of property may assume**; one is joint tenancy and the other is tenancy-in-common.

- It is not necessary for the purpose of the present discussion to examine in 'detail the distinctive features of these two forms of co-ownership but we may briefly indicate the principal characteristics of each.

JOINT TENANCY:

- The two main features of a joint tenancy are the right of survivor-

ship and the four unities. **The right of survivorship is, above all others, the distinguishing feature of joint tenancy.** On the death of a joint tenant, his interest in the property passes to the other joint tenants by right of survivorship and this process continues until there is but one survivor who then holds the property as sole owner.

- The four unities of a joint tenancy are unities of possession, interest, title and time. The concept of unity of possession involves that each co-owner is as much entitled to possession of any part of the land as the others. The other three unities, namely, unities of interest, title and time are no doubt essential attributes of a joint tenancy but they are not material and we need not pause to consider them.

TENANCY-IN-COMMON:

- A tenancy in common is quite different. It differs greatly from a joint tenancy. Unlike joint tenants, tenants-in-common hold the property in undivided shares: each tenant-in-common has a distinct share in the property which has not yet been divided amongst the tenants-in-common.
- **There is also no right of survivorship amongst tenants-in-common:** When a tenant-in-common dies, the devolution of his interest is not governed by the right of survivorship but it passes under his will or intestacy, for his undivided share is his to dispose of as he wishes.
- Lastly though the four unities of a joint tenancy may be present in a tenancy-in-common the only unity which is essential is the unity of possession. Each tenant-in-common is entitled to Possession of the entire land that is to say, every part of it as much as the others. Vide Jahuri Shah v. D. P. Jhun-jhunwala. AIR 1967 SC 109.

10. The Gujarat High Court also referred to the legal principles enunciated by the Honourable Privy Council and the Honourable Supreme Court when it observed/held:

> "Now when property is transferred to two or more persons, a question may arise whether the transferees take as joint tenants or as tenants-in-common. **The rule of English law is to presume that a transfer to a plurality of persons creates a joint tenancy unless there are words of severance. The law in India is, however, different.** It has always been held in this country that where there is a transfer to two or more persons, they must be presumed to take as tenants-in-common unless there are clear words conveying a contrary intention. Vide Jogeshwar Narain Deo v. Ram Chand Dutt. (18961 23 Ind. App. 37 **(PC);** Mahmad Jusab v. Fatima Bai. 49 Bom LR 505 = (AIR 1948 Bom 53).

11. In yet another decision, the Gujarat High Court in the case of Union of India (UOI) vs. Sarala Dhruvakumar Shukla decided on the 11th July, 2003 [AIR 2004

Guj 150] held that the Post Office Savings Account Rules, 1981 providing that upon the death of the husband, the joint Account became "the single-holder Account" do not prohibit any succession taking place in accordance with the relevant law regarding succession of property upon the death of one of the depositors.

The Excerpts from the Gujarat High Court decision are in the **ANNEXURE-I**

12. Therefore, on the principle & authority of the Honourable Privy Council, the Supreme Court & the Gujarat High Court, it is manifestly clear that in India, the Law presumes that the property held by the Joint Account-holders is held by the two or more persons as "tenants –in-common" and not as "Joint-tenants", unless the contrary intension is expressly so stated.

13. The above legal position can be demonstrated in a bullet-point–manner as below:

Joint tenants: As joint tenants (sometimes called 'beneficial joint tenants'):

- One has equal rights to the whole property
- The property automatically goes to the other owners if one dies.
- One can't pass on the ownership rights in the property by making a Will.

Tenants in common: As tenants in common:

- One can own different shares of the property
- The property doesn't automatically go to the other owners if one dies.
- One can pass on one's share in the property by Will.

Change your type of ownership:

One can change from being either:

- Joint tenants to tenants in common, e.g. if you divorce or separate and want to leave your share of the property to someone else.
- Tenants in common to joint tenants, e.g. if you get married and want to have equal rights to the whole property.
- This is called transferring ownership; this has to be supported by proper documentation.

14. Considering the legal position as discussed above, all the property held in the "Joint names" would be considered as being held by such persons as "tenants-in-common".

As a corollary, on the death of one of the joint owners, the property would not revert to or belong to the survivor or the last survivor, but it would follow the succession route. Therefore, every joint owner must be on guard and take the advantage of the Nomination facility available under the law in relation the property held in joint names.

ILLUSTARATIVE POSITION IN VARIOUS FIELDS:

(A) BANK DEPSOITS:

15. Some nationalized or non-nationalized Banks are marking the Joint Accounts or the Fixed Deposit Receipts or other Term Deposits in joint names with "Either or Survivor" or "Anyone or the Last Survivor" mandate, which, according to the Banks, provides enough safeguard as the Banks would, without any additional documentation, hand over the property to the survivor or the last survivor, on production of the death Certificate of the joint-holder/s. On that premise, the Banks even dissuade or deter by advice that the clients need not file any Nomination. In the absence of Nomination, it may be construed as having the effect that when anyone dies, the survivor or the last survivor would collect the money from the Bank, and may retain it as his/her.

16. The prevailing practice of some of the Banks, as above, has been frowned upon by the Reserve Bank of India, the Regulatory Body. The Reserve Bank of India has since given (14/12/2012)the guidelines (Joint Accounts) :

- "Reserve Bank of India has advised banks to allow all depositors to use nomination facilities if they are willing to. The banking regulator said has noticed that sometimes customers opening joint accounts with or without "either or survivor" mandate, are dissuaded from exercising the nomination facility. It clarified that nomination facility is available for joint deposit accounts too and advised banks to ensure that their branches offer nomination".

17. The Banks mislead the customers by saying that the nomination is unnecessary. In fact, the rule "E or S" or "A or S" is merely for "collecting" the amount from the Bank, and the person "collecting the money", be the "survivor" or the "Last Survivor" or even the Nominee of one of them, does not get the "beneficiary title". Therefore, even when the Fixed Deposit Receipt or the Joint Account is "E or S", the Nomination must be made and (to complete the "title of such nominee") the Will must say explicitly that the "nominee 'xyz'" is the "beneficial owner" having full rights, title and interest to deal with the property so received, to the exclusion of all others.

- The Banking Regulation Act, 1949. Section 45ZA thereof, is given in **Annexure-II**

(B) POST OFFICE ACCOUNTS, NATIONAL CERTIFICATES:

18. The case law quoted in the preceding paragraphs i.e. the Gujarat High Court decisions related to the Joint Accounts held in the Post Offices. The Counsel on behalf of the Appellant Post Master General raised the contention that the Note no. 4 below Rule 4 of the Post Office Savings Account Rules, 1981 provides that:

> "if one of the depositors dies in a joint account, the joint account shall, as from the date of death of the said depositor, be deemed to be a single account in the name of the surviving depositor".

The Honourable Gujarat High Court held that the Post Office Rules did not prohibit the operation of any succession taking place in accordance with the relevant law regarding succession of property upon the death of one of the depositors. The general principle of law is that when there are two owners of a property jointly owning such property, they are presumed to be "tenants in common". Consequently, each joint owner has distinctive share, though not earmarked, and that principle would apply in the case of a Joint Account under the monthly income scheme Rules also.

(C) EMPLOYEES' PROVIDENT FUNDS AND Miscellaneous Provisions Act, 1952 ("Provident Fund Act")

19. In the case of Smt. Usha Majumdar and Ors. Vs. Smt. Smriti Basu (AIR 1988 Cal 115,) decided on the 28th August, 1987 the Division Bench of the Kolkata High Court considered the provisions of the Provident Fund Act, and held as under:

QUOTE:

The Issue was:

> "9. The question whether the plaintiff is also entitled to equable distribution of the money which was standing to the credit of her father in his account under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("Provident Fund Act" for short) and since received by the defendant-appellant No. 4 as nominee in respect thereof."

- Considering the various provisions of the Provident Fund Act and the Scheme we are of the opinion that the status of a nominee under the Provident Fund Act is completely-different from his counterpart under the Insurance Act. The most and striking difference about the status of the nominee under the two Acts is clearly discernible from Section 10(2) of the Provident Fund Act which expressly provides that the amount standing to the credit of a member of the Fund at the time of his death shall vest in the nominee and it shall be free from any debt or liability incurred by the deceased or the nominee before the death of the member.
- The Honourable Kolkata High Court, therefore, held that the nominee under the Provident Fund Act has not only the right to receive the money but also a beneficial interest therein".

UNQUOTE:

- The Honourable Kolkata High Court judgment (excerpts) is in **ANNEXURE-III**

(D) JOINT STOCK COMPANY SHARES:

20. In the case of the Company shares, the legal position of the Nominee is well settled by the decision of the Honourable Bombay High Court in the case of Harsha Nitin Kokate vs. The Saraswat Co-Op. Bank Ltd., decided on the 20th April, 2010. The High Court reviewed the case law and referred to the provisions of the Companies Act, 1956, (as amended on 31-10-1998) Section 109A thereof, which reads:

> **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).....
>
> {Sec. 72 of the Companies Act, 2013 is in pari materia: see Annexure-IV}

On reading the above provisions, the High Court observed that 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. The position would be the same under the Depository Act, 1996. (Shares held in Demat Account)

21. Considering the above provisions, the High Court held that upon such nomination the securities automatically get transferred in the name of the nominee upon the death of the holder of shares. Accordingly, in such a situation, the nominee would be entitled to elect to be registered as a **beneficiary owner** of the Shares by notifying the Bank along with the certified copy of the death certificate. 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.

- The Text of the Honourable Bombay High Court decision in Harsha Nitin Kokate case is in **Annexure—IV.**
- The case reference of the Honourable Delhi High Court decision in M/S Dayagen Pvt. Ltd. is also given, and at the end new section 72 of the Companies Act, 2013 is reproduced in **Annexure-IV.**

(D) JOINT STOCK COMPANY SHARES: [Part-II]

(DISSENTING VIEW)

22. While the view taken by the Bombay High Court in Kokate case (supra) based on the statutory provisions in the Companies Act, 1956 distinguishing the decision of the Honourable Apex Court in Smt. Sarabati Devi & Anr. v. Smt. Usha Devi, AIR 1984 SC 346 and Vishin N. Kanchandani v. Vidya Lachmandas Kanchandani, AIR 2000 SC 2747 which held that a mere nomination did not confer any beneficial interest in favour of the nominee, stands to reason; recently, another single member bench has expressed a dissent. Following are the details:

23. The Bombay High Court in Jayanand Jayant Salgaonkar vs. Jayashree Jayant Salgaonkar has held (on 31st March 2015) that a nominee of shares and securities of a company merely holds the securities in trust and as a fiduciary on behalf of any claimants under the laws of succession. The court was compelled to analyze the question of law since the earlier decision in Harsha Nitin Kokate vs. The Saraswat Co-operative Bank Limited & Ors. (**Kokate case**) was assailed as being in direct conflict with the views of the Apex Court on the subject. The Court observed /held as below:

QUOTE:

> **"33.** Mr. Pai also cites the decision of a Division Bench of the Calcutta High Court in Smt. Usha Majumdar v Smt. Smriti Basu,34 which held that a nominee in respect of a provident fund account is exclusively entitled to the amount in that account to the exclusion of the others. It is not possible to accept this submission. That decision was considered by Mr. Justice Britto in Antonio Joao Fernandes, and expressly not accepted in view of Sarbati Devi and Khanchandani. Mr. Justice Britto's decision binds me; that of the Calcutta High Court, with respect, does not. To accept Mr. Pai's submission, I would have to hold that Antonio Joao Fernandes was incorrect and refer the matter to a larger Bench, or to hold that it was per incuriam. **I can do neither. xxxx**
>
> But at the end, the following view is taken:
>
> **"40.** There are additional problems too. ....it is clear that a nomination only provides the company or the depository a quittance. The nominee continues to hold the securities in trust and as a fiduciary for the claimants under the succession law. Nominations under Sections 109A and 109B of the Companies Act and Bye-Law 9.11 of the Depositories Act, 1996 cannot and do not displace the law of succession, nor do they open a third line of succession. This is the consistent view of the Supreme Court in Khanchandai, Shipra Sengupta and of our Court in Nozer Gustad Commissariat and Antonio Joao Fernandes, all decisions that preceded Kokate; and the submission made in paragraph 9 of Kokate was correctly placed and was in line with those decisions. **Those decisions were all**

binding on the Kokate Court. They were neither noticed nor considered. The Kokate Court could not have taken a view contrary to those decisions. Kokate is, therefore, per incuriam. xxx

24. While the Court in **Salgaonkar case** felt that it was bound to follow the Single Judge decision in Mr. Antonio Joao Fernandes vs. The Assistant Provident Fund Commissioner & Ors., 2010 (4) Bom CR 208, delivered on the 6th April 2010, but in respect of the Kokate's decision, also delivered by a Single Judge of the same High Court on the 20th April 2010 (15 days late) the Court dissented & hastened to declare it as "per incurium".

Incidentally, what is "per incuriam"?

- In Secretary of State for Trade and Industry v Desai (1991) The Times 5 December, Scott LJ said that to come within the category of **per incuriam** it must be shown not only that the decision involved some manifest slip or error but also that to leave the decision standing would be likely, inter alia, to produce serious inconvenience in the administration of justice or significant injustice to citizens.
- However, this rule does not permit the Court of Appeal to ignore decisions of the House of Lords. In Cassell v Broome [1972] AC 1027 Lord Denning MR held the House of Lords' decision in Rookes v Barnard [1964] AC 1129 **to be per incuriam** on the basis that it ignored previous House of Lords' decisions. He was rebuked sternly **by the House of Lords** who considered that the Court of Appeal **'really only meant' that it 'did not agree' with the earlier decision**.

25. With utmost respect, it is felt that having regard to the judicial propriety and directives of the Apex Court, observations of the House of Lords, the Court in **Salgaonkar case (supra)** had better recorded its "dissent" and proceeded to make a reference to the Larger Bench.

- One thing is clear that the decision in the Kokate case is not a standalone decision as it is in company with the Delhi High Court decision on Company Shares & the Kolkata High Court Division Bench decision in PF case, taking identical view.
- That apart, unless **the decision in Kokate case** is overruled as per judicial precedent theory, it holds the field, notwithstanding a dissent expressed by another Single Judge of the same High Court.

(E) IMMOVABLE PROPERTIES: (General)
LAND, BUILDINGS.

26. Having considered the situation in relation to movable assets like the Deposit Accounts in the Banks, Post Offices Savings Accounts and other Joint Accounts like Monthly Income Schemes and the Company Shares, the principles of law relating to the immovable property can, now, be examined. There are

specific provisions in the Transfer of Property Act, 1872. The relevant Section dealing with the Joint Owners is reproduced below:

> **45.** Joint transfer for consideration:
>
> Where immovable property is transferred for consideration to two or more persons and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced. In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, **such persons shall be presumed to be equally interested in the property.**

It is a well-settled principle of law that there is no need to call into aid any of the rules of construction when meaning of the words in a statute is plain and unambiguous. The statutory provisions speak so eloquently that no other legal principle or authority is necessary.

- The provisions of joint ownership, transfers contained in the Transfer of Property Act,1872 are reproduced in **ANNEXURE_V**

(F) IMMOVABLE PROPERTIES:

(Co-operative Housing Society)

27. This last category of Joint Ownership is a combined type, where a person subscribes to the Membership of a Co-operative Housing Society Ltd., by purchasing the requisite number of shares of the Society and obtains a Share Certificate (a movable asset) and as a sequel thereto gets a right to occupy a Flat (immovable property) in a building owned by the Society. This type of the Society is called: "a tenant co-partnership society". In such a type of society, it is the society in which the land and the buildings, in the eye of law, vest.

Therefore, when a member of such a co-operative housing society "transfers his shares" to another with the approval of the society, he not only transfers the shares but also, as a necessary incident thereof, transfers his interest in the immovable property which has been allotted to him. The Share Certificate carries the name/s of the Member/s.

28. If there are two or more persons, who have contributed to the purchase price of the Flat, the names of all such persons are specified in the Share Certificate. While the person whose name stands First is called "the Member", the 2nd and the 3rd persons whose names are in the Share Certificate are called "Associate Members".

Property Held in 'Joint Names' under Maharashtra Co-operative Society

- The Co-operative Department, Maharashtra State, has been doing flip-flop as to the true meaning & connotation of the term "Associate Member" & the rights, duties & obligations of such an Associate Member/s. Even as of date, there is a complete lack of clarity.

29. The concept of 'Associate member' and 'joint member' was well defined & the decision of the Honourable Bombay High Court in the case of R.B. Rajput vs. Hiralal Bhagwandas Rajput and others (1989) 91 BOMLR 869, had fully explained it way back in 1989. The Honourable High Court held:

QUOTE:

> "6. At this juncture, before going to the averments in the plaint, I will like to refer to the definition of 'member' and 'associate joint member' as contemplated by the Maharashtra Co-operative Societies Act, 1960. xxx
>
> After going through the aforesaid provision, it is clear that as per section 2, sub-section 19(b) 'associate member' means a member who holds jointly a share of a society with others, but whose name does not stand first in the share certificate. **That means there is no distinction as per the Maharashtra Co-operative Societies Act, 1960 between associate member and the joint member.** Further it is also pertinent to note that in Exh. 'A' which I have already referred to i.e. the joint application made by respondent No. 1 and the present petitioners, **they have made a clear cut statement that the said suit flat was purchased by them jointly and therefore, the petitioner's name should be added jointly along with respondent No. 1."**

UNQUOTE:

30. The confusion as to the true meaning & purport is on account of refusal to treat the "Joint Purchaser" alone as the "Associate Member".

(i) The Maharashtra Co-operative Societies (Amendment)Act, 2013,which is deemed to have come into force on the 14th February 2013 unambiguously defines in Section 2(19)(b):**"Associate Member" "**means a member who holds jointly a share of a society with others, but whose name does not stand first in the share certificate".

(ii) However, the Bye-law no. 3 (xxiv) (b) of the 2014 Model Bye-laws amplifies and gives distorted definition, which reads: **"Associate Member"** means a member who holds the right, title and interest in the property individually or jointly with other, but whose name does not stand first in the share certificate.

(iii) And under 2014 Model Bye-law no. 19(b) a person "eligible to be an Associate member" is required to apply in the Appendix 5 and pay Rs. 100 /=for admission as an Associate Member.

(iv) Now, **Appendix 5** creates **two categories**: one where a person intending to hold shares jointly, and the other who does not jointly

own or have 'joint title to the property', both paying Rs. 100/= as admission fee for becoming an "Associate Member".

Reading of the confused phraseology in the Bye-laws, it appears clear that the concept of "Associate Membership" has acquired two meanings, one true legal meaning as the "Joint (purchaser) Member", and another popular meaning as a member 'added for the sake of convenience'.

31. It is high time that the Commissioner for Co-Operation and Registrar, Co-operative Societies, Maharashtra State, clears the ground by giving clear-cut ruling on this widely confused area: "Associate Membership".

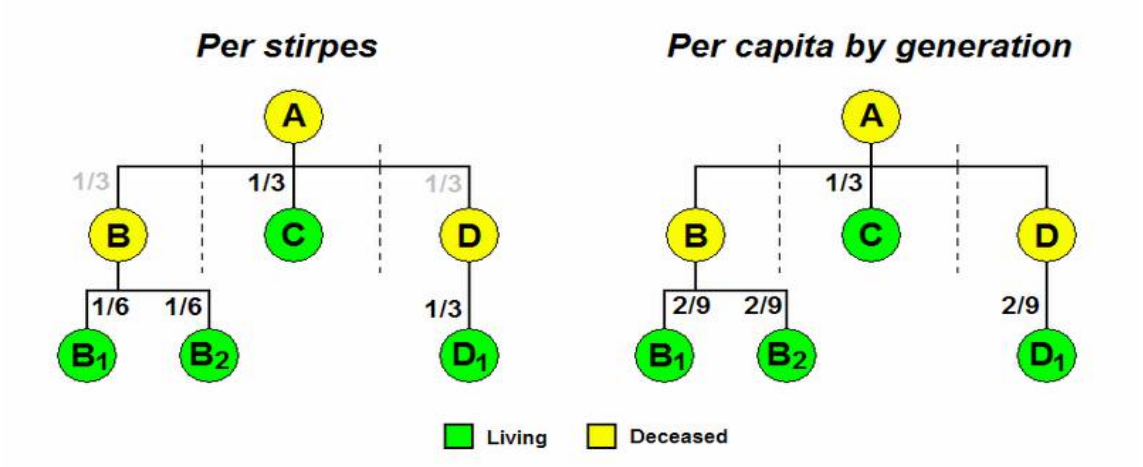
32. Once it is accepted that the Joint Purchaser is the Associate Member, it is obvious that if the person whose name stands first in the share Certificate dies, the membership of the Associate member does not lapse or become non-exiting. Some Officials in the Co-operative Department & many Society-Office-bearers believe that if the first or primary-holder of the Share Certificate dies, the membership of the Associate Member automatically stands deleted. This is misreading, misconstruction of the law.

In fact, when the share certificate stands in the "joint names" each joint-holder has a share in the capital of the society, and the Member & the Associate member can & should individually appoint a "nominee" to their respective interests in the share or property of the Society.

Per Stirpes vs. Per Capita

33. In this context, one needs to know that there are two ways to leave your estate to your children, Per Stirpes and Per Capita. Per Stirpes means that the Grantor intends that the Beneficiary's share of the inheritance will go to his or her heir; and Per Capita indicates that the Grantor intends that no one except the named beneficiary receive that share of the estate.

- Illustrations are given in the **ANNEXURE-VI** & the graphic chart is below



34. The "Joint Ownership" concept qua the movables like Bank Accounts, Post Office Accounts etc. and the Joint Ownership in relation to the immobile property must be kept in mind when dealing with the property transactions.

FINALITY: JUDICIAL OPINION

35. Incidentally, the conflicting judicial opinion is of a common occurrence rather than an exception. The Trial Judge interprets the law and so does the Higher Judiciary. As of date, the law of the Bombay High Court in Kokate case declared by a single judge holds the field until overruled by a superior court. A dissenting opinion of a single judge of the court of co-ordinate jurisdiction is neither here nor there.

- Incidentally, a reference is invited to interesting comments in the context of finality of judicial opinion.
  - (i) USA Justice John Marshall's most famous declaration from his most famous opinion: "It is, emphatically, the province and duty of the judicial department, to say what the law is".
  - (ii) A befitting reply: an oft quoted self-reflection of an American judge: "We are not final because we are infallible, we are infallible only because we are final". (An Associate Justice of the Supreme Court of the United States, Robert Jackson in Brown v. Allen in 1953).
  - (iii) On the 14th Sep., 2015: While asking the counsel for Yusuf Mohsin Nul-walla, Harish Salve, to move a curative petition, (in the Supreme Court) Justice Gogoi said: "All orders of the court are not always correct or perfect. Whatever orders we give, right or wrong, **are final.**"
- However, pending finality in the Kokate case, like the hypothetical prudent-man-theory, one must protect others' interests (legal heirs) by arranging the affairs in such a way that the property transmission is smooth and as far as possible litigation-free.

36. In Conclusion:

(i) Looking to the true legal meaning & purport of the "Joint Ownership" of the estate, movable or immovable, one thing appears clear that the person must bear in mind the consequences that flow from the concept of "joint tenants" and "tenants-in-common". In the case of "joint tenants" the property automatically goes to the other owner/s if one dies; whereas in the case of "tenants-in-common" it is not automatic.

(ii) The rule of English law is to presume that a transfer to a plurality of persons creates a "joint tenancy" unless there are words of severance. The law in India is different. It has always been held in this country that where there is a transfer to two or more persons, they must be

presumed to take as "tenants-in-common" unless there are clear words conveying a contrary intention.

(iii) The discussion hereinabove would make it abundantly clear that it is important to file "nomination" forms, in all cases, to protect the interest in the property even when the Deposit or other Accounts are in "joint names", and even with "E or S" mandate; and make a Will based on such nomination and declare unequivocally in the Will that the person in whose favour a Nomination has been filed would be the exclusive owner of that particular property, with all rights to hold, enjoy or dispose of the property at the sole discretion of such person; and no one else shall have any right, title or interest threin whatsoever.

(iv) A nomination in respect of each property coupled with the relative will in favour of the nominee would avoid complications and may perhaps render the property litigation–free; whether the Kokate case is endorsed or overruled by a superior Court in the years ahead.

ANNEXURE: I

The Gujarat High Court in the case of
Union of India (UOI) vs. Sarala Dhruvakumar Shukla
Decided on 11th July, 2003[AIR 2004 Guj 150]
Had held: [EXCERPTS ONLY]

QUOTE:

1. The High Court was dealing with the Letters patent appeal against the judgment and order dated 5.7.2001 passed by the learned Single Judge allowing Special Civil Application No. 458 of 2001 challenging the decision of the appellants herein, i.e. Post Master General, Ahmedabad and Sub-Post Master, LG Hospital Road Post Office, Maninagar, Ahmedabad under the provisions of the Post Office Savings Account Rules, 1981 (hereinafter referred to as "the Rules").

> The learned Single Judge held that the appellants [Union of India] were estopped from treating the account as a single-holder account upon the death of the husband of the first petitioner.

2. It was the case of the Appellants, that is, the Post Master General, that upon the death of the husband, the joint Account became "the single-holder Account" and as such the substitution of the name of the second petitioner, the Nominee, in place of the husband who died, was wrong.

3. The Counsel for the Appellants pointed out that that the note below Rule 4 of the Post Office Savings Account Rules, 1981 provides that:

> "if one of the depositors dies in a joint account, the joint account shall, as from the date of death of the said depositor, be deemed to be a single account in the name of the surviving depositor".

4. The Honourable High Court held:

"5. Having heard the learned counsel for the appellants, we are of the view that all that the aforesaid note 4 below Rule 4 of the 1981 Rules provides is that when there is a joint account of two depositors and one of them expires, the ordinary consequence would be that the account would become a single depositor account, that is, it will be deemed to be a single account in the name of the surviving depositor. The question is whether the above note will apply even where the heir or the nominee of the deceased depositor comes forward for getting his or her name substituted for the name of the deceased depositor in the joint account.

The Rules do not prohibit any such succession taking place in accordance with the relevant law regarding succession of property upon the death of one of the depositors. The general principle of law that when there are two owners of a property jointly owning such property, they are presumed to be tenants in common and each has a definite though undivided share in the property, would apply in the case of a joint account under the monthly income scheme Rules also. **As far as immoveable property is concerned, Section 45 of the Transfer of Property Act, 1882** provides that in the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, **such persons shall be presumed to be equally interested in the property.**

A joint tenancy connotes unity of title, possession, interest and commencement of title; in a tenancy in common, there may be unity of possession and commencement of title, but the other two features would be absent.

5. The High Court further held:

(v) The rule of English law is to presume that a transfer to a plurality of persons creates a joint tenancy with a right of survivorship, unless there are words of severance. This principle is adopted in Section 106 of the Indian Succession Act, 1952, replacing Section 93 of the Indian Succession Act, 1865; and a joint tenancy has been recognized in a gift by will of an Indian Christian, Parsee, and Muslim.

(vi) The Hindu rule is the opposite. In Jogeswar Narain vs. Ram Chand Dutt, 23 IA 37, 44; Bahu Rani vs Rajendra Baksh Singh, (1933) 60 IA 95, 101, the Privy Council said -

"The principle of joint tenancy appears to be unknown to Hindu law, except in case of coparcenary between members of an undivided family."

- This has been approved by the Supreme Court in Venkatakrishna vs. Satyavathi, AIR 1968 SC 751. Even if the grantees are members of a coparcenary they will take as tenants in common, unless a contrary intention appears from the grant. **It is held that in India the**

Court must always lean against holding a bequest or a grant to be a joint bequest or grant, and the presumption must always be in favour of a tenancy in common (Mahamed Jusali vs. Fatimabai (1948) Bom 53, 49 Bom LR 505, AIR 1949 Bom 33 [vide Mulla's Transfer of Property Act, 9th Ed. Page 340].

- In any view of the matter, since Rule 4 stipulated at the relevant time the upper limit of Rs.2,04,000/- for a single account and Rs. 4,08,000/- for a joint account, there was no breach of the said substantive part of Rule 4 because the amount in the joint account did not exceed Rs. 4,08,000/-. It is also required to be noted that it is not the case of the respondent authorities that petitioner No.2 had any other MIS account in his name before he became a joint holder with his mother upon the death of his father in 1995.

6. In view of the above interpretation of the Rules and also in view of the fact that upon the death of the husband of petitioner No. 1 in the year 1995, the appellants permitted the second petitioner, who was a nominee, to be substituted for his deceased father (who was husband of the first petitioner) in the aforesaid joint monthly income scheme account, the Postal Department was rightly estopped from taking the view that continuation of the joint monthly income scheme account in the names of the first petitioner and the second petitioner was contrary to the aforesaid Rules."

UNQUOTE:

ANNEXURE:II

TENANCY BY THE ENTIRETY

There are three types of concurrent ownership, or ownership of property by two or more persons: tenancy by the entirety, Joint Tenancy, and Tenancy in Common.

A tenancy by the entirety can be created only by married persons. A type of concurrent estate in real property held by a Husband and Wife whereby each owns the undivided whole of the property, coupled with the Right of Survivorship, so that upon the death of one, the survivor is entitled to the decedent's share.

It can be created only by will or by deed. As a form of joint tenancy that also creates a right of survivorship, it allows the property to pass automatically to the surviving spouse when a spouse dies.

In addition, tenancy by the entirety protects a spouse's interest in the property from the other spouse's creditors. Under a tenancy by the entirety, creditors of an individual spouse may not attach and sell the interest of a debtor spouse: only creditors of the couple may attach and sell the interest in the property owned by tenancy by the entirety.

It differs from joint tenancy in one major respect: neither party can voluntarily dispose of her or his interest in the property.

In the event of Divorce, the tenancy by the entirety becomes a tenancy in common, and the right of survivorship is lost.

About half of the U.S. states allow tenancy by entirety for all types of property; a handful of states allow it only for real estate.

THE BANKING REGULATION ACT, 1949. SECTION 45ZA THEREOF, READS:

45ZA. Nomination for payment of depositors' money.- (1) Where a deposit is held by a banking company to the credit of one or more persons, the depositor or, as the case may be, all the depositors together, **may nominate, in the prescribed manner**, one person to whom in the event of the death of the sole depositor or the death of all the depositors, the amount of deposit may be returned by the banking company.

(2) 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 deposit, where a nomination made in the prescribed manner purports to confer on any person the right to receive the amount of deposit from the banking company, the nominee shall, on the death of the sole depositor or, as the case may be, on the death of all the depositors, become entitled to all the rights of the sole depositor or, as the case may be, of the depositor, in relation to such deposit to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.

- It is undoubtedly true that: the Nomination as per sub-section (1) above intends " to confer on any person the **right to receive the amount** of deposit from the banking company", and as per sub-section (2) become entitled **to all the rights of the sole depositor or, as the case may be, of the depositor, in relation to such deposit to the exclusion of all other persons**", and such payment made by the Bank would, in terms of sub-section (4) >>> (4) Payment by a banking company in accordance with the provisions of this section shall constitute a full discharge to the banking company to its liability in respect of the deposit:
- However, when the dispute is raised inter-se between the Joint Account holder, the Nominee or the survivor / Last Survivor who collected the amount from the Bank does not get full beneficiary title; but his S/he simply holds the money as a Trustee.
- This is so, based on the weighty authority of the Privy Council / the Supreme Court:

  "Two case laws were also dealt with in support of the derivations made therein. Those cases are (ILR 55 Cal. 944 = AIR 1928 PC 172) Guran Ditta Vs. Ram Ditta and the other case law is Pandit Pushkar Nath 71 Ind App 1997 = (AIR 1945 PC 10) . It was held in the first case as follows:

> " The deposit made by a Hindu of his money in a bank in the joint names of himself and his wife, and on the terms that it is to be payable to either or the survivor, does not on his death constitute a gift by him to his wife. There is resulting trust in his favour in the absence of proof of a contrary intention, there being in India no presumption of an intended advancement in favour of a wife."

The same view was expressed by the Judicial Committee in the second cited case above mentioned. (AIR 1945 PC 10).

ANNEXURE: III

SMT. USHA MAJUMDAR AND ORS. VS. SMT. SMRITI BASU

(AIR 1988 CAL 115,) DECIDED ON 28 AUGUST, 1987

THE DIVISION BENCH OF THE KOLKATA HIGH COURT CONSIDERED THE PROVISIONS OF THE PROVIDENT FUND ACT,

and held as under:

QUOTE: The Issue was:

"9. The question whether the plaintiff is also entitled to equable distribution of the money which was standing to the credit of her father in his account under the **Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("Provident Fund Act" for short)** and since received by the defendant-appellant No. 4 as nominee in respect thereof."

- Mr. Pal submitted that the principle laid down by the Supreme Court in the case of Sarbati Devi (supra), that a mere nomination made under Section 39 of the Insurance Act did 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, was not applicable to nominations made under the Provident Fund Act as would be evidently clear from the various provisions of the Act and the Scheme framed thereunder; and according to Mr. Pal, **the nominee under the latter becomes entitled to the money also.** He relied upon a Division Bench judgment of this Court in the case of Keshablal v. Iva Rani Rudra, reported in AIR 1947 Cal 176 in support of this contention.
- To consider and appreciate the rival contentions of the parties in their proper perspective it will be necessary to read the provisions of Section 39 of the Insurance Act juxtaposing the relevant provisions of the Provident Fund Act and the scheme framed thereunder. Section 39 of the Insurance Act reads as under:

"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 pay-

ment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death:

Provided that XXX

(2) Any such nomination in order to be effectual shall unless it is incorporated in the text of the policy itself, be made by an endorsement on the policy communicated to the insurer and registered by him in the records relating to the policy **and any such nomination may at any time before the policy matures for payment be cancelled or changed by an endorsement, or a further endorsement or a will, as the case may be,** but unless notice in writing of any such cancellation or change has been delivered to the insurer, the insurer shall not be liable for any payment under the policy made bona fide by him to a nominee mentioned in the text of the policy or registered in records of the insurer.

(3) to (7) xxxxx policy."

- In the case of Sarbati Devi (supra) the Supreme Court considered the above clauses in details to decide the only question which was raised therein, namely, whether a nominee under the above section got an absolute right to the amount due under a life insurance policy on the death of the assured. On such consideration and looking into decisions of different High Courts on the point the Supreme Court observed that the language of Section 39 of the Insurance Act was not capable of altering the course of succession and ultimately decided ....these words :

  ".....The reasons given by the Delhi High Court are unconvincing. We, therefore hold that the judgments of the Delhi High Court in Fauja Singh's case AIR 1978 Delhi 276 and in Mrs. Uma Sehgal's case do not lay down the law correctly. **They are, therefore, overruled.** We approve the views expressed by the other High Courts on the meaning of Section 39 of the Act and hold that a mere nomination made under Section 39 of the Act 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."

- 13. Having given our anxious consideration to the various provisions of the Provident Fund Act and the Scheme we are of the opinion that the status of a nominee under the Provident Fund Act is completely-different from his counterpart under the Insurance Act. The most and striking difference about the status of the nominee under the

two Acts is clearly discernible from Section 10(2) of the Provident Fund Act quoted earlier which expressly provides that the amount standing to the credit of a member of the Fund at the time of his death shall vest in the nominee and it shall be free from any debt or liability incurred by the deceased or the nominee before the death of the member. From Section 10(2) **it is abundantly clear that immediately upon the death of the member the provident fund money becomes part of the asset of the nominee whereas under the Insurance Act after the death of the assured the money continues to be his asset**; and the money which was standing to the credit of the member becomes free even from the debt or liability incurred by the nominee before the death of the member.

- Only because the money vested in and thereby became the property of the nominee after the death of the member such a provision was required to be incorporated as, otherwise, **being estate of the nominee**, it was liable to be attached for debts or liabilities incurred by him prior to the death of the member. That the nominee under the Provident Fund Act, unlike the nominee under the Insurance Act, gets a right to the money also has been made clear by the provisions of paras 61 and 70 of the Scheme quoted earlier.

  For the foregoing discussions we therefore find no hesitation in concluding that the nominee under the Provident Fund Act, unlike the nominee under the Insurance Act, has not only the right to receive the money but also a beneficial interest therein".

UNQUOTE:

N.B. In the recent decision of the Honourable Supreme Court, in Indrani Wahi case, (10th March 2016) in paragraph 13, at the end, the Court held:

> ".....At this juncture, all that needs to be stated with reference to the judgment in the Smt. Sarbati Devi case (supra) is, that the provisions with reference to nomination under the Life Insurance Act, 1938 are at variance from the ones which are subject matter of consideration in the instant case, and as such, it would suffice to merely state, that the aforesaid judgment is not of much significance, insofar as the adjudication of the present controversy is concerned".

That means, the language of the statute plays an important role.

ANNEXURE: IV

BOMBAY HIGH COURT

Harsha Nitin Kokate vs. the Saraswat Co-Op. Bank Ltd. & ... on 20 April, 2010: Bench: R. S. Dalvi

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

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 de- materialised 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 him 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 a 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 simplifies 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 Demat 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 pre-

vent 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 enjoinment. 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.)

DELHI HIGH COURT

M/S Dayagen Pvt. Ltd. vs. Mr. Rajendra Dorian Punj & Anr.

On 2 July, 2008 Author: Vipin Sanghi

Co. A. (SB) No.14/2007

(RELEVANT EXCERPTS FROM THE JUDGMENT):

"39. From a reading of the aforesaid provision it is seen 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. Subsection (3) of Section 109A begins with a non obstante clause which overrides any other law for the time being in force or any disposition whether testamentary or otherwise, in respect of shares of which a nomination is made in the prescribed manner, and states that upon the demise of the shareholder such nomination would entitle the nominee, in relation to the shares to all the rights therein, to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner. Therefore, 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. In Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. (2005) 7 SCC 234 the Supreme Court, while dealing with Section 45 of the Arbitration and Conciliation Act, 1996 observed as follows: -

> "29. 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 statue 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."

"40. The submission of Mr. Shakdher 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. 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 in relation to 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. The prescribed manner, to which repeated reference is made in Sections 109A,is to be found in Form No.2B which reads as follows:

"Form No.2B [See rules 4CCC and 5D] Nomination Form (To be filled in by individual(s) applying singly or jointly) I/We.....and.....and.....the holders of Shares/Debentures/ Deposit Receipt bearing number(s)..... of M/s.....wish to make a nomination and do hereby nominate the following persons(s) in whom all rights of transfer and/or amount payable in respect of shares or debentures or deposits shall vest in the event of my our our death.

Name: .....Address ..... Date of Birth.....

*(to be furnished in case the nominee is a minor) **The Nominee is a minor whose guardian is ..... Name and Address ....

(**To be deleted if not applicable) Signature :..... Name :..... Address :..... Date :.....

Signature :.....Name :..... Address :.... Date : ....."

From the aforesaid it is evident that the nomination is required to be attested by witnesses."

Companies Act, 2013

72. Power to nominate.

1. Every holder of securities of a company may, at any time, nominate, in the prescribed manner, any person to whom his securities shall vest in the event of his death.
2. Where the securities of a company are held by more than one person jointly, the joint holders may together nominate, in the prescribed manner, any person to whom all the rights in the securities shall vest in the event of death of all the joint holders.
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 the securities of a company, where a nomination made in the prescribed manner purports to confer on any person the right to vest the securities of the company, the nominee shall, on the death of the holder of securities or, as the case may be, on the death of the joint holders, become entitled to all the rights in the securities, of the holder or, as the case may be, of all the joint holders, in relation to such securities, to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.
4. Where the nominee is a minor, it shall be lawful for the holder of the securities, making the nomination to appoint, in the prescribed manner, any person to become entitled to the securities of the company, in the event of the death of the nominee during his minority.

[29th August, 2013]

An Act to consolidate and amend the law relating to companies.

BE it enacted by Parliament in the Sixty-fourth Year of the Republic of India as follows:—

ANNEXURE: V

The Transfer of Property Act, 1872:

The relevant provisions are reproduced below:

44. Transfer by one co-owner

Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same' but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

- Then the next Section deals with the Joint Owners:

45. Joint transfer for consideration

Where immovable property is transferred for consideration to two or more persons and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests **in such property in proportion to the shares of the consideration which they respectively advanced**.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, **such persons shall be presumed to be equally interested in the property.**

- Now, the converse situation is covered in the next section 47:

47. Transfer by co-owners of share in common property

Where several co-owners of immovable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal, proportionately to the extent of such shares.

Illustration

A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share, in mauza Sultanpur, transfer a two-anna share in the mauza to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of A, and half-an-anna share from each of the shares of B and C.

[Here, "Sultanpura" is a District in the Uttar Pradesh, and "Mauza" means: "Before the 20th century, the term referred to a revenue collection unit in a pargana or revenue district. As populations increased and villages became more common and developed, the concept of

the mouza declined in importance. Today it has become mostly synonymous with the gram or village.

- These provisions speak so eloquently that no other principle or authority is necessary. The provisions of law would operate unless the parties make an agreement to the contrary.

ANNEXURE: VI

Illustrations of Per Stripes and Per Capita.

(vii) If there are two or more primary beneficiaries and each has children, it is important to specify in the will whether the children of each prime beneficiary are simply to take their parent's share, divided equally among the children of that particular parent, or whether all of the children of all of the deceased prime beneficiaries are to share equally in the combined shares of their deceased parents.

(viii) Reviewing examples helps solidify understanding of per stirpes and per capita distribution.

EXAMPLE 1:

Consider an example where you, the Grantor, are not survived by your spouse but you are survived by two children (named Amy and Bob), and Amy and Bob will each receive 50% of your estate. Suppose Bob died before you and left a child (named Bob, Jr.). Where should Bob's 50% of your estate go? To Amy, or to Bob, Jr.?

(i) If you want Bob's share to be inherited by Bob's children, then the share passes per stirpes (think of it as "down the stripe"). If you want Amy to get the entire estate (thus shutting out Bob's children), then the estate passes per capita. Per Capita distribution looks at the number of surviving heads on the generational line.

EXAMPLE 2:

(ii) The remainder of the estate is to go to Arnold and Betty in equal shares and, if either or both die before the testator, then to their children living per stirpes. Arnold and Betty both die before the Grantor. Arnold has one child, Cindy, and Betty has two children, Debra and Edward. Cindy gets half of the residue; Debra and Edward each get one quarter under a per stirpes distribution.

If a per capita distribution were called for, then Cindy, Debra and Edward would each get one-third.
