Harish

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.446 OF 2015
WITH
CIVIL APPLICATION NO.965 OF 2015
IN
SECOND APPEAL NO.446 OF 2015

1. Shashidhar Janardan Pandharkar
5, Garva Society, M. Gandhi Cross Road,
behind Everest Shopping Center,
Dombivali (West)-421202.

2. Rekha Madhukar Puntambekar,
Age 68 yrs. Occ -Household work,
R/o. B-12, Vishakha Co. op. Housing Society,
Navghar Road, Mulund (E), Mumbai-400081.

3. Sarojini Ramesh Mujumdar,
Age 56 yrs., Occ- Household work, R/o 5,
Chaitanyakurpa Co-op. Housing Society,
Kala Nagar, Jail Road, Nashik -Road,
Nashik-422101. **...Appellants/ Applicants**

Versus

1 (a) Jayshree Sudhakar Pandharkar
(wife of deceased Respondent No. 1)
Madhav Krupa, New Model Colony,
Shivaji Nagar, Jail Road, Nashik Road
Nashik-422 101.

1 (b) Ajay Sudhakar Pandharkar,
age approx. 45 (Married son of Deceased
Respondent No. 1) having his residence
at Madhav Krupa, New Model Colony,
Shivaji Nagar, Jail Road Nashik Road,
Nashik-422101.

1 (c) Chetan Sudhakar Pandharkar,
age approx. 39 (Unmarried son of

Deceased Respondent No. 1,) having his
residence at Madhav Krupa, New Model
Colony, Shivaji Nagar, Jail Road,
Nashik Road, Nashik-422 101.

2. Asit C. Mehta Investment Intermediates Ltd.
Nashik, 38, City Center, In front of Siddhi
colony, Jail Road, Nashik-422101.

3. Savita Arun Pandharkar,
age 24 yrs. Occ- Education R/o 3, **Amarja**
Co-op Society, Jail Road, Shivaji Nagar,
Nashik Road, Nashik-422101
(Correct name- Smita Arun Pandharkar).

4. Janalaxmi Co-op Bank Ltd.
Samruddhi, Gadkari Chow, Nashik,-422001.

5. Manik alias Manisha Suryakant Khedkar
age 52, Occ- Household work, R/o Dhake
Bhuvan, Behind Astabhuja Temple,
Jamner Road, Bhusawal, Dist- Jalgaon.
Present address :- S-10, Rahul Apartment,
Near Santhoshi Mata Hall, Surbhi Nagar, Bhusaval. **...Respondents**

Adv. Ashwin Bhadang i/b Keegan Almeida, for the Appellants/Applicants.
Adv. Rahul D. Motkari, for Respondent Nos. 1(a) to 1(c) & 3.
Adv. Praveen L. Singh, i/b Jignesh Shah for Respondent No. 2.

CORAM : SHARMILA U. DESHMUKH, J.
RESERVED ON : FEBRUARY 6, 2024
PRONOUNCED ON : FEBRUARY 27, 2024

JUDGMENT :

1. Vide order dated 25th January, 2024, the Second Appeal was admitted by this Court. Being aggrieved and dissatisfied by the judgment dated 9th October, 2014, passed by the Appellate Court in Regular Civil

Appeal No. 200 / 2008 dismissing the Appeal and thereby confirming the dismissal of the suit being RCS No. 343 of 2005 by the Trial Court vide Judgment dated 29th August, 2008 the original Plaintiff is before this Court. For sake of convenience, parties are referred to by their status before the Trial Court.

2. Before proceeding further it would be profitable to take a look at the genealogy which is as under :

Vidyadhar J. Pandharkar
UnMarried ("deceased")
Died intestate on 01.**12**.2004

Shashidhar J. Pandharkar
Appellate No. 1
Brother of the Deceased

Rekha M. Puntambekar
Appellant No. 2
Sister of the Deceased

Sarojini **R.** Mujumdar
Appellant No. 3
Sister of the Deceased

Manik alias
Manisha S. Khedkar,
Respondent No. 5
Sister of the Deceased

Late Sudhakar B. Pandharkar
Respondent No. 1
Died on 01-09-2022
Cousin Brother of Deceased

Jayashree S. Pandharka**r**
Respondent No. 1(a)
Wife of Late **Sudhakar**
B. Pandharkar

Ajay S. Pandharkar
Respondent No. 1(b)
Son of Late **Sudhakar B.**
Pandharkar

Chetan S. Pandharkar
Respondent No. 1(c)
Son of Late **Sudhakar**
B. Pandharkar

Smita A Pandharkar (Savita)
Respondent No. 3
Niece of Deceased and Daughter of late
Arun B. Pandharkar

3. The dispute arises out of right to succession to the movable properties in the form of Dematerialisation accounts (Demat account) of Vidyadhar J. Pandharkar who expired in Nashik on 1 th December, 2004. He was unmarried and the Plaintiffs are the full blood brothers and sisters of deceased Vidyadhar. Whereas the Defendant No. 1 is the cousin brother of the deceased Vidyadhar and Defendant No. 3 is the niece of deceased Vidyadhar. Defendant Nos. 2 and 4 are the inter mediators/agents with whom the deceased Vidyadhar had Demat account.

4. RCS No. 343/2005 was instituted by the Plaintiffs seeking declaration that the Plaintiffs are the legal heirs to the Demat account No. 12013204, (client ID No. 00000301) **held with Defendant No. 2** and IN 302121 (client ID No. 10001234) **held with Defendant No.4** of deceased Vidyadhar and that the transfer of the ID in favour of Defendant No. 1 be treated as illegal and be cancelled and that the Demat account of deceased Vidyadhar be transferred in their names and for injunction restraining the Defendant Nos. 1 and 3 from receiving any benefits by being a nominee in respect of Demat accounts.

5. Written statement came to be filed by Defendant Nos. 1 and 3 contending that the suit is premature as the heirship certificate under the Indian Succession Act had not been obtained by the Plaintiffs. It was also contended that the nomination is the testamentary Will by which the deceased has expressed his wish to bequeath his movable assets to the Defendant Nos. 1 and 3.

6. Defendant No. 2 filed a written statement accepting that the Defendant No. 1 has been nominated by the deceased Vidyadhar in the Demat account held with the Defendant No. 2. Defendant No. 4 filed his written statement accepting that the Defendant No. 3 has been nominated by the deceased Vidhyadhar in respect of Demat account with the Defendant No. 4 and for the purpose of receiving the benefits under the said nomination a separate account had been opened by the deceased Vidyadhar and Defendant No. 3 is also the nominee in the said bank account.

7. The parties went to trial. The Plaintiff No. 1 examined himself and deposed as to the contents of the plaint. In the cross-examination, he has admitted that the movable properties belongs to the deceased Vidyadhar. He has also deposed that the legal notice was sent to Defendant No. 1which was later on withdrawn as the Defendant No. 1 had assured about the settlement. He has also admitted that the Defendant No. 2 had informed them that as per the SEBI regulations, the shares cannot be transferred in his name. He has also admitted that in the present proceedings, the disputed shares have not been included in the succession certificate. He has further admitted that Defendant No. 1 is his cousin brother and the deceased Vidyadhar used to treat the Defendant No. 3 as his daughter.

8. On behalf of the Plaintiff, one Dr. Ali Mohammat Shiakhlal Tamboli was examined who was the neighbor of the deceased Vidyadhar. He has deposed that when the deceased Vidyadhar opened the Demat account with Defendant No. 2, deceased Vidyadhar wanted to nominate the witness as nominee. However, he had suggested to nominate a relative who was staying at Nashik and thereafter the deceased Vidyadhar nominated the Defendant Nos. 1 and 3 in respect of the Demat accounts. He has deposed that the Defendant Nos. 1 and 3 were not aware of their nomination and after the death of the Vidyadhar he had informed the Plaintiffs and Defendants about the nomination. In the Cross-examination, he has admitted that the deceased Vidyadhar had out of his own funds purchased shares in the name of the witness and after the death of Vidyadhar, the Plaintiffs have handed over the share certificates to him. He admitted that the deceased Vidyadhar had purchased shares in the name of the witness as well as in his own name and had also opened Demat accounts. He has admitted that in the Demat account deceased Vidyadhar had nominated the Defendant No. 1. He has further deposed that he has not aware as to why the deceased had purchased the share in his name. He has further admitted that there is no Will executed by the deceased Vidyadhar bequeathing the shares to the witness.

9. The Defendant No. 1 examined himself and deposed as to the contents of the written statement. In the cross-examination, he has admitted that he was not aware that his name had been nominated by deceased Vidyadhar and the said fact became known to him three weeks after the death of Vidyadhar.

10. Defendant No. 3 examined herself and deposed as to the contents of her written statement. She has admitted that she became aware of the nomination in her favour after a period of three weeks from the date of **Vidyadhar's death**.

11. The Trial Court framed the necessary issues for consideration. As regards the issue of the entitlement of the Plaintiff to get transferred the Demat account in their name as legal heirs of Vidyadhar, the Trial Court observed that the Plaintiffs have suppressed the fact that the deceased had nominated them in respect of certain shares which they have received. The Trial Court considered the provisions of Section 109(A) of the Companies Act, 1956 (Companies Act) and interpreted the same to mean that the provision provides for the nominee to become entitled to all rights in shares to the exclusion of all other persons. In light of the provision of Section 109A of the Companies Act, the Trial Court refused to grant declaration of the ownership of the Demat account in favour of the Plaintiffs in view of the nomination of Defendant Nos. 1 and 3. The Trial Court held that the overriding the provisions of Section 109A of the Companies Act confers rights as to the shares of the deceased on the nominee to the exclusion of the legal heirs.

12. As against this, Regular Civil Appeal No. 200 of 2008 was preferred in the Appellate Court by the Plaintiffs. The Appellate Court framed the following points for consideration. `

Sr. No.	Issues	Findings
1.	Whether by virtue of Section 109A of the Companies Act, respondent No. 1 became exclusive owner of the share left behind by deceased Vidyadhar ?	Yes
2.	Whether the judgment and decree passed by the Trial Court is correct, legal and proper ?	**Yes**
3.	What order ?	As per final order below

13. The Appellate Court considered the decision in the case of ***Harsha Nitin Kokate vs. Saraswat Co-operative Bank Ltd. [2010 (3) Mh.L.J. 718]*** holding that the effect of nomination of shares is that on death of the owner, the nominee acquires title to the shares to the exclusion of all other persons. The Appellate Court held that Section 109A of the Companies Act, is a special provision which is exception to the general law and upon being nominated by the share-holder as per the prescribed procedure, upon death of the share holder, the nominee acquired title to the share though it is contrary to the law of inheritance. The Appellate Court therefore dismissed the Appeal.

14. The Second Appeal was admitted on the following substantial question of law:

> i) Whether the view taken by trial Court and affirmed by the 1st appellate Court that the provisions of section 109A of the Companies Act, 1956 have an overriding effect over the existing laws as regards the disposition of property testamentary or otherwise is correct position in law ?
>
> ii) Whether the trial Court and the 1st appellate Court were right in holding that upon the death of share-holder, nominee becomes entitled to the rights of share-holder to the exclusion of other legal heirs ?
>
> iii) Whether judgment of the trial Court and the 1st appellate Court are sound in law considering the decision of the Apex Court in the case of Shakti Yezdani vs. Jayanand Jayant Salgaonkar [2023 SCC OnLine SC 1679] ?

15. Heard Mr. Ashwin Bhadang for the Appellants, Mr. Rahul D. Motkari, for Respondent Nos. 1(a) to 1(c) & 3 and Mr. Praveen L. Singh, for Respondent No. 2.

16. Learned counsel for the Appellant-Plaintiff would submit that the Plaintiffs are the Class II heirs of the deceased. He would submit that inter se relationship between the parties is not disputed and neither is the fact that Defendant Nos. 1 and 3 have been nominated to the Demat Account of the deceased Vidyadhar. He would submit that Division Bench of this Court considered the issue whether the view taken by the learned Single Judge in ***Harsha Nitin Kokate vs. Sarswat Co-operative Bank Ltd.,*** is the correct view in ***Shakti Yezdani and Another vs Jayanand Jayant Salgaonkar and Ors. [2016 SCC OnLine Bom 9834]*** and held that the decision in the case of ***Harsha Nitin Kokate Vs. Saraswat Co-operative Bank Ltd.*** *(supra)* is per incuriam as it was rendered without considering relevant and binding precedents. He submits that the issue was taken to the Apex Court and the Apex Court in the case of ***Shakti Yezdani and Anr vs. Jayanand Jayant Salgaonkar [2023 SCC OnLine SC 1679]*** concluded that nomination process does not override the the succession laws and there is no third mode of succession that the scheme of the Companies Act, 1956 and the Depositories Act, 1996 aims for and intends to provide. He submits that the Apex Court has upheld the view taken by the division bench in the case of ***Jayanand Jayant Salgaonkar*** *(supra)*. He would therefore submit that the issue is therefore no longer *res integra* and the nomination in favour of Defendant Nos. 1 and 3 does not create a third mode of succession to the properties and the same will have to be governed by the Succession Act as the deceased had died intestate.

17. *Per contra*, learned counsel for the Defendants has taken this Court through the judgment of the Trial Court and the Appellate Court and would submit that it is an admitted position that the Defendant No. 3 was treated as a daughter by the deceased Vidyadhar. He would submit that the Plaintiff No. 1 has admitted in his cross-examination that the Application for succession certificate do not include the shares forming part of the suit, and as such, the Plaintiff has given up the right in respect of the shares. He would further submit that the witness for the Plaintiffs has admitted that the shares which were purchased by the deceased Vidyadhar in the name of the witness had been handed by the Plaintiffs to the said witness. He submits that the Plaintiff has therefore accepted the nomination as the Will of the deceased and has acted accordingly. He submits that Application for succession certificate was pending as on the death when the suit was filed and as such the suit was premature. He would further submit that in view of Section 32(6) of the Evidence Act, the nomination is in fact a statement of relevant fact made by the deceased relating to his property and is therefore to be held to be the Will of the deceased. He submits that the Appellate Court has rightly considered that as per the SEBI rules, the Plaintiff was not entitled to the shares and the said fact was made known to the Plaintiffs. He submits that no substantial question of law arises in the present Case.

ANALYSIS AND CONCLUSION:

18. I have considered the submissions and perused the record. The inter se relationship between the parties is not disputed. The Plaintiffs are the full blood brother and sisters of the deceased Vidyadhar. Whereas the Defendant No. 1 is the cousin brother of the deceased and the Defendant No. 3 is the niece of the deceased. It is also not disputed that the deceased Vidyadhar was unmarried and had died intestate. As per Section 8 of the Hindu Succession Act, 1956 the property of a Hindu male, dying intestate devolves firstly upon the heirs being the relatives specified in Class-I of the Schedule and if there is no heirs in Class-I, then upon the heirs being the relative specified in Class-II of the Schedule. The Schedule to the Hindu Succession Act, 1956 classifies brother and sister of deceased as Class-II heirs. It is thus clear that, it is Plaintiffs are the Class-II heirs of the deceased Vidyadhar.

19. The question which arises for consideration is whether the provisions of Section 109A of Companies Act, 1956 have an overriding effect over the existing law in respect of disposition of property, testamentary or otherwise and whether the rights in the Demat account vests in the nominee in exclusion to the legal heirs. It will be relevant to refer to Section 109A of the Companies Act, which reads thus:

> "*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) Where the shares in, or debentures of, a company are held by more than one person jointly, the joint-holders may together nominate, in the prescribed manner, a person to whom all the rights in the shares or debentures of the company 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 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) Where the nominee is a minor, it shall be lawful for the holder of the shares, or holder of debentures, to make the nomination to appoint, in the prescribed manner, any person to become entitled to shares in, or debentures of, the company, in the event of his death, during the minority".

20. The trial court upon consideration of Section 109A of the Companies Act, has held that the provisions are having overriding effect over the existing law including the testamentary disposition or otherwise and that on the death of the share holders, the nominee becomes entitled to all the rights in the shares to the exclusion of all other persons. The Appellate Court relied upon the decision in the case of ***Harsha Nitin Kokate Vs. Saraswat Co-operative Bank Ltd.*** *(supra)* where it was held that the nominee acquires title to the shares to the exclusion of all other persons and thus upheld the findings of the Trial court that the Plaintiffs though being legal heirs are not entitled to succeed to the Demat account of the deceased Vidyadhar.

21. The issue is no longer *res integra* and is settled by the decision of Apex Court in ***Shakti Yezdani vs Jayanand Jayant Salgaonkar*** (supra). arising out of Division Bench judgment of this Court in ***Shakti Yezdani vs Jayanand Jayant Salgaonkar*** (supra). In the facts of that case, the deceased had left behind a Will making provisions for devolution of his estate upon the successors. Apart from the properties mentioned in the Will, the testator had made certain nominations in respect of fixed deposits, mutual fund investments. The nominees claimed that the securities vested in them by virtue of nomination. The Division Bench of the Court upon consideration relevant statutory provisions i.e. Section 109A and 109B of the Companies Act as well as Bye-Law 9.11 of the Depositories Act 1996, held that Section 109A of the Companies Act does not suggest that on nomination being made by the deceased share holder of the Company his nominee becomes the owner of the shares to the exclusion of all other legal heirs and held in paragraph Nos. 43 and 44 as under.

> 43. The object of the provisions of the Companies Act is not to either provide a mode of succession or to deal with succession. The object of the Section 109A is to ensure that the deceased shareholder is represented by some one as the value of the shares is subject to market forces, Various advantages keep on accruing to shareholders. For example, allotment of Bonus shares. There are general meetings held of the Companies in which a shareholder is required to be represented. The provision is enacted to ensure that the commerce does not suffer due to delay on the part of the legal heirs in establishing their rights of succession and claiming the shares of a Company.
>
> 44. Considering the consistent view taken by the Apex Court while interpreting the provisions relating to nominations under various Statutes (including the view in the recent decision in the case of Indrani Wahi), there is no reason to make a departure from the consistent view. The provisions of the Companies Act including Sections 109A and 109B, in the light of the object of the said Enactment, do not warrant any such departure. The so called vesting under Section 109A does not create a third mode of succession. It is not intended to create a third mode of succession. The Companies Act has nothing to do with the law of succession. We have gone through every decision and material relied upon by the Appellants to which we have not made a specific reference in this Judgment. We hold that there was no reason to take a view which is contrary to the view taken in the long line of the decisions of the Apex Court on interpretation of provisions regarding nominations. Hence, the view taken in Kokate's case is not correct. We answer the first question in the negative and the third question in the affirmative. The second question is answered accordingly.

22. The matter was carried to the Apex Court in which the Apex Court concluded in paragraph No. 59 to 63 as under :

“59. Consistent interpretation is given by courts on the question of nomination, i.e., upon the holder's death, the nominee would not get an absolute title to the subject matter of nomination, and those would 72A apply to the Companies Act, 1956 (pari materia provisions in Companies Act, 2013) and the Depositories Act, 1996 as well.

60. An individual dealing with estate planning or succession laws Understands nomination to take effect in a particular manner and expects the implication to be no different for devolution of securities perse. Therefore, an interpretation otherwise would inevitably lead to confusion and possibly complexities, in the succession process, something that ought to be eschewed. At this stage, it would be prudent to note the significance of a settled principle of law. In Shanker Raju v. Union of India, the Court held:

> "10. It is a settled principle of law that a judgment, which has held the field for a long time, should not be unsettled. The doctrine of stare decisis is expressed in the maxim stare decisis et non quieta movere, which means "to stand by decisions and not to disturb what is settled". Lord Coke aptly described this in his classic English version as "those things which have been so often adjudged ought to rest in peace". The underlying logic of this doctrine is to maintain consistency and avoid uncertainty. The guiding philosophy is that a view which has held the field for a long time should not be disturbed only because another view is possible."

61. The vesting of securities in favour of the nominee contemplated under S. 109A of the Companies Act, 1956 (pari materia S. 72 of Companies Act, 2013) & Bye-Law 9.11.1 of Depositories Act, 1996 is for a limited purpose i.e., to ensure that there exists no confusion pertaining to legal formalities that are to be undertaken upon the death of the

holder and by extension, to protect the subject matter of nomination from any protracted litigation until the legal representatives of the deceased holder are able to take appropriate steps. The object of introduction of nomination facility vide the Companies (Amendment) Act, 1999 was only to provide an impetus to the investment climate and ease the cumbersome process of obtaining various letters of succession, from different authorities upon the shareholder's death.

62. Additionally, there is a complex layer of commercial considerations that are to be taken into account while dealing with the Issue of nomination pertaining to companies or until legal heirs are able to sufficiently establish their right of succession to the company. Therefore, offering a discharge to the entity once the nominee is in picture is quite distinct from granting ownership of securities to nominees instead of the legal heirs. Nomination process therefore doesnot override the succession laws. Simply said, there is no third mode of succession that the scheme of the Companies Act, 1956 (pari materia provisions in Companies Act, 2013) and Depositories Act, 1996 aims or intends to provide.

63. Upon a careful perusal of the provisions within the Companies Act, it is clear that it does not deal with the law of succession. Therefore, a departure from this settled position of law is not at all warranted. The impugned decision takes the correct view. The appeal is accordingly dismissed without any order on cost.

23. The position of law as regards the rights of nominee under Section 109A and 109B of the Companies Act, 1956 read with Bye-law 9.11 of Depositories Act, 1996 is now settled by the authoritative pronouncement of the Apex Court upholding the view of the Division

Bench of this Court. The Apex Court has held that the vesting of securities in favour of nominee contemplated under Section 109A of the Companies Act, and by law 9.11.1 of the Depositories Act is for a limited purpose to protect the subject matter of the nomination from any protracted litigation until the legal representatives of the deceased holder are able to take appropriate steps. The Apex Court having held that the nomination process does not override the succession laws, the issue is now settled.

24. In the present case, admittedly the Plaintiffs are Class-II heirs and they are entitled to succeed to the Demat accounts of the deceased Vidyadhar irrespective of the nomination in favour of the Defendant Nos. 1 and 3 by the deceased Vidyadhar. The submission that as the succession certificate obtained by the Appellant is not in respect of Demat account which are subject matter of the suit, the Plaintiffs have given up their right cannot be accepted. To constitute waiver there must voluntary and intentional relinquishment of the right. Waiver is a question of fact which is required to be pleaded and proved. No case of waiver was pleaded by the Defendants and as such the submission is liable to be rejected.

25. In view of Section 8 of the Hindu Succession Act, 1956, the plaintiffs being Class-II heirs are entitled to succeed to the Demat accounts of deceased Vidyadhar as he had died intestate.

26. The substantial question is settled by the Division Bench of this Court as well as the decision of Apex Court in ***Shakti Yezdani vs Jayanand Jayant Salgaonkar*** (supra). The view taken by the Trial Court and the Appellate Court that the provisions of Section 109A of the Companies Act, 1956 having overriding effect over the existing laws as regards the disposition of property by testamentary or otherwise is not the correct view. Upon death of the shareholder, the nominee does not became entitled to the rights of shareholder to the exclusion of the other heirs and that there is no third mode of succession that the scheme of Companies Act aims or intends to provide as held by the Apex Court.

27. The substantial questions of laws are answered accordingly. Resultantly the Appeal succeeds. The impugned judgment and order of the Appellate Court dated 9th October, 2014 as well as the Judgment of the Trial Court dated 29th August, 2008 are hereby quashed and set aside. Resultantly, RCS No. 343/ 2005 is decreed. Decree be drawn up accordingly. Civil Application does not survive and stands disposed of.

(SHARMILA U. DESHMUKH, J.)

This order is corrected as per speaking to the minutes order dated 6th March, 2024.

Signed by: Harish V. Chaudhari
Designation: PA To Honourable Judge
Date: 08/03/2024 10:51:48