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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY & INTESTATE JURISDICTION

NOTICE OF MOTION NO. 822 OF 2014

IN

SUIT NO. 503 OF 2014

JAYANAND JAYANT SALGAONKAR,
of Bombay Indian Inhabitant,
Occupation Business, having his address at
B-1, Vikas Apartment, N.M. Kale Marg,
Agar Bazar, Bombay - 400 028. ... Applicant

In the matter between

JAYANAND JAYANT SALGAONKAR,
of Bombay Indian Inhabitant,
Occupation Business, having his address at
B-1, Vikas Apartment, N.M. Kale Marg,
Agar Bazar, Bombay - 400 028
Org. Plaintiff ... Plaintiff

versus

1. **JAYASHREE JAYANT SALGAONKAR**,
of Bombay Indian Inhabitant,
having her address at 604B, Laxmi Sadan,
Dr. Baba Saheb Ambedkar Marg,
Dadar, Bombay - 400 014

2. **JAYRAJ JAYANT SALGAONKAR**,
of Bombay Indian Inhabitant,
Occupation Business, having his
address at 604B, Laxmi Sadan,

Dr. Baba Saheb Ambedkar Marg,
Dadar, Bombay - 400 014

3. **JAYENDRA JAYANT SALGAONKAR**,
of Bombay Indian Inhabitant,
Occupation Business, having his
address at 2, Radha Mandir,
Ground floor, 213, Sir Bhalchandra
Road, Matunga, Bombay – 400 014

4. **BHARTI SALGAONKAR**,
of Bombay Indian Inhabitant,
Occupation Business, having her
address at 604B, Laxmi Sadan,
Dr. Baba Saheb Ambedkar Marg,
Dadar, Bombay - 400 014

5. **SHAKTI YEZDANI**,
of Bombay Indian Inhabitant,
Occupation Employed, having her
address at 604B, Laxmi Sadan,
Dr. Baba Saheb Ambedkar Marg,
Dadar, Bombay - 400 014

6. **LALITA LAXMI SALGAONKAR**,
of Bombay Indian Inhabitant,
Occupation Employed, having her
address at 604B, Laxmi Sadan,
Dr. Baba Saheb Ambedkar Marg,
Dadar, Bombay - 400 014

7. **SEEMA SALGAONKAR**,
of Bombay Indian Inhabitant,
Occupation Business, having her
address at 2, Radha Mandir,
Ground floor, 213, Sir Bhalchandra
Road, Matunga, Bombay – 400 014

8. **SAMARTH SALGAONKAR**,
of Bombay Indian Inhabitant,
Occupation Employed, having his
address at 2, Radha Mandir,
Ground floor, 213, Sir Bhalchandra
Road, Matunga, Bombay – 400 014

9. **SIDDHI SALGAONKAR**,
of Bombay Indian Inhabitant,
Occupation Employed, having her
address at 2, Radha Mandir,
Ground floor, 213, Sir Bhalchandra
Road, Matunga, Bombay – 400 014

10. **JAY GANESH NYAS TRUST**
A trust registered under the Public Trusts
Act, 1950 having its address at 604B, Laxmi
Sadan, Dr. Baba Saheb Ambedkar Marg,
Dadar, Bombay - 400 014 ...Defendants

APPEARANCES

FOR THE PLAINTIFF	**Mr. Snehal Shah**, *i/b Y. R. Shah.*
FOR DEFENDANTS NOS. 2 AND 4	**Mr. P. G. Karande**
FOR DEFENDANTS NOS. 5 AND 6	**Mr. Rajendra V. Pai**, *a/w A. R. Pai, A. A. Dandekar, N. Thakkar, Prashant Karande i/b Mrs. Bina R. Pai.*
FOR DEFENDANTS NOS. 3, 7, 8 AND 9	**Mr. Vikas Warerkar**, *i/b M/s. Warerkar and Warerkar.*

ALONG WITH

TESTAMENTARY PETITION NO. 457 OF 2014

PETITION FOR PROBATE OF THE LAST WILL AND TESTAMENT OF URMILA S GHATALIA of Mumbai, Jain, Inhabitant residing at the time of her death at IRIS, 6th Floor, Flat No. 21-22, G D Somani Marg, Cuffe Parade, Mumbai – 400 005, Maharashtra State ... Deceased

SWATI SHATISHCHANDRA GHATALIA ... Applicant/ Caveatrix

In the matter between

NANAK S. GHATALIA,
of Mumbai, Indian Inhabitant, residing at IRIS, 6th Floor, Flat No. 21-22, Cuffe Parade, Mumbai – 400 005 ... Petitioner

versus

SWATI SHATISHCHANDRA GHATALIA
aged about 49 years, Indian Inhabitant of Mumbai, residing at Flat No. 21-22,6th floor, IRIS, Cuffe Parade, Mumbai 400 005

... Caveatrix

APPEARANCES

FOR THE PETITIONER	**Mr. Nanak Ghatalia**, *in person.*
FOR THE CAVEATRIX	**Mr. Karl Tamboly,** *i/b Harish Pawar.*

CORAM : G.S.Patel, J.

JUDGMENT RESERVED ON : 12th December 2014

JUDGMENT PRONOUNCED ON : 31st March 2015

JUDGMENT:

1. A common question of law arises in these two otherwise unrelated cases. In this judgment, I have addressed only that question of law, but not the respective applications on merits.

2. The question first came up in *Jayanand Jayant Salgaonkar v Jayashree Jayant Salgaonkar* ("***Salgaonkar***") when Mr. Snehal Shah, learned Counsel for the Plaintiff in that matter, urged that the decision of a learned single Judge of this Court in *Harsha Nitin Kokate v The Saraswat Cooperative Bank Ltd & Ors.*[1] was *per incuriam* and not good law. As a substantially similar issue arose in the second of these cases *Nanak Ghatalia v Swati Ghatalia*, I invited Mr. Ghatalia, the Petitioner appearing *pro-se* and Mr. Karl Tamboly, learned Counsel for the Caveatrix, to make their submissions on the question as well.

3. I am not in this judgment deciding the merits of the applications in *Salgaonkar* or *Ghatalia*, but only considering whether *Kokate* was or was not *per incuriam*. The applications in both cases will then have to be heard on their merits. However, it is necessary to set out briefly how the question for determination arises.

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[1] 2010 (112) Bom. LR 2014

4. *Salgaonkar* (Suit No.503 of 2014) is an action for administration of the estate of one Jayant Shivram Salgaonkar. The Plaintiff's Notice of Motion No. 822 of 2014 seeks reliefs in respect of his estate described in the list at Exhibit "A" to the Plaint. Item 9 of that list speaks of investments in Mutual Funds, etc. These are detailed in Exhibit "D" to the Plaint. This is a list of various investments in Mutual Funds and it shows the name of the 'nominee' in respect of each such investment. Defendants Nos. 5 and 6 seem to be the nominees in respect of the bulk of these mutual fund investments. In their Affidavits in Reply to the Notice of Motion, Defendants Nos. 5 and 6, represented by Mr. Rajendra Pai, learned Counsel, have specifically urged that these investments do not form part of the Jayant Salgaonkar's estate. They each claim to be exclusively entitled in law to 'succeed to' these investments *qua* such nominees, and they invoke, *inter alia*, Regulation 29A of the SEBI (Mutual Fund) Regulations, 1996. Defendant No.6 makes a similar claim on the basis of Section 45-ZA of the Banking Regulation Act, 1949 in respect of a fixed deposit receipt for Rs.50 lakhs with IDBI Bank.

5. In *Ghatalia*, probate is sought to the will of one Urmila S. Ghatalia. The Petitioner is one of the deceased's sons. The other son has consented to the grant of probate. The action is opposed by the deceased's daughter. At present, the controversy is only whether or not the daughter is entitled to file and maintain a caveat in opposition to the probate petition or whether this caveat must be held to be defective and *non-est*. In the course of the hearing, a settlement was suggested and was very nearly reached. The only contentious issue related to some of the deceased's investments.

The Petitioner, Mr. Nanak S. Ghatalia, submitted that being a nominee in respect of those investments he alone was entitled to them and, notwithstanding anything in the will, these investments came to him exclusively on his mother's death. They did not form part of her distributable estate and were not required to be distributed in accordance with the will that he propounds.

6. In both cases, the claims of exclusive rights to and ownership of the investments are founded on the judgment of the learned single Judge in *Kokate*. That decision was in a Notice of Motion in a Suit in which the plaintiff claimed an interest in certain shares as the heir and legal representative of one Nitin Kokate, the plaintiff's deceased husband. Nitin Kokate had, in his lifetime, made a nomination in respect of these shares in favour of his nephew, the 3rd defendant to the suit. The question placed before the Court was whether the plaintiff, Nitin Kokate's widow, could "show her legal right, title and interest in those shares".[2] There was no dispute about the correctness of the nomination or that Nitin Kokate made that nomination *inter vivos* after his marriage to the plaintiff. The Court then considered the provisions of Section 109A of the Companies Act, 1956,[3] and Bye-Law 9.11 under the Depositories Act, 1996,[4] and found that once a nomination is made, the securities in question:

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[2] Para 2 of the Maharashtra Law Journal report. All page and paragraph references to *Kokate* are to those in this report.

[3] Equivalent to Section 72 of the Companies Act, 2013.

[4] Incorrectly described in *Kokate* as *Section 9* to the Act.

> automatically get transferred in the name of the nominee upon the death of the holder of the shares.[5]

and, further, that:

> "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."[6]

7. In opposition to the 3rd defendant's claim, the submission made on behalf of the plaintiff was noted in paragraph 9 of Kokate thus:

> "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."

This is precisely the formulation that Mr. Shah and Mr. Tamboly commend before me today.

8. The plaintiff's counsel in *Kokate* also placed before the Court the Supreme Court decision in *Smt. Sarbati Devi v Smt. Usha Devi*,[7] a decision under Section 39 of the Insurance Act. Similarly, attention was also invited to Section 30 of the Maharashtra Cooperative Societies Act, 1960. The *Kokate* Court held that these analogies were misplaced, and that the position under the

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5 Paragraph 6

6 Paragraph 6

7 (1984) 1 SCC 424 : AIR 1984 SC 346

Companies Act, 1956 was to the contrary. The Court considered various standard texts on the meaning of the word 'vest',[8] and the decisions of the Supreme Court in *The Fruit & Vegetable Merchants' Union v The Delhi Improvement Trust*[9], *Dr. M. Ismail Faruqi v Union of India*,[10] *Municipal Corporation of Greater Bombay v Hindustan Petroleum Corporation*,[11] and *Bharat Coking Coal v Karam Chand Thapar & Bros.*[12] Then, in paragraphs 24 to 26 of *Kokate*, the Court concluded:

> "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***

[8] Paragraphs 14 through 23.

[9] AIR 1957 SC 344; *Kokate*, paragraph 18.

[10] (1994) 6 SCC 360 : AIR 1995 SC 605; *Kokate*, paragraph 21.

[11] (2001) 8 SCC 143; *Kokate*, paragraph 22.

[12] (2003) 1 SCC 6 : 2002 (8) SCALE 388; *Kokate*, paragraph 23.

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 there under 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."
>
> (*Emphasis supplied*)

9. Mr. Shah and Mr. Tamboly submit that in arriving at this conclusion, although the *Kokate* Court did consider the Supreme Court decision in *Sarbati Devi*, its attention was not drawn to several other binding decisions of the Supreme Court and of this Court, all of which considered statutory provisions *in pari materia* with Section 109A of the Companies Act, 1956 and Bye-Law 9.11 under the Depositories Act, 1996. These decisions, they submit, make it clear that the emphasis is not on vesting, a term that is necessarily to be viewed in its context, but on whether a third line of succession, in addition to testamentary and intestate succession, was contemplated by the statutory provisions before the *Kokate* court. This, they submit, is not what the previous decisions of the Supreme Court and this High Court say; to the contrary, those decisions make it clear that the submission on behalf of Harsha Kokate were indeed accurate and were the only possible view in law, viz., that a nomination will only serve to discharge the responsibility or liability of the issuing depository *vis-à-vis* the nominee, but the nominee continues to be in a fiduciary capacity *vis-à-vis* all other claimants under either of the two statutorily recognized modes of succession. To hold otherwise, they submit, would be to put these corporate

statutes in direct and irreconcilable conflict with the Indian Succession Act, 1925. For, Mr. Shah and Mr. Tamboly say, not only would succession by intestacy be defeated by a corporate provision intended for the protection of the corporate, but, and perhaps more significantly, a testamentary disposition would be wholly defeated by a nomination, even if the will in question is actually made after the nomination and does contain a perfectly legitimate bequest of the very securities in respect of a nomination is made. In other words, a nomination not only becomes a testamentary disposition of sorts but stands on a higher pedestal, and, at the same time, is unguarded by any of the checks, balances and tests against which the validity of a will and its due execution are to be tested. This was not, they say, the intendment of the corporate statutes considered, and this construct of the law is directly contrary to decisions of the Supreme Court and the High Court, each of which was binding on the *Kokate* Court. I will turn presently to the decisions cited in this regard, and to these arguments in greater detail.

10. Mr. Shah invites attention to the preamble to the Depositories Act, 1996. This is:

> An Act to provide for regulation of depositories in securities and for matters connected therewith or incidental thereto.

When Mr. Shah says, therefore, that this has nothing whatever to do with succession or disposition *inter vivos*, I believe he is correct. Plainly, the Depositories Act is concerned with the regulation of depositories, i.e., those entities providing depository services, and not in relation to the holders of the securities in such services, or the

manner in which those security-holders might choose to conduct their affairs or to leave the distribution of these securities either to be governed by actions and deeds *inter vivos*, testamentary succession or inheritance.

11. Section 2(1)(a) of the Depositories Act defines the expression 'beneficial owner' thus:

> (a) "beneficial owner" means a person whose name is recorded as such with a depository;

This, Mr. Shah says, is a definition wholly unrelated to any fiduciary responsibilities, and there is no other section that deals with nominations *per se*. That issue (nomination) is to be found only in Bye-Law 9.11 framed under the Depositories Act; and the purpose of this Bye-Law is made clear in 9.11.7. The relevant Bye-Laws (as also reproduced in *Kokate*) read:

> 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 therefore. The closure of the account by the Nominating Person(s) shall conclusively cancel the nomination.

9.11.5. A Nominee shall not be entitled to exercise any right conferred on Beneficial Owners under these Bye Laws, upon the death of the Nominating Person(s), unless the Nominee follows the procedure prescribed in the Business Rules for being registered as the Beneficial Owner of the securities of the Nominating Person(s) in the books of the Depository.

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

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

> 9.11.8 ...
>
> (*Emphasis supplied*)

Now while it is true that Bye-Law 9.11.7 contains a *non-obstante* clause, the reason for this is clear from the following phrase, viz., "for the purposes of dealing with the securities lying to the credit of the deceased Nominating Person(s) in any manner".

12. Section 109A of the Companies Act, 1956 was introduced in 1999 and this was done, Mr. Shah submits, for conformity with the Depositories Act which preceded it by three years. Sub-section (3) of the newly introduced section of the Companies Act, 1956 reads:

> (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.

13. The purpose of the Companies Act is to consolidate the law relating to companies and certain other associations. It is not in any sense intended or directed to settled laws of succession or transfer

of property, but only the law relating to companies. Therefore, Mr. Shah submits, any provision of the Companies Act must be viewed in context, and there is nothing in this sub-section that can or should be viewed as an amendment *sub-silentio* of the testamentary and other dispositive laws, ones that concern themselves with the transfers (*inter vivos* or by inheritance or succession) of all property, including corporate securities. What Section 109A does is to ring-fence the liability of companies *vis-à-vis* the holders of securities. It does not absolve the nominees of those securities from their fiduciary responsibilities to the heirs or legatees of the original holder of the securities, the nominator.

14. The decision of the Supreme Court in *Utkal Contractors & Joinery Pvt. Ltd. & Ors. v State of Orissa & Ors.*[13] reiterates well-settled principles governing the interpretation of statutes. The Supreme Court held:

> 9. In considering the rival submissions of the learned Counsel and in defining and construing the area and the content of the Act and its provisions, it is necessary to make certain general observations regarding the interpretation of statutes. **A statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation. The words of a statute take their colour from the reason for it.** How do we discover the reason for a statute? There are external and internal aids. The external aids are statement of Objects and Reasons when the Bill is presented to Parliament, the reports of Committees which preceded the Bill and the reports of Parliamentary

[13] (1987) 3 SCC 279

Committees. Occasional excursions into the debates of Parliament are permitted. Internal aids are the preamble, the scheme and the provisions of the Act. Having discovered the reason for the statute and so having set the sail to the wind, the interpreter may proceed ahead. ***No provision in the statute and no word of the statute may be construed in isolation.*** **Every provision and every word must be looked at generally before any provision or word is attempted to be construed.** ***The setting and the pattern are important.*** **It is again important to remember that Parliament does not waste its breath unnecessarily. Just as Parliament is not expected to use unnecessary expressions, Parliament is also not expected to express itself unnecessarily. Even as Parliament does not use any word without meaning something,** ***Parliament does not legislate where no legislation is called for.*** **Parliament cannot be assumed to legislate for the sake of legislation; nor can it be assumed to make pointless legislation. Parliament does not indulge in legislation merely to state what it is unnecessary to state or to do what is already validly done. Parliament may not be assumed to legislate unnecessarily. Again, while the words of an enactment are important, the context is no less important.** For instance, "the fact that general words are used in a statute is not in itself a conclusive reason why every case falling literally within them should be governed by that statute, and the context of an Act may well indicate that wide or general words should be given a restrictive meaning' (see Halsbury, 4th edn. Vol. 44 para 874).

10. In *Attorney General v. H.R.H. Prince Augustus* 1957 (1) All ER 49, Viscount Simonds said,

> My Lords, the contention of the Attorney-General was, in the first place met by the bald general proposition that, where the enacting part of a statute is clear and unambiguous, it cannot be cut down by the preamble, and a large part of the time which the hearing of this case occupied was spent in discussing authorities which were said to support that proposition. I wish, at the outset, to express my dissent from it, if it means that I cannot obtain assistance from the preamble in ascertaining the meaning of the relevant enacting part. ***For words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context.*** So it is that **I conceive it to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes *in pari materia*, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy.**

11. In *Chertsey, V.D.C. v. Mixnam's Properties* 1964 (2) All ER 627, Lord Reid said that the general effect of the authorities was properly in Maxwell's Interpretation of Statutes as follows:

> **General words and phrases therefore, however wide and comprehensive they may be in their literal sense, must usually**

> **be construed as being limited to the actual objects of the Act.**

Though no reference was made to Maxwell this Court in *Empress Mills v. Municipal Committee, Wardha* [1958] 1 SCR 1102 , stated the same proposition:

> It is also a recognised principle of construction that ***general words and phrases however wide and comprehensive they may be in their literal sense, must usually be construed as being limited to the actual objects of the Act***.

12. In *Maunsell v. Olins* 1975 (1) All ER 16, Lord Wilberforce observed,

> ...I am not, myself, able to solve the problem by a simple resort to plain meaning. Most language, and particularly all languages used in rent legislation, is opaque: all general words are open to inspection, many general words demand inspection, to see whether they really bear their widest possible meaning.

13. But we think that when we rely upon rules of construction we must always bear in mind Lord Reid's admonition in *Maunsell v. Olins* (supra) to the following effect:

> Then rules of construction are relied on. They are not rules in the ordinary sense of having some binding force. **They are our servants not our masters. They are aids to constructions, presumptions or pointers. Not infrequently one 'rule'**

> **points in one direction, another in a different direction. In each case we must look at all relevant circumstances and, decide as a matter of judgment what weight to attach to any particular 'rule'.**
>
> (*Emphasis supplied*)

15. Mr. Shah submits that if a mere nomination was to effect a full-fledged transfer with all the incidents of ownership, it could not be dependent on the death of the nominator. If the nominator died holding securities, they necessarily fell into the deceased's estate and could not be abstracted from it. The position would be different in the case of a transfer *inter vivos*, for then the securities would no longer be the property of the nominator and, on his death, would form no part of his or her estate. The consequence of *Kokate* is that there is a transfer *in praesenti*, but to take effect only on death. That creates an inherent conflict: would it mean, for instance, that the nominator could not truck with those shares? Would the nomination, on account of the transfer *eo instante*, divest the nominator of ownership? If not, then the property in the form of securities would necessarily form part of the nominator's estate on his demise, and it cannot be otherwise.

16. This is evident, Mr. Shah says, when one looks at the accepted definitions of 'nominee' rather than 'vesting'. That definition will tell us whether or not a nominee properly so called can ever acquire the full panoply of the incidents of ownership. In *Black's Law Dictionary*, 8th edition, a nominee is defined thus:

> Nominee (nom-i-nee), *n*. **1**. A person who is proposed for an office, membership, award, or like title or status; an individual seeking nomination, election or appointment is a *candidate*. A candidate for an election becomes a *nominee* after being formally nominated. See CANDIDATE. **2**. A person designated to act in place of another, usu. in a very limited way. **3**. **A party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others.**
>
> (*Emphasis supplied*)

It is the third of these definitions that Mr. Shah commends as the correct meaning for our purposes. That definition, he says, makes it clear that the nominee holds title in a fiduciary capacity and none other.

Iyer's Judicial Dictionary includes this definition under the entry 'nomination':[14]

> *Nominee*. It is clearly wide enough to include a transferee of shares who was paying for them from his own resources.
>
> Should not be given the narrow meaning of a trustee for the company, but should be given its ordinary meaning of any person nominated by the company. [*Motor & General Insurance Co Ltd v Gobin*, 1987 LRC (Comm) 824 (PC)]
>
> **This expression is not defined in the Companies Act. It apparently means a holder of shares, having no beneficial interest in the shares, the**

[14] Page 1098

> **whole beneficial interest remaining in one or more other persons.**
>
> (*Emphasis supplied*)

17. No nomination can ever result in a divesting, Mr. Shah submits. It is merely a matter of convenience for the company or the depository, not for the nominator and certainly it does not transfer ownership to the nominee. The reason for this is that the company or depository should not have to face a legal vacuum till the contesting rights are decided. *Vatticherukuru Village Panchayat v Nori Venkatarama Deekshithulu & Ors.*[15] is a decision of vital import to the present discussion because it not only considers the meaning of the word 'vest', but also the decision in *Fruit & Vegetable Merchants' Union*, which was cited before and considered by the *Kokate* Court. In paragraph 10 of *Vatticherukuru*, the Supreme Court considered the implications and meaning of the word 'vest' in the context of a local tenancy and land law and revenue records. It said:

> 10. **The word 'vest' clothes varied colours from the context and situation in which the word came to be used in a statute or rule**. In Chamber's Mid-Century Dictionary at p. 1230 defined "vesting" in the legal sense 'to settle, secure, or put in fixed right of possession; to endow, to descend, devolve or to take effect, as a right'. In Black's Law Dictionary, 5th Ed. 1401, the word, 'vest', to give an immediate, fixed right of present or future enjoyment, to accrue to, to be fixed, to take effect, to clothe with possession, to deliver full possession of land or of an estate, to give seisin to enfeoff. In Stroud's Judicial Dictionary, 4th Edition, Vol. 5 at p. 2938, the

[15] 1991 Supp (2) SCC 228

word 'vested' was defined in several senses. At p. 2940 in item 12 it is stated thus 'as to the interest acquired by public bodies, created for a particular purpose, in works such as embankments which are 'vested' in them by statute, see *Port of London Authority v. Canvey Island Commissioners* [1932] 1 Ch. 446 in which it was held that the statutory vesting was to construct the sea wall against inundation or damages etc. and did not acquire fee simple. Item 4 at p. 2939, the word 'vest', in the absence of a context, is usually taken to mean vest in interest rather than vest in possession'. In item 8 to 'vest', "generally means to give the property in". **Thus the word 'vest' bears variable colour taking its content from the context in which it came to be used.** Take for instance, the land acquired under the Land Acquisition Act. By operation of Sections 16 & 17 thereof, the property so acquired shall vest absolutely in the Government free from all encumbrances. Thereby, absolute right, title and interest is vested in the Government without any limitation divesting the pre-existing rights of its owner. Similarly, under Section 56 of the Provincial Insolvency Act, 1920, the estate of the insolvent vests in the receiver only for the purpose of its administration and to pay off the debts to the creditors. The receiver acquired no personal interest of his own in the property. The receiver appointed by the court takes possession of the properties in the suit on behalf of the court and administer the property on behalf of the ultimate successful party as an officer of the court and he has no personal interest in the property vested thereunder. In *Fruit and Vegetable Merchants Union v. Delhi Improvement Trust* [1957] SCR 1 the question was whether the Delhi Improvement Trust was vested of the Nazul land belonging to the Government with absolute right, when the property was entrusted under the

> scheme for construction of the markets etc. It was held by this Court that **placing the property at the disposal of the trust did not signify that the Government had divested itself of its title to the property and transferred the same to the trust. The clauses in the agreement show that the Government had created the Trust as its agent not on permanent basis but as a convenient mode of having the scheme of improvement implemented by the Trust subject to the control of the Government.**

18. The Supreme Court decision in *Smt. Sarbati Devi v Smt. Usha Devi*[16] was placed before the *Kokate* Court. This was a case under Section 39 of the Insurance Act, 1938. The question, as set out in paragraph 1, was whether a nominee of life insurance policy under that Section, on the death intestate of the assured, would be entitled to 'the beneficial interest' in the amount received under the policy to the exclusion of all the heirs of the assured. The section under consideration contained no *non-obstante* clause akin to the ones in Section 109A of the Companies Act, 1956 or Bye-Law 9.11.7 under the Depositories Act, 1996. In Mr. Shah's submission, this makes no difference, for that *non-obstante* clause only serves to protect the company or the depository not divest an heir. In *Sarbati Devi*, the Supreme Court said that there was no warrant for the position that Section 39 of the Insurance Act "operates as a third kind of succession which is styled as a 'statutory testament' in paragraph 16 of the decision in Uma Sehgal's case." The Supreme Court said:

> "5. ... **It is difficult to hold that Section 39 of the Act was intended to act as a third mode of succession provided by the statute. The provision in**

[16] (1984) 1 SCC 424 : AIR 1984 SC 346, *supra*.

> **Sub-section (6) of Section 39 which says that the amount shall be payable to the nominee or nominees does not mean that the amount shall belong to the nominee or nominees.** We have to bear in mind here the **special care which law and judicial precedents take in the matter of execution and proof of wills, which have the effect of diverting the estate from the ordinary course of intestate succession and that the rigour of the rules governing the testamentary succession is not relaxed even where wills are registered.**
>
> (*Emphasis supplied*)

Later, in paragraph 8, the Supreme Court said:

> "8. We have carefully gone through the judgment of the Delhi High Court in Mrs. Uma Sehgal's (case) supra. In this case of the High Court of Delhi clearly came to the conclusion that the nominee had no right in the lifetime of the assured to the amount payable under the policy and that his rights would spring up only on the death of the assured. **The Delhi High Court having reached that conclusion did not proceed to examine the possibility of an existence of a conflict between the law of succession and the right of the nominee under Section 39 of the Act arising on the death of the assured and in that event which would prevail. We are of the view that the language of Section 39 of the Act is not capable of altering the course of succession under law.** The second error committed by the Delhi High Court in this case is the reliance placed by it on the effect of the amendment of Section 60(1)(kb) of the CPC, 1908 providing that all moneys payable under a policy of insurance on the life of the judgment

> debtor shall be exempt from attachment by his creditors. **The High Court equated a nominee to the heirs and legatees of the assured and proceeded to hold that the nominee succeeded to the estate with all 'plus and minus points'. We find it difficult to treat a nominee as being equivalent to an heir or legatee having regard to the clear provisions of Section 39 of the Act.** ..."
>
> (*Emphasis supplied*)

19. Mr. Shah submits that this decision was on all fours with the case before the *Kokate* Court and was incorrectly distinguished. What the *Kokate* Court also did not consider was that *Sarbati Devi* was also considered by the Supreme Court itself in *Shri Vishin N. Khanchandani & Anr. v Vidya Lachmandas Khanchandani & Anr.*[17] That case came up to the Supreme Court from a decision of this court in a First Appeal. It dealt with a nomination under the Government Savings Certificates Act, 1959. The question before the Supreme Court was whether the nominee specified in the National Savings Certificate, on the death of its holder, became entitled to the sum due under the certificate to the exclusion of all other persons, or whether the amount of the certificate was to be retained by him for the benefit of the deceased's legal heirs. Clearly, this was substantially the question in *Sarbati Devi*. The contention by the appellants in *Khanchandani* was precisely the same as is taken here by Mr. Pai and Mr. Ghatalia:

> 4. Feeling aggrieved, the appellants- the nominees of the National Savings Certificates have filed this appeal contending that under Section 6 of the Government

[17] (2000) 6 SCC 724

> Savings Certificates Act, 1959, after the death of the holder they had become entitled to the payment of such saving certificates in which they were nominees, to the exclusion of all other persons including the respondents and entitled to utilise the aforesaid amounts in the manner they like. **It is contended that by their nomination, the holder of the National Savings Certificates, namely, Shri Lachmandas Naraindas Khanchandani has diverted the normal course of succession. According to them Section 6 provides another mode of succession, to the exclusion of testamentary and non-testamentary successions. Alternatively, it was urged that nomination itself amounted to testamentary succession.**

20. The statutory provision in question is set out in paragraph 6 of *Khanchandani*. Section 6(1) of the act in question also contained a *non-obstante* clause, thus:

> **6. Nomination by holders of savings certificates.**
>
> (1) **Notwithstanding anything contained in any law for the time being in force, or in any disposition, testamentary or otherwise in respect of any savings certificate**, where a nomination made in the prescribed manner purports to confer on any person ***the right to receive payment of the sum for the time being due on the savings certificate on the death of the holder thereof*** and before the maturity of the certificate, or before the certificate having reached maturity has been discharged, ***the nominee shall, on the death of the holder of the savings certificate, become entitled to the savings certificate*** and to be paid the sum due thereon to the exclusion of all other persons, unless the

nomination is varied or cancelled in the prescribed manner.

(*Emphasis supplied*)

21. Section 8 then said that payment made in accordance with the previous sections would discharge the insurer; and then followed Section 8(2), one that is without a comparable parallel in Section 109A and the Depositories Act, 1996:

> **8. Payment to be a full discharge.—**
>
> (1) Any payment made in accordance with the foregoing provisions of this Act to a minor or to his parent or guardian or to a nominee or to any other person shall be a full discharge from all further liability in respect of the sum so paid.
>
> **(2) Nothing in Sub-section (1) shall be deemed to preclude any executor or administrator or other representative of a deceased holder of a savings certificate from recovering from the person receiving the same under Section 7 the amount remaining in his hands after deducting the amount of all debts or other demands lawfully paid or discharged by him in due course of administration.**
>
> (3) Any creditor or claimant against the estate of a holder of a savings certificate may recover his debt or claim out of the sum paid under this Act to any person and remaining in his hands unadministered in the same manner and to the same extent as if the latter had obtained letters of administration to the estate of the deceased.

(*Emphasis supplied*)

22. Mr. Pai and Mr. Ghatalia submit that *Khanchandani* clearly has no application because the statutory provision there had a fail-safe in Section 8(2) that specifically saved the interests of heirs or legatees. There is no such provision in the Companies Act or the Depositories Act, they say, and the two legal schemas are distinct and different from the one under the Government Savings Certificate Act. I do not believe this to be an argument of substance. The savings provision in Section 8(2) was clarificatory and perhaps *ex majore cautela*. It does not take away the settled position in law, and this is clear from paragraph 9 of *Khanchandani* in which *Sarbati Devi* is considered and quoted at length. These are the same passages I have extracted above. If there was any doubt about this, it is put to rest by paragraphs 11 to 13 in *Khanchandani*:[18]

> 11. **It is contended on behalf of the appellants that the *non-obstante* clause in Section 6 excludes all other persons, including the legal heirs of the deceased holder, to claim any right over the sum paid on account of the National Savings Certificates, to the nominee. There is no doubt that by *non-obstante* clause the Legislature devices means which are usually applied to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other statute. In other words such a clause is used to avoid the operation and effect of all contrary provisions. *The phrase is equivalent to showing that the Act shall be no impediment to measure intended. To attract the applicability of the phrase, the whole of the Section, the scheme of the Act and the objects***

[18] Paragraph numbers follow the SCC report.

and reasons for which such an enactment is made has to be kept in mind.

12. The submission made on behalf of the appellants has no substance in view of Sub-section (2) of Section 8 and the Statement of Objects and Reasons necessitating the passing of the Act. Sub-section (1) of Section 8 provides that if any payment is made in accordance with the provisions of the Act to a nominee, the same shall be a full discharge from all further liabilities in respect of the sum so paid. Section 7 of the Act provides that after the death of the holder of the savings certificates payment of the sum shall be made to the nominee, if any, and Sub-section (1) of Section 8 declares that such payment shall be a full discharge from all further liabilities in respect of the sum so paid. **However, Sub-section (2) of Section 8 specifies that the payment made to the nominee under Sub-section (1) shall not preclude any executor or administrator or the legal representative of the deceased holder of a savings certificate from recovering from the person receiving the same under Section 7; the amount remaining in nominee's hand after deducting the amount of all debts or other demands lawfully paid or discharged by him in due course of administration. In other words though the nominee of the National Savings Certificates has a right to be paid the sum due on such savings certificates after the death of the holder, yet he retains the said amount for the benefit of the persons who are entitled to it under the law of succession applicable in the case, however, subject to the exception of deductions mentioned in the Sub-section.** In the Statement of Objects and Reasons of the Act it is stated:

13. **In the light of what has been noticed hereinabove, it is apparent that though language and phraseology of Section 6 of the Act is different than the one used in Section 39 of the Insurance Act, yet, the effect of both the provisions is the same.** The Act only makes the provisions regarding avoiding delay and expense in making the payment of the amount of the National Savings Certificates, to the nominee of holder, which has been considered to be beneficial both for the holder as also for the post office. Any amount paid to the nominee after valid deductions becomes the estate of the deceased. Such an estate devolves upon all persons who are entitled to succession under law, custom or testament of the deceased holder. In other words, the law laid down by this Court in *Sarbati Devi*'s case holds the field and is equally applicable to the nominee becoming entitled to the payment of the amount on account of National Savings Certificates received by him under Section 6 read with Section 7 of the Act who in turn is liable to return the amount to those, in whose favour law creates beneficial interest, subject to the provisions of Sub-section (2) of Section 8 of the Act.

23. The Supreme Court in *Khanchandani* though it had before it a statute with a provision of express saving in Section 8(2), placed the entirety of the case on par with *Sarbati Devi*, a decision that considered Section 39 of the Insurance Act and did *not* have a provision parallel to Section 8(2) of the Government Savings Certificates Act. Consequently, the argument that a saving provision of that nature is essential and that, in its absence, there is an absolute devolvement to the exclusion of all heirs or legatees, on the nominee is an argument that was expressly raised and rejected by the Supreme Court.

24. But that is not all. Both *Sarbati Devi* and *Khanchandani* were considered in *Shipra Sengupta v Mridul Sengupta & Ors.*[19] Here again a claim was made on the basis of a nomination, the nominee contending that he succeeded, by virtue of that nomination made *inter vivos*, to specific movable property to the exclusion of heirs. *Sarbati Devi*[20] was considered as was *Khanchandani*.[21] Then the Supreme Court held:

> 17. **The controversy involved in the instant case is no longer *res integra*. The nominee is entitled to receive the same, but the amount so received is to be distributed according to the law of succession.** In terms of the factual foundation laid in this case, the deceased died on 8.11.1990 leaving behind his mother and widow as his only heirs and legal representatives entitled to succeed. Therefore, on the day when the right of succession opened, the appellant, his widow became entitled to one half of the amount of the general provident fund, the other half going to the mother and on her death, the other surviving son getting the same.
>
> 19. ***In view of the clear legal position, it is made abundantly clear that the amount in any head can be received by the nominee, but the amount can be claimed by the heirs of the deceased in accordance with law of succession governing them. In other words, nomination does not confer any beneficial interest on the nominee.*** In the instant case amounts so received are to be distributed according to the Hindu Succession Act, 1956. The State Bank of India is directed to release half of the amount of general

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19 (2009) 10 SCC 680

20 *Shipra Sengupta*, paragraph 14

21 *Shipra Sengupta*, paragraph 15

provident fund to the appellant now within two months from today along with interest.

(*Emphasis supplied*)

25. Now *Shipra Sengupta* is a decision of 20th August 2009; *Kokate* is of 20th April 2010, about eight months later. *Shipra Sengupta* contains an absolutely unambiguous statement of the law without any qualification on account of this or that statutory provision. This decision was preceded by just a few months by that of the Supreme Court in *Challamma v Tilaga & Ors.*[22] on 31st July 2009, and this decision too reiterates and follows *Sarbati Devi* and *Khanchandani*. It reaffirms paragraph 4 of Sarbati Devi:

> 14. In *Sarbati Devi v. Usha Devi* [(1984) 1 SCC 424 : 1984 SCC (Tax) 59] this Court held: (SCC p. 427, para 4)
>
> > "4. At the outset it should be mentioned that except the decision of the Allahabad High Court in *Kesari Devi v. Dharma Devi* [AIR 1962 All 355] on which reliance was placed by the High Court in dismissing the appeal before it and the two decisions of the Delhi High Court in *S. Fauza Singh v. Kuldip Singh* [AIR 1978 Del 276] and *Uma Sehgal v. Dwarka Dass Sehgal* [AIR 1982 Del 36] in all other decisions cited before us **the view taken is that the nominee under Section 39 of the Act is nothing more than an agent to receive the money due under a life insurance policy in the circumstances similar to those in the present case and**

[22] (2009) 9 SCC 299

> **that the money remains the property of the assured during his lifetime and on his death forms part of his estate subject to the law of succession applicable to him.**"

26. On 6th April 2010, another learned single Judge of this Court considered precisely the question of a nomination in relation to provident fund dues in *Antonio Joao Fernandes v The Assistant Provident Fund Commissioner & Ors.*[23] Mr. Justice N.A. Britto had before him a First Appeal from an order dismissing a suit in which the plaintiff claimed to be entitled to 50% of the provident fund dues as one of the two nominees of the deceased holder of the provident fund account, his cousin. The deceased's sister, the 3rd defendant to the suit, was the nominee of the remaining 50%. The learned single Judge expressly rejected the argument that the nomination would operate to the exclusion of the legal heir. Both *Sarbati Devi* and *Khanchandani* were cited and followed;[24] and Mr. Justice Britto specifically held that the word 'vests' takes its colour from its context and has different connotations.[25] In this regard, the learned single Judge relied on the decision of this Court in *Nozer Gustad Commissariat v Central Bank of India & Ors.*[26] (which, in turn, relied on the Supreme Court decision in *Fruit & Vegetable Merchants' Union*), and to which Mr. Tamboly draws attention. *Nozer Commissariat* was also a decision in relation to an employee's provident fund, and in that decision, Mr. Justice D.R. Dhanuka categorically held that the decision in *Sarbati Devi* was not limited in

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23 2010 (4) Bom. C. R. 208 : 2010 (3) All M.R. 599

24 Paras 13 and 15 of the equivalent Manupatra report, MANU/MH/0330/2010

25 Paragraph 15 of the equivalent Manupatra report, *supra*.

26 1993 Mh. L.J. 228

any way to claims under the Insurance Act but set a general principle in relation to nominees. Both *Nozer Commissariat* and *Antonio Joao Fernandes* preceded *Kokate* (the latter by about two weeks). Neither was cited nor noticed in *Kokate*. Neither was distinguished.

27. The Supreme Court's decision in *Ram Chander Talwar & Anr. v Devender Kumar Talwar & Ors.*[27] was delivered on 6th October 2010 a few months after *Kokate*. Its relevance lies in the fact that it quite unequivocally reiterates the legal position in relation to a nominee and a nomination following *Khanchandani*; and *Talwar* does so in the context of Section 45ZA of the Banking Regulation Act, 1949, a provision that is *in pari materia* with Section 109A of the Companies Act, 1956:

> 45ZA(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 to 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 depositors, in relation to such deposit to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.

[27] (2010) 10 SCC 671

28. Mr. Pai's submission that the expression 'right to receive' is materially different from 'the right to vest' is not one that commends itself. The Supreme Court in *Talwar* said:

> 5. Section 45ZA(2) merely puts the nominee in the shoes of the depositor after his death and clothes him with the exclusive right to receive the money lying in the account. It gives him all the rights of the depositor so far as the depositor's account is concerned. But it by no stretch of imagination makes the nominee the owner of the money lying in the account. It needs to be remembered that the Banking Regulation Act is enacted to consolidate and amend the law relating to banking. It is in no way concerned with the question of succession. All the monies receivable by the nominee by virtue of Section 45ZA(2) would, therefore, form part of the estate of the deceased depositor and devolve according to the rule of succession to which the depositor may be governed.

29. *Talwar* came after *Kokate*, and it is not, of course, a reason to hold that the latter decision is *per incuriam*. But *Talwar* is significant because it reiterates in demonstrably comparable circumstances a statement of law that was canvassed before the *Kokate* court and expressly rejected; and, further, traces this statement of law at least to *Khanchandani*, a decision that preceded *Kokate* by several months.

30. The concept of a nomination has been extensively covered in the decision of a learned single Judge of the Delhi High Court in *Leelawati Singh & Anr. v State of Delhi & Ors.*[28] There again, a

[28] 1998 (75) DLT 694

question of nomination arose in a contested probate action. The learned single Judge not only followed *Sarbati Devi* but also set out an exhaustive survey of decisions of various courts on this aspect, saying *inter alia* that the legal effect of a nomination is no longer *res integra*. The learned single Judge quoted from an early decision in *Aimai v Awabai Dhanjishaw Jamsetji & Ors.*[29] That passage is a crystalline articulation of the law and is best reproduced in its entirety:

> "To take the second point first, that is, let us assume that the amount at the credit of Master in the fund, or at any rate the right to recover that amount from the fund, formed part of the estate of Master during his life-time. Has he done anything to divest himself of his right thereto? All he did was to direct that in case of his death the sum should be paid to Aimai. This is in itself a mere mandate the validity of which expires with the death of the mandator. It is true the validity is extended by Statute beyond such death but such statutory extension does not by itself produce any change in the nature of the mandate. The question as to what the recipient is to do with the fund when she has obtained it is still for decision. **The nomination paper is not a Will. In no case could a Parsi execute a Will in that form. But even in the case of those persons who can make a valid informal Will the nomination paper could not be considered as a Will and nothing more; if it were so considered the whole object of the nomination would be frustrated. The object of the nomination system is to designate some person to whom the Provident Fund may pay over the amount due to the subscriber, and obtain a valid quittance. If the nominee were**

[29] AIR 1924 Sind 57

merely the legatee under the nomination paper considered as a Will then in so much as a Will can be revoked by a later Will even if not communicated to the fund or by some former instrument of revocation or in some cases by marriage of the testator the fund could never be certain whether the person nominated was the person entitled to receive payment, that is, if the nominee is to be regarded as legatee only. True it is that the fund is made safe in respect of the payment made to the nominee, but I am not now considering that, I am merely ascertaining what the legal effect on Master's rights to this fund was by his executing this nomination, paper, and it is certain that the nomination paper cannot operate as a Will."

... I should hesitate, unless the words of the Statute and of the rules framed there under were explicit, to suppose that the perpetration of such unnatural injustice was rendered obligatory on a subscriber to a Provident Fund. **Nor can I conceive why the Provident Fund should wish to introduce so strange a law of inheritance.** I do not find in the Statutes anything which renders it obligatory for me to take this view. The object of Section 4, as amended by Act IV of 1903, is to render the fund incapable of attachment in the hands of the nominee for debts due by the subscriber. **It is true that the Legislature uses the word "vest" but that word does not necessarily connote title. A person, in whom the property of another vests, has the same rights of dominion over the property as the owner would have had, no more and no less. But no one has the right to deal with his property so as to defeat the legal claims of others.**"

The learned single Judge of the Delhi High Court found that no nominee gets any right or title by virtue of a nomination alone. This was also the view of the Lahore High Court in *Hardial Devi Ditta v Janki Das & Anr.*,[30] which held that:

> "Nomination would not amount to a Will or a gift or trust in favour of the nominee. **The nominee would only get the right to receive the amount and he holds the amount for the benefit of the heirs.**"

This was also the view of the Madras High Court in *D. Mohanavelu Mudaliar v Indian Insurance & Banking Corporation, Salem & Anr.*:[31]

> "So far as nomination is concerned we do not see any appreciable difference between the English and American Laws on the one hand, and what obtains in our country. **According to the English Law the payee or the nominee is nothing more than an agent to receive the money, which money remains as the property of the assured and at his disposal during his life time and on his death forms part of the estate. The result is that the payee or the nominee takes no beneficial interest in it.**"

The views of the Kerala High Court, the Calcutta High Court, the Andhra Pradesh High Court and the Delhi High Court all to the same effect were also considered.

31. Mr. Shah and Mr. Tamboly both relied on the 2009 decision of a learned single Judge in *Ramdas Shivram Sattur v Rameshchandra*

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30 AIR 1928 Lah 773

31 AIR 1957 Mad 115

alias Ramchandra Popatlal Shah & Ors.[32] This was a decision under Section 30 of the Maharashtra Co-operative Societies Act, 1960. The learned single Judge (A.P. Deshpande, J) held that the purpose of a nomination is to make certain the person to whom the society must look, and not to create an interest in the nominee to the exclusion of those in law entitled to the estate of a deceased member. This was also the view of another learned single Judge of this Court (R.D. Dhanuka, J) in *Shashikiran Ashok Parekh v Rajesh Virendra Agarwal & Ors.*[33] Mr. Shah and Mr. Tamboly submit that although *Kokate* sets out Section 30 of the Maharashtra Co-operative Societies Act, 1960, it is set apart only on an interpretation of the word 'vest', one that is unsupported in law, and is also an interpretation that fades into insignificance when the other decisions squarely on the aspect of the legal effect of nominations under diverse statutes are taken into account. Further, if the purposive approach is to be taken, as it should be in the submission of Mr. Warerkar, who also supports Mr. Shah and Mr. Tamboly, then the preamble to the Indian Succession Act, 1925 should leave no room for doubt, for that is clearly an act to 'consolidate the Indian law relating to succession.' Till then there were very many 'large and important enactments' on the subject, making ascertainment difficult.

32. Mr. Pai's response to all this is that there are only two modes of transfer of property: by operation of law and by act of parties. Transfer by law may be voluntary or involuntary. A transfer *inter vivos* is followed by an absolute vesting, and this is apparent from

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32 2009 (3) Bom. C. R. 705

33 2012 (4) Mh. L. J. 370

Section 5 of the Transfer of Property Act and Section 130 which deals with transfers of actionable claims. Mr. Pai claims that the nomination is a 'statutory testament', something known, contemplated and approved by the Indian Succession Act. The purposes of a will and a nomination are identical, and both serve to disrupt a natural line of succession. Therefore, the same considerations must apply to both. Further, Section 58(2) of the Indian Succession Act specifically excludes from that Act other modes of succession, i.e., it recognizes that other modes of testamentary succession are possible, for it says that Part VI of the Indian Succession Act constitutes the law of India applicable to all cases of testamentary succession save as provided in sub-section (1) *or by any other law for the time being in force*. According to Mr. Pai, all the other decisions are subject to a rider and each has to be confined to the facts of its particular case, since none of them deal with the Companies Act, 1956 or the Depositories Act, 1996, two statutes that stand alone and apart. He invites attention to a comparative tabulation in this regard. According to Mr. Pai, the transfer in a nomination takes place absolutely on the death of the holder, and this is contemplated by Section 58(2) of the Indian Succession Act. The statutory intention, he says, was to 'avoid disputes' between heirs.

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

[34] AIR 1988 Cal 115

was considered by Mr. Justice Britto in *Antonio Joao Fernandes*, and expressly not accepted in view of *Sarbati Devi* and *Khanchandani*.[35] 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.

34. Similarly, I am unable to accept Mr. Pai's submission that the decision of a learned single Judge of the Delhi High Court in *Dayagen P. Ltd v Rajendra Dorian Punj & Anr.*[36] should be followed. There, the learned single Judge held that the submission that the nominee under Section 109A of the Companies Act, 1956 held merely in trust was negatived on account of the *non-obstante* clause. The learned single Judge held that legislative intent was to override the general law of succession and to carve out an exception in relation to nominations in respect of shares and debentures. But *Dayagen* too does not consider the Supreme Court decision in *Khanchandani*.[37]

35. I have also considered Mr. Ghatalia's remarkably fluent and concise written submissions. He makes the point that Sections 109A and 109B of the Companies Act must be read as a code in themselves and their statutory intent must be gleaned, in the first instance, from the plain meaning of the words. The words 'vest' and 'nominee' are to be seen, he submits, from that statute alone and no

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35 Paragraph 15 of the Manupatra report in *Antonio Joao Fernandes*.

36 [2009] 151 Com Cas 92 (Del)

37 *Dayagen* preceded *Shipra Sengupta* by amount a month.

other; and the *non-obstante* clause over-rides every other statutory provision, including the Succession Act. Mr. Ghatalia too cites *Dayagen* in this behalf.[38] He joins Mr. Pai in submitting that the words of the statute must be seen without reference to outside considerations.[39] There can be no quarrel with this well-settled proposition. But none of these are to be read to suggest that statutes must be read in a vacuum and that it is never permissible to look at others *in pari materia*, for that would mean that every new statute would have to be read and construed in a bubble of isolation. There is absolutely nothing in any portion of the Companies Act, 1956 or the Depositories Act, 1996 to support the view that Mr. Pai and Mr. Ghatalia commend.

36. I must also note that the argument of a 'statutory testament' was raised before the Supreme Court in *Sarbati Devi* and was expressly negatived there. To accept it now would be to confine *Sarbati Devi* to the narrow confines of Section 39 of the Insurance Act, a view that has since been rejected, most clearly in *Khanchandani*, *Shipra Sengupta*, *Talwar*, *Nozer Gustad Commissariat* and *Antonio Joao Fernandes*.

37. The decision in *Kokate* does not consider the decisions of the Supreme Court in *Khanchandani*, *Shipra Sengupta* or *Challamma*, or

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38 I am not at this stage considering the remaining submissions made by Mr. Ghatalia, as these are on the merits of his case, one that I am not taking up presently.

39 *New Piecegoods Bazar Co Ltd v Commissioner of Income Tax Bombay*, AIR 1950 SC 165; *Nathuprasad v Singhai Kapurchand*, AIR 1976 MP 136; *Ram Krishna Ram Nath v Janpad Sabha*, AIR 1962 SC 1073; *Harcharan Singh v Shivrani*, (1981) 2 SCC 535.

those of learned single Judges of this Court in *Nozer Gustad Commissariat* and *Antonio Joao Fernandes*. Each one of these was binding on the *Kokate* court. The view taken in *Kokate* is contrary to, and does not consider any of these. It is, for that reason, *per incuriam*.

38. The interpretation on Section 109A and Bye-Law 9.11 placed by the *Kokate* Court does not seem to me to be reconcilable with the explicit decisions of the Supreme Court and of this Court. What was the 'mischief', if any, sought to be avoided by those two statutes? The succession law is unchanged. There are no further complications on account of testamentary or intestate succession. The nature of corporate instruments and securities has, however, undergone a massive change and so has the way corporations (including banks and depositories) conduct their business. The fundamental focus of Section 109A and Section 109B of the Companies Act and Bye-Law 9.11 of the Depositories Act is not the law of succession, nor is it intended to trammel that in any way. The sole intention is, quite clearly, to afford the company or depository in question a legally valid quittance so that it does not remain forever answerable to a raft of succession litigations and an endless slew of claimants under succession law. It allows that liability to move from the company or the depository to the nominee. The company or depository gets a legally valid discharge; but the nominee continues to hold in a fiduciary capacity and is answerable to all claimants under succession law.

39. It cannot be otherwise. The *Kokate* view generates the very inconsistencies and conflicts that *Sarbati Devi* and, later,

Khanchandani, *Shipra Sengupta* and the decisions of this Court (*Nozer Gustad Commissariat* and *Antonio Joao Fernandes*) were careful to avoid. Take for instance the example I referred to earlier, of a will being made after a nomination. In the ordinary law of succession, if the nomination is indeed a testamentary instrument, it would be displaced by a later will. Yet, in the formulation that Mr. Pai and Mr. Ghatalia commend, the nomination stands apart and is unaffected by any later will though they call the nomination a 'statutory' will. Further, testamentary dispositive capacities are not all identical. There are, for instance, restrictions in Mohammedan law on how much can be disposed by will. The so-called 'statutory' testament would oust this personal law entirely, even though there is nothing in either of the corporate statutes to indicate that this was ever the legislative intent. Moreover, nominations when viewed as *Kokate* would have it, create insoluble problems: no such 'statutory testament' can be displaced on the one ground that can always be invoked in a challenge to a will, viz., that it is 'unnatural' and gives to an outsider to the exclusion of heirs, or prefers one heir over all others.

40. There are additional problems too. The 'statutory testament' is not subject to the rigour of the Succession Act. It does require witnesses, but not the discipline mandated by Section 63 of the Indian Succession Act. A nomination, though said to be a 'testament', requires no probate or other proof 'in solemn form'. Yet it is said to be a will. Witnesses need not be in the presence of the nominator. Yet it is said to be a will. Witnesses need not act at the instance of the nominator. Yet it is said to be a will. Witnesses need not see the nominator execute the nomination. Yet it is said to be a

will. No nomination can be assailed on the ground of importunity, fraud, coercion or undue influence; Section 61 of the Indian Succession Act is wholly defenestrated, as is Section 59. Yet it is said to be a will. There can be no codicil to a nomination. Yet it is said to be a will. In short, a nomination, in the *Kokate* formulation, is some sort of 'super-will', one that partakes of none of the defining traits of a properly executed will and none of the tests of its validity, one that is never displaced by a later, properly made will that deals with the very same property. Mr. Pai asks that we should place ourselves in the 'armchair of the nominator'. That, as it happens, is the same furniture used by a testator, and it simply cannot be that the view from that seat depends on the nature of the document before the executant. There is no particular form for a will, but there are requirements attendant to its proper making. These do not apply to all nominations: even the requirement of witnesses is a matter of prudence rather than statute. If that be so, no nomination *per se* requires attestation, and if that be so, it is admissible in evidence under Section 68 of the Evidence Act, 1872 without the evidence of any witness (simply because a witness to a nomination is not, in any sense, an 'attesting witness'). But no will can be so read in evidence without such evidence. From the fundamental definitions to the decisions cited, 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*.

41. This judgment does not dispose of the Notice of Motion in *Salgaonkar* or the application in *Ghatalia*. Those will be considered on their merits in view of the legal position enunciated above. Given that this judgment deals only with a question of law, there is no question of a stay of the judgment.

42. List Notice of Motion 822 of 2014 in Suit No.503 of 2014 and Chamber Summons No.72 of 2014 in Testamentary Petition 457 of 2014 for final hearing on 16th April 2015 at 3:00 pm. These matters will now be heard separately and are not to be tagged together.

(G.S. PATEL, J.)