Nominee Versus Legal Heir

Introduction

The legal position of a nominee has been much debated both in Bangladesh and in India. Question arose time and again whether it was the nominee who would be entitled to the deceased's property, or whether it would be the legal heirs. The distinction between the right to receive the property of the deceased and the right to succeed was not well understood. Confusion prevailed for a long time, not least among the banking communities, as to whether they would be discharged of their obligations by making payment to the person whose name appeared in the prescribed forms as the nominee of the deceased account holder, or whether they were bound to search for the deceased's legal heirs. Similar questions arose in other aspects too, e.g. securities kept in a B.O. account, claim under a life insurance policy etc. These issues have been stirred and settled in India in five distinct areas: bank account deposits, shares, life insurance policy, savings certificate and provident fund. In Bangladesh statutory provisions are in force in cases of bank deposits and insurance claims, while some delegated legislation appeared regulating shares in a B.O. account. Judicial pronouncements have come only in regard to money in the deceased's bank account. The purpose of this essay is to clarify the position of the nominee vis-à-vis the legal heirs in three different fields: money in a bank account, claim under a life insurance policy and securities kept in a B.O. account.

Bank account deposit

With regard to money in bank accounts, there are express provisions in the Government Savings Banks Act 1873 (section 4) and Bank Companies Act 1991 (section 103). These statutes allow depositors to make nominations conferring upon any person the right to receive the deposit standing to his credit upon his death. Section 103(3) of the Bank Companies Act went so far as to lay down that the nominee shall receive *all the rights of the deceased depositor, to the exclusion of all other persons.* This gave rise to the question whether the nominee will succeed to the depositor's money to the exclusion of the deceased's legal heirs.

This issue was settled in India by the Supreme Court in the case of *Ram Chander Talwar vs Devender Kumar Talwar* reported in (2010) 10 SCC 671. There is a comparable provision in subsection (2) of section 45ZA of Banking Regulation Act of India, which provides that "… 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* (Emphasis added] or, as the case may be, of the depositors, in relation to such deposit *to the exclusion of all other persons* [Emphasis added] …".

The Indian Supreme Court held: "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."

Thus in India the issue is resolved. Despite the exclusion phrase 'to the exclusion of all other persons' which seemingly bolstered the nominee's right, the nominee was held to be entitled only to receive the money. It is the legal heirs who will be the owners.

It is submitted that like the Indian Banking Regulation Act, our Bank Companies Act too was enacted to regulate the affairs of bank-companies, not matters of succession, and therefore section 103(3) of the Bank Companies Act should not be interpreted to mean that a nominee will be the owner of the money lying in the deceased's account.

In April 2016, reports were published in some newspapers (e.g. New Age, 04 April 2016; The Independent, 04 April 2016) about a case decided by the High Court Division on 03 April 2016, which shed light on the matter (the case has not been reported yet, and the certified copy of the judgment is not available as of date). According to these reports, a Division Bench of the High Court Division comprising Justice Naima Haider and Justice Khizir Ahmed Choudhury ruled in the case of *Monjurul Haq vs. Bilqis Ara Begum* that it is the legal heirs, not the nominee, who will succeed to a deceased depositor's money. The nominee is a trustee or an agent only. The deposited money must be distributed among the deceased's heirs as per Mohammedan Law.

Because the judgment in the case is not available yet, no discussion is possible based only on the newspaper reports. If this is true, however, this will be a welcome decision and will no doubt put to rest the controversy created by section 103(3) of the Bank Companies Act.

Unfortunately, however, these reports sparked an odd reaction in the banking community. The banks took a warped view and felt uncertain whether money in a deceased depositor's account can now be released to the nominee at all, or whether the legal heirs must be hunted. Many scheduled banks started taking unnecessary affidavits from the nominees. Their worry is ill-founded. The effect of section 103(4) of the Bank Companies Act is clear: that the bank concerned will be relieved of its obligation if it pays to the nominee, and the bank must do so even though other persons may have claims on the money. A bank should only concern itself with the ownership issue when there is no nominee. Recently, in April 2017, Bangladesh Bank directed all banks to follow section 103 of Bank Companies Act 1991 and pay directly to the nominee.

Previously, there were two cases on the subject of the right of the nominee. The first of the decisions, reported in 8 MLR 2003, page 257 (*Muhaiminul Hasan Khan vs. Md. Nurul Islam Khan*), actually answered the question whether an ex-wife who was the mother of the deceased's son would be entitled on his behalf to apply for a succession certificate under section 372 of the Succession Act 1925 in respect of certain sums in the deceased's bank account. The High Court Division answered in the affirmative and scrapped the objection raised by a person claiming to have been nominated by the deceased as his next of kin. But the Court also observed: "In law nomination or declaring one as the next of kin for official record does not operate as a transfer or assignment of the securities or debts, more particularly the estate of the deceased."

If this means that nomination does not entitle the nominee to receive the nominator's money upon his death, this will be in direct opposition to the statutory duty of the banks to release the money to the nominee. Perhaps all their Lordships meant to say was that nomination does not operate to 'transfer or assign *ownership* of the securities or debts'. In any event, this being only an *obiter* dictum, it did not lay down any new proposition of law.

The second case, *Ziauddin Ahmed vs. Arab Bangladesh Bank*, reported in III ADC 885, affirms the statutory duty of the banks to make payment to the nominee. The Appellate Division observed at the end of the judgment, again *obiter*, that "It therefore appears that the Bank shall be discharged of his obligation by making payment to such nominee."

It is therefore settled that the banks must make payment to the nominee on the death of the depositor. But the issue of ownership of the money should be resolved once and for all. As stated above, the better view is that the legal heirs should succeed, not the nominee. The confusion created by section 103(3) of the Bank Companies Act should be set right, either by making suitable amendments to the statute or through intervention of our highest court.

Life insurance policy

Section 57 of the Insurance Act 2010 provides for nomination. In cases of life insurance policies a person can nominate another, but only for the purpose of receiving the money on maturing the policy. If the policy matures in the policy-holder's lifetime, and the nominee dies when the policy matures, only then the insurance company will give the money to the policy-holder himself or his successor or legal representative or one holding the succession certificate.

No judicial decision is available in relation to life insurance policies. In India section 39 of the Insurance Act 1938 contains similar provisions, and in the landmark case of *Sarabati Devi v Usha Devi*, 1984 AIR SC 346, the Supreme Court of India held that a mere nomination does not have the effect of conferring on the nominee any beneficial interest in the amount payable under the life insurance policy. The nomination only indicates the hand which is authorized to receive the amount, on payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession.

The *Sarabati* decision is the first in line of a series of cases of the Indian Supreme Court which has firmly rooted the principle that a nominee is a receiver only, while the heirs are the actual owners. This principle now regulates money in the deceased's bank account (*Ram Chander Talwar vs Devender Kumar Talwar* reported in (2010) 10 SCC 671, see above), money under National Savings Certificate (*Vishin N. Khanchandani v. Vidya Lachmandas Khanchandani*, (2000) 6 SCC 724), and retirement benefits e.g. gratuity, provident fund etc. (*Shipra Sengupta v Mridul Sengupta*, (2009) 10 SCC 680). With regard to securities kept in a B.O. account a Bombay High Court has recently applied the *Sarabati* principle (see below).

Securities in B.O. accounts

There is no statutory provision regarding transmission of securities kept in a deceased person's B.O. account, and the secondary legislation available is far from satisfactory.

According to Bye Law 11.8.1 of Central Depository of Bangladesh Limited (CDBL), an account holder may nominate any person who, upon his death, shall be entitled to *succeed to* the securities held in his account. Bye Law 11.8.4 states that the securities standing to the credit of such account *shall vest in the nominee*. CDBL Bye Laws contain a Transmission Request Form, Form 16, through which application for transmission should be made (Bye Law 11.7.1).

However, in Form 16 itself the purpose of the Form is stated to be the transfer of entire holdings of an account 'at the instruction of the Account Holder or on the death of the Account Holder at the instruction of his/her legal heirs.' Thus instruction of the legal heirs, not the nominee, is required. Names and signatures of the legal heirs are to be given at the end of the Form. The nominee of the account holder has no place in the Form.

Thus the provisions of Bye Law 11.8 themselves contradict the Form they specify for the purpose of transmission. The scheme of the Bye Law involves the nominee only, who will not only receive the deceased's shares but will also succeed to them (or the shares will vest in him). The legal heirs have no place in this scheme, just as the nominee has no place in the prescribed Form.

In such a situation Bye Law 11.8 should have prevailed over the Form, but for the express provision of the Depository (User) Regulations 2003. Regulation 42(7) of these Regulations provides that on the death of an account holder his *legal heir* can apply to CDBL for transmission of the securities by filling up Form 16 of the CDBL Bye Laws.

The 2003 Regulations were promulgated by the Securities and Exchange Commission, and thus have greater force than the CDBL Bye Laws. CDBL is a company registered with the Commission under section 4 of Depository Act 1999 and Regulation 5 of the Depositories Regulations 2000. Section 17 of the Depository Act empowers a Depository as well as the Commission to make Rules, and section 18 enables a Depository to make Bye Laws with prior approval of the Commission, which are *not inconsistent with the Rules*. Depository (User) Regulations 2003 were made by the Commission itself under section 17 of the Depository Act. Thus these Regulations are superior to the Bye Laws in two ways: Bye Laws were made by a Depository (CDBL) which is itself registered with the Commission and is subject to the Commission's supervision, and so any Rules/Regulations etc. promulgated by the Commission should have higher force than those made by CDBL. Secondly, section 18 of Depository Act provides that CDBL Bye Laws must not contradict any Rules made under section 17 (whether made by CDBL itself or by the Commission). Since Depository (User) Regulations 2003 were made under section 17 of the Act, CDBL Bye Laws must be subordinate to the Regulations.

Both the Bye Laws as well as the Regulations prescribe Form 16 as the practical tool, which corresponds to the Regulations and requires legal heirs to apply. Therefore, as the law as it stands now, Form 16 of the CDBL Bye Laws reigns supreme, and upon death of an investor his Depository Participant/TREC holder/broker cannot transfer the deceased's shares to the person named as his nominee in Form 23, the B.O. Account Nomination Form. Upon production of sufficient proof (Probate, Letters of Administration, Succession Certificate etc.) and on an application filed and signed by all the legal heirs in Form 16, the DP/TREC holder/broker must transfer the shares to the account designated by the legal heirs (the account of the person whose name appears in the "Transferee Details" column in Form 16).

Thus the elaborate scheme of Bye Law 11.8 containing provisions relating to nomination has been nullified by the Regulations of 2003 and the prescribed Form. It is submitted that the better view is that where there is specific nomination by an account holder, the nominee should be able to initially receive it. But in contrast to the provision of Bye Law 11.8, this should not give him the *right to succeed* to the shares. Only the legal heirs have the right to succeed. The Bombay High Court in a recent decision (*Jayanand Jayant Salgaonkar vs Jayashree Jayant Salgaonkar & Ors.*, [2015] 190 CompCas 44 (Bom), held that even though the shares, debentures or other securities initially pass to the nominee on the death of the holder, they must eventually be distributed among the deceased's legal heirs as per the laws of succession. This decision overturned an earlier judgment by the same Court that had declared that nominees, and not legal heirs, will get the ownership rights of share certificates (*Harsha Nitin Kokate v. The Saraswat Cooperative Bank Ltd. & Ors*., 2010 (112) Bom. LR 2014).

No guidance has come from our apex court yet with regard to securities kept in a B.O. account. But the *Salgaonkar* judgement above, it is submitted, is clearly the correct position, which tallies with the principle established in other fields.

Conclusion

The principle that a nominee is only a convenience to enable the bank/insurance company to discharge their obligation, but he can only hold the money as a trustee for the rightful heirs of the deceased under personal law or the law of succession, has much to commend it. Any other suggestion would render the law of succession as well as the law of nomination meaningless. A corollary of this principle is that nomination cannot substitute a will. If a person nominates one of his heirs with the intention that the appointed nominee will get the entire beneficial interest in his money upon his death, depriving other heirs, his intention will be defeated. Nomination gives the nominee only the right to receive the deceased depositor's property, not to succeed to it. Succession is governed by an entirely different regime and has no bearing on the nominee's right to receive immediately after the nominator's death. Money received by the nominee will form part of the estate of the deceased and will devolve upon his legal heirs according to the rules of succession. Of course, if the nominee is himself one of the heirs, he will get his portion as per law. The purpose of nomination is to help the organization concerned, not the nominee, so that money etc. may be discharged without undue delay. Intervention of our apex court is warranted in order to establish this principle firmly. As for securities kept in a B.O. account, appropriate amendments should be made to Depository (User) Regulations 2003 and CDBL Bye Laws so as to bring them in line with this principle.