(2015) 03 KL CK 0030

In the High Court Of Kerala

Case No : R.S.A. No. 1333 of 2014

Assyrian Charities Kuries Ltd. and Others APPELLANT

Vs

James C. Joseph and Others RESPONDENT

Date of Decision : 07-03-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27
Companies Act, 1956 — Section 169, 169(4)(a), 53, 53(2), 53(2)(a)

Citation : (2015) 03 KL CK 0030

Hon'ble Judges : A. Hariprasad, J.

Bench : Single Bench

Advocate : P.B. Krishnan, P.M. Neelakandan, P.B. Subramanyan and Sabu George, for the Appellant; S. Vinod Bhat, Advocates for the Respondent

Final Decision : Allowed

Judgement

A. Hariprasad, J.—Can it be held that a notice of Extraordinary General body Meeting (EGM) sent to the shareholders by ordinary post in the registered address is sufficient service in terms of Section 53(2)(a) of the Companies Act, 1956 (in short, "the Act") and if so, whether the court below erred in holding that the EGM convened on 24.12.2011 was bad for want of notice? These are the main questions raised for decision.

2. Heard the learned counsel for the appellants and the learned counsel for the respondents.

3. Brief facts are as follows: Appellants are the defendants in the suit. Plaintiffs are the contesting respondents. 1st defendant company is a public limited company registered under the Act. Manager of the company is the 2nd defendant and Chairman is the 3rd defendant. Defendants 4 to 11 are the Directors. 1st plaintiff is a shareholder of the company and plaintiffs 2 to 4 are the Directors elected in an EGM held on 22.01.2012. As per the EGM, defendants 3 to 11 were removed from the post of Directors. 1st plaintiff demanded to call an EGM and notice was given on 11.11.2011. 2nd defendant accepted the notice on behalf of

the company. 1st defendant is bound to call an EGM within 21 days after giving notice to the shareholders. Since the 1st defendant failed to call an EGM, 1st plaintiff issued notice to the 3rd defendant on 06.12.2011. 1st defendant company issued a registered notice on 02.01.2012 to the 1st plaintiff in which it was informed that an EGM was held on 24.12.2011. The meeting alleged to have been convened on 24.12.2011 without notice is legally unsustainable. Therefore, the suit for declaration and injunction was filed.

4. The defendants contended that the suit is false and frivolous. 3rd plaintiff filed a suit against the company before the Munsiff Court, Thrissur as O.S. No. 2729 of 2013 alleging that he did not receive any notice of Annual General Meeting (AGM). EGM was conducted on 24.12.2011 after giving due notice and as per Section 169 of the Act and the same was properly held. The allegations against conduct of the meeting are incorrect.

5. The trial court dismissed the suit after considering evidence adduced before it. In the appeal, the lower appellate court reversed the decree declaring that EGM conducted on 24.12.2011 and the resolutions taken therein are not valid. It further held that the EGM convened and conducted on 22.01.2012 and the resolutions taken therein are valid. Consequently a decree for prohibitory injunction restraining the defendants from causing obstructions to the 2nd plaintiff acting as Chairman of the company was also granted.

6. Learned counsel for the appellants submitted that the court below completely misdirected itself in arriving at the above conclusion. One of the crucial findings of the lower appellate court is that the appellants herein could not produce postal receipts to show that notice to the shareholders contemplated under Section 53 of the Act had been issued. According to the appellants, the lower appellate court should not have discarded Ext.B8 postal receipt. Reliance should have been placed on Ext.B7 list of shareholders by the court below is yet another contention raised by the appellants. The court below should have considered, according to the learned counsel, all the probabilities pointing to the fact that the plaintiffs were aware of the meeting held on 24.12.2011 and still they abstained from participating in it.

7. Per contra, learned counsel for the respondents contended that the appellants failed to establish that they complied with the legal formalities required under various provisions of the Act to see that notice is served on the shareholders inviting them to attend an EGM. The documents produced to establish that notices have been served on the shareholders are legally unacceptable and remains not proved. Therefore, the lower appellate court is justified in discarding those documents and decreeing the suit.

8. Learned counsel for the appellants vehemently argued that the court below should have seen that by virtue of Section 53(2) of the Act, where a document, including a notice for an EGM, if required to be sent by post shall be sent by properly addressing, prepaying and posting the letter by ordinary post and,

where a member has intimated to the company in advance that documents should be sent to him under a certificate of posting or by registered post with or without acknowledgement due and if has deposited with the company a sum sufficient to defray the expenses of doing so, service of the document/notice shall not be deemed to be effected unless it is sent in the manner intimated by the member. Contention of the appellants is that the respondents/plaintiffs have not done so for raising a claim that the notice sent by ordinary post was not sufficient. Further, it is contended that the practise of sending letter under a certificate of posting has been done away with by the postal department. On a reading of Section 53 of the Act, it can be seen that unless the member, who raises a complaint that he did not receive a notice sent by ordinary post, shows that he had intimated the company in advance that notice should be sent to him under a certificate of posting or by registered post with or without acknowledgement due and has deposited sufficient sum to defray the expenses, cannot be heard to say that service of notice through ordinary post is not in accordance with the provision. But, the question to be resolved is whether Exts.B7 and B8 would justify the contention of the appellants that they have served notice to all the shareholders in respect of the disputed EGM. Learned counsel for the appellants submitted that Ext.B7 is the list of shareholders maintained by the company. On the top of front page of Ext.B7, it is written that shareholders list of GBM on 24.12.2011 sent on 28.11.2011. It starts with number 1570 showing the name of persons as the shareholders. The lower appellate court is right in holding that the document does not show any signature or seal of the authorised representative of the 1st defendant company. It was not properly proved at the time of trial that the document was kept in the regular course of the business of the company. It is also contended by the contesting respondents that Ext.B8 postal receipt would only show the fact that the 1st defendant company paid a total sum of Rs. 3,710/- to the Business Post Centre, Thrissur on 28.11.2011. According to the contention raised by the respondents, which was accepted by the lower appellate court, this document will not show the fact, as required mandatorily by the statute, that the appellants issued notice to 700 shareholders of the company intimating them about convening of EGM on 24.12.2011. The lower appellate court criticized Exts.B7 and B8. It also found that those documents did not reveal the contention that Ext.B7 contained a true list of shareholders of the company and also Ext.B8 did not show that notices were issued to the shareholders requiring them to attend the meeting scheduled on 24.12.2011. In paragraph 18 of the judgment, the court below held that Ext.B8 could not be treated as a receipt issued by the postal authorities for sending articles under certificate of posting. This finding of the lower appellate court is seriously challenged by the learned counsel for the appellants. According to him, the court below should have seen that there was no occasion for the 1st defendant company to create such a document in collusion with the postal authorities. Ext.B8 postal receipt shows the following facts. The postal department has collected Rs. 3,500/- for despatching 700 letters. Learned counsel for the appellants, relying on an information taken out of the website of

India Post, particularly the details regarding business post, contended that the rate prescribed for sending an ordinary letter being Rs. 5/- and the number of shareholders of the company being 700, the amount shown in Ext.B8 as Rs. 3,500/- can only be the amount received by the postal authorities as postal charges for sending 700 ordinary letters. Rs. 210/- shown in Ext.B8 is the handling charges as per the regulations of the postal authorities. However, there is no evidence adduced either before the trial court or before the first appellate court to establish these contentions.

9. Section 169 of the Act has been referred to by the court below. It deals with calling of EGM on requisition. Section 169(4)(a) of the Act permits persons having not less than 10% share in the company to demand for convening an EGM. There is no dispute that the respondents together were having more than 10% share in the company. The crucial point to be decided is whether the company had performed its statutory duty while calling a meeting on 24.12.2011. If that is decided properly, the whole issue will be resolved. Learned counsel for the appellants submitted that I.A. Nos. 135 of 2015 and 136 of 2015 filed in this appeal under Order XLI Rule 27 of the Code of Civil Procedure are to be allowed for effective and judicious disposal of the case. According to the learned counsel for the appellants, these documents would expose the falsity of the case propounded by the respondents. The documents produced along with I.A. No. 135 of 2015 are certain letters sent by the company calling its members to attend a meeting scheduled to 24.12.2011. Learned counsel contended that the postal seal on these covers would show that all of them were posted on 28.11.2011 as contended by the appellants. Further the serial number on the covers would exactly tally with Ext.B8 document. Along with I.A. No. 136 of 2015 documents are produced to show that even after the disputed EGM, the appellants were managing the affairs of the company and the contention raised by the respondents are totally incorrect. However, additional evidence cannot be produced in appeal, especially in a second appeal, as a matter of right. The conditions for receiving additional evidence in appeal have been specifically enumerated in the above provision. To put it briefly, it can be seen that if the court from whose decree the appeal is preferred has refused to admit evidence, which ought to have been admitted or if the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or it could not be produced by him in spite of showing diligence at the time when the decree appealed against was passed or the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court may permit a party to adduce evidence in an appeal. Learned counsel for the appellants would submit that the case in hand falls within categories 2 to 4 mentioned above. The appellate court rejected the case of the appellants mainly on the reason that they did not establish that notice regarding the EGM was properly served on the respondents.

10. Learned counsel for the appellants placing reliance on North Eastern Railway

Administration, Gorakhpur Vs. Bhagwan Das (D) by Lrs., argued that the Supreme Court has laid down a principle that necessity of additional evidence in an appeal can be considered by the appellate court at the time of hearing the appeal on merits and also when the court is satisfied that those documents are necessary to pronounce a judgment in a more satisfactory manner, additional evidence shall be allowed. It is further held that the appellate court has the power to allow additional evidence not only if it requires such evidence to enable it to pronounce a judgment, but also for any other substantial cause. Based on Rajesh D. Darbar and Others Vs. Narasingrao Krishnaji Kulkarni and Others, , it is contended by the learned counsel for the appellants that subsequent events will have to be taken into account in moulding the relief in a litigation.

11. In this case, the crucial dispute relates to non-service of notice to shareholders asking them to participate in an EGM held on 24.12.2011. The documents now produced at the appellate stage may throw light on the main controversy in the litigation. Shutting out evidence at this stage may amount to denial of opportunity to the parties to prove their case. Therefore, I am of the view that the additional evidence now produced can be accepted in this case and consequently, the appeal will have to be allowed. And in that event, the only option is to remit the matter to the trial court for enabling the parties to adduce further evidence to establish the contention regarding due service of notice of EGM. It is contended by the learned counsel for the appellants that a definite number of members in the director board will keep on changing and the respondents have run out of their tenure by efflux of time. However, the controversy in the suit is required to be finally adjudicated as it affects the legal rights of parties. Hence, the following directions are issued.

The appeal is allowed. The impugned judgment and decree of the lower appellate court are set aside. The matter is remitted back to the trial court for a de novo consideration after affording parties on both sides opportunity to adduce evidence in support of their contentions. I.A. Nos. 135 of 2015 and 136 of 2015 are allowed. Additional evidence produced are received. Since some of the documents require proof, they shall be produced before the trial court and marked in the trial proceedings. The parties are directed to appear before the trial court on 06.04.2015.

All pending interlocutory applications will stand closed.

