

(2010) 09 KL CK 0061

In the High Court Of Kerala

Case No : Company Appeal No. 9 of 2010

Jayalakshmi and Others

APPELLANT

Vs

Nair Service Society and Others

RESPONDENT

Date of Decision : 07-09-2010

Acts Referred:

Companies Act, 1956 — Section 171, 172, 173, 174, 175

Constitution of India, 1950 — Article 226

Travancore Companies Regulations, 1092 — Section 26

Citation : (2011) 166 CompCas 77

Hon'ble Judges : T.R. Ramachandran Nair, J;K.M. Joseph, J

Bench : Division Bench

Advocate : K.P. Dandapani and Millu Dandapani, for the Appellant; M. Pathrose Mathai P. Gopal and T.K. Vipindas, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Joseph, J.—The appeal is lodged against the judgment of the learned Company Judge in C.P. No. 10/2007. The company petition was filed by some of the members of the second Respondent. It is their case that they are creditors of the second Respondent. They had made deposits, according to them, with the second Respondent. There was failure on the part of the second Respondent to return the money. Accordingly, they filed a company petition u/s 433(e) of the Companies Act, 1956 after serving requisite lawyer notice u/s 434 of the Companies Act. The first Respondent is the Nair Service Society. The second Respondent is a Karayogam. According to the Appellants, the first Respondent is a three tier organisation with Karayogam at the base level, Taluk Unions at the intermediate level and the Head Quarters at the apex level. The second Respondent is one of the base level organisations of the first Respondent having registered as per the memorandum and bye-laws approved by the Board of Directors of the company and as certified by the Karayogam Registrar. Annexure A produced is the Registration Certificate and Annexure B purports to be the bye-law of the second Respondent.

2. Respondents 1 and 2 have filed separate counter-affidavits before the learned Company Judge in C.P. No. 10/2007. The first Respondent contended that the company petition is not maintainable. It took the stand that it is a company registered u/s 26 of the Travancore Companies Regulations 1 of 1092 M.E. as a Company limited by guarantee, but without the addition of the word, "limited" to its name as per licence dated 18th March, 1925 certified by the Government in its favour. The Society became a deemed company within the meaning of Section 3 of the Companies Act, 1956 on the commencement of that Act. As the objects of the Society were confined to one State, namely, the State of Kerala, it was contended that it was no longer governed by the Companies Act, 1956. It was further contended that it was governed by the provisions of the Kerala Non-trading Companies Act, 1961 (Act 42 of 1961). They relied upon Ext.R-1(c). It is an order published in the Kerala Gazette, Extraordinary, to the effect that the first Respondent is exempted from the provisions of Sections 171 - 186 (both inclusive) and Sections 433 - 483 (both inclusive) of the Companies Act, 1956. It was on this score it was contended that the company petition was not maintainable.

3. The second Respondent contended that it is a voluntary association, i.e. neither a company nor any registered association of persons. It is not a legal person or a registered body. It was contended that the association, as per its bye-laws, is an association which came into existence mainly for the upliftment of the persons of the Nair Community. It is also contended that it is not a branch of the first Respondent nor is it a unit of the first Respondent. It has its own bye-laws and rules of administration.

4. When the matter came up before the learned Company Judge, the learned Company Judge passed an order dated 26-6-2008. We would refer to paragraphs (2), (4) and (5) which read as follows:

2. More importantly, I have, prima facie, to focus attention on the nature of transactions, the institutions involved and the public, contributing component in the transactions. Litigations may have to be liquidated to ensure that communities exist harmoniously and with the intention of proceeding to a better future.

4. In the totality, this is a fit case where Respondents 1 and 2, the Petitioners, and other good spirited institutions have to make a very serious attempt to persuade all concerned to amicably settle the litigations, even if it becomes necessary to formulate and evolve a workable scheme which would take care of the interest of all parties, including those who are parties to the civil suits and decrees referred to above. This could also be a fit case where the effective involvement of the Legal Services Authority could also be considered. Mediation and conciliation have to be appropriately, earnestly and fruitfully applied in this case to find an end to this litigation before requiring the Court to deliver a verdict by treating this as an adversarial litigation.

5. With the aforesaid in view, the second Respondent will make available a chart of details touching the litigations, decrees etc. in relation to the issue in hand. In the meanwhile, Respondents 1 and 2 and the Petitioners could also place any concrete proposal which could be considered to aid a fruitful resolution of this litigation in an amicable manner.

5. Still later, the learned Company Judge, inter alia, passed the following order dated 6-10-2008:

1. This matter relates to Neerkunnam NSS Karayogam No. 1365, Neerkunnam in Alappuzha, the second Respondent, hereinafter, the "Karayogam", for short.

2. This company petition is filed alleging that the aforesaid Karayogam had received advances of loans from the Petitioners and had collected various amounts in the name of the Karayogam, from the public at large, as deposits and are essentially carrying on activities which may amount to money lending. The office bearers of the Karayogam are charged with breach of duty and this company petition is filed seeking an investigation into the affairs of the Nair Service Society and the aforesaid Karayogam on the allegation that the amounts have not been appropriately accounted, but are siphoned off, misutilised and not returned either with or without interest to the persons from whom it was collected. The Petitioners contend that the Karayogam is a branch of the Nair Service Society and hence the petition.

3. Different issues are placed for consideration, including as to whether the first Respondent Nair Service Society is one to which the provisions of the Companies Act would apply. That question would arise for decision only if Nair Service Society could be proceeded at all, on account of the acts attributed to the Karayogam. This is so because, one among the contentions of the first Respondent is that Karayogams are not branches of the Nair Service Society.

4. Leaving apart the issues that may, thus, arise for decision ultimately in this company petition, certain core aspects need to be noticed.

5. The financial muddle in which the aforesaid Karayogam is placed may have different legal aspects, commercial and also other materialistic aspects. However, during the hearing of this matter on various occasions, it was noticed that what is more important is the resolution of a problem which has become a social issue, involving persons belonging to different classes in community and different financial strata of Neerkunnam and nearby areas. The Nair Service Society, whatever be its relation to the Karayogam, would and should have the necessary persuasive command to see that the Karayogam acts in a manner befitting the situation which calls for applying all available alternative dispute resolution mechanisms, rather than let parties scout the different civil and criminal courts in different proceedings. Meaningful end of litigations is the goal that has to be achieved and this is a social welfare measure that germinates from the socialist concept of the Constitution. It is in the aforesaid context that this Court deemed it proper to search for resolving the disputes rather than issue orders, one way

or other, directing investigation or by rejecting application on jurisdictional grounds.

6. In the course of the proceedings, this Court has ascertained views of Nair Service Society through its senior Counsel Adv. Sri M. Pathrose Mathai, instructed by Adv. Sri P. Gopal.

7. It appears that the assets and the funds of the Karayogam have to be preserved; and managed, to deal with the various complaints. The assets and expenditure of the Karayogam are also to put in a regular mechanism of control.

8. Having regard to the aforesaid, the following orders are issued:

(a) Sri V.K. Chandrasekhara Kurup, Secretary, Ambalappuzha NSS Taluk Union is hereby appointed as Receiver and is put in-charge of all the assets of NSS Karayogam No. 1365, Neerkunnam and he shall be custodian of all documents, files, assets and other materials in relation to the Karayogam.

(b) All office bearers of the Karayogam shall handover whatever documents, money, negotiable instruments or any other movable properties belonging to the Karayogam, in their possession, to the Receiver, within one week.

(c) All such persons shall place in the custody of the Receiver, all documents, they have, in relation to the assets, movable and immovable of the Karayogam.

(d) The aforesaid Receiver shall be apprised of the pending litigations in all the courts in which the Karayogam is a party, including the execution proceedings.

(e) The Receiver shall place a comprehensive report before this Court, by the 4th December, 2008 stating the course of events that take place in the meanwhile. The Receiver shall have the authority, either by himself, or through proper person, to collect all amounts that may be payable to the Karayogam. For this purpose, a separate suspense account will be opened in a bank in the nearest branch in the locality creating facility to issue receipts even on the basis of statement made by the persons paying the funds.

(f) As Receiver, it is appropriate that, he will be as of now, entitled to spend an amount of Rs. 15,000 per month as a consolidated amount for expenditure.

(g) If the Receiver requires any directions or clarifications, that could be sought by filing reports. He may also consider the feasibility of drawing up of a notice regarding this exercise for public information and appropriate publication expenditure be incurred from the funds of the Karayogam. Petitioners are also at liberty to place materials before the Receiver, further, without raising any claims.

(h) Since it is stated that there is a three storied building with about 30 rooms which are also let out generating above Rs. 15,000, that amount shall be permitted to be collected by the Karayogam for its purposes, for which it shall render accounts to the Receiver.

(i) The Receiver will also suggest as to when an audit could be conducted into

the accounts of the Karayogam through a qualified Chartered Accountant, particularly in relation to the transactions of the nature of which reference is made in the company petition.

(j) The Superintendent of Police, Alappuzha is directed to ensure that all help is extended to the Receiver to carry out the aforesaid directions.

9. All the aforesaid will be without prejudice to the contentions of the parties.

6. Thereafter, apparently, when the matter came up on 18-8-2009, the learned Company Judge has taken the view that the company petition is not maintainable for the reason that vide Ext.R-1(c), as far as the first Respondent is concerned, Section 433 of the Companies Act does not apply. The learned Company Judge further took the view that Ext.R-1(c) has not been challenged in any proceedings known to law. The learned Company Judge further noted that the Appellants have no case that the second Respondent--Karayogam is a company incorporated under the provisions of the Companies Act, 1950 and, therefore, the learned Company Judge took the view that the company petition against the second Respondent is liable to be dismissed.

7. We have heard the learned Senior Counsel for the Appellants, Shri K.P. Dandapani and also Shri M. Pathrose Mathai, learned Senior Counsel appearing on behalf of the first Respondent.

8. The learned Senior Counsel for the Appellants addressed before us the following submission:

He would emphasise the orders dated 26-6-2008 and 6-10-2008, which we have already adverted to. He would contend that the company court having dealt with the matter had taken a view and the parties having acted upon it, it was not proper on the part of the learned Company Judge to proceed to hold that the company petition is not maintainable. He would also emphasise large sums were due to the Appellants from the second Respondent. Very fairly he does not dispute the issue of Ext.R-1(c). Equally fairly he does not dispute that the first Respondent is not a company under the Companies Act. But he would none the less contend that having regard to the peculiar circumstances of the case when the learned Company Judge has applied his mind and proceeded to pass orders dated 26-6-2008 and 6-10-2008 and the company petition was kept pending for a fairly long period of time and, particularly, having regard to the conduct of the Respondents in not impugning the orders and on the contrary submitting themselves to the orders, he would canvass for the over turning of the impugned order which, according to the learned Senior Counsel for the Appellants, is premised on a view which was not proceeded by even posting the matter for evidence.

9. He also pressed before us for our acceptance of the principles enunciated by the Supreme Court judgments referred to in L.K. Verma Vs. H.M.T. Ltd. and Another, and Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad AIR

1996 S.C. 556 and a decision of the Division Bench of this Court in *Thressiamma v. Union of India* 1999 (2) KLT 683. Per contra, the learned Senior Counsel, Shri M. Pathrose Mathai appearing on behalf of the first Respondent would point out that it is true that the two orders were passed. But he contended they could have the effect of shutting out the contention of the Respondent based on the legal requirement to be satisfied before a company petition could be maintainable. He would also refer to the very order dated 6-10-2008 which on its terms was without prejudice to contentions of parties.

10. A company petition u/s 433 of the Companies Act, namely, for winding up of the company can only be premised on the basis that the Respondent is a company to which Section 433 of the Companies Act would apply. This is a case where allegations have been made by the Appellants against both Respondents 1 and 2. The first Respondent is undoubtedly a company. But having regard to Ext.R-1(c) notification which as the learned Company Judge has correctly observed has not been challenged in any proceedings known to law, the first Respondent is not governed by the provisions of Section 433 of the Companies Act. In other words, we think it is clearly beyond the shadow of doubt that a petition u/s 433 will not lie against the first Respondent.

11. As far as the second Respondent is concerned, as submitted by the learned Senior Counsel appearing for the Appellants before the learned Company Judge and also before us, it is not a company registered under the Companies Act. We would extract grounds "F" & G in this appeal which read as follows:

F. The learned Single Judge ought not to have held that the 2nd Respondent is not a company registered under the Companies Act and therefore provisions of the Companies Act cannot be pressed into service against the 2nd Respondent. The learned Single Judge ought to have considered the fact that the 2nd Respondent is a member of the 1st Respondent Society, which is a company registered under the Travancore Companies Act and therefore the company petition was maintainable as against the 1st and 2nd Respondents.

G. It is respectfully submitted that a specific contention was taken before the learned Single Judge that the 2nd Respondent Karayogam is a base level organisation of the 1st Respondent, which is functioning on the bye-laws approved by the Board of Directors of the 1st Respondent, and as evidenced from Annexure B bye-laws produced along with the company petition, that the 2nd Respondent Karayogam is completely under the administrative control of the 1st Respondent society and that the same had been admitted by the 1st Respondent society in the Annexure F reply notice produced along with the company petition, and further that it was admitted by the 1st Respondent, that as per the bye-laws, amounts were collected from the various Karayogams under different heads like supervision charges, audit fees etc. The learned Single Judge failed to appreciate that the 2nd Respondent was an integral part of the 1st Respondent and that it was under the supervision and control of the 1st Respondent and therefore a company petition was maintainable. The learned

Single Judge ought to have considered that, as per Clause 59 of the bye-laws and as per Clause 1(g) of the Articles of Association of the 1st Respondent, the 2nd Respondent was under the administrative control of the 1st Respondent.

12. It may be true that the second Respondent is a member of the first Respondent--Society which is in turn a company registered under the Travancore Companies Act. But we fail to see how on that score it could be considered to be a company. A member of a company can be a natural person or a legal person. The fact that the second Respondent is a member of the first Respondent company would not by itself make it a company. In other words, unless the Appellants have a case that the second Respondent is a company in its own right, by the mere fact that it is a member of the first Respondent company, it cannot be transformed into a company against which a petition u/s 433 would be maintainable. As already noted, there is no case for the Appellants that this is a company registered under the Companies Act to which Section 433 would apply in its own right. Even assuming for a moment without deciding the issue that there is control by the first Respondent over the second Respondent that again by itself would not make the second Respondent a company against which a petition u/s 433 would lie in its own right.

13. Therefore, we would think that the view taken by the learned Company Judge in the impugned judgment is unexceptionable.

14. We need however address the contention addressed by the learned Senior Counsel for the Appellants on the basis of the orders passed by the learned Company Judge which we have referred to. It is true that the learned Company Judge apparently with an eye on bringing about a settlement in the matter, passed certain orders. But it is equally important not to overlook the fact that in the order dated 6-10-2008, which is the latter of the two orders, the learned Company Judge had made it clear that it will be without prejudice to the contentions of the parties. Of course, the learned Senior Counsel for the Appellants would contend that the learned Company Judge only meant that the stage has not yet reached and that the matter should have been posted for evidence.

15. The stage is now set to consider the decisions cited by the learned Senior Counsel. In *L.K. Verma Vs. H.M.T. Ltd. and Another*, the Court was considering a case where a writ petition was filed challenging an order in a disciplinary proceedings. Therein, the court took the view that once a writ petition was entertained and determined on merits, the appellate court would not, except in rare cases, interfere therewith on the ground of existence of an alternative remedy. We at once notice that the principle which is enunciated by the Apex Court was in the context of a writ petition under Article 226. The existence of an alternate remedy is not a bar to the exercise of the jurisdiction as an absolute rule. There are circumstances in which a party may pursue a writ petition despite existence of alternative remedies. It is not a case where the writ court is totally without jurisdiction to entertain the matter. In such a case, if the learned Single

Judge exercises his powers, as held by the Apex Court, it is only rarely that the Appellate Court would turn away the writ Petitioner on the ground of availability of an alternate remedy.

16. Unlike the situation in the said case, this is a case where we are dealing with a company petition sought to be maintained under the provisions of Section 433 of the Companies Act. We cannot hold that the company court is a court of unlimited jurisdiction. Its jurisdiction is delineated by the provisions of the Act under which the Company Court acts. We cannot liken a company court to a writ court under Article 226 of the Constitution of India. Therefore, the principles which are apposite in the conduct of a writ petition may be irrelevant and inapplicable in the context of the company courts acting under the provisions of the Companies Act.

17. We notice that the decision in *Thressiamma v. Union of India* 1999 (2) KLT 683 also related to a writ petition. It was a case where the writ petition was admitted and lying in the court for four years and the court took the view that it has to be disposed of on merits.

18. *Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad* AIR 1996 S.C. 556 also is a case under the writ jurisdiction under Article 226 of the Constitution of India. We would think that none of the decisions relied upon by the learned Senior Counsel for the Appellants are applicable in the facts of the case, for the reasons which we have already given.

19. In the light of the position as obtaining aforesaid, we are also of the view that the complaint of the learned Senior Counsel for the Appellants that the decision should be overturned as the matter was not posted for evidence cannot be accepted. In such circumstances, we see no merit in the appeal and it is dismissed. Needless to say the observations made by the learned Company Judge that it will be open to the Appellants to seek appropriate reliefs before the appropriate court, will remain.