

(2013) 03 KL CK 0033
In the High Court Of Kerala
Case No : W.A. No. 2233 of 2009

Kamala Krishnan Nair

APPELLANT

Vs

Nair Service Society and Others

RESPONDENT

Date of Decision : 05-03-2013

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2013) 03 KL CK 0033

Hon'ble Judges : Pius C. Kuriakose, J; Babu Mathew P. Joseph, J

Bench : Division Bench

Advocate : T.K. Pankajashan Pillai, Sri. Saji Pankajakshan and Sri. P.R. Padmanabhan Nair, for the Appellant; M. Pathrose Matthai , Sri. P. Gopal, Sri. M. Gopikrishnan Nambiar, SC, Sri. M.K. Aboobacker, Senior Govt. Pleader, Sri. T.P.M. Ibrahim Khan and Sri. P. Parameswaran Nair, ASGI, for the Respondent

Final Decision : Dismissed

Judgement

Pius C. Kuriakose, J.—The petitioner in the Writ Petition is the appellant. The first respondent/the first respondent in the Writ Petition is the Nair Service Society represented by its President and respondent Nos. 2 to 6 are respondent Nos. 2 to 6 in the Writ Petition. The Writ Petitioner who is a member of the first respondent Nair Services Society, a company registered under the Travancore Companies Regulation-I of 1092 (M.E.) as a company limited by guarantee filed the Writ Petition claiming the following reliefs:-

(i) to issue a writ of mandamus or any other writ or order directing the respondents 3 to 7 to initiate action against the 1st respondent for violating the provisions of relevant law with respect to Ext. P4 Memorandum and Articles of Association and if the 1st respondent fails to comply with the law direct the 3rd and 5th respondents to cancel the certificate of incorporation issued to it.

(ii) to declare that clause 1(i) & (n) clause 21 & clause 90 of the Articles of Association of the 1st respondent Nair Service Society (Ext. P4) is ultra vires of the companies Act 1956 and be pleased to quash the same.

(iii) to declare that every member of the 1st respondent society has legal right to take part and to vote in the Annual General Body meeting of the respondent society and to exercise voting rights in election of the directors.

(iv) to declare that every member of the 1st respondent society including the petitioner has a right to contest in the election to the Board of Directors of the respondent society without becoming members of "Pratinidhi Sabha".

(v) to declare that the "Prathinidhi Sabha" is not the General Body of the respondent society and it is the meeting of the members as per the membership register that constitute the general meeting of the respondent society.

(vi) to declare that the 2nd respondent N.S.S. election commission has no power to limit the number of members to the Prathinidhi Sabha and to quash the provision to clause 1 of Articles of Association.

(vii) to direct the respondent society to make suitable amendments to the articles of association of the 1st respondent society so that their may not be any violation to the company law 1956.

However, before the learned Single Judge arguments were addressed by the Writ Petitioner only in support of relief No. 2. The case of the Writ Petitioner has been stated precisely in paragraphs 2, 3, 4 and 5 of the impugned judgment of the learned Single Judge and we do not think it necessary to refer to the facts again. A counter affidavit was filed on behalf of the first respondent and the learned Single Judge would take the view that having regard to the impact of R1(b) judgment rendered by a Civil Court it is appropriate that the question of maintainability of the Writ Petition was examined. Examining that question, the learned Single Judge would hold that R1(b) judgment would bar the Writ Petitioner from urging the contentions presently urged and canvassing the invalidity of certain provisions of Memorandum and Articles of Association of the first respondent Company. Holding that the principle of res judicata applies, it was held that the Writ Petition is not maintainable and accordingly on that score the Writ Petition was dismissed without examining the merits of the matter.

2. In this appeal various grounds are raised by the appellant assailing the impugned judgment of the learned Single Judge. We have heard the submissions of Sri. T.K. Pankajakshan Pillai, the learned counsel for the appellant and those of Sri. M. Pathrose Mathai, the learned counsel for the first respondent in extenso. We have heard the submissions of Sri. M. Gopikrishnan Nambiar, the learned counsel for the second respondent. We have also heard the learned senior counsel, Sri. T.P.M. Ibrahim Khan for the third respondent. Sri. M.K. Aboobacker, the learned Senior Government Pleader also addressed us.

3. Sri. T.K. Pankajakshan Pillai would argue that the finding of the learned Single Judge that the Writ Petition is barred by res judicata in view of Ext. R1(b) judgment is totally erroneous. According to the learned counsel this Court while exercising jurisdiction under Article 226 of the constitution to decide whether Ext.

P4 Memorandum and Articles of Association of first respondent is in contravention of the Companies Act is quite competent to ignore R1(b) decision taken by a Subordinate Court. The learned counsel argued that at any rate decision of question of law will not operate as res judicata and it is only decision of questions of fact which will operate as res judicata. The learned counsel submitted that res judicata will apply only between courts of co-ordinate jurisdiction and hence this Court being a constitutional court could decide the question independent of R1(b) judgment. It was argued that it was on the ground of limitation that the Sub Court disallowed relief to the appellant. Limitation is a pure question of law and could be re-considered by this Court independent of Ext. R1(b) judgment. We were taken extensively through R1(b) judgment. Various judicial pronouncements were relied by Sri. Pankajakshan Pillai in support of his submissions. He would refer us Section 3 of the Kerala Non-trading Companies Act 1961. Reliance was placed by him on the judgment of the Supreme Court in Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, for expatiating why the judgment of the Civil Court in this case will not operate as res judicata. For the same purpose he relied on the judgment of the Supreme Court in State of Maharashtra and another Vs. M/s. National Construction Company, Bombay and another, . Sri. Pillai relied on the judgment of the Supreme Court in Smt. Isabella Johnson Vs. M.A. Susai, to argue that decision on pure question of law unrelated to the rights of the parties to a previous suit will not be res judicata in a subsequent suit. Sri. Pillai relied on the judgment of a Division Bench of this Court in P.C. Aravindhan Vs. M.A. Kesavan and Others, for expatiating his contention that the impugned provisions in the Memorandum and Articles of Association of the first respondent are violative of the provisions of the Companies Act. It was pointed out by Sri. Pillai that the learned Single Judge has very quickly concluded that the civil court's judgment operates as res judicata for the writ petitioner even in the absence of pleadings relating to the earlier suit. According to him in order that a plea of res judicata is accepted the respondent should have been insisted to produce the pleadings relating to the suit. Sri. Pillai relied on the judgment of a Division Bench of this Court in Balakrishnan Alias Balan Vs. Venugopalan Alias Venu, in support of his argument that there is no limit for the jurisdiction under Article 226 and that the above jurisdiction can be invoked for undoing illegality at any stage. Sri. Pillai relied on Dr. Kashinath G. Jalmi and another Vs. The Speaker and others, . Counsel argued relying on the above decision that delay shall not stand in the way of rendition of justice.

4. Per contra the learned senior counsel Sri. M. Pathrose Mathai would draw our attention to the averments in the Writ Petition and the reliefs claimed therein and submit at the very outset that the averments in the Writ Petition are vague and most of the reliefs claimed are irrelevant and per se unsustainable. Sri. Pathrose Mathai referred to Schedule 7 of the Constitution of India and Entry 32 List II and Entry 44 List I. He submitted that Travancore Company Regulation 1092 is repealed by Travancore Act of 1114. The learned Senior Counsel submitted that

the Kerala Non-Trading Companies Act 1961 is a legislation by incorporation. The provisions of the companies Act have been incorporated in this Act by notification. Section 3 and 8 of the Non-Trading Companies Act was referred to and it was submitted that the only challenge in the Writ Petition is regarding amending the articles of the company in 1958. The articles were amended by Special Resolutions. The Inspector General of registration is the competent authority. In this context Sri. Pathrose Mathai referred to sub clause 3 of Section 2 of the Non-Trading Companies Act which defines Registrar. Ext. R1(e) was referred to by the learned Senior Counsel. Answering the submissions of Sri. Pillai that the case involved questions of law Sri. Pathrose Mathai submitted that questions of law should be specifically raised. Here no questions of law has been specifically and clearly raised. In such a situation no relief can be granted on this Writ Petition. The Sub Court judgment was delivered way back in 1977. That judgment has become final. Writ Petition will inevitably have to be dismissed on the ground of delay and laches. Sri. Pathrose Mathai relied on the Full Bench judgment of this Court in State of Kerala and Another etc. Vs. Miss Rafia Rahim etc., to argue that even without filing cross objections relief can be given to the respondents who is defending the impugned judgment. Strong reliance was placed by Sri. Pathrose Mathai on the judgment of the Supreme Court in State of Orissa and Another Vs. Mamata Mohanty, to argue that delay and laches can be good grounds for denying relief to a non-diligent person. The learned Senior Counsel relied on the judgment of the Supreme Court in Banda Development Authority, Banda Vs. Moti Lal Agarwal and Others, to argue that though it is true that no limitation has been prescribed for filing the petition under Article 226 of the constitution, there is a self imposed restraint evolved by Supreme Court that High Court will not entertain petitions filed after long lapse of time. Sri. Pathrose Mathai relied on the judgment of the Supreme Court in Suneeta Aggarwal Vs. State of Haryana and Others, to argue that delay and laches on the part of the appellant in challenging the judgment of the civil court will dis-entitle him to relief. The judgment of the Supreme Court in Virender Chaudhary Vs. Bharat Petroleum Corporation and Others, was also relied on by Sri. Pathrose Mathai in support of his argument based on delay and laches. The judgment of a Division Bench of this Court in Joseph Michael and Another Vs. Travancore Rubber and Tea Co. Ltd. and Another, was also relied on by Sri. Pathrose Mathai in support of his argument that Articles of Association is essentially a contract between the company and its shareholders and hence, amendment of the same cannot be subjected to judicial review under Article 226. Sri. Pathrose Mathai would place reliance on H.P. Gupta Vs. Hiralal, and argue that the argument of the appellant of not having been given notice of the meetings and even General Meetings is not correct. Reiterating his argument that the company and its members are governed by the articles of association Sri. Pathrose Mathai relied on the judgment of the Supreme Court in Naresh Chandra Sanyal Vs. Calcutta Stock Exchange Association Ltd., .

5. We have heard the rival submissions addressed at the Bar. We have gone

through the judgment of the learned Single Judge which is impugned. We have examined the pleadings raised by the parties and the various materials placed on record by the parties. We must mention at the very outset that some of the submissions addressed by Sri. Pathrose Mathai against the maintainability of the Writ Petition under Article 226 of the constitution in view of the vagueness of the allegations and prayers and also in view of the binding nature and the contractual nature of the Articles of Association vis-?-vis the company and its shareholders and touching the merits of the contentions were attractive. However, as the impugned judgment of the learned Single Judge rests solely on the impact of Ext. R1(b) judgment rendered by the Civil Court on the grantability of relief No. 2 in the Writ Petition and as the learned counsel for the appellant and the learned Senior Counsel for the respondent would fairly agree that it will suffice that we examine the legality and correctness of that decision, this judgment of ours touches mostly the above aspect only. Ext. R1(b) has attained finality. Ext. R1(b) is a judgment rendered by the Sub Court, Kottayam in a suit where the appellant was the plaintiff. The relief sought for in that suit was a declaration that the budget placed in the General Body Meeting in which all the members are not allowed to participate should not be allowed to be passed. The appellant, the plaintiff therein also sought for an injunction restraining the defendants therein (the first respondent being the first defendant) from placing and passing the budget for the year 1977-1978 after extracting issue Nos. 3 to 5 which were framed in Ext. R1(b) judgment. The learned Single Judge has observed that the prayers in that suit could not have been granted unless the validity of the amendments were considered. As rightly noticed by the learned Single Judge the Sub Court examined the validity of the various provisions of the Memorandum and Articles of Association including clause 2(1) and (n) and held that the same is in favour of the plaintiff. However, dealing with the contentions raised by the first respondent that the suit was time barred the learned Single Judge noticed that it was in paragraph 15 of Ext. R1(b) judgment that the above issue was considered and that the Sub Court accepted the contentions of the first respondent that the case was covered by Article 58 of the Limitation Act and on that basis held that the suit is time barred. Accordingly relief was declined and the suit was dismissed.

6. We also feel that it is obvious that the contentions in the Writ Petition were raised and urged by the appellant before the Civil Court and relief was declined to the appellant on the ground of limitation. We are impelled to endorse the view of the learned Single Judge that the parties are bound by Ext. R1(b) judgment passed by a competent Civil Court and the appellant is not entitled to resort to successive litigations before different forums. It is also discernible from the records that the appellant who has been a member of the first respondent Company for 37 years has contested the election of the Prathinidhi Sabha of the first respondent during 1971-1974, 1977 and 1993 according to the Articles of Association of the first respondent under challenge in this Writ Petition. The judgment of the Supreme Court in *State of Orissa v. Mamata Mohanty* (cited

supra) relied on by Sri. Pathrose Mathai gives support to the learned Senior Counsel's argument based on delay and laches. This in our opinion is a case where the principles laid down by the Supreme Court in *Banda Development Authority v. Moti Lal Agarwal* (cited supra) applies and it can be safely held that the Writ Petition filed after long delay need not be entertained. The delay and laches on the part of the appellant dis-entitles him to a discretionary relief under Article 226. The principles of acquiescence or waiver will also operate against the appellant as noticed by the Supreme Court in *Suneeta Aggarwal v. State of Haryana* (cited supra). According to us the doctrine of estoppel or acquiescence or waiver squarely applies in this case and in this regard we notice the judgment of the Supreme Court in *Virender Chaudhary v. Bharat Petroleum Corpn.* (cited supra). In short it is not only that we do not find any infirmity about the judgment of the learned Single Judge but we find that the impugned judgment is supportable by other good reasons also. The Writ Appeal fails and the same is dismissed.