
(2021) 01 KL CK 0108
In the High Court Of Kerala
Case No : Writ Petition (C) No. 19266 Of 2020

M.K. Sanoo

APPELLANT

Vs

State Of Kerala And Ors

RESPONDENT

Date of Decision : 05-01-2021

Acts Referred:

Kerala Non-Trading Companies Act, 1961 — Section 3, 4, 5
Companies Act, 2013 — Section 152(3), 152(4), 154, 164, 164(2), 164(2)(a), 167, 167(1)(a)
Constitution Of India, 1950 — Article 226

Citation : (2021) 01 KL CK 0108

Hon'ble Judges : N. Nagaresh, J

Bench : Single Bench

Advocate : P.B. Krishnan, P.B. Subramanyan, Sabu George, Manu Vyasana Peter, Deepa Narayanan, A.N. Rajan Babu

Final Decision : Disposed Of

Judgement

1. The petitioner, a retired Professor, Writer and Critic, who has authored large number of literary works, has filed this writ petition. The petitioner is a social worker and is a member of the Aruvippuram Sree Narayana Dharma Paripalana Yogam. The petitioner seeks the following reliefs:-

"(i) Declare that respondents 4 to 7 are disqualified under Section 164(2) of the Companies Act, 2013 to act as the Directors/office bearers of respondent No.3 Yogam;

(ii) Pass an order restraining respondent Nos.4 to 7 from functioning as Directors of respondent No.3 Yogam.

(iii) Appoint an Administrator to manage the day to day activities of respondent No.3 Yogam and to conduct election to its Board of Directors/office bearers in accordance with law and under the supervision of this Hon'ble Court;

(iv) Issue a writ of Mandamus or any other appropriate writ or direction

commanding respondent No.1 to consider and pass orders on Ext.P4 after hearing the petitioner within a time frame as may be fixed by this Hon'ble Court."

2. The petitioner states that the 3rd respondent-Aruvippuram Sree Narayana Dharma Paripalana Yogam (hereinafter referred to as the 'Yogam') was registered under the Travancore Regulation No.1 of 1063 as an Association. The Kerala Non-trading Companies Act, 1961 came into effect from 01.03.1962 and the Yogam being an existing company came under the ambit of the Act, 1961. The Yogam is also deemed to be a company registered under the Companies Act, 1956 in view of Sections 3 to 5 of the Act, 1961. Consequent to the repeal of the Companies Act, 1956 and enactment of the Companies Act, 2013, the Act, 2013 would apply to the Yogam, as held by this Court in the judgment in K. Manoj @ Manoj Kadakampally and others v. Sree Narayana Dharma Paripalana Yogam and others [2020 (5) KLT 266]. The competent authority under the Kerala Non-trading Companies Act, 1961 is the 2nd respondent-Inspector General of Registration.

3. The complaint of the petitioner is that the Yogam did not file annual returns from 2006 onwards. The 1st respondent-State of Kerala appointed an officer to adjudicate the matter as per Ext.P2. However, no effective steps were taken by the adjudicator. Ext.P3 information would show that annual returns have not been filed by the Yogam till that date.

4. The petitioner sent Ext.P4 representation to the 1st respondent pointing out that in view of Section 164(2) of the Companies Act, 2013, the Directors of the Yogam stand disqualified. According to the petitioner, the Yogam and persons who claim to be its Directors are taking advantage of absence of a proper and effective regulatory frame work. The petitioner urged that respondents 4 to 7, who are General Secretary, President, Vice President and Devaswom Secretary of the Yogam, stand disqualified for being Directors of the Yogam since the year 2017. But, they are reappointed as Directors from time to time.

5. The petitioner further alleged that the Yogam administers more than 40 Schools and 4 Colleges and respondents 4 to 7 are making appointments to various posts in the Schools and Colleges illegally. They are making amendments to the bye-laws without prior sanction of the Government. Local Branches and Unions of the Yogam are appointed and dismissed indiscriminately to stifle dissent. As the Directors of the Yogam are disqualified, an Administrator has to be appointed for day to day functions and to conduct elections in accordance with law.

6. Respondents 3 to 7 filed a counter affidavit and defended the writ petition. Respondents 3 to 7 stated that Section 164(2) of the Companies Act, 2013 only prescribes that a person who is or has been a Director of a Company, which has not filed financial statements or annual returns for a continuous period of three financial years, is not eligible to be reappointed as a Director of the Company or appointed as Directors of any other Company for 5 years from the date of default. Therefore, attribution of disqualification to respondents 4 to 7 can be

done only if the 3rd respondent has not filed financial statement and annual returns for a continuous period of 3 financial years.

7. Respondents 3 to 7 contended that Section 164 does not contemplate any application being made to the Company Court either to declare that the office has been vacated or to declare that the office has not been vacated. No application can be entertained by the Company Court or High Court. The remedy, if any, of the petitioner is through civil court or by arbitration.

8. Respondents 3 to 7 refuted the allegation that the 3rd respondent has not filed annual returns in all these years. Financial statements for the years 2006-'07 to 2017-'18 were submitted in time. The 2nd respondent informed that they could not record the returns in registry due to want of original records which were in the office of Registrar of Companies. The annual returns submitted by the 3rd respondent were not processed due to certain litigations. The delay caused has been condoned by the Government of Kerala and the 2nd respondent has permitted the 3rd respondent to file Annual Returns remitting requisite fee.

9. Respondents 3 to 7 further stated that the 3rd respondent filed a request for availing the benefit of the Companies Fresh Start Scheme, 2020 (CFSS, 2020) and for issuance of Immunity Certificate under the Scheme. The Deputy Inspector General (Licence) and Non-trading Company Registrar, Kerala has granted Ext.R3(o) Certificate to the 3rd respondent, granting immunity from prosecution or imposition of penalty under the Act subject to the provisions contained in the CFSS, 2020. The writ petition is therefore without any merit and is liable to be dismissed, contended respondents 3 to 7.

10. The 2nd respondent-Inspector General of Registration filed counter affidavit. The 2nd respondent stated that the Registrar of Non-trading Company, the Deputy Inspector General of Registration (Licensing) issued letter dated 30.12.2019 to the General Secretary of the Yogam and required to submit documents for filing the annual returns from 2006-'07 to 2016-'17. Accordingly, the Yogam produced required documents. There was lack of clarity as to whether the Non-trading Company Registrar has the power to consider applications under the CFSS, 2020. Ultimately, the Registrar of Non-trading Company issued an adjudication order dated 24.09.2020 imposing a penalty of ₹ 1 lakh and filing fees of ₹ 6,600/- for receiving the annual returns of the Yogam.

11. On receipt of complaints from the petitioner, a letter was sent to the Government of India for clarification as to whether CFSS, 2020 is applicable to the Yogam. Now, the Government has informed that the CFSS, 2020 is applicable to Non-trading Companies also. Accordingly, the application submitted by the Yogam was considered and Immunity Certificate was issued to the Yogam after receiving requisite fees. The 2nd respondent submitted that the representation submitted by the petitioner will be considered after receipt of reply from the Government. 12. The learned counsel for the petitioner argued that it has been held by this Court in K. Manoj @ Manoj Kadakampally and others (supra) that

the provisions of the Companies Act, 2013 are applicable to the Companies governed by the Kerala Non-trading Companies Act, 1961. From the said judgment, it is clear that the regulatory law applicable to the Yogam is the Companies Act, 2013. The Yogam has not filed annual statement or Balance Sheet since the year 2006 before the Inspector General of Registration, who is the competent authority. The fact that mandatory filing of annual statements and balance sheets was not done in time, is admitted by the Government, as is evident from Ext.P2, Ext.P3 and Ext.R3(h). The documents were filed before the competent authority only on 15.06.2020.

13. The learned counsel for the petitioner urged that Section 164(2)(a) disqualifies a person as Director if financial statements or annual returns are not filed for a continuous period of three years. Such Directors cannot be reappointed for a period of five years. Section 167 of the Companies Act, 2013 mandates that the office of a Director shall become vacant in case he incurs any of the disqualifications specified in Section 164. In view of the continued default in filing the mandatory returns, respondents 3 to 7 should be deemed to have vacated office of the Directors by operation of Section 164(2) of the Companies Act read with Section 167 and they are disqualified from seeking re-election. Learned counsel for the petitioner relied on the judgment of the Hon'ble Delhi High Court in W.P.(C) No.9088/2018 and the judgment of the Hon'ble Madras High Court in W.P.(C) No.13616/2018, in support of his contentions.

14. Learned counsel appearing for respondents 3 to 7, on the other hand, contested the maintainability of the writ petition itself. The learned counsel pointed out that Section 164(2) prohibits reappointment of certain Directors. Directors of a company who have defaulted in filing returns for a continuous period of three years, are disqualified for appointment as Directors in other Companies. As far as the defaulted company is concerned, the Directors shall continue till new Directors assume office as per the bye-laws of the company.

15. The learned counsel for respondents 3 to 7, placing reliance on Exts.R3(a) to R3(g), argued that the Yogam was sending annual returns every year. The competent authority could not act on such filings due to non-availability of records, which were lying with the Registrar of Companies under the Companies Act, 2013. Therefore, when the question whether there is any default on the part of the Yogam or its Directors, is itself in dispute, there cannot be any automatic disqualification of the Directors of the Yogam under Section 164 of the Companies Act, 2013.

16. I have heard Sri. P.B. Krishnan, learned counsel appearing for the petitioner, Smt. Deepa Narayanan, learned Government Pleader appearing for respondents 1 and 2 and Sri. A.N. Rajan Babu, learned counsel appearing for respondents 3 to 7.

17. The questions arising for consideration in this writ petition are whether the writ petition is maintainable, whether the Directors of the Yogam have defaulted

in filing annual returns and whether there is an automatic disqualification of the Directors of the Yogam for re-appointment as the Directors of the Yogam.

18. Before dealing with the issues, it would be beneficial to read Sections 152(3), 152(4), 164 and 167 of the Companies Act, 2013 which are as follows:-

"152. Appointment of Directors: (1) x x x x x

(2) x x x x x x x x x x

(3) No person shall be appointed as a director of a company unless he has been allotted the Director Identification Number under section 154.

(4) Every person proposed to be appointed as a director by the company in general meeting or otherwise, shall furnish his Director Identification Number and a declaration that he is not disqualified to become a director under this Act.

164. Disqualification for appointment of director -

(1) A person shall not be eligible for appointment as a director of a company, if -

(a) he is of unsound mind and stands so declared by a competent court;

(b) he is an undischarged insolvent;

(c) he has applied to be adjudicated as an insolvent and his application is pending;

(d) he has been convicted by a court or any offence, whether involving moral, turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence:

Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company;

(e) an order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;

(f) he has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call;

(g) he has been convicted for the offence dealing with related party transactions under section 188 at any time during the last preceding five years; or

(h) he has not complied with sub-section (3) of section 152.

(2) No person who is or has been a director of a company which -

(a) has not filed financial statements or annual returns for any continuous period of three financial years; or

(b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more, shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

(3) A private company may by its articles provide for any disqualifications for appointment as a director in addition to those specified in sub-sections (1) and (2):

Provided that the disqualifications referred to in clauses (d), (e) and (g) of sub-section (1) shall not take effect -

(i) for thirty days from the date of conviction or order of disqualification;

(ii) where an appeal or petition is preferred within thirty days as aforesaid against the conviction resulting in sentence or order, until expiry of seven days from the date on which such appeal or petition is disposed of; or

(iii) where any further appeal or petition is preferred against order or sentence within seven days, until such further appeal or petition is disposed [of].

167. Vacation of office of director.-- (1) The office of a director shall become vacant in case -

(a) he incurs any of the disqualifications specified in section 164;

(b) he absents himself from all the meetings of the Board of Directors held during a period of twelve months with or without seeking leave of absence of the Board;

(c) he acts in contravention of the provisions of section 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested;

(d) he fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested, in contravention of the provisions of section 184;

(e) he becomes disqualified by an order of a court or the Tribunal;

(f) he is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than six months:

Provided that the office shall be vacated by the director even if he has filed an appeal against the order of such court;

(g) he is removed in pursuance of the provisions of this Act;

(h) he, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company, ceases to hold such office or other employment in that company.

(2) If a person, functions as a director even when he knows that the office of director held by him has become vacant on account of any of the disqualifications specified in sub-section (1), he shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both.

(3) Where all the directors of a company vacate their offices under any of the disqualifications specified in sub-section (1), the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting.

(4) A private company may, by its articles, provide any other ground for the vacation of the office of a director in addition to those specified in sub-section

(1)." It is evident that no person shall be appointed as a Director of a company unless he has been allotted the Director Identification Number under Section 154 and every person proposed to be appointed as a Director by the Company, shall furnish his Director Identification Number and a declaration that he is not disqualified to become a Director under the Act, 2013.

19. Section 164(2) makes it clear that no person who is or has been a Director of a company which has not filed financial statements or annual returns for any continuous period of three financial years shall be eligible to be reappointed as Directors of that company for a period of five years from the date on which the said company fails to do so. Section 167 mandates that the office of a Director shall become vacant in case a Director incurs any of the disqualifications specified in Section 164.

20. The Companies Act, 2013 does not provide for any administrative procedure for disqualification of Directors by operation of Section 164(2). Respondents 3 to 7 also admit that no application to declare that the office has been vacated, can be entertained by the Company Court. According to respondents 3 to 7, the remedy available is through civil court. The disqualification for reappointment prescribed by Section 164(2) of the Companies Act, 2013 is for a period of five years. As initiation of civil proceedings and final culmination of the proceedings after appeals provided under the Code of Civil Procedure, 1908, ordinarily takes more than five years, this Court finds that civil remedy is not an efficacious alternate remedy and consequently a writ petition under Article 226 of the Constitution of India will be maintainable in appropriate cases.

21. Now the question is whether the Directors of the 3rd respondent-Yogam have defaulted in filing annual returns and are disqualified to hold office by operation of Section 164(2) of the Companies Act. Section 164(2)(a) makes it clear that a Director of a company which has not filed financial statements or annual returns for any continuous period of three financial years shall not be eligible to be reappointed as a Director of that company or appointed in other company, for a period of five years from the date on which the said company fails to do so. Section 167(1)(a) mandates that the office of a Director shall become vacant in

case he incurs any of the disqualifications specified in Section 164. It is evident from the said provisions that disqualification of such Directors occurs by operation of law and is automatic and an administrative decision is not required in that regard.

22. Then the question will be whether any of the Directors of the 3rd respondent-Yogam have incurred the disqualification due to non-filing of annual returns/financial statements for a continuous period of three years. It is evident from the pleadings that the annual returns of the Yogam from the year 2006-'07 to 2016-'17 were filed paying the penalty imposed by the Non-trading Company Registrar, Kerala only after 24.09.2020. The amended provisions of the Companies Act came into force with effect from 12.09.2013. Therefore, if financial statements/annual returns for the years 2013-'14, 2014-'15 and 2015-'16 were not filed, such of the Directors who were in office during the period will be disqualified for reappointment as Directors in the Yogam for the next five years.

23. The pleadings in the writ petition would show that the Secretary of the Yogam sought to file annual returns for the year 2006-'07 on 17.02.2009 and the Non-trading Company Registrar as per Ext.R3(c) informed the Yogam that requisite registers were not available with his office and the Non-trading Company Registrar has requested the Registrar of Companies, Cochin to make available the registers of the Yogam.

24. Ext.R3(d) letter dated 11.10.2010 of the Assistant Registrar of Companies, Kerala would show that the Assistant Registrar has required the Yogam to file returns before the office of the Inspector General of Registration, Trivandrum as per the procedure laid down under the Kerala Non-trading Companies Act, 1961.

25. Ext.R3(e) order dated 09.02.2009 of the Hon'ble High Court of Delhi would show that the Central Government on 23.08.2005 found that the appropriate authority in respect of the Yogam would be the State Government under the Kerala Non-trading Companies Act, 1961 and the Hon'ble high Court of Delhi has set aside the said order and directed the Central Government to decide the issue afresh after giving appropriate notice to the parties.

26. Ext.R3(f) letter dated 18.10.2011 of the Deputy Registrar of Companies, Kerala would show that the entire records of the Yogam have been transferred to the Inspector General of Registration in January, 2009. Ext.R3(g) letter dated 18.12.2012 of the 4th respondent would show that balance sheet and income and expenditure account along with audit report and annual report was forwarded to the Registrar of Non-trading Corporation on 18.12.2012. Therefore, it is evident that the Yogam had made some attempts to file annual returns/financial statements during the years 2009 to 2012. However, there are no materials to indicate that the Directors of the Yogam took any effective steps to file annual returns/financial statements during the period from 2013-'14 to 2015-'16. Even if such attempts were made unsuccessfully, that may not be

sufficient to avert disqualification because the disqualification under Section 164(2) is by operation of law and automatic. Since the Yogam has not filed annual returns/financial statements from the year 2013-'14 to 2015-'16 for a continuous period of three years, the Directors who were holding the office during the period would be disqualified for reappointment for the next five years.

27. Now, the issue to be considered is whether respondents 4 to 7 in the writ petition are liable to be declared as having incurred the disqualification under Section 164(2) of the Companies Act, 2013, by this Court. Going through the pleadings in the writ petition, I find that there is no positive assertion anywhere in the writ petition that respondents 4 to 7 were Directors of the Company during the three consecutive years since 2013-'14, except in the case of the 4th respondent. A reference with regard to the tenure of the 4th respondent can be found only in Ext.P4 complaint preferred by the petitioner before the Inspector General of Registration, which is as follows:-

"The present General Secretary of the SNDP Yogam took charge in 1997. From that year onwards, he is not functioning in accordance with the provisions of the law, rules and other circulars governing in the Companies Act."

The pleadings in the writ petition leaves this Court to presume that the 4th respondent has been the General Secretary of the Yogam during the years 2013-'14 to 2015-'16. As regards respondents 5 to 7, there is no pleading in the writ petition asserting that they were Directors of the Company during the said period.

28. Disqualification of Directors for reappointment or appointment in any Company is a serious matter affecting rights of Directors to hold office of the Director not only in the defaulted company but also in other companies. Therefore, it will not be advisable and would indeed be improper to declare that respondents 4 to 7 are disqualified for reappointment in the Yogam, in view of Section 164(2) of the Companies Act, 2013 in the absence of sufficient pleadings. Furthermore, there are other Directors of the Yogam also, as is evident from the cause title shown in Ext.P4 complaint, who are not parties to this writ petition, who may also be disqualified for reappointment as Directors in the Yogam. In the circumstances, this Court finds that it will not be appropriate to declare that respondents 4 to 7 are disqualified to be reappointed as Directors of Yogam, in this writ petition.

29. However, this Court finds that the allegations made by the petitioner have strong legal footing and the petitioner had brought this issue before the competent authority. The issue therefore, has to be examined by the competent authority. The petitioner has approached the 2nd respondent filing Ext.P4 petition seeking to remove the disqualified Directors of the Yogam, including respondents 4 to 7, in the light of Section 164(2) of the Companies Act, 2013.

In the circumstances, the writ petition is disposed of directing the 2nd respondent to consider and take a decision on Ext.P4 petition submitted by the

writ petitioner, within a period of three months. The petitioner as well as the Directors of the 3rd respondent-Yogam who are likely to be affected by the decision on Ext.P4, shall be given opportunity of hearing before a final decision is taken. The parties may also be permitted to produce additional documents and to make further pleadings, if they so desire.