

(2012) 10 KL CK 0060
In the High Court Of Kerala
Case No : Co. Appeal No. 14 of 2012

S.R. Kalyanakrishnan Panicker, Sreekrishna Mandiram,
Thithamel, Chengannur and G. Gopinath

APPELLANT

Vs

M/s. Green City Heritage P. Ltd. and Others

RESPONDENT

Date of Decision : 17-10-2012

Acts Referred:

Citation : (2012) 10 KL CK 0060

Hon'ble Judges : P.S. Gopinathan, J;K. Hema, J

Bench : Division Bench

Advocate : V.M. Kurian, Sri. Mathew B. Kurian, Sri. K.T. Thomas and Sri. George Poonthottam, for the Appellant; Shaji P. Chaly, Sri. R. Sanjith and Smt. C.S. Sindhu Krishnah, for the Respondent

Final Decision : Dismissed

Judgement

K. Hema, J.—This petition is filed to condone the delay in filing the Company Appeal. The appeal is filed challenging the order dated 3.7.2012 passed by the learned Single Judge in Co. Appln. Nos. 340 and 691/2011 in C.P. No. 41/2009. The appellant is admittedly not a party to the present case. Hence he sought for leave of the court to file appeal and leave was also granted. There is a delay of 66 days in filing the appeal and hence notice was given to the respondents and all of them entered appearance except 7th respondent. The appellant/petitioner and the respondents 1 to 6 were heard in detail. The reason for the delay is stated specifically in paragraph 4 of the affidavit as follows:

4. The appellant is the President of Business India Investment Forum representing more than 700 depositors, in which was formed to protect the interest of the depositors. Subsequent to the order passed by the learned Single Judge, meetings were convened to decide the future course of action. The depositors are from various districts and it took time to take a decision to file appeal against the impugned order. The Company Appeal ought to have been filed on or before 3.8.2012. Hence there occurred a delay of 66 days in filing the

appeal. The delay happened due to the aforesaid reasons. There is no laches or negligence on the part of the appellants or counsel in not filing the appeal in time.

2. Respondents 1 to 3 filed a counter affidavit stating that there is no bonafides in filing the appeal and sufficient reasons are not stated for condoning the delay. Various other contentions are also raised in the counter affidavit. It is also the contention of the respondents that the validity of the proposed schemes can be considered only after the meetings are convened, as held by the Supreme Court in the various decisions. The meetings are sought to be convened tomorrow (18.10.2012) and also on 20.10.2012 and the delayed appeal is filed without any bonafides, it is submitted.

3. On hearing both sides and on going through paragraph 4 of the affidavit filed along with the delay petition, it can be seen that the only reason stated by the petitioner is that subsequent to the impugned order, meetings were held to decide future course of action and it took time to take a decision as to whether appeal has to be filed against the impugned order. The time taken for taking a decision whether appeal is to be filed or not is, apparently no reason at all to condone the delay.

4. However, our attention was drawn to the merits of the case by both sides to certain extent. Learned Counsel for the appellant submitted that the impugned order is not sustainable, since the company applications are not filed in the proper forum. Rule 67 is not complied with, and the Judges Summons is not prepared in accordance with the language in Form 33, it is submitted. It is also submitted that an independent application is to be filed u/s 391, but the Co. Appln. No. 340/2011 is filed as an interim petition filed under the main Company Petition filed u/s 433. Therefore, the impugned order is liable to be set aside, it is submitted.

5. On the other hand, the respondents would submit that the requirements under Rule 67 are complied with though the Judges Summons is referred to as filed under Rule 11(b). There is also no merit in the contention that a separate petition is to be filed u/s 391, it is submitted.

6. On hearing both sides and on going through the records produced along with this petitions, it can be seen that Co. Appln. No. 340/2011 was filed with a prayer to accept the scheme of arrangement/Reorganisation/Compromise of 5th respondent Company in this appeal and for compromise with secured and unsecured creditors of 5th respondent Company and for that purpose, to pass orders for convene meetings of the shareholders and secured and unsecured creditors of 5th respondent. Co. Appln. No. 691/2011 is also with the same prayer in respect of another scheme and the said application was filed by the 7th respondent in this appeal.

7. On consideration of the contentions raised, learned Single Judge passed the impugned order, appointing Sri. Rajesh Narayanan (Advocate) as the Chairman for convening separate meetings of shareholders and different classes of

creditors of the Company. The Chairman was also directed to file a report with a detailed proposal for the conduct of the meetings. The Chairman accordingly filed a report on 21.7.2012 before the learned Single Judge in compliance of the directions issued as per the impugned order. On filing of the report, respondents 1 to 3 in this appeal contended before learned Single Judge that only 45 creditors of the Company (Respondent No. 5) need to vote. Rejecting the contentions of respondent Nos. 1 to 3 and accepting the rival contentions raised, learned Single Judge passed an order dated 3.8.2012 stating that all creditors should be allowed to vote. It was ordered that the Chairman will issue notice to the persons who are included in the list filed by him and who are described as beneficiaries of the compromise scheme.

8. It is also submitted that learned Single Judge also passed another order dated 20.9.2012, since the Chairman filed another report seeking permission to effect publication etc. It was directed that publication of notice in the gazette is dispensed with and the proposals of the Chairman are accepted for convening the meetings of the shareholders and creditors of the Company (Respondent No. 5) and the Chairman was directed to proceed to conduct the meeting, as suggested. According to the respondents 1 to 3, thereafter, publication was effected in Malayala Manorama Malayalam daily, Indian Express English daily and individual notices were issued to the creditors, shareholders etc. which incurred huge expenses to the tune of Rs. 4.5 lakhs to respondents 1 to 3. The meeting is also proposed to be held on tomorrow and two days thereafter, on 20.10.2012.

9. According to Learned Counsel for the respondents, the present attempt of the appellant is only to block the meetings being convened and there is absolutely no bonafides in the move made by the appellant. In support of the contentions it was pointed out that the compromise, Annexure-C, was entered into by the appellant in his capacity as President of Business India Investors Forum, which is an association of a few creditors (700 according to appellant). After having signed the compromise, proposing to move as new scheme as per clause 11 of Annexure-C (compromise) before the Court and having obtained an order u/s 391, the appellant has now filed an appeal in his personal capacity, it is submitted.

10. It is also pointed out that the appellant is aware of all the orders passed by learned Single Judge after passing of the impugned order pursuant to the reports submitted by the Chairman. But, he did not raise any objection to such orders being passed and in fact, one of the orders was passed accepting the contentions raised by him. The meeting is proposed to be convened to a near date, but, in the meantime, this appeal is filed with a petition to condone delay of 66 days. According to the respondents, there is absolutely no bonafides in filing this petition and no sufficient reasons are shown in the petition to condone the delay.

11. On hearing both sides and on consideration of the contentions raised and the history of litigation, we would reiterate that the reason stated in the petition for condonation of delay in paragraph 4 of the affidavit is not at all sufficient to

condone delay. It is clear that much water has flown under the bridge after passing of the interim orders and steps were also taken for convening the meetings on two near dates. As pointed out by Learned Counsel for the respondents, majority of the shareholders and creditors are coming from abroad and if at this stage the petition for condonation of delay is allowed, it will result in great injustice.

12. It is also to be mentioned in this context that the appellant may not be prejudiced, since the validity of the scheme and all the contentions raised now on merit can be considered by learned Single Judge, while disposing of the petition u/s 391. As pointed out by Learned Counsel for the respondents as per the impugned order itself the learned Single Judge observed that an objection was raised in the petitions that there is no bonafides in the scheme prepared and that seems to be the only objection raised before the learned Single Judge. The learned Single did not accept the contention by holding that the stage for this Court to examine the bonafides or validity of a scheme proposed is reached only after the meetings are held. The above finding was entered into on the basis of a decision of the Supreme Court in *Rainbow Denim Ltd. v. Rema Petrochemicals Ltd.* [2003(116) CC 640]. Other decisions were also cited at the Bar on behalf of the respondents from which also, we are satisfied that the appellant will get an opportunity to raise the same contentions on bonafides etc., while challenging the validity and bonafides in the scheme at the time of consideration of the application u/s 391 finally. It is also to be noted that against an order passed in Co. Appln. No. 691/2011 no appeal has been filed and the impugned order has become final as far as the scheme suggested by 7th respondent is concerned. In the above circumstances, we find no merit in the petition.

Petition is dismissed. Consequently, this appeal is also dismissed.