

(1993) 07 KL CK 0050

In the High Court Of Kerala

Case No : Copy Application No. 485 of 1992 in C.P. No. 9 of 1991

The Kuttanad Rubber Co. Ltd. and Others

APPELLANT

Vs

K.T. Ittiyavirah and Another

RESPONDENT

Date of Decision : 09-07-1993

Acts Referred:

Companies Act, 1956 — Section 397, 398, 399, 399(3)

Citation : AIR 1994 Ker 131 : (1997) 88 CompCas 438 : (1993) 1 ILR (Ker) 71

Hon'ble Judges : G. Rajasekharan, J

Bench : Single Bench

Advocate : S. Paraeswaran, for the Appellant; K. Jagadeeshchandran Nair, for the Respondent

Judgement

G. Rajasekharan, J.—An application by the Managing Director and two Directors of the Kuttanad Rubber Co. Ltd. for deciding the question of maintainability of the Company Petition filed under Sections 397 and 398 of the Companies Act.

2. The allegations in the Company Petition No. 9/91 are oppression and mismanagement. The petition was filed on 13-3-1991. In the written statement filed by the Company, it is inter alia contended that the petition is not maintainable. Now the question of maintainability is sought to be decided as a preliminary issue.

3. The points raised are that the petition does not satisfy the statutory requirements of Section 399 of the Companies Act, and that by the amendment of the Companies Act, the jurisdiction of this Court has been taken away.

4. The first point is raised on the premises that 1/10th of the shareholders have not come forward with the petition, and the consent given by some of the shareholders is not proper and the requirement of 1/10th has to be satisfied by the petitioners themselves. The averments are denied in the counter and according to the counter affidavit, no grounds are made out to sustain the application and it is made only to protract the matter.

5. The first argument advanced by the learned counsel for the applicants is that the petitioners in the Company petition do not hold 1/10th of the issued share capital, and for that simple reason, the petition is liable to be dismissed. According to him, it is not enough that the requirement of 1/10th share holding is satisfied by the share held by the petitioners as well as the shareholders who have given their consent. This argument conveniently forgets the provisions of Section 399(3). That sub-section reads :

"Where any members of a company are entitled to make an application in virtue of Sub-section (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them."

According to learned counsel, for any member to be entitled to make an application, he should hold a minimum of 1/10th share.

6. If this argument is accepted, then the provision regarding consent of some of the shareholders become superfluous, meaningless, and unnecessary. If a particular individual or individuals who purpose to move an application under Sections 397 - 399, hold 1/10th of the shares, then no question of anybody's consent for such a petition arises. They by themselves will be entitled to move the petition and need not seek for anybody's consent. When provision for consent of members is provided, necessarily that is to enable the persons who actually wish to file the petition, to do so with the consent of other shareholders when they together constitute 1/10th of the shareholders. It may also be noted that in terms of Sub-section (3) of Section 399, when a petition is moved with the consent in writing of some of the shareholders, such a petition is on behalf of and for the benefit of all of them, namely the petitioners and the consenting shareholders. When the petition is for the benefit and on behalf of the consenting shareholders also, it is idle to contend that the persons who figure as petitioners, should hold a minimum of 1/10th shares. If that were the intention of the legislature, then there was no need for making provision for some shareholders giving their consent in writing for the petition. If the petitioners themselves satisfied the requirement of holding 1/10th shares, then they need not seek the consent of anybody-else because, they themselves will be entitled to file the petition. The argument of the learned counsel does not seem to be correct.

7. The expression "where any members of the company are entitled" appearing in Sub-section (3) of Section 399, certainly will include the persons who figure as petitioners as well as the persons giving consent in writing. It is enough that they together are entitled to make an application. When they together are entitled to make an application, it is enough that one or more of them file the petition with the consent in writing of the rest.

8. A similar contention was raised in *Rajammal v. Union Tile Works P. Ltd.* (1968) 2 CLJ 93 (Ker). In that case, the Court held that under the provision of Section 399(3) of the Companies Act, it is enough that the petitioners together with the

consenting shareholders, hold 1/10th of the share capital. I am in respectful agreement with that conclusion and the reasons stated therein.

9. It was urged, referring to the decisions reported in (1989) 2 CLJ 229 (Delhi). (1989) 2 CLJ 269 (Ker), and (1980) 50 CC 154 (Mad) (M. C. Durai Swami v. Sakthi Sugars Ltd.), that the consent given in this case does not satisfy the specific requirements of Law. They were cases where there was no written consent or the consent given was only of a general nature without applying the consenters' mind to the allegations and reliefs prayed for in the petitions. In those circumstances, it was held that a mere consent of a proposed action for mismanagement is not sufficient and there must be something to infer from the writing given by the consenter that he has understood the purport, scope etc. of the petition, for which the consent was given. Before a member can be said to have consented to a particular action, the said member should have known what was the action to be initiated, what were the reliefs to be prayed for, and what was the ground to be urged in support of the reliefs claimed. The member should have applied his mind to the question before consent was given.

10. In the case on hand, the facts are entirely different and those decisions have no application to the facts of this case. Here, the consent in writing is appended to the petition. The consenter is one V. J. Thomas, Vettathu House, Kainakari PO, Alappuzha District, and in the consent letter he asserts that he had perused a copy of the petition to be presented before this Court by the petitioners and he gives his consents for filing the said petition on his behalf as well. That affirmation certainly would indicate that he has understood the allegations in the petition, the grounds under which the reliefs are prayed for, and the reliefs prayed for in the petition. That consent in writing certainly satisfies the requirements of Law, and the contention that the consent is improper or insufficient, cannot be accepted.

11. The total number of shares of the Company is 4500. The first petitioner holds 169 shares and his wife Alice Ittiyavirah was holding 155 shares. The first petitioner's brother Thomas Sebastian had 73 shares and the consenting party V. J. Thomas holds 115 shares. These together will constitute 512 shares. The dispute raised in the written statement is that the order issuing letters of administration to petitioners 2 and 3 in L.A. OP No. 81/88 on the file of the District Court Kottayam, has been challenged and so the petitioner who consented together, do not have the required number of shares.

12. Alice Ittiyavirah, the mother of petitioners 2 and 3, as mentioned earlier, was holding 155 shares. She executed a Will bequeathing her shares to petitioners 2 and 3 and on the strength of that Will, the latter have obtained letters of administration. The shares held by Thomas Sebastian was sold in Court auction, and that was purchased by the second petitioner. The letter of administration issued by the District Court have not been revoked, nor the operation of that stayed. As matters stand, the letters of administration entitle petitioners 2 and 3 for those 155 shares. The Court sale of the 73 shares held by Thomas Sebastian

also passes title to the second petitioner. The purchaser automatically gets title (see Philipose, Advocate v. Vanchinad Rubber Produce Co. Ltd. AIR 1953 TC 253). In addition to that, there is the power of Attorney executed by Thomas Sebastian in favour of second petitioner. Thus, the petitioner together with the consenting party, hold 512 shares which is above the 1/10th of the total shares of the Company.

13. The other point raised in the application regarding maintainability is lack of jurisdiction of this Court, by virtue of the amendment of the Companies Act.

14. The jurisdiction to entertain applications under Sections 379 - 399 was taken away and conferred on the Company Law Board with effect from 31-5-1991 by the amendment. But, specific provision has been made u/s 68 of the Amendment Act, 1988, regarding pending proceedings. Section 68(1) reads :

"Any matter or proceeding which, immediately before the commencement of the Companies (Amendment) Act, 1988, was pending before any Court shall, notwithstanding that such matter or proceeding would be heard by the Company Law Board after such commencement, be continued and disposed of by that Court after such commencement in accordance with the provisions of the principal Act as they stood immediately before such commencement."

It cannot be disputed that this Company petition was pending when the Amendment Act came into force. Regarding the pending proceedings, the jurisdiction even now rests with this Court. In the circumstances, that contention also is not tenable.

15. No other point was argued regarding the maintainability of the petition. The above discussions clearly show that the Company petition is perfectly maintainable. Ordered accordingly.