(2022) 01 KL CK 0175

In the High Court Of Kerala

Case No : Writ Petition (C) Nos. 8382 Of 2020 & 1385 Of 2021

V.Vijayakumar APPELLANT

Vs

S.N.D.P Yogam, Represented By Its General Secretaryoffice Of S.N.D.P.Yogam, Kollam, Pin 691001 RESPONDENT

Date of Decision : 24-01-2022

Acts Referred:

Companies Act, 2013 — Section 10, 462, 465, 465(2)(a)
Companies Act, 1956 — Section 9, 12, 13, 13(2), 14, 25, 25(6), 29, 37, 87(1)(a), 89(1), 92(2), 172(2), 181, 219, 397, 398
Companies Act, 1882 — Section 26
Evidence Act, 1872 — Section 90, 114

Citation : (2022) 01 KL CK 0175

Hon'ble Judges : T.R.Ravi,J

Bench : Single Bench

Advocate : K.Jagadeeschandran Nair, D.Anil Kumar, A.N.Rajan Babu, P.Gopalakrishnan, S.Manu, Deepa Narayanan

Final Decision : Disposed Of

Judgement

T.R.Ravi, J

1. The reliefs sought for in these writ petitions are intrinsically connected and the writ petitions are hence being heard and disposed of together.

W.P.(C)No.8382/2020

2. This writ petition has been filed praying to quash Ext.P5 order issued by the 3rd respondent whereby M/s.Sree Narayana Dharma Paripalana

Yogam (hereinafter referred to as 'the Yogam') was exempted from the provisions of Sections 172 (2), 219 and Article 14 of Table C of Schedule I of

the Companies Act, 1956 (hereinafter referred to as 'the Act'), in exercise of the power conferred under Section 25(6) of the Act. The petitioner has also prayed for a declaration that clause 44 of the Articles of Association of the Yogam is ultra vires the Union, illegal and unenforceable inÂ law and

for a writ of mandamus appointing an independent and responsible person or persons as Administrator/Administrators for the Yogam for the purpose

of preparing a true and correct voters' list of the members and to conduct the election thereafter.

W.P.(C)No.1385/2021

3. The writ petition has been filed praying for a writ of certiorari to quash Ext.P2 order issued by the 3rd respondent (Ext.P5 in W.P.

(C)No.8382/2020) or in the alternative to declare Ext.P2 as having been rendered without jurisdiction, obtained by fraud, misrepresentation and

suppression of facts and therefore liable to be quashed. The petitioner has also sought for a declaration that every member of the Yogam has a right

to vote at any election to be held by the Yogam. Unless otherwise indicated, the reference to documents in this judgment are as they are referred to in

W.P. (c)No.8382 of 2020.

FACTS RELEVANT FOR DECIDING THE DISPUTE:

4. The Yogam was originally incorporated as a Company under Regulation 1 of 1063 of Travancore Regulations, which was the equivalent of the

Indian Companies Act, 1882. Ext.P1 is the copy of the Certificate of Incorporation of the Yogam and it is dated 15.05.1903. Ext.P1 would show that

the Yogam was formed for the purpose of promoting and encouraging religious and secular education and industrious habits among the 'Ezhava'

community and the doing all such other things as are incidental or conducive to the attainment of the above said objects with limited liability, but

without the addition of the word 'Limited' to its name. Such a form of registration was permissible under Section 26 of the Indian Companies Act, 1882

which corresponds to Section 25 of the Companies Act, 1956. The Yogam continued to be governed by the Companies Act, 1956. The Kerala Non-

Trading Companies Act,1961 (Act 42 of 1961) (hereinafter referred to as the Kerala Act) came into force with effect from 01.03.1962. A copy of the

Act has been produced as Ext.P1 in W.P.(C)No.1385/2021. As per the preamble to the Kerala Act, its purpose is to provide for the incorporation,

regulation and winding up of Companies, other than trading corporations (including banking, insurance and financial corporations), with objects confined to the State of Kerala. The petitioners as well as the contesting respondents (Yogam) are now in agreement, that by virtue of the Kerala

Act, the Yogam is governed by the Kerala Act and not by the Companies Act,1956 and its successor enactment. In 1968, regulations were issued

under the Kerala Act and Regulation 6 stipulated that the Memorandum of Association of the proposed company shall be in the Form specified in

Annexure 1 or in a Form as near to, as circumstances admit. Clause 5(6) of Annexure 1 says that no alteration shall be made to the Memorandum of

Association or to the Articles of Association of the Company which are for the time being in force, unless the alteration has been previously submitted

to and approved by the Government.

5. Ext.P4 is the Articles of Association of the Yogam, of the year 1966. Clause 47 of Ext.P4 which is in the vernacular, when translated to English

says that in the general meeting of the Yogam, the members of the Director Board, Union Presidents, Union Secretaries and 1% of the permanent

members of the Unions who are selected in the manner prescribed, will be entitled to participate. That is to say, if there are 100 permanent members

in a Union, 1% will be entitled to represent in the general meeting. The stipulation in Clause 47 was based on a resolution dated 19.03.1966 as can be

seen from Ext.P4. Prior to the above resolution, all members were entitled to participate in the General Meeting. Clause 47 was subject matter of a

challenge before this Court and a Division Bench of this Court in the decision dated 28.11.1972 in P.C.Aravindhan v. M.A.Kesavan & Ors. reported

in [1973 KLT 70] declared that Clause 47 of the Articles of Association of the Yogam is violative of the provisions of Table C of Schedule 1 of the

Companies Act, 1956 and hence void. It would appear from the judgment that the provisions of the Kerala Act which had by then come into force

was not considered by the Division Bench. The Court proceeded on the basis that the Companies Act, 1956 governs the Yogam. Section 181 of the

Companies Act, 1956 provided that no member shall exercise any voting right in respect of any shares registered in his name, on which any calls or

other sums presently payable by him have not been paid, or in regard to which the Company has, and has exercised, any right of lien. The above

Section permits restriction on the voting right for the reasons stated therein. The Division Bench held that every member of a Company is entitled to take part in its administration and that right can be exercised only in the meeting of shareholders. It was held that such right cannot be restricted. The

right was inherent in the membership of the Company and need not be specifically conferred upon. It was on the above reasoning that the Court held

that clause 47 is violative of the provisions in Table C of Schedule 1 and the provisions of the Companies Act and hence void. However, in paragraph

21 of the judgment, the Division Bench observed that it is open to the Yogam to take advantage of Section 25(6) of the Companies Act.

6. The Yogam thereafter approached the Central Government under Section 25(6) of the Companies Act, and, apparently under a mistaken notion

that the Yogam was governed by the Companies Act and not by the Kerala Act, a request was made to exempt the Yogam from the provisions of

Section 172(2), 219 and Article 14 of Table C. The main dispute in these writ petitions is regarding Article 14 in Table C which says that â??every

member shall have one voteâ?. The Central Government by Ext.P5 order in W.P.(C)No.8382/2020 granted exemption to the Yogam from the above

provisions. The order is dated 20.08.1974. It can be seen from Ext.P4 that even prior to Ext.P5 order, the Yogam has adopted Schedule A of Act 9 of

1114 ME. It is seen from Ext.R1(p) produced by the Yogam in their second counter affidavit filed in W.P. (C)No.1385/2021 that a special resolution

to adopt Table C instead of Table A was passed only on 09.11.1974, subsequent to Ext.P5 order. It would thus appear that the Yogam had moved the

Central Government for exemption from Article 14 of Table C, when the Yogam as a matter of fact had adopted Table A and not Table C. It is in the

above circumstances that the petitioners have filed these writ petitions seeking quashing of Ext.P5 order issued in 1974 for the reason that the Central

Government did not have any power to grant exemption, since the Yogam was governed by the Kerala Act and even on facts, the order has been

issued without any reference to the fact that the Yogam had actually adopted Table A and not Table C. Even though the challenge is made after

several years of the issuance of Ext.P5, it is the contention of the petitioners that the illegality should not be allowed to be perpetrated, even if the

actions taken so far are to be protected to the possible extent.

7. The Yogam had filed a counter affidavit on 20.05.2009 in C.P.No.18/2008 before this Court, a copy of which has been produced as Ext.P6,

wherein it is admitted that the Yogam is governed by the Kerala Act. Such an admission is also seen in Ext.P7 dated 12.02.2020 which is the

judgment of this Court in F.A.O.No.18/2020. Ext.P8 dated 26.12.2019 is an order issued by the Government of Kerala authorising the Registration

Deputy Inspector General (Licensing) to be the Adjudicating Authority with regard to filing of annual returns of the Yogam. The order has been

issued on the basis that the Kerala Act applies to the Yogam. Ext.P10 is an order dated 21.04.2015 issued by the Company Law Board, Chennai,

where again an application complaining of mismanagement was rejected for the reason that the Yogam is governed by the Kerala Act and the

Company Law Board lacks jurisdiction. Another document showing the fact that the Yogam admits that it is governed by the Kerala Act is Ext.P11

dated 02.10.2005, which is an application filed by the Yogam itself, before the Registrar of Companies, Ernakulam, requesting that all records relating

to the Yogam be transferred to the Office of the IG of Registration, State of Kerala. The reason stated in the application is that the Yogam is

governed by the Kerala Act.

ISSUES FOR CONSIDERATION

8. The crucial question to be decided is whether every member of the Yogam has got a right to vote. If the Yogam is a Company Limited by Shares,

by operation of Section 87(1)(a) of the Companies Act, every member will have a right to vote. If on the other hand the Yogam is a Company Limited

by Guarantee, then its Articles of Association should be in one of the forms in Table C, D or E. According to the Yogam, Table C will apply. Clause

14 of Table C says that â??every member shall have one voteâ?. Whether the Yogam can delete the said clause and restrict the voting right to one

representative for every 200 persons will then be the issue to be decided. According to the petitioners, going by Section 29 of the Companies Act, if

the Articles of Association of the Yogam is inconsistent with the model Articles of Association, the model Articles of Association will prevail over that

of the Yogam. It is also submitted that by operation of Section 9 of the Companies Act, 1956, the Act has an overriding effect over the Memorandum

and Articles of Association.

9. Even on the admitted facts, till an amendment restricting the voting right was brought in for the first time in the form of clause 47 in 1966, every

member could vote. The amendment was challenged and a Division Bench of this Court in Aravindhan (supra) held that Clause 47 is void. It is

thereafter, Ext.P5 order was issued by the Central Government. It is to be noted that the Kerala Act had come into force in 1962 and even when

clause 47 was introduced, the Yogam was legally to be governed by the Kerala Act. The fact that the Kerala Act governs the field was never noticed

either at the time of bringing in the amendment or when the issue was considered by this Court, resulting in the judgment dated 28.11.1972. While

considering the application for exemption in 1974, the Central Government overlooked the aspect that the Yogam was governed by the Kerala Act.

When the Kerala Act is to apply, the consideration of a request under Section 25 of the Companies Act, 1956, can only be by the State Government

and not the Central Government. After Ext.P5 order was issued by the Central Government, clause 47 which had been struck down by this Court was

brought back in 1977. This was again amended in 1999 whereby instead of one out of 100, the representation of members in General meeting is

restricted to one out of 200 members. The clause 47 has been replaced by Clause 44 in the amended Articles of Association. The petitioner contends

that since the Kerala Act applies, the process by which clause 47 was brought back in 1977 is not supported by law. The Central Government could

not have granted exemption and the power is to be exercised by the State Government.

10. Sri A.N.Rajan Babu, appearing for the Yogam seeks to defend the Government order dated 20.08.1974. It is contended that Schedule A applies in

cases of Companies Limited by shares. Section 29 deals with Companies not limited by shares, to which Table C Schedule 1 will be applicable. It is

contended that Table C should be deemed to have been adopted by the Yogam. According to him, the Articles of Association was amended adopting

the C Schedule and the Memorandum and Articles of Association together constitutes the framework of the Company. It is further contended that the

Memorandum and Articles of Association have a binding force and are to be treated as a statutory agreement to which all the members have

subscribed to. As such when a resolution is adopted by the Yogam amending the Articles of Association or the Memorandum of Association, it is

binding on all members and the petitioners cannot challenge the amendment or the order Ext.P5 issued by the Central Government which was pursuant to an application filed by the Yogam as authorised by the members of the Yogam. It is submitted that when the members of the Yogam itself

wanted their voting rights to be curtailed and on that basis orders have been issued, it is not open to some of the members to challenge the same. It is

further submitted that after the amendment made in 1999 was registered on 7.1.2001 with the Registrar of Companies, the General Body of the

Yogam was being held with such restricted membership and the challenge is preferred after 20 years, which should not be entertained by this Court. It

is further submitted that the order that is challenged was issued as early as in 1974 and the present challenge is highly belated. The counsel submits

that once Table C is adopted, nothing further remains.

STATUTORY PROVISIONS WHICH HAVE A BEARING

11. The following statutory provisions in the Companies Act, 1956, which are relevant for consideration of the issue in question are extracted below;

â??Section 9.- Act to Override Memorandum, Articles, etc.- Save as otherwise expressly provided in the Act -

(a) the provisions of this Act shall have effect notwithstanding anything to the contrary contained in the memorandum or articles of a company, or in any agreement

executed by it, or in any resolution passed by the company in general meeting or by its Board of directors, whether the same be registered, executed or passed, as the

case may be, before or after the commencement of this Act ; and

(b) any provision contained in the memorandum, articles, agreement or resolution aforesaid shall, to the extent to which it is repugnant to the provisions of this Act,

become or be void, as the case may be.

Section 12.- Mode of forming incorporated company.- (1) Any seven or more persons, or where the company to be formed will be a private company, any two or more

persons, associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this

Act in respect of registration, form an incorporated company, with or without limited liability.

(2) Such a company may be either-

(a) a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them (in this Act termed

a company limited by shares"") ;

(b) a company having the liability of its members limited by the memorandum to such amount as the members may respectively undertake by the memorandum to

contribute to the assets of the company in the event of its being wound up (in this Act termed ""a company limited by guarantee"") ; or (c) a company not having any

limit on the liability of its members (in this Act termed ""an unlimited company"").

Section 13.- Requirements with respect to memorandum.-

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(3) The memorandum of a company limited by guarantee shall also state that each member undertakes to contribute to the assets of the company in the event of its

being wound up while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company, or of such debts and

liabilities of the company as may have been contracted before he ceases to be a member, as the case may be, and of the costs, charges and expenses of winding up,

and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount.

Section 14.- Form of memorandum.- The memorandum of association of a company shall be in such one of the Forms in Tables B, C, D and E in Schedule I as may be

applicable to the case of the company, or in a Form as near thereto as circumstances admit.

Section 25.- Power to dispense with ""Limited"" in name of charitable or other company.-

(1) Where it is proved to the satisfaction of the Central Government that an

association-

(a) is about to be formed as a limited company for promoting commerce, art, science, religion, charity or any other useful object, and

(b) intends to apply its profits, if any, or other income in promoting its objects, and to prohibit the payment of any dividend to its members, the Central Government

may, by licence, direct that the association may be registered as a company with limited liability, without the addition to its name of the word ""Limited"" or the words

Private Limited"".

(2) The association may thereupon be registered accordingly; and on registration shall enjoy all the privileges, and (subject to the provisions of this section) be

subject to all the obligations, of limited companies.

(3) to (5) xxxÂ Â Â Â Â Â Â Â Â Â Â Â Â Â Â Â Â Â Â xxxÂ xxxÂ Â Â Â Â Â Â

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(6) It shall not be necessary for a body to which a licence is so granted to use the words â??Limitedâ? or the words â??Private Limitedâ? as any part of its name and,

unless its articles otherwise provides, such body shall, if the Central Government by general or special order so directs and to the extent specified in the directions, be

exempt from such of the provisions of this Act, as may be specified therein

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Section 28.- Adoption and application of Table A in the case of companies limited by shares.-

(1) The articles of association of a company limited by shares may adopt all or any of the regulations contained in Table A in Schedule I.

(2) In the case of any such company which is registered after the commencement of this Act, if articles are not registered, or if articles are registered, insofar as the

articles do not exclude or modify the regulations contained in Table A aforesaid, those regulations shall, so far as applicable, be the regulations of the company in the

same manner and to the same extent as if they were contained in duly registered articles.

Section 29.- Form of articles in the case of other companies.- The articles of association of any company, not being a company limited by shares, shall be in such

one of the forms in Tables C, D and E in Schedule I as may be applicable, or in a form as near thereto as circumstances admit:

Provided that nothing in this section shall be deemed to prevent a company from including any additional matters in its articles insofar as they are not inconsistent

with the provisions contained in the form in any of the Tables C, D and E, adopted by the company.

Section 31.- Alteration of articles by special resolution (1) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may,

by special resolution, alter its articles:

Provided that no alteration made in the articles under this sub-section which has the effect of converting a public company into a private company, shall have effect

unless such alteration has been approved by the Central Government.

(2) Any alteration so made shall, subject to the provisions of this Act, be as valid as if originally contained in the articles and be subject in like manner to alteration by

special resolution.

Section 37.- Provision as to companies limited by guarantee.- (1) In the case of a company limited by guarantee and not having a share capital, and registered on or

after the first day of April, 1914, every provision in the memorandum or articles or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void.

(2) For the purpose of the provisions of this Act relating to the memorandum of a company limited by guarantee and of this section, every provision in the

memorandum or articles, or in any resolution, of any company limited by guarantee and registered on or after the first day of April 1, 1914, purporting to divide the

undertaking of the company into shares or interests, shall be treated as a provision for a share capital, notwithstanding that the nominal amount or number of the

shares or interests is not specified thereby.

Section 87.- Voting rights (1) Subject to the provisions of section 89 and sub-section (2) of section 92-

(a) every member of a company limited by shares and holding any equity share capital therein shall have a right to vote, in respect of such capital, on every resolution

placed before the company.â??

12. Relevant provisions in the Kerala Non-trading Companies Act, 1961 are extracted below;

Â â??2. Definitions.â?"In this Act and in the Companies Act, 1956 (Central Act I of 1956), as applied to the State of Kerala by section 3, unless the context otherwise

requires,--

(1)â??companyâ? means a company, other than a trading corporation (including banking, insurance and financial corporations), with objects confined to the State of

Kerala formed and registered under the Companies Act, 1956 (Central Act I of 1956), as modified by this Act, or an existing company as defined in clause (2).

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3. Application of the Companies Act, 1956 (Central Act I of 1956) to non-trading companies with objects confined to the State of Kerala.- The Companies Act,

1956,

(Central Act I of 1956), in so far as it is the law relating to companies, other than trading corporations (including banking, insurance and financial corporations), with

objects not confined to one State shall, mutatis mutandis, and subject to the modifications specified in the Schedule to this Act, be applicable to the State of Kerala,

and shall be the law relating to companies, other than trading corporations (including banking, insurance and financial corporations, with objects confined to the

State of Kerala.

4. Provision relating to existing companies.â?" Every existing company with its registered office in any place in the State of Kerala shall be deemed to be registered

under the Companies Act, 1956 (Central Act I of 1956), as applied to the State of Kerala by section 3, and shall be governed by the said Act, accordingly.

5. Validation of registration of non-trading companies under Central Act 1 of 1956.- Every company other than a trading corporation (including banking, insurance

and financial corporations), with objects confined to the State of Kerala, registered before the commencement of this Act under the Companies Act, 1956 (Central Act

1 of 1956), shall be deemed to have been validly and lawfully registered as if the said Act, in so far as it relates to such companies, had been passed by the State

Legislature.

6. Transfer of records relating to existing companies to Registrar.- On the commencement of this Act, the records relating to existing companies in the office of

Registrars appointed under the Companies Act, 1956 (Central Act 1 of 1956), shall be transferred to the office of the Registrar referred to in clause (3) of section 2 and

shall thereafter be maintained in that office.â??

ARGUMENTS ADVANCED BY COUNSEL ON EITHER SIDEÂ Â Â Â Â Â Â Â Â Â Â Â Â Â Â

13. Sri Joseph Kodianthara, learned Senior Advocate appearing for the petitioners submitted that admittedly all the members were entitled to vote at

the time of formation of the Company, which is continued till 1966. Amendment was sought to be introduced in 1966 whereby clause 47 of the

Articles of Association of the Yogam was sought to be amended to the effect that 1% of the total members of the Union could alone take part in the

General Body Meeting. The above amendment was challenged and it resulted in the judgment in Aravindhan (supra). This Court held that clause 47 is

violative of the provisions contained in Table C to Schedule 1 and the provisions of the Companies Act and is void. The Division Bench in the above

case was considering a first appeal filed against the judgment of a learned Single Judge in Company Petition No.10/1970. The above petition was filed

under sections 397 and 398 of the Act by two members, for prevention of oppression and mismanagement by the General Secretary of the Yogam.

The learned Single Judge allowed the petition and by way of an interim arrangement appointed two Advocates of this Court as Administrators for

carrying on the affairs of the Yogam and to convene a general meeting of the Yogam in accordance with the 1966 Articles of Association and to

conduct the elections. The order was challenged before the Division Bench in appeal contending that Regulation 47 of the 1966 Articles of

Association is void. On the basis of an earlier judgment in Company Petition No.6/1969, a contention was raised before the Division Bench that the

Court has already held that the Yogam is a Company Limited by Guarantee and the said finding will be res judicata. The Bench did not choose to go

into the correctness of the said plea and assumed for the purpose of the discussion that the Yogam is not a Company Limited by Shares. In paragraph

17, the Court considered the contention on behalf of the respondents based on the absence of a provision conferring voting rights on the members of

the Companies Limited by Guarantee similar to Section 87 of the Companies Act, 1956, which confers voting rights to members of Companies Limited

by Shares. The Division Bench held that the conferment of voting right by a specific provision cannot be a criteria to hold that there is no such right

available to members of the Companies Limited by Guarantees to be present and to vote in the meeting of a Company. The Court went on to state

that a Company registered under the Companies Act is an association of persons which can function only through its members. Before the Division

Bench, the parties appear to have agreed that Table C governs the Yogam. Article 14 of Table C shows that every member shall have one vote. The

Court went on to hold that every member is entitled to vote and there cannot be a restriction by operation of clause 47 of the Articles of Association.

It can thus be seen that whether the company is limited by shares or by guarantee, all members are to be entitled to vote in usual course. Section 25(6)

of the Act empowers the Central Government to issue orders exempting a company from such of the provisions of the Act as is specified in the order.

On the basis of an observation in the judgment that to address difficulties of convening of a meeting to large body of members it is open to the Yogam

to take advantage of Section 25(6) of the Companies Act, the Yogam appears to have approached the Central Government which resulted in Ext.P5

order dated 20.8.1974. The counsel submits that after the Kerala Act came into force in 1962, admittedly, the Yogam is governed by the 1961 Act and

not the Companies Act. Going by the provisions contained in the Kerala Act, the provisions of the Companies Act are to apply with certain

modifications as are stated in the Schedule to the Act. One of the modifications stated is that reference to Central Government and Government is to

be construed as reference to the Government of Kerala. That is to say that if Section 25(6) of the Act can be applied for the purpose of seeking

exemption, the application for such a relief has to be made to the State Government. It is hence submitted that the application submitted in 1974 before

the Central Government itself is an application which was not maintainable and the same ought to have been made before the State Government and

the State Government alone had the power to grant such exemptions and that, as long as there is no order by the State Government granting an

exemption similar to Ext.P5 order, the Yogam cannot restrict the voting rights of its members. It is submitted that the clause which was struck down

by this Court in Aravindhan (supra) could not have been later reintroduced in 1977 on the basis of an order issued without jurisdiction or authority by

the Central Government in 1974 nor could there have been a further amendment in the year 1999, whereby the restriction was even increased by

making it half percent of the total number of members in a Union.

14. Another contention raised by the learned Senior Counsel is that even though this Court had observed that the parties have agreed that Table C

applies, as a matter of fact, going by the records, on the date on which the application was made before the Central Government and on the date on which Ext.P5 was issued by the Central Government, the Memorandum and Articles of Association of the Yogam stated that it is governed by A

schedule. This is all the more clear from Ext.R1(b) produced along with the second additional counter affidavit filed in W.P.(C)No.1385/2021. The

said document says that on 9.11.1974 an Extraordinary General Body Meeting of the Yogam was held at Kollam Terminus Theatre wherein the

Articles of Association which were framed on 19.3.1966 at the meeting held in Ernakulam Town Hall was amended. It can be seen that Article 1 was

amended by including Table C in the place of Table A. In the second additional counter affidavit it is admitted that the amendment was brought in only

after Ext.P5 order was passed on 23.8.1974 by the Central Government. It is thus evident that the Central Government while issuing Ext.P5 order

was not aware of the fact that on that day the Articles of Association stood adopting Table A and not Table C. A reading of Ext.P5 will show that the

order proceeded as if the Yogam was a Company registered under the Travancore Regulation as an association with limited liability and was seeking

exemption from the provisions of Sections 172(2) and 219 and Article 14 of Table C of Schedule 1. When Table C itself was not available, there is no

question of exempting the provisions of Article 14 of Table C; is the contention.

15. The Senior Counsel further pointed out that Section 8 of the Companies Act, 2013, corresponds to Section 25 of the 1956 Act but a provision

similar to Section 25(6) of the 1956 Act is no longer available. The only provision under which a company can be exempted from the provisions of the

2013 Act is Section 462, but the same can apply only as a general exemption. It is further pointed out as per Section 465 of the 2013 Act, the 1956

Act stands repealed and under Section 465(2)(a) the only aspects saved from the repeal are actions taken or purported to have been done etc., in so

far as they are not inconsistent with the provisions of the new Act. It is admitted in the counter affidavit of the Yogam that in Ext.R1(c) order dated

23.8.2005, the Central Government had held that the Kerala Act is applicable, while rejecting an application filed by some members of the Yogam

seeking permission/sanction to move a petition under Section 397/398 of the 1956 Act before the Company Law Board, Chennai. The above order

was set aside by the Delhi High Court by its judgment dated 9.2.2009, directing the Central Government to consider the issue afresh. The order is produced as Ext.R1(d). The reason stated in the judgment is that the order of the Central Government does not consider the issue as to whether the

activity of the company is confined to the State of Kerala properly. The Court observed that the issue can be decided on the basis of an interpretation

with is either subject based ie. â??Ezhava Communityâ? or activity/operation based. However, the petitioners before the High Court did not pursue

the matter any further. The Delhi High Court did not render a finding on the applicability of the Central Act or the Kerala Act. The attempt in the

counter affidavit of the Yogam appears to be to justify the authority of the Central Government, despite the fact that the Kerala Act had come into

force in 1962, by taking shelter under the observation of this Court in Aravindhan (supra), Ext.P5 order and the order of the Delhi High Court

Ext.R1(d) whereby the order of the Central Government was set aside. Neither the judgment in Aravindhan (supra) nor the judgment of the Delhi

High Court, have considered inter alia as to which Act is applicable.

16. Sri Rajan Babu, counsel for the Yogam addressed elaborate arguments with regard to the right of the petitioners to challenge Ext.P5 on the ground

that the members are bound by the amendment of the Articles of Association and were not entitled to challenge the same. It was also contended that

Ext.P5 was issued in 1974 at a time when the Companies Act, 1956 was being followed by the Yogam and it was within the authority of the Central

Government to issue such an order. It is submitted that under Section 10 of the 2013 Act, there is a statutory agreement between the members as

regards the contents of the Memorandum and Articles of Association. On facts, it is contended that the membership of the Yogam increased to

around 12 lakhs by 1998 which necessitated the reduction of representation of members in the General Body meetings. It is contended that the

Articles as amended in 1999 is being followed till now and there is no need for any interference at this stage at the instance of members who are

bound by the amendment.

17. Detailed arguments were also addressed on the question whether the company is limited by shares or limited by guarantee. On the basis of the

judgment of this Court in In Re SNDP Yogam, Quilon reported in [1970 KLT 365], the counsel for the Yogam contended that it has categorically

been held that the Yogam cannot be treated as a Company Limited by Shares and is a Company Limited by Guarantee. A reading of the judgment will

show that this Court held that the company is not limited by shares. However, the judgment does not contain any discussion regarding the question

whether the Yogam is a Company Limited by Guarantee, except a finding being entered in that regard. In Aravindhan (supra), the Division Bench did

not go into the question, but held that even if it is to be presumed that the Yogam is limited by guarantee, going by Article 14 of Table C which would

then be applicable, every member has a right to vote. The view expressed by the Division Bench was noted with approval by the Delhi High Court in

the decision in Pramod Chopra and others v. Apparels Export Promotion Council reported in [ILR 1984 Delhi 717]. Sri D. Anilkumar, counsel

appearing for the petitioners in W.P.(C)No.8382 of 2020, supplemented the arguments advanced by Sri Joseph Kodianthara, Senior Counsel, and

submitted that Section 13(2) and (3) of the 1956 Act specifically states as to what should be contained in the Memorandum of Association of a

Company Limited by Guarantee and a reference to the Memorandum will show that no such details are stated in the Memorandum of the Yogam to

the effect that it is limited by guarantee. It is hence submitted that the observation in the judgment in In Re SNDP (supra) will not by itself have the

effect of rewriting the Memorandum of Association of the Yogam.

18. The Counsel for the Yogam does not dispute the fact that the Yogam is governed by the provisions of the Kerala Act. However, the contention is

that Ext.P5 exemption has been validly granted by the Central Government and that the said exemption continues to be valid even after the Companies

Act 2013 came into force. It is further contended that for the last 46 years a representative General Body alone is being convened for the purpose of

election. It is submitted that there are now 32 lakhs members in the Yogam. It is contended that there is no inconsistency between Ext.P5 and the

provisions of the Companies Act, 2013, regarding the power to grant exemption to the companies. It is contended that the petitioners are barred by the

principles of res judicata in the light of the decisions in Aravindhan (supra) and the judgment in O.S.45 of 1999 which is a suit in which the issue

regarding Ext.P5 was put in issue. Another contention taken is that the Latin maxim â??Ex diuturnitate (wrongly quoted as duntumitate in the counter

affidavit) temporis omnia praesumuntur rite et solenniter esse actaâ?? is applicable.

CONSIDERATION

Whether the contentions raised are barred by principles of res judicata or estoppel ?

19. The specific question that is put in issue in these writ petitions is whether Ext.P5 order issued by the Central Government in purported exercise of

the power available under Section 25(6) of the Companies Act, 1956 can be sustained legally, given the fact that the Yogam is governed by the Kerala

Act with effect from 1.3.1962. Such a question was never put in issue before the Division Bench of this Court in Aravindhan (supra). The issue that

was considered by this Court was the validity of Clause 47 of the Articles of Association of the Yogam which restricted the voting rights of members.

Even though the question whether the Yogam is a Company Limited by Shares or Guarantee was raised before the Division bench, the Bench

observed that it is not necessary to go into the issue and even assuming that the Yogam was a Company Limited by Guarantee, the voting right cannot

be restricted in view of Article 14 of Schedule C. It is well settled that only matters that are put in issue and considered and decided will act as res

judicata between the same litigants. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not

every observation found therein nor what logically follows from the various observations made in it [See State of Orissa v. Sudhansu Sekhar Misra

(AIR 1968 SC 647)]. The above decision was noted with approval by the Hon'ble Supreme Court in a recent decision in State of Kerala v. Mother

Superior Adoration Convent, [(2021) 5 SCC 602] wherein it was observed that it is well settled that a decision is only an authority for what it decides

and not what may logically follow from it. A mere observation by the Court regarding a legal remedy that might be available to a losing party in a

litigation is never treated as res judicata. As such it cannot be held that the petitioners are barred by the principles of res judicata in putting forth such

a contention. Regarding the judgment in O.S.45 of 1999, admittedly, the judgment is challenged in appeal and is pending before this Court as

R.F.A.No.843 of 2003. The decision has not reached its finality. The said finding also cannot be res judicata. Regarding the question whether the

petitioners are barred by res judicata regarding the contention that the Yogam is a Company Limited by Shares in view of the judgment of a learned

Single Judge in In re SNDP(supra), the judgment will clearly show that this Court had not considered the issue as to whether the Yogam is a

Company Limited by Guarantee with reference to the statutory provisions contained in Section 13 of the Act. A finding that a company cannot be

treated as a Company Limited by Shares by itself cannot create a presumption that it is limited by guarantee. The findings of the learned Single judge

in the judgment in In Re SNDP (supra) cannot in my opinion be treated as a binding precedent regarding the question, since it is rendered without any

discussion on the issue and without reference to the statutory provisions. However, I do not think it is necessary in these proceedings to go into the

question whether the Yogam is a Company Limited by Shares or Guarantee for the reason that in Aravindhan (supra) this Court categorically held

that even if the Yogam is a Company Limited by Guarantee, all members have a right to vote. I am in complete agreement with the above view. It is

immaterial whether the company is limited by shares or by guarantee, when it comes to the question of right to vote. The right to vote could only have

been taken away by a legal and valid order issued by the appropriate Government under Section 25(6) of the Act. The said finding actually acts as res

judicata against the Yogam.

Whether Ext.P5 can be treated to be a valid order issued with necessary legal authority ?

20. Ext.P5 purports to have been issued on an application submitted before the Central Government under Section 25(6) of the Companies Act, 1956.

The application has been preferred admittedly after the Kerala Act came into force in 1962. The apparent reason for preferring the application before

the Central Government is the observation contained in the judgment in Aravindhan (supra). In the said judgment, this Court had only observed that the

Yogam is not without remedy and they can always approach the Central Government under Section 25. This Court had not considered whether such

an application has to be preferred before the Central Government or the State Government in view of the Kerala Act. As a matter of fact it was not

even brought to the notice of the Court that the Kerala Act applies to the Yogam. Thus Ext.P5 cannot be justified as an order issued on the basis of

directions issued by this Court.

21. By operation of Sections 3 to 6 of the Kerala Act, the registration of Yogam as a non-trading company under the Companies Act, 1956 is deemed

to be a registration in the State of Kerala. The Kerala Act is a statute falling under Entry 32 of List II of the Seventh Schedule of the Constitution and

the State Legislature has exclusive power to make laws with respect to the matter. After coming into force of the Kerala Act, the Companies Act,

1956 can no longer govern the Yogam. Sections 3 to 6 of the Kerala Act in effect facilitates the transfer of governance from under the Companies

Act, 1956 to the Kerala Act. Section 3 specifically says that the operation of the Companies Act, 1956 with regard to companies coming under the

Kerala Act, will be subject to such modifications specified in the Schedule to the Kerala Act. One such modification made by the Schedule is that

references to â??the Central Governmentâ? and â??Governmentâ? where it refers to the Central Government shall be construed as references to

the Government of Keralaâ?. Section 25 of the Companies Act, 1956 will thus have to be read with the above modification and the necessary result is

that an application under Section 25(6) has to be preferred before the State Government and not the Central Government, in the case of the Yogam,

after 1.3.1962. Admittedly, Ext.P5 was issued on the basis of an application preferred much after 1962. Ext.P5 is hence not issued by the competent

authority and hence cannot stand the test of law.

Whether the passage of time and continued acceptance of Ext.P5 order for the past several years can legitimise the order ?

22. Sri Rajan Babu relied on the Latix maxim â??Ex diuturnitate -----â? , to contend that owing to the passage of more than 46 years, Ext.P5 order

should be treated as legal, since many actions had been taken on the basis of the validity of the order. The maxim only means that things which had

been done several years past, by passage of time, lends them a presumption that they were performed rightly and in the usual manner, or with the

necessary solemnities. The maxim is used mostly with regard to documents that had been executed long past, about the origin of which there is not

sufficient evidence. In Brooms Legal Maxims, Tenth Edition the maxim has been dealt with from page 640 onwards. As far as official acts are

concerned, the applicability of the maxim is that â??everything is presumed to be rightly and duly performed until the contrary is shownâ? (see at page 642 with reference to Davies v. Pratt 17 C.B.183). As a matter of fact, such presumptions are statutorily recognised in the Evidence Act, 1872.

Section 114 of the Evidence Act raises a presumption that official acts have been regularly performed. Such a presumption is however rebuttable, in a

case where the correctness of such act itself is under challenge. Section 90 of the Evidence Act raises a presumption regarding documents which are

thirty years old, that the signature and every other part of a document, which purports to be in the handwriting of any particular person, is in that

person's handwriting and that it is duly executed and attested. Such a presumption is similar to the presumption contained in the maxim referred above.

However, the presumption does not apply to orders issued under purported exercise of authority given by a statute. I am hence of the opinion that

Ext.P5 cannot be held to be legal solely for the reason that several years have passed after it was issued. Since the correctness of the order has been

specifically challenged before the Court of law, once the court finds that the order has been issued without authority of law and by persons not

competent to issue the same, as per Section 25(6) of the Companies Act, 1956, as modified by Section 3 of the Kerala Act, this Court cannot allow

the illegality to be perpetrated any further.

Whether, the petitioners, who have subscribed to the memorandum and articles of association are estopped from challenging the same

?

23. The above arguments necessarily have to be appreciated with particular reference to Section 9 of the 1956 Act. As per Section 9, the provisions

of the Act will prevail upon anything contrary stated in the Articles of Association. That is, the members cannot have any statutory agreement which

does not align with the provisions of the 1956 Act. So, unless the Yogam had been granted a valid exemption under Section 25(6), there could not have

been any provision in the Articles of Association which restricts the right of every member to vote. This again takes us to whether the Kerala Act will

apply. If Kerala Act applies, the Central Government could not have issued Ext.P5. The necessary consequence is that in the absence of Ext.P5,

there cannot be any agreement between the members of the Yogam, which is against Article 14 of Schedule C, if the Yogam is a Company Limited

by Guarantee. If the Yogam is a Company Limited by Shares, then Section 87(1)

(a) of the Companies Act, 1956 will operate and every member will

get a right to vote. Hence, the Yogam will have to get exemption from the appropriate authority, from the operation of the provisions of the statute, if

the same is legally permissible, in order to restrict the voting right of its members.

24. It would not be proper for this Court to merely decide on the legal issue without issuing any further directions. This Court is aware of the

ramifications that may result by the finding that Ext.P5 is without authority of law. As admitted, the members of the Yogam were being governed by

the Articles of Association prepared on the basis of the exemption granted under Ext.P5 till now. It would hence not be proper to set at naught all

actions that had been carried out on the basis of Ext.P5 so far. It is hence made clear that this judgment will not in any way nullify the meetings held

by the Yogam earlier or elections conducted earlier. However, decisions taken at the meetings to restrict the voting rights will not gain sanctity of law.

CONCLUSION

25. In the result, Ext.P5 order is set aside. It is declared that clause 44 of the Articles of Association of the SNDP Yogam is ultra vires the statutory

provisions contained in the Companies Act, 1956 read with the provisions of the Kerala Non-Trading Companies Act,1961. It is declared that all the

members of the Yogam have a right to vote in any election to be held by the Yogam.

The writ petitions are disposed of as above.