ALLAHABAD HIGH COURT

Swami Shantanand Sarswati

Vs.

Advocate-General

Special Appeal No. 127 of 1954, against order of V. Bhargava J.
(Raghubar Dayal and Agarwala, JJ.)

05.08.1954. 07.01.1955

JUDGMENT

Agarwala, J.

1. This is a special appeal from a judgment of a single Judge of this Court in a case under Article 226 of the Constitution. The dispute relates to the succession to the mahantship of a math known as the Jotir Math. The Jotir Math is one of the four maths founded by the first Shankaracharya at the four corners of India, and is situated in Pauri Garhwal in this State. The other maths are at Shringiri in Mysore, Gobardhan Peeth in Puri and Sharda Peeth in Gujerat. The Mahants of these maths are also called Shankaracharyas. The last Shankaracharya of Jotir Math was swami Brahmanand Saraswati who died or. 20-5-1953. He was alleged to have executed a will, dated 18-12-1952, by which he had nominated as his successor to the mahantship of Jotir Math, as also to his personal properties, Swami Shantanand Saraswati, the appellant before us. Some persons, including respondents 3 to 6, were dissatisfied with the nomination of the appellant to the mahantship and they challenged the accession of the appellant to the mahantship of the math. The four respondents - 3 to 6 - as well as one Swami Sarupanand made an application to the Advocate General on 25-11-1953, asking him to accord them permission to institute a suit under Section 92, Civil Procedure Code for some of the reliefs mentioned in that section against the appellant in respect of the properties pertaining to Jotir Math. On receipt of that application the Advocate General directed the Collector of Banaras to hold an enquiry and to submit his report to him. The Collector thereupon issued notice to the appellant and held an enquiry in which both sides adduced evidence before him and he reported that Swami Sarupanand and others, who wanted the consent of the Advocate-General to the institution of a suit under Section 92, Civil Procedure Code, were not entitled to the permission sought. The Advocate General, however, came to a contrary decision and considered that permission should be granted to them and accordingly he granted the permission by an order, dated 29-1-1954. Later on, Sarupanand, who himself claimed to be the senior-most disciple of the late Swami Brahmanand Saraswati and on that account to be entitled to succeed to the gaddi of Mahant, did not consider that he should himself be a party to that suit. The remaining four persons thereupon made a fresh application to the Advocate-General on 26-4-1954, for a fresh permission being granted to them. The

Advocate-General granted them the required permission by an order, dated 29-4-1954. On this occasion no further enquiry was made by the Advocate-General as to whether he should grant the permission or not.

2. Armed with the sanction of the Advocate-General respondents 3 to 6 filed a suit against the appellant under Section 92, Civil Procedure Code in the court of the District Judge of Banaras. The appellant thereupon made an application under Article 226 of the Constitution in this Court praying that the sanction granted by the Advocate-General to the opposite parties may be quashed as the opposite parties had no interest in the math and further because no enquiry had been made by the Advocate-General before he granted the sanction and no opportunity was given to the appellant to show cause why the permission should not be granted. It was alleged that the Advocate-General was bound to act in a quasi-judicial manner in giving his consent under Section 92, Civil Procedure Code and that he was bound to make an enquiry which he did not do. The learned single Judge before whom the matter came up for orders dismissed the application without issuing notice to the opposite parties. He based his decision on the ground that if the sanction granted by the Advocate-General was void the petitioner had a remedy of taking that plea in the suit which was pending in the court of the District Judge of Banaras and that, on the other hand, if the sanction of the Advocate General was not void and the plea relating to it could not be taken by him in the suit the order of the Advocate General could not be vacated by this Court in exercise of the powers vested in this Court under Article 226 of the Constitution because this Court can issue a writ only if the order be void.

3. In this appeal it has been urged that the reason given by the learned single Judge for rejecting the petition of the appellant was not sound in law. As we have, on hearing counsel, come to the conclusion that even on the merits, there is no force in the appeal, we have not considered it necessary to examine the validity of the reasoning of the learned single Judge. Two points have been urged before us, first that under Section 92, Civil Procedure Code the Advocate General in giving his consent acts quasi-judicially and is, therefore, bound to make an enquiry after giving an opportunity to the parties affected by his consent and is also bound to act upon the materials produced before him as a result of the enquiry; and secondly that, in the present case, the Advocate General's order was void, inasmuch as there was no material before him to show that the applicants asking for his consent had any interest in the trust in respect of which the suit was sought to be filed.

4. Upon the question whether the Advocate General acts quasi-judicially in giving his consent under Section 92, Civil Procedure Code, learned counsel has referred to a decision of the Travencore-Cochin High Court viz., - '*Abu Backer v. Advocate-General of Travencore-Cochin State*[1]',

5. In our opinion, the contention that the Advocate-General is bound to act quasi-judicially under Section 92, Civil Procedure Code is not sound. Section 92, Civil Procedure Code, lays down that

in the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the court is deemed necessary for the administration of any such trust, the Advocate General or two or more persons having an interest in the trust and having
obtained the consent in writing of the Advocate General, may institute a suit, etc. Where
[1] AIR 1954 Tran Coch 331

the Advocate General himself does not sue he may authorize two or more persons to sue under the section. Three conditions have to be satisfied before the persons so authorized can sue: first that there is an express or constructive trust created for public purposes of a charitable or religious nature; secondly that there is an alleged breach of the trust, and thirdly that the persons suing have an interest in the trust. Over and above these, they must be armed with the sanction of the Advocate General. The section does not lay down the procedure to be followed by the Advocate-General in giving his consent. Part X, Civil Procedure Code containing Sections 121 to 131 authorizes the framing of rules for various matters under the Civil Procedure Code. Section 128 lays down in detail the matters for which rules may be framed. There is no provision for making any rules for the exercise of the discretion vested in the Advocate General under Section 92. It has not been shown to us whether the authorities described in Part X, Civil Procedure Code have made any rules relating to the exercise of the discretion vested in the Advocate General under Section 92, Civil Procedure Code The Government have no doubt made certain departmental rules which are embodied in the Legal Remembrance's Manual. These rules and orders are not statutory inasmuch as they are not made in the exercise of the power conferred upon the Government by any law. They are made for the proper exercise of the business, duties or powers conferred upon the Legal Remembrance or the Advocate General. These rules are not rules of law in the sense that they can be enforced in a court of law. Any violation of these rules is a matter between the Government and the Legal Remembrance or the Advocate General.

6. Even a perusal of these rules shows that the Advocate General in giving his consent under Section 92, Civil Procedure Code, is not bound to act quasi-judicially. These rules are contained in Chap.17 of the Manual. Rule 386 requires that an application for permission under Section 92 shall be accompanied by a copy of the draft of the plaint proposed to be filed in Court. The applicants are also required to state how they have an interest in the trust.

Rule 387 requires that when the application is received by the Advocate General he shall,

> "unless he considers an enquiry unnecessary, forward it to the District Officer of the district in which the alleged trust property is situated, for enquiry and report as to whether the consent applied for should or should not be given."

Under Rule 389 the District Officer is required to enquire into the matter either himself or cause such enquiry to be made by an officer not below the rank of a tahsildar and to report the result to

the Advocate General with his opinion whether consent should be given or refused. It is also provided that such enquiry shall not take the form of a regular judicial enquiry and that a visit to the locality and an enquiry on the spot will in most cases expedite matters. Then, R 390 lays down that the Advocate General after considering the District Officer's report, shall decide whether the consent applied for should be given or withheld.

7. It is clear, therefore, that even under the rules, it is open to the Advocate General not to order any enquiry at all when he considers such an enquiry to be unnecessary and it is also clear that the Advocate General is not bound by the opinion of the District Officer. The rules do not prescribe that notice shall in every case be given to the party against whom the suit is to be instituted or whether any-and if so what- opportunity shall be given to the parties in support of their cases during the course of the enquiry. The enquiry as is contemplated by the rules is a sort of enquiry which even in administrative or executive orders is very often made.

8. The distinction between a quasi-judicial act and an administrative or executive act was dealt with at length by Agarwala J. in a decision reported in - '*Avadhesh Pratap Singh v. State of Uttar Pradesh*[1]*',* After considering the authorities on the point (e.g., - '*Rex v. Electricity Commrs*[2]*.',* - '*King v. London County Council*[3]*',* - *'Huddart, Parker and Co. Proprietary Ltd. v. Moorehead*[4]*',* - '*Shell Co. of Australia Ltd. v. Federal Commr. of Taxation*[5]*',* - *'Cooper v. Wilson*[6]*',* - *'Cooper v. Board of Works, Wandsworth*[7]*',* - '*R. v. Doublln Corpn.*[8]*',* - '*Hopkins v. Smethwick Local Board of Health*[9]*',* - '*Chheetham v. Manchester Corpn*[10]*.',* - '*Board of Education v. Ric*[11]*e',* and the decision of the Supreme Court in - *'Province of Bombay v. Khushaldas S.Advani*[12]*',* it was held that

> "a quasi-judicial act requires that a decision is to be given not arbitrarily or in the mere discretion of an authority, but according to the facts and circumstances of the case, as determined upon an enquiry held by the authority after giving an opportunity to the party to be affected of being heard and whenever necessary leading evidence in support of his contentions. Whenever the authority is 'bound' (The Italics are ours (here in ' ')) to make a decision in this way, it acts judicially or quasi-judicially.

The essential difference between an administrative or executive act on the one hand and a judicial and quasi-judicial act on the other is that while in the former case, the authority vested with the power to give a decision affecting the rights of others, may be bound to enter upon an enquiry, he is not bound to give a decision as a result of the enquiry, but may act in his discretion, in utter disregard of the result of the enquiry, in the latter case, such authority is 'bound' (The Italics are ours (here in ' ')) by law to act on the facts and circumstances, as determined upon the enquiry, in which a person to be affected is given full opportunity to place his case before the authority even though the decision of such authority, whether right or wrong, may be final and may not be liable to be challenged in a Court of law."

In the Report of the Ministers' Powers Committee (Command Paper 4060 of 1932), p.73 (Sec.

III, para. 3) as quoted in (1937) 2 KB 309 at pp.340 and 341, it was pointed out that

> "A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites: (1) The presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by
> the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4). a decision which disposes

[1] AIR 1952 Ail 63 [3](1931) 2 KB 215 [5]1931 AC 275
[2](1924) 1 KB 171 [4](1909) 8 CLR 330 [6](1937) 2 KB 309
[7](1863) 14 CB (NS) 180 [9](1890) 24 QBD 712 [11]1911 AC 179
[8](1878) 2 LR Ir 371 [10](1875) 10 CP 249 [12] AIR 1950 SC 222

> of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law. A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2)" at least, i.e., the presentation of their case by the parties to the dispute and the ascertainment of the fact by means of evidence adduced by the parties to the dispute.

9. As we have pointed out above, Section 92, or any other provision, of the Civil Procedure Code does not require the Advocate-General to hold any enquiry or to give an opportunity to the party to be affected of being heard. The rules framed for the guidance of the Advocate-General even if they are treated as statutory rules do not make it Incumbent upon the Advocate-General in all cases to give an opportunity to the party concerned of being heard. Further, the Advocate General is not bound by the rules to act upon the report of the District Officer or to give his consent only on the basis of the facts and circumstances as determined upon the enquiry. He is at liberty to act upon his own pure discretion in spite of the report of the District Officer. Where an officer or other authority is not bound by any rule of law to hold an enquiry and to act strictly in accordance with the facts and circumstances of the case as they appear upon the enquiry, he cannot be said to be acting judicially or quasi-judicially. Even where he is directed to hold an enquiry-but where he is not bound to act in accordance with the facts and circumstances of the case-he merely acts in an executive or administrative manner.

10. Again, a judicial or quasi-judicial act must involve a decision as to the rights of the parties and must affect the interests of one or the other o the parties, (Vide the observations of Lord Atkin in - '(1924) 1 KB 171 at pp.204 and 205' and of Slesser L.J. in - '(1931) 2 KB 215 at p.243, wherein he analysed the conditions laid down by Atkin L.J. in - '*Rex v. Electricity Commrs*. In giving his consent under Section 92, Civil Procedure Code the Advocate General is not expected to decide the rights of the contending parties. Even if he has to hold an enquiry, he is merely to

see whether there is a 'prima facie' case that should be allowed to go to a Court of law. When he gives his consent to the institution of a suit, he does nothing more than this. By the consent which he gives for the institution of the suit, he does not affect the rights of the person against whom the suit is filed. That person has full opportunity to present his case before the court in which the suit is filed. The Court is not to be influenced in deciding the case by the "fact that the Advocate General has given his consent to the institution of the suit. It is, therefore, not a case in which there is any decision about a dispute or a claim. For all these reasons we think that the act of the Advocate General in giving his consent to the institution of a suit under Section 92, Civil Procedure Code, cannot be called a quasi-judicial act. In our opinion, it is merely an administrative or executive act. The act was described as administrative in - '*Dhian Das v. Jagat Ram*[13]',

11. It may be that the Advocate-General will always be well advised to hold an enquiry either himself or through the District Officer as required by the rules after giving notice to the proposed defendants to the suit and to give his consent only when he finds a 'prima

[13]8 Ind Cas 1160 (1) (Lah)

facie' case made out for the institution of the proposed suit as was held in - '*Pitchayya v. Venkatakrishnamacharl*[14]*u',* But this is merely a directive which can be said to be desirable and cannot be said to be binding as a matter of law.

12. The view taken by the Travencore-Cochin High Court in AIR 1954 Tranvancore Cochin 331 (A) that the Advocate-General acts quasi-judicially in giving his consent under Section 92, Civil Procedure Code, does not, with all respect, appear to us to be sound in law. After discussing some of the cases which have already been mentioned by us earlier, the learned Judges went on to observe:

> "The petitioners in the present case have come forward as persons having such an interest in the public trust in question. As beneficiaries they have an undoubted right to see that the trust is properly administered. They have also the right, in cases of mal-administration to institute a suit seeking the aid of the Court in the matter of setting matters right. Section 92, Civil Procedure Code, has placed a restraint on the exercise of this right by persons having an interest in the trust. Clause 2 of the section lays down that such persons can exercise their right to institute a suit for the reliefs mentioned to Clause 1 only with the consent in writing of the Advocate General. Thus it is obvious that the decision of the Advocate General, whether the consent asked for should be given or not, is a decision affecting the rights of these persons. When the consent is sought for, it is the duty of the Advocate General to come to a definite decision as to whether such consent should be given or not."

It may be observed that Section 92, Civil Procedure Code, does not deal with cases of personal rights of a party who seeks the consent of the Advocate-General. Such party proposes to file a

suit not for his own personal benefit but in the interests of the public at large. He has an interest along with others. If he has a special interest of which protection is sought, there is nothing in law which prevents him from instituting a suit without the consent of the Advocate General for the protection of that special interest. The law contemplates that when a suit is to be instituted on behalf of the public at large the Advocate General is the proper custodian of the public interest unless he thinks that some other persons may be authorized to act on behalf of the public. We do not think that the decision of the Advocate General whether the consent should or should not be given is a decision affecting any special right of the persons seeking the permission.

13. Then the learned Judges of the Travencore-Cochin High Court went on to consider whether the decision is purely a matter depending upon his opinion based on his subjective satisfaction as to whether there is necessity to institute a suit as contemplated or whether he has to arrive at a decision on that question after a judicial consideration of the grounds urged in support of the request for sanction or consent, and they observed that these are matters requiring decision after due investigation. But the mere fact that some sort of investigation has to be made does not necessarily make the decision or the act of the authority concerned a judicial or quasi-judicial decision or act. Their Lordships further observed:

> "Even though the section does not specify the manner and the extent of the investigation in these directions, it is obvious that the section contemplates the necessary investigation and inquiries being made by the Advocate General before he finally decides whether the sanction or consent applied for should be given or not. It is equally obvious that he has to make a judicial approach to the question in controversy and then to arrive at a decision after due consideration of the facts and the evidence made available to him."

[14] AIR 1930 Mad 129

With respect we do not think that the section requires any such thing being done by the Advocate General. The Advocate General may on such materials as may be made available to him arrive at his own conclusion and give or withhold the consent and it is not a matter to be investigated in a court of law whether the consent was given on proper materials after holding a proper enquiry or not.

14. The next point urged was that, in the report of the District Officer, it was stated that the applicants had no personal interest in the trust. The Advocate General was not bound to accept the conclusion reached by the District Officer. The full materials upon which the Advocate General based his opinion have not been placed before us by the appellant. Even a copy of the draft of the proposed plaint has not been supplied to us. Nor are we aware what other materials the Advocate General had before him when he gave his consent to the institution of the suit.

15. It was urged that though in the first instance when the application was made by five persons a

regular enquiry was held and an opportunity was given to the appellant to appear and put forward his case before the District Officer, no such enquiry was made and no such opportunity was afforded to the appellant when the second petition by the four respondents 3 to 6 was made on 26-4-1954, and the consent was given within three days only. There is no force in this contention. When consent has been recently given to a certain number of persons after due enquiry and investigation and if shortly afterwards a smaller number of those very persons ask for a fresh consent because some one of them has dropped out and is not prepared to join as plaintiff in the proposed suit and nothing new has happened in the interval, it would be a sheer waste of time and energy if a fresh enquiry were held. The Advocate General would be justified in basing his decision upon the materials which were already placed before him on the previous occasion and to give his consent or to withhold it without holding any fresh enquiry.

16. For all these reasons we are of opinion that the petition of the appellant under Article 226 of the Constitution was rightly dismissed by the learned single Judge. We accordingly dismiss this appeal. The Advocate General and respondents 3 to 6 will have their separate sets of costs. We assess the costs of the Advocate General at Rs. 160 and the same amount as the costs of respondents 3 to 6.

Appeal dismissed.