KERALA HIGH COURT

A.K. Bhaskar

Vs.

Advocate General

O.P. No. 383 of 1958

(M.S. Menon, C.A. Vaidialingam and T.C. Raghavan, JJ.)

18.07.1961

JUDGMENT

Vaidialingam, J.

1. In this writ petition under Article 226 of the Constitution, Mr. S. Easwara Iyer, learned counsel for the petitioners, attacks the limited manner in which the learned Advocate General has given sanction to institute the suit to the petitioners under Section 92, C.P.C.

2. In fairness to the learned counsel, it must be stated that there is no attack whatsoever either against the manner in which the proceedings were conducted by the learned Advocate General, nor even against the actual decision taken by the Advocate General in the circumstances of this case.

3. But the main attack, so far as we could gather, is that though the plaintiffs asked for reliefs on various grounds in the draft plaint filed by them and marked as Ext.P in these proceedings, the ultimate sanction given by the Advocate-General, confining the reliefs only to clauses (A) and (I) practically makes the filing of the suit illusory as not serving any purpose at all.

4. According to Mr. S. Easwara Iyer, in considering the question of granting a sanction under Section 92, Civil Procedure Code the learned Advocate-General who functions under the provisions of Section 92, C.P.C., should be considered to be discharging judicial function or at any rate, quasi-judicial function. In such a case, it is further urged that a decision taken ultimately by him, can be reviewed by this Court, in a proper case, under Article 226 of the Constitution. Mr. Easwara Iyer further urged that even on the basis that the learned Advocate-General discharges purely administrative functions, nevertheless, it is open to this Court to consider the correctness of the decision ultimately taken by the Advocate-General in a proper case. Therefore, the main grievance of the petitioners is that the learned Advocate-General has really not granted the plaintiff-petitioners sanction to institute the suit as they intended claiming all the reliefs, but has really restricted it, according to the learned counsel without giving any proper reasons, to only two of the reliefs asked for in the plaint.
Section 92 of the Civil Procedure Code is as follows: Public charities. - (1) 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, whether contentious or not, in the principal civil court of original jurisdiction or in any other court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject matter of the trust is situate, to obtain a decree –

(a) removing any trustee;
(b) appointing a new trustee;
(c) vesting any property in a trustee;
(cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possessession to the person entitled to the possession of such property;
(d) directing accounts and inquiries;
(e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;
(f) authorizing the whole or any part of the trust property to be let, sold, mortgaged or exchanged;
(g) settling a scheme, or
(h) granting such further or other relief as the nature of the case may require.
(2) Save as provided by the Religious Endowments Act, 1863, or by any corresponding law in force in the territories which immediately before the 1st November 1956, Were comprised in Part B States no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section."

5. It will be seen that under Section 92 the Advocate-General himself can institute a suit in the interest of the trust or give sanction to two or more persons having an interest in the trust to institute the suit. No doubt the learned Advocate-General will have to be prima facie satisfied that there is an alleged breach of any express or constructive trust constituted for public purposes of a charitable or religious nature. The learned Advocate-General must also satisfy himself that the two persons, are persons having an interest in the trust, in whom the conduct of the suit in the circumstances, can be properly entrusted. The various reliefs that could be asked for in the suit, are also indicated in Clauses (a) to (h) of sub-section (1) of Section 92. The question is whether the contention of Mr. Easwara Iyer, learned counsel that when discharging the functions entrusted to him under Section 92 C.P.C., the Advocate-General can be considered to be acting either judicially or in any event, quasi-judicially, when he gives or refuses to give sanction or even limits the sanction acorded, as he thinks proper in the particular circumstances of a case, is correct or not.

6. Mr. Easwara Iyer urged that at any rate, when the Advocate-General has to satisfy himself as to whether permission is to be granted or not, he must investigate the question (a) as to whether there is an allegation of a breach of express or constructive trust;

(b) whether that allegation of breach relates to a trust created for public purposes of a charitable or religious nature; and

(c) that the persons, who applied to him for sanction, are persons who have an interest in the trust. Therefore, the fact that the Advocate-General has to consider, at any rate, these matters and arrive at a decision is, according to Mr. Easwara Iyer, enough to constitute him as a person who has a duty to function either judicially or quasi-judicially. The question is whether this contention can be accepted by us.

7. No doubt, this contention raised in such a large manner, has found approval at the hands of the learned Judges of the Travancore-Cochin High Court in the decision reported in *Abu Backer Adam, Sait v. Advocate-General*[1], where Sankaran and Vithayathil, JJ., took the view that in such circumstances, the Advocate-General must be considered to be acting in a judicial or at any rate, a quasi-judicial capacity and in a proper case, his action can be reviewed by the High Court under Article 226 of the Constitution. We must also admit that this view has been accepted and followed by a learned single Judge of the Pepsu High Court reported in *Sadhu Singh v. Mangalgir Mohatmim Dera*[2] (Mehar Singh, J.) But the decision of the Travancore-Cochin High Court has not been accepted by two other Division Bench rulings reported in *Shantanand Saraswati v. Advocate General, U.P., Allahabad*[3], (Raghubar Dayal and Agarwala, JJ.) and *Srimali Lal v. Advocate-General*[4],

8. In AIR 1955 Allahabad 372, Mr. Justice Raghubar Dayal, as he then was and Mr. Justice Agarwala had to consider the question as to whether a writ can issue against the orders passed by the Advocate-General under Section 92 Civil Procedure Code. No doubt, in that case, there appears to have been certain rules framed by the State Government to regulate the procedure to be adopted by the Advocate-General in such circumstances. But even on a perusal of those rules, the learned Judges are of the view that it is open to the Advocate-General not to order any enquiry at all when he considers such an enquiry is unnecessary and according to the learned Judges, the Advocate-General is not bound by any rule of law to hold an enquiry. The learned Judges had to consider the decision of the Travancore-Cochin High Court and they are not inclined to follow the principles laid down therein. The learned Judges observe at page 376:

> "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

[1] Trav-Co. ILR 1954 Trav-Co. 369: AIR 1954 Tra Coc 331
[2] AIR 1956 Pepsu 65
[3] AIR 1955 All 372
[4] AIR 1955 Raj 166

> circumstances as determined upon the enquiry. He is at liberty to act upon his own pure discretion."

The learned Judges further state:

> "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".

9. On this reasoning the learned Judges, ultimately disagreed with the view expressed by the Travancore-Cochin High Court and have come to the conclusion that the decision taken by the Advocate-General under Section 92 of the Civil Procedure Code and a decision arrived at thereon cannot certainly be made the subject of review under Article 226.

10. The same view has again been taken by the Rajasthan High Court in the decision reported in AIR 1955 Rajasthan 166 (Wanchoo, C.J. and Sharma, J.). Chief Justice Wanchoo as he then was, who spoke for the Bench, has again adverted to the ruling in ILR 1954 Trav-Co. 369: AIR 1954 Travancore Cochin 331, (Sankaran and Vithayathil, JJ.) and was not prepared to accept the position enunciated therein as correct. The learned Chief Justice is of the view that under Section 92 Civil Procedure Code the Advocate General himself can file a suit or give permission to two or more persons to do so and that this function of the Advocate-General cannot be called a judicial or even a quasi-judicial function in the circumstances and there is no question of that order being revised either under Article 226 or 227 of the Constitution. In fact, the learned Chief Justice observes at page 167:

> "Obviously this function of the Advocate-General cannot be called a judicial or quasi-judicial function under the circumstances, and there is no question of revising it under Article 227 or issuing a writ under Article 226 compelling him to do this, that or the other".

11. We have gone through the reasons given by the learned Judges of the Travancore-Cochin High Court in ILR (1954) Trav-Co. 369, (Sankaran and Vithayathil JJ.) as also the decision of the Pepsu High Court in AIR 1956 Pepsu 65, (Mehar Singh, J.)

12. After considering those decisions, in the light of the reasoning adopted by the learned Judges of the Allahabad High Court in AIR 1955 Allahabad 372 (Raghubar Dayal and Agarwala, JJ.) and Rajasthan High Court in AIR 1955 Rajasthan 166 (Wanchoo, C.J. and Sharma, J.) with great respect, the reasoning either in the judgment of the Travancore-Cochin High Court or in the judgment of the Pepsu High Court referred to earlier, do not appeal to us and we are not inclined to follow those decisions. On the other hand, the reasoning and the principles enunciated in the judgments of the Allahabad and Rajasthan High Courts appeal to us and we are with great respect, inclined to follow and adopt the reasoning and principles laid down therein.

13. More recently, the nature of the function discharged by the Board under the Muslim Wakfs Act, 1954 came up for decision before Mr. Justice Rajagopalan of the Madras High Court in the decision reported in *Abdul Kasim v. Md. Dawood*[5], There again Section 55 of the Act in question has been extracted in the judgment of the learned Judge. The question was whether the High Court can interfere with the sanction given by the Board under Article 226 of the Constitution.

14. The learned Judge refers to the decision of the Travancore-Cochin High Court in ILR 1954 Trav-Co 369 : AIR 1954 Travancore Cochin 331 as also the decisions to the contrary taken by the Rajasthan and Allahabad High Courts in AIR 1955 Rajasthan 166 and AIR 1955 Allahabad 372. After a consideration of these conflicting views, the learned Judge ultimately comes to the conclusion as follows at page 247:

> "In my opinion, the principle laid down by the Rajasthan and Allahabad High Courts should be extended to this case in preference to that laid down by the Travancore-Cochin High Court in AIR 1954 Travancore Cochin 331".

If we may say so with respect, the learned Judge has adverted to several circumstances to come to the conclusion that notwithstanding that the Advocate-General, when considering the matter under Section 92 C.P.C., has to take a decision, it does not necessarily mean that he is performing a judicial or quasi-judicial nature (Sic). We are in entire agreement with the reasoning of Mr. Justice Rajagopalan in the decision referred to above.

15. Respectfully adopting, as we have stated, the principles laid down in the decisions of the Allahabad, Rajasthan and the Madras High Courts referred to above, we have no hesitation in rejecting the contentions of Mr. Easwara Iyer that the Advocate-General, in circumstances like this, functioning under Section 92 C.P.C., should be considered to be discharging either a judicial or a quasi-judicial function when he gives sanction or dsclines to give sanction or even limits the scope of the sanction granted in particular circumstances of the case.

16. There is one other aspect namely, that when it is open to the Advocate-General himself to institute a suit under Section 92 C.P.C., without reference to anybody, it is not open to any party to challenge such a decision taken. We cannot understand how the position may materially differ, when instead of himself filing a suit, he authorizes persons like the petitioners in this case, to institute a suit filed really as against the public trust. We do not find any material difference. If the action of the Advocate-General, when he himself institutes a suit cannot be challenged by way of Mandamus or Certionari, it is needless to say that we cannot also interfere with the decision

[5] AIR 1961 Mad 244

arrived at by him, when, in his opinion, sanction should be restricted only to particular matters, having due regard to the various circumstances.

17. As we have already stated, the fact that he has to consider, no doubt certain aspects under Section 92 C.P.C., before giving a sanction, will not certainly constitute him as a person who is acting in a judicial or quasi-judicial manner. No doubt, we dare say, the learned Advocate-General who is a very high and responsible officer charged with a duty under Section 92 C.P.C.,

will have due regard to all the factors before he comes to a conclusion one way or the other and act properly.

18. Notwithstanding the fact that the Government, before making a reference under Section 10(1) of the Industrial Disputes Act, has to satisfy itself on the facts and circumstances brought to its notice that an industrial dispute exists or is apprehended, their Lordships of the Supreme Court in the decision reported in *Madras State v. C.P. Sarathy*[6], held that in such circumstances, the Government is doing an administrative act. Their Lordships have also stated that the fact that the Government has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its functions, does not make it any the less administrative in character. Adopting, with respect, the reasoning of the Supreme Court, we have to hold that notwithstanding that the Advocate-General has to form an opinion and come to a conclusion one way or the other when he acts under Section 92 C.P.C., that does not make it either a judicial or a quasi-judicial order. As we have indicated already, he does not decide anybody's rights and though it may be proper for him to issue notice to the proposed defendants and hear their view point also, he is not bound to follow that procedure. Anything that he decides, does not become conclusive and it is open to the proposed defendants to fight a suit instituted even on such sanction on all grounds available to them in law. Therefore, we have to hold that the action of the Advocate-General cannot be judicially reviewed by this Court under Article 226 of the Constitution. The contention of Mr. Easwara Iyer, learned counsel that even on the basis that the Advocate-General acts in an administrative capacity, nevertheless, that order can be reviewed by this Court under Article 226, need not detain us because we have already held that the Advocate-General does not in any way, decide the rights of parties. This is enough to dispose of this contention of Mr. Easwara Iyer. Even as an administrative order, it will come under the Supreme Court decision referred to above.

19. Therefore, having due regard to all these matters mentioned above, the writ petition will have to be dismissed and it is accordingly dismissed; but there will be no order as to costs.
Petition dismissed.

[6] AIR 1953 SC 53