

(1962) 09 MAD CK 0033
In the Madras High Court
Case No : Writ Appeal No. 125 of 1960

Haji K.M. Abdul Kasim and Others

APPELLANT

Vs

P.M.N. Mohammed Dawood and Others

RESPONDENT

Date of Decision : 21-09-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92
Constitution of India, 1950 — Article 226
Religious Endowments Act, 1863 — Section 14

Citation : AIR 1964 Mad 247 : (1963) ILR (Mad) 824 : (1963) 1 MLJ 281

Hon'ble Judges : S. Ramchandra Iyer, C.J.;Anantanarayanan, J

Bench : Division Bench

Advocate : M.K. Nambiyar, for M. Ramachandran, for the Appellant; T.R. Srinivasa Iyengar, S. Parthasarathi, T. Krishnaswami Iyengar, M.P. Sundararajan, M.M. Ismail and M.A. Sathar Sayeed, for the Respondent

Final Decision : Dismissed

Judgement

Ramachandra Iyer, C.J.—The sole question that arises for determination in this appeal against the judgment of Rajagopalan, J. is whether an

order of the Wakf Board constituted under Act XXIX of 1954 (The Wald Act, 1954) granting permission to certain relators to institute a suit, can

be regarded as amounting to the performance of a quasi judicial duty so as to be subject to the jurisdiction of this Court under Article 226 of the

Constitution. The learned, judge (his judgment is reported in K.M. Abdul Kasim and Others Vs. P.M.N. Mohamed Dawood and Others, has

answered that question in the negative. Hence this appeal.

2. The appellants are three among the six trustees of Annural Muhammadiyah Madarsa Trust which is being administered under a scheme framed

by this Court. Respondents .1 to 7 to this appeal claiming to be interested in the

institution and complaining of breaches of trust on the part of the trustees and also alleging that directions of the Court were necessary to amend the existing scheme approached and obtained from the Advocate General, Madras sanction for filing a suit for reliefs coming u/s 92, C. P. Code. The trust being a muslim wakf, a further sanction was necessary u/s 55(2) of the Wakf Act, 1954 from the Wakf Board. They accordingly applied for the same. The Wakf Board consists of ten members, one of them is a trustee of Annural Mahamadiyali Madrasa itself, he has been impleaded as a defendant to the proposed suit. He is the 8th respondent to this appeal. The Full Board" met on 19-12-1959 when the question of according sanction to the trust came up for consideration. The Chairman of the Board who is a well-known-advocate of this Court presumably thought that the matter was one for judicial consideration and" disposal. Nothing material except directing the trustee to file within a date specified counter statements, if any, was done that day. At the further meetings of the Board when the matter came up, the 8th respondent was excluded from the deliberations of the Board. The rest of the members alone enquired into the matter; the Board" even heard counsel thus adopting all the semblance of judicial procedure. At the conclusion of the enquiry it granted its consent in writing for the institution of the suit.

3. The appellants complain that the 8th respondent represented a faction among the trustees which is antagonistic to them and although he was ostensibly excluded, he was influencing and guiding: the deliberations of the Board at all material times, sitting behind a screen in the very room where the Board met. This, it is said, is opposed to the fundamental principle of judicial procedure, namely, that no person shall be a judge of his own cause. On those allegations the appellants filed an application to this Court under Article 226 of the Constitution to issue a writ of certiorari to quash the order of the Wakf Board granting sanction.

4. Both the Wakf Board and the other respondents have denied the factual background to the petition; they also contend that a consent given by the Board u/s 55 of the Act for the institution of a suit, is not a justiciable matter.

5. If the matter were to be decided on the materials on record we would have very little hesitation in accepting the affidavits filed by the Chairman of the Wakf Board, rejecting what appears to be a fantastic story about the 8th

respondent's participation at the meeting of the Wakf Board from behind a screen.

6. But it has become unnecessary to adopt that course as the case was decided by Rajagopalan, J. on a question of jurisdiction, that being the only point argued in the appeal. What then arises for consideration is whether this Court can by way of certiorari call upon the Wakf Board to produce

its records with a view to quash its orders u/s 55(2) of the Act. The conditions to be satisfied before this Court can do so have been enunciated in

the classic passage in the judgment of Atkin L. J. in *King v. Electricity Commrs.*, 1924 1 KB 171 thus,

Whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having a duty to act judicially act

in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench division exercised in these writs.

There can be little doubt in the present case that the Wakf Board has the legal authority to give the consent to the proposed suit. Indeed it is a

public duty cast on it to consider whether the consent should be given or not. The question then is whether in so doing the Board acts judicially

with reference to rights of parties. If that is answered in the affirmative the need for considering the further question whether it acted in excess of its

jurisdiction will arise.

7. Whether the Board in giving the sanction to the proposed suit acted as a quasi judicial tribunal or not has to be decided not on the basis of what

it conceived its duties to be, or by the procedure adopted by it, but by examining the scope of its duty as prescribed by Section 55 of the Wakf

Act. Before we proceed to do so, it will be necessary to set out as a background to the discussion, the conception of a wakf under the Muslim

law, the statutory provisions for its protection and the relevant provisions of the Act.

8. Wakf means a permanent dedication by a person professing Islamic faith of properties for any purpose recognised by that law as religious pious

or charitable. Prior to the enactment of the Muslim Wakf Validating Act of 1913, a Wakf can be valid only if the property was given in substance

for charitable or religious purposes, but that enactment enabled the creation of a wakf for the maintenance and support wholly or partially of the

members of the settlor's family provided the ultimate benefit is either expressly or impliedly reserved for the poor or for any other purpose

recognised by the Muslim law as religious, pious or charitable, but it should be of a permanent character. But a wakf of this kind namely of

including a reservation for the benefit of the donors' family will often expose it to the risk of dissipation its ultimate use might also be imperilled.

Abuses on the part of the descendants of the settlor might even endanger the trust. A wakf in its essential character is a public, religious or

charitable trust. But there was no machinery under the law for ascertaining or knowing about the several endowments as wakfs in existence. There

was no system of registration even.

9. u/s 14 of the Religious Endowments Act, 1863, any person interested in any mosque or religious establishment etc., may sue before a civil Court

the trustee or manager etc. of such an institution for misfeasance, breach of trust or neglect of duty committed by such, manager, etc., and the

Court has the power to direct specific performance of any act by the trustee etc., and even give a decree for damages and costs against such

trustee. The Court will also have power to remove such managers, trustees etc. That is undoubtedly a provision intended to protect the endowment

against misfeasance, breach of trust or neglect of duty.

10. Section 92, C. P. Code is another statutory provision conferring on the Courts powers in regard to public trusts. Whenever there is a breach

of a public trust or when the affairs thereof are conducted in such a manner that a direction of the Court is felt necessary, the Advocate General by

himself or two or more persons interested in. the trust after obtaining his sanction can file a. suit in the appropriate Court for any or all the reliefs

specified in that section.

11. But the effectiveness of those provisions depends on public spirited persons coming forward to take necessary measures for protecting the

trust. Further, apart from the Court, there was no agency to have a vigilant eye on the administration of the wakfs. The Wakf Act, 1954, was,

therefore, passed with a view to cure this deficiency, to provide for the better administration and supervision of the wakfs.

By that enactment a statutory corporation having perpetual succession has been created with, certain defined powers for the general

superintendence of the wakfs. It will be its duty to ensure that wakfs under its superintendence are properly managed so as to fulfil the objects and

purposes of the foundation. The Board is empowered to remove a mutavalli who has been convicted for breach of trust or of the offence 01

contravention of Section 41 of the Act on more than one occasion. There is a power to fill up vacancies in the office of Mutavalli of a wakf in

certain cases. Sections 42 and 15 (2) contain several provisions regarding the functions and powers of the Board. It can settle for the wakf. The

Act envisages the maintenance of a register of wakfs. Many of the duties of the Wakf Board and of the powers can be exercised only after an

enquiry. Section 44 enables persons interested to apply to the Board to enquire into the administration of any particular trust and Section 45

empowers it to conduct at: enquiry. The Act also contains provisions regarding suits under the ordinary law concerning the; administration of

wakfs.

Section 55 which relates to that subject says:

A suit to obtain any of the reliefs mentioned in Section 14 of the Religious Endowments Act, 1863 and in Section 92, C. P. C. 1908 relating to

any wakf may notwithstanding anything to the contrary contained in those Acts be instituted by the Board without obtaining the leave or consent

referred to in those Acts. (2) No suit to obtain any of the reliefs referred to in Sub-section (1) relating to a wakf shall be instituted by any person or

authority other than the Board without the consent in writing in the Board; Provided that, no such consent shall be required for the institution of a

suit against the Board in respect of any act purporting to be done by it, in pursuance of this Act or of any rules or orders made thereunder.

12. From the foregoing section it will be seen that the intention of the Legislature is not to abolish the existing remedies open to the Advocate

General or persons interested in the trust to resort I to the Court either u/s 92, C. P. C. or u/s 14 of the Religious Endowments Act. Situations may

arise even for the Board to apply for removal of trustees or for haying a scheme settled by Court, its own powers in that direction being limited. In

such cases sub-section (1) prescribes that no sanction of the Advocate General will be necessary for a suit u/s 92, C. P. C. nor need the Board

show that it has an interest in the endowment for its suit u/s 14 of the Religious

Endowments Act. The Board itself is a responsible statutory authority with a duty to protect wakfs and if it considers proper to file a suit of the kind mentioned above no further restriction by way of consent of the Advocate General should really be necessary. In effect Section 55(1) engrafts an exception to Section 92 of the C. P. Code, and Section 14 of the Religious Endowments Act.

13. The object and purpose of Sub-section (2) is however slightly different. Many of the reliefs which persons interested or relators, may want under those provisions can be given by the Board or the Board may consider that it will be better for itself to file the suit rather than leave it to the relators. Sub-section (2) does not itself specify the persons who could apply for sanction. The marginal note to the section makes it clear that it applies to suits referred to in Section 14 of the Religious Endowments Act and Section 92, C. P. Code only. The sub-section therefore is enacted requiring those persons who want to file a suit under any of the two provisions aforesaid, obtain the consent of the Wakf Board. The object of the section cannot obviously be to enable the Board to sit in judgment over the propriety of the sanction given by the Advocate-General, but to see that having regard to its own powers In the matter of preventing abuses in the management of a particular wakf whether it should give 1 the consent or exercise its powers to rectify the errors or itself file the suit. The provisions of the Act make it clear that it will be the duty of the Board to ensure the proper management of the mosque

14. The Advocate-General is the protector of charities and if he decides to institute a, suit or even authorises others to do it, the Board should not normally refuse its sanction unless it be for the reasons to which we have referred to above. An unreasonable refusal on the part of the Wakf Board to consent to a suit u/s 92, C. P. C. sanctioned by the Advocate-General, will undoubtedly amount to a breach of its public duty.

15. When the Advocate-General has accorded his sanction to a suit u/s 92, C. P. Code, and the Board is approached for its consent it cannot be regarded as sitting in judgment over the propriety of the sanction of the former. The office of the Advocate-General is one under "the Constitution and when he decides to file a suit or give sanction for one, he does a statutory duty.

He has a duty to protect the charities. He holds a pre-eminent position, entirely free from political or party affiliations in the matter of advising the

Government and at the Bar of the Courts. It will be a travesty of sound principle if one were to construe the power given to the Board, a lay body,

u/s 55(2) as one to supersede the opinion of the Advocate General. Section 55(2) of the Wakfs Act; should, therefore, be read harmoniously with

the powers of the Advocate General u/s 92, C. P. C. If so done, the only matter to be considered by the Board will be whether it will itself file the

same or a mere comprehensive suit or whether all the defects pointed out in the plaint can be rectified by itself.

16. Such a task can hardly be regarded as a judicial one. At its best the consent under subsection (2) can only be similar to the quality of the duty

performable under Sub-section (1) of Section 55. Further if the Advocate General in giving a sanction to a suit u/s 92, C. P. C. is not himself

performing a quasi judicial act, it cannot be held that the further consent required for a suit under that section by virtue of Section 55, will be any

the more a quasi judicial act. In other words, the quality of sanction given by the Board cannot be different from that given by the Advocate-

General.

There is a conflict of opinion between the High Courts in India in regard to the question whether the order of the Advocate General granting

sanction u/s 92, C. P. C. is justiciable. In *Abu Bucker v. Advocate General, Travancore-Cochin*, AIR 1954 Trav-Co. 331, a Division Bench of

the Travancore-Cochin High Court held that the duty which the Advocate General performs u/s 92, C. P. C. was a quasi judicial one in its scope

and hence capable of correction by issue of a writ of certiorari. The Allahabad High Court in *Shantanand v. Advocate General U. P. Allahabad*,

ATR 1955 All 372, and the Rajasthan High Court in *Shrimalilal v. Advocate General*, (S) AIR 1955 Raj 166 have taken a contrary view.

In a recent case, *Raju and Another Vs. Advocate General H.C. Buildings, Madras and Others*, , Jagadisan, J. had to consider that question, and,

after an elaborate consideration of the relevant authorities, the learned Judge came to the conclusion that the granting of consent by the Advocate

General to two or more persons to institute a suit u/s 92, C. P. C. in respect of a trust or refusing to give such consent cannot amount to a

discharge of a judicial duty. We respectfully agree.

In the judgment under appeal, Rajagopalan, J. who preferred to accept the view of the Rajasthan and Allahabad High Courts, has taken the same

view. That being so, the consent required u/s 55(2), which, as we stated above, is necessary by reason of the peculiar position of the Board with

respect to wakfs, cannot be treated as a judicial act.

17. But Mr. M. K. Nambiar appearing for the appellants does not accept that the nature of the consent of the Board given u/s 55(2) in any way

partakes the quality of the Advocate General's sanction u/s 92, C. P. C.

Learned counsel contends that although the latter might not be justiciable, the consent of the Wakf Board u/s 55(2) of the Wakf Act, 1954 will be

justiciable as it amounts to a performance of a quasi judicial duty. To reach that conclusion it will be necessary to show that in giving or refusing

consent u/s 55(2) the Board decides the rights of parties. Learned counsel argues that as the want of consent would entail a dismissal of the suit,

the defendant to it should be regarded as having a vested right not to be sued without a sanction a procedural right, it is said analogous to a plea of

limitation or res-judicata. When the effect of the Board's act is to imperil that plea it is said that a valuable right of defending the suit is lost and

therefore the consent of the Board should be regarded as one adjudicating a right.

18. Misapprehension underlies the argument. A condition prescribed for the institution of a suit cannot be regarded as a right created in the

defendant. It may be that as in the case of Section 92 C. P. C. the condition is imposed to prevent impecunious persons coming forward to fight

out public rights on whom the award of costs if in case the suit were to fail, will have no effect. But nevertheless the obtaining of a consent is only a

preliminary requisite to be satisfied before a plaintiff can launch a suit. Such a sanction or consent is not for investigating any right but only whether

an investigation into the right should be made by the appropriate authority, namely, the Court. There is undoubtedly a manifest distinction between

the two.

We may usefully refer in this connection to the decision of the Privy Council in Director of Public Works v. Sang, 1961 AC 901. To appreciate the

passage from the judgment in that case which we shall presently give, it will be

useful to refer first to the facts of the case. Under the interpretation Ordinance in Hongkong the repeal of a Statute will not affect the rights and privileges already accrued while the statute was in force. There was a statute in that country which gave protection to tenants against eviction. But a provision in it stated that if the landlord was able to obtain a rebuilding certificate from the Director, he could evict his tenant. The landlord (who himself got the land on lease from Crown) applied for it and before he could obtain it the Statute itself had been repealed. With it his right to evict disappeared. But it was contended that as his application for rebuilding certificates was pending, it must be held that a right had accrued to him and the Interpretation Ordinance saved his further right to evict under the repealed statute.

19. Lord Morris delivering the judgment of the Judicial Committee observed:

The difference between that case and the present is that in that case a right existed and the investigation which was unaffected was an investigation in respect of it; whereas in the present case no right existed or had accrued and the intended investigation which had not taken place before the time of the repeal (consideration by the Governor-in-Council) was an investigation in order to decide whether a right should or should not be given.

It was not itself a right or privilege which was preserved by the Interpretation Ordinance.

20. Similarly, when a person applies to the Advocate General or the Wakf Board for sanction to a proposed suit, it cannot be said that any right

has to be adjudicated as between him and his opponent. It is only after sanction by the two authorities, that the person gets a right to institute the

suit. If, therefore, that person himself does not get any right, it is difficult to see how any right could arise in favour of the defendant. What the forum

obtains from the Board on a consent being given, is a mere right to agitate the matter and vindicate the right of the trust. That cannot be regarded

as a right in which the rival parties are interested in the true sense of the word.

21. It is then contended that as the mode or the manner in which any decision of the Board should be arrived is prescribed in Section 45, which

attracts the judicial procedure to some extent, the enquiry conducted for deciding whether a consent u/s 55 (2) should be regarded only as a

judicial one. Reference was also made to the rules framed under the Act in their

correction. In other words, the contention is that Section 45 makes it obligatory on the part of the Board to conduct an enquiry as prescribed by it before granting sanction u/s 55(2) of the Act. We cannot see how Section 45 can at all apply to a case coming u/s 55(2). As we stated earlier, the duty of the Board u/s 55(2), though a public one, is nevertheless merely administrative. It can be performed without making any enquiry whatsoever. The Board may however hold an enquiry if it considers it necessary, but that does not mean that it is bound to conduct an enquiry with all the trappings of a judicial procedure. Further Section 45(1) in terms cannot apply to a case u/s 55 (2), which states as follows:

The Board may on application received u/s 44 or on its own motion, institute an enquiry into any matter relating to a wakf and shall hold the enquiry in such manner as may be prescribed or authorise any person in this behalf to hold the enquiry.

The case before us is not one on an application received by the Board u/s 44. Nor is it one initiated by the Board suo motu. On that short ground alone the contention that Section 45 will apply to the case will have to be rejected.

22. That apart, it is conceded that the Board can under the provisions of Section 55(1), even without any enquiry file a suit for any or all of the reliefs u/s 92 of the C. P. Code. If the Board can do that even in a case where the Advocate General has not considered the matter, there will be less reason for an enquiry where there is his sanction. It follows that a consent given by the Wakf Board u/s 55(2) neither involves an adjudication of rights of parties, nor need it be given after an enquiry or on the basis of any judicial adjudication. The question is more or less one of expediency of permitting a suit to be filed. Such a duty on the part of the Board cannot be regarded as quasi-judicial act to entitle this Court to interfere under Article 226.

23. The appeal fails and is dismissed with costs.