

(1960) 08 MAD CK 0003
In the Madras High Court
Case No : Writ Petition No. 187 of 1960

K.M. Abdul Kasim and Others

APPELLANT

Vs

P.M.N. Mohamed Dawood and Others

RESPONDENT

Date of Decision : 25-08-1960

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 1961 Mad 244 : (1961) ILR (Mad) 493 : (1960) 73 LW 649 : (1961) 2 MLJ 77

Hon'ble Judges : Rajagopalan, J

Bench : Single Bench

Advocate : V. Thiagarajan, for M. Ramachandra and T.V. Balakrishnan, for the Appellant; T.R. Srinivasa Iyengar and S. Parthasarathi, S. Rangaswami Iyengar and Sethar Sayeed, for the Respondent

Final Decision : Dismissed

Judgement

Rajagopalan J.

1. The administration of the Annural Muhammadeeya Madarsa Trust was governed by a Scheme sanctioned by the High Court by its decree

dated 16-4-1956 in A.S. No. 235 of 1952. The Scheme provided for six trustees. The three petitioners and respondents 8, 9 and 10 were the

trustees appointed under the scheme. The trust constituted a wakf now governed by the provisions of the Muslim Wakfs Act (Act XXIX of 1954).

2. Respondents 1 to 7 sought and obtained the sanction of the Advocate-General u/s 92 C. P. C. to file a suit to amend the scheme now in force

for the administration of the trust. That sanction was accorded on 9-12-1959, after the Muslim Wakfs Act, 1954, to which I shall hereafter refer

as the Act, came into force. Section 55 of the Act provided:-

1. A suit to obtain any of the reliefs mentioned in Section 14 of the Religious Endowments Act, 1863 (Act XX of 1863) and in Section 92 of the

CPC (Act V of 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 of the Board." (proviso omitted)

Respondents 1 to 7 therefore applied to the Board constituted under the Act impleaded as the 11th respondent in these proceedings, for obtaining

the consent prescribed by Section 55(2). The 8th respondent, M.S. Abdul Majid, who was one of the trustees appointed under the scheme was

also a member of the Wakf Board. Notice of the application presented by respondents 1 to 7 u/s 55 (2) of the Act was given to the trustees

including the petitioners. It was the petitioners that opposed the grant 61 the sanction sought by respondents 1 to 7.

3. On 19-12-1959, when the application preferred by respondents 1 to 7 u/s 55 (2) of the Act came up before the Board, the 8th respondent, as

a member of the Board, participated in the proceedings. But nothing was done that day except to adjourn the proceedings to 16-1-1960, to

enable the petitioners to file their counter statement to the application preferred "by respondents 1 to 7. The Board enquired into the petition on

16-1-1960, and again on 30-1-1960. In these proceedings the 8th respondent did not participate.

The petitioners, however, alleged that the 8th respondent was present in the same room on the other side of a screen, and while he was there some

of the members of the Board met and talked to him. On 1-2-1960 the petitioners challenged the validity of the proceedings before the Board on

the plea, that the 8th respondent who was one of the trustees had participated in the proceedings of the Board. On 27-2-1960 the Board

accorded the sanction sought by respondents 1 to 7 by a written order. The 8th respondent was not a party to that order. It was signed only by

the other nine members of the Board.

4. The petitioners applied under Art. 226 of the Constitution for the issue of writ of Certiorari to set aside the order of the Board dated 27-2-1960

giving the sanction sought u/s 55 (2) of the Act by respondents 1 to 7.

5. The learned counsel for the petitioners challenged the validity of the sanction accorded by the Board on 27-2-1960 on the following grounds;

(1) The 8th respondent's participation in the proceedings invalidated the proceedings and the sanction. The Board violated the principle that no

one should be a judge in his own case. It was coram non judice. (2) The 2nd respondent's presence on the premises and in the same room on 16-

1-1960, 30-1-1960 and 1-2-1960, with the other members of the Board having access to him vitiated the ultimate decision of the Board. (3) The

Board in giving sanction took into account what should be viewed as an irrelevant factor, the sanction already accorded by the Advocate-General

u/s 92 C.P.C.

6. In the view I propose to take it is not necessary for me to express any opinion on the soundness or otherwise of any of the three contentions, I

have mentioned above. The learned counsel for the respondents contended that the application for the issue of writ of certiorari was not

maintainable at all, because the consent or sanction accorded by the Board u/s 55 (2) of the Act on 27-2-1960 could only be viewed as an administrative act of the Board, outside the purview of correction by the issue of a writ of certiorari.

7. No decision directly bearing on Section 55 (2) of the Act has been brought to my notice to determine the question, whether the consent of the

Board prescribed by Section 55 (2) is wholly administrative in its scope, or whether the Board acts as a judicial or a quasi-judicial Tribunal in

deciding whether the sanction or consent sought u/s 55(2) should be accorded or not. Section 55 (2) of the Act is however analogous to some

extent to Section 92, C.P.C. There is no decision of this court on the question, whether a sanction accorded by the Advocate-General u/s 92

C.P.C. can be corrected in appropriate cases by the issue of a writ of certiorari, There is a conflict between the views taken :by the other courts.

8. In *Dhian Das v. Jagatram*, 8 Ind Cas 1160 (Lah), the Chief Judge of the Punjab Chief Court held that the sanction accorded by the Collector

u/s 539 C.P.C. of 1882, which has since been replaced by Section 92 C. P. C. of 1908, was an executive or administrative order and was outside

the scope of the revisional jurisdiction exercised by the Chief Court.

9. In *Abu Backer v. Advocate-General, Trav Co. State*, AIR 1954 Trav-Co. 331 a Division Bench of the Travancore Cochin High Court held

that the decision which the Advocate-General arrived at u/s 92 C. P. C. was quasi-judicial in its scope and was capable of correction by the issue of a writ of certiorari.

10. The High Courts of Rajasthan and Allahabad took a contrary view and expressly dissented from the view taken in AIR 1954 Trav Co 331. In

Shrimati Lal Kasliwal v. Advocate-General, (S) AI.R. 1955 Raj 166, Wanchoo C.J. after declining to accept as correct the view taken in AIR

1954 Trav Co 331 observed:-

All that is required is that Advocate-General should be prima facie satisfied that the Case is of the nature mentioned in Section 92 and then he can

give his permission. It may also be mentioned that u/s 92 the Advocate-General can file a suit himself or give permission to two or more persons to

do so. Obviously this function of the Advocate-General cannot be Called judicial or quasi-judicial function in the circumstances and there is no

question of revising it under Art. 227 or issuing a writ under Art. 226 compelling him to do this, that or the other.

A similar view was taken by a Division Bench of the Allahabad High Court in *Swami Shantanand Sarswati Vs. Advocate-General, U.P.*,

Allahabad and Others, . There was a more elaborate discussion of what constituted administrative or executive acts as distinct from judicial or

quasi-judicial acts.

11. In *Pitchayya v. Venkatakrishnamcharlu* AIR 1930 Mad 129, the learned Judges observed at page 131:

The object of requiring sanction or permission before such suits are instituted u/s 92 is to safeguard not only the rights of the public but also the

rights of the institution and the trustees. The suit being a representative suit, it is necessary to see that the persons who come forward are persons

who have an interest in the temple and persons who can Be safely entrusted with the conduct of the suit. Even though the whole public are

technically parties, still the plaintiffs who file the suit have the conduct of the suit and very large powers in the shaping and the conduct of the suit.

As a matter of general experience, the public leave it to the plaintiffs to conduct all the proceedings and to take the various steps necessary for its

successful prosecution. It is also for the benefit of the institution and of the trustees because it affords a safeguard against the impecunious improper persons coming as plaintiffs and involving the trust in litigation expenses and it is also a safeguard that the persons are substantial persons from whom, if the suit fails, the costs can be recovered and not merely men of straw..... The authority giving the sanction must consider the various aspects before giving the sanction and one important consideration should be as regards the status and position of those who come forward to represent the community. We may in this connection state that it would be more desirable, before giving the sanction that notice should be given to the institution or the trustees although it is not obligatory.

It is in the light of these principles that I shall examine the scope of Section 55 of the Act.

12. The scope of Section 55 of the Act cannot obviously be decided with reference to what the Board did or purported to do in this case. It gave notice to the petitioners, who contested the application preferred to the Board by respondents 1 to 7. The Board permitted counsel to represent the applicants and the respondents before it. Elaborate arguments were heard. Orders were reserved, and a reasoned order styled a judgment was given. Thus there were all the trappings of a lis and of a determination of this lis by the Board. But what happened in one case or in the case before me cannot determine the true scope of Section 55 of the Act.

13. Section 55 (1) empowers the Board to file a suit, and it specifically dispenses with the need to obtain the sanction of the Advocate-General u/s 92 C.P.C., or the need to obtain the sanction of the Court under Act XX of 1863. With reference to a wakf, the question, whether a suit should be instituted to obtain any of the reliefs mentioned in Section 92 C.P.C., could be taken up for consideration by the Board suo motu or on the matter being brought to its notice by any interested person. In either case the Board can decide whether it should file a suit or not.

Even if one or more persons claiming to be interested in the proper administration of the wakf preferred an application to the Board for sanction to institute a suit, it is open to the Board to decide whether a suit should be instituted. After reaching that decision it is open to the Board to file a suit itself in exercise of the right conferred upon it to file such a suit; it is equally

open to the Board to give them its consent u/s 55 (2). It is equally open to the Board to decide that it is not in the interests of the wakf to file any suit at all. In that case no question of exercising the statutory right to file a suit u/s 55 (1) could arise. The consent sought u/s 55 (2) would have to be refused, if the Board is convinced that no suit need be filed.

14. In proceedings taken suo motu, where the Board comes to a conclusion that a suit should be filed or it should not be filed, there can obviously be no lis, and there is no determination of right, either the rights of the Board or the rights and liabilities of the wakf. If the Board considers on an application preferred to it that it should itself file a suit, the position would still be the same. There is no judicial determination of the rights and liabilities of any person.

If the Board comes to the conclusion that it is desirable to file a suit but that it need not file a suit itself, the Board could permit another person to file the suit and give the requisite consent u/s 55 (2) of the Act. In deciding whether it should itself file the suit in exercise of the right conferred upon it by Section 55 (1) or give its consent to another u/s 55 (2) the question would be one of expediency. The Board is under no statutory obligation to give the consent asked for u/s 55 (2). In fact the Board is under no statutory obligation to file a suit or give its Consent to another to file a suit.

15. It is against this scheme that I have to apply the test postulated by Atkin L.J. in *King v. Electricity Commissioners*, 1924 1 KB 171:

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.

In deciding whether it should file a suit or not u/s 55 (1), the Board is not invested with any legal authority to determine question affecting the rights of subjects. Nor has it a duty to act judicially in arriving at a decision one way or the other. No doubt the discretion should be exercised on sound lines, but to a large extent it would be a question of expediency. Expediency would enter even more into the decision of the question, whether the Board should itself file a suit or should permit another to file a suit u/s 55 (2) of the Act.

If the decision of the Board to file or not to file a suit, that is, to exercise or not

to exercise a statutory right given to it by Section 55 (1) of the Act

is not equivalent to a judicial or quasi-judicial determination of rights, it is a little difficult to see how the decision to permit another to file a suit

could be viewed as a decision determining questions affecting the rights of parties. No doubt, unless consent is given no suit can be filed. But

neither the grant of consent nor the withholding of consent can really be said to affect the rights of parties, either of the applicant who seeks the

consent, or of the wakf against whom it is intended to file a suit.

16. To put it in other words, if the decision reached by the Board either to file a suit or not to file a suit u/s 55 (1) of the Act is not a judicial or a

quasi-judicial decision, it is a little difficult to see how the alternative open to the Board to sanction or withhold sanction to another person to file a

suit becomes a judicial or quasi-judicial decision affecting the lights of parties. In arriving at a decision in none of the contingencies mentioned

above is there any statutory obligation Cast on the Board to act in a Judicial or a quasi-judicial manner. Of course, there is a decision, but every

decision is not necessarily judicial or quasi-judicial in its scope. Even administrative acts are based upon the decisions taken.

17. 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 Trav Co. 331.

18. I uphold the preliminary objection and I hold that the decision of the Board is outside the purview of correction by the issue of a writ of

certiorari.

19. I do not thereore propose to discuss the other questions at issue between the parties, neither the questions of law nor the disputed questions ot

fact. At one stage, I thought of recording my views on these contentions also, but I have refrained from doing so, lest it should embarrass the

determination of these issues, should they arise for determination in other proceedings, where the validity of the sanction given by the Board is put

in issue.

20. The rule nisi is discharged and the petition is dismissed. No order as to costs.