

(1974) 07 KL CK 0012
In the High Court Of Kerala
Case No : O.P. No. 1994 of 1969

Mayer Simon Parur

APPELLANT

Vs

Advocate General of Kerala and Others

RESPONDENT

Date of Decision : 01-07-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92, 92(1), 92(2)
Constitution of India, 1950 — Article 226

Citation : AIR 1975 Ker 57

Hon'ble Judges : P. Govindan Nair, C.J.; V.P. Gopalan Nambiyar, J; V. Balakrishna Eradi, J; M.U. Isaac, J; C. Balagangadharan Nair, J

Bench : Full Bench

Advocate : K. Sreedharam, for the Appellant; S. Easwara Iyer, for the Respondent

Final Decision : Allowed

Judgement

Govindan Nair, C.J.—The question is whether the order Ext. P3 passed by the Advocate-General of Kerala, the first respondent refusing "consent in writing" as envisaged by Section 92(1) of the CPC to the petitioner for instituting a suit along with another for the reliefs that would fall under that subsection is amenable to be quashed), as prayed for, by the issue of a writ of certiorari. The order Ext. P3 is a brief one and reads thus:

"On a consideration of all facts and circumstances of the case I do not think that there is a case for grant of sanction u/s 92 of the Code of Civil Procedure, Hence I reject the petition,"

2. The circumstances which led to the application before the Advocate-General are stated in the order of reference of Isaac J.. the relevant part of which we shall extract:

"The petitioner and respondents 2 to 9 are members of the Jewish Synagogue, Parur. It is an ancient charitable and religious institution which owns very large

extent of properties, movable and immovable, costing not less than Rs. 5 to 6 lakhs. The properties were managed by some old trustees. A suit was instituted by some of the beneficiaries of the Synagogue u/s 92 C P. C. in the Parur District Court as O. S. 37 of 1116 against those trustees for framing a scheme and for rendition of accounts. There was a preliminary decree as prayed for. An appeal was filed in this Court from that decree. During the pendency of the appeal, there was a compromise. The members of the Synagogue unanimously decided, among other things, that the Synagogue should be managed by a Board of Trustees, elected as per terms of the compromise, and that Shri, S. S. Koder, a highly respected number of that community would manage the affairs of the Synagogue till the Board of Trustees was constituted. Accordingly, the appeal was dismissed; and the litigation ended. Shri Koder took over the management and conducted it for some time. The Board of Trustees was not constituted, nor were the terms and conditions of the compromise implemented. Then Shri Koder resigned from the management.

There upon the second respondent and one Ezra got into the management under the pretext that they were elected as Trustees by the Yogam of the Synagogue on 10-5-1964. The second respondent was removed from the office by the Yogam held on 9-5-1965. Then he filed O. S. 45 of 1965 in the District Court, Parur, to declare that his removal from office was invalid and to restrain other persons for interfering with his management. The trial court granted a temporary injunction in his favour. From that order, an appeal was filed to this court as C. M A. 104 of 1965. Raman Nayar, J. by his judgment dated 17-6-1966 held that the proper course was to appoint a competent and independent outsider as receiver to manage the affairs of the Synagogue. In that view of the matter, he allowed the appeal and directed the trial Court to appoint a suitable advocate as receiver. He also observed that the disputes can be settled only by a suit instituted u/s 92 C, P. C.. and that the receiver need be continued "till such a suit is instituted and appropriate directions regarding the management of the Synagogue are made in that suit. The learned Judge has also recorded that the plaintiff, who is the present second respondent, stated that he would himself move for the institution of such a suit, and that, on the institution, of that suit, he would withdraw his suit namely O. S. 45 of 1965. Pursuant to the direction of this Court, the trial Court appointed an advocate as Receiver: and he assumed management.

Some time later, the second respondent contrary to what he stated before this Court entered into a compromise with the defendants in that suit, by which it was agreed that the second respondent and Ezra would be the Trustees of the Synagogue. Pursuant to that compromise, the suit was dismissed; and they took over management of the Synagogue. On 1-3-1967, Ezra resigned; and the third respondent stepped into his shoes. Thus respondents 2 and 3 have assumed the management. On the allegation that there was no scheme for the management of the Synagogue, that these respondents were mismanaging the affairs of the Synagogue and misappropriating its funds, and that they have not rendered any

accounts of their management, the petitioner and respondents 4 to 9 filed a petition before the Advocate General, Kerala, the first respondent, for his consent to file a suit u/s 92 C. P. C. for appropriate reliefs. The learned Advocate General, by his order Ext. P-3 dated 17-2-1969, rejected the petition. He stated the facts of the case and the contentions of the parties, and passed the following order:

"On a consideration of all the facts and circumstances of the case. I do not think that there is a case for grant of sanction u/s 92 of the Code of Civil Procedure. Hence I reject the petition."

The learned Advocate General has not stated any reason whatsoever for his order, though this Court observed in C. M. A. 104 of 1965 that a suit u/s 92 C. P. C. was the only course for settling the disputes relating to this institution, and respondent No. 2 who opposed the application before the Advocate General submitted in this Court that he himself would file such a suit. The petitioner contends that the power vested in the Advocate General u/s 92. Civil P. C. is a quasi-judicial power, and that he cannot refuse his consent for institution of a suit under that section quite arbitrarily and to the detriment or ruination of the institution. This writ petition has been, therefore, filed to quash Ext. P-3. and to direct the Advocate General to dispose of the petition for consent according to law."

3. Isaac J. felt that the Full Bench (consisting of 3 Judges) decision of this Court in A.K. Bhaskar Vs. Advocate General, required reconsideration and the case was therefore placed before the Chief Justice who directed the posting of the case before a Division Bench. The Division Bench, consisting of Govindan Nair and Sadasivan JJ. before whom the case came up, referred the case to a Full Bench for decision and the Full Bench consisting of Raghavan C J. and Balakrishna Eradi and Nambudiripad JJ felt that the case has to be placed before a "Full Bench".

4. The contention of counsel for the petitioner is two fold. The Advocate General has to act judicially or quasi-judicially u/s 92(1) of the CPC and must therefore state reasons for refusing consent and reasons not having been stated in the order Ext. P3 the order has to be vacated. Alternatively, it was argued that even if the Advocate General was acting only administratively, since his order in given cases would prejudicially affect the applicants when consent is refused, and would cause substantial injury to them, there is a duty on the part of the Advocate-General to follow the principles of natural justice, at any rate, to act justly and fairly and apply his mind fully and impartially to the matters involved, and further that the order itself should show that he had complied with those requirements.

5. The view taken by the Full Bench in A.K. Bhaskar Vs. Advocate General, was that the Advocate-General while functioning u/s 92 of the CPC was not functioning as a "judicial" or a "quasi-judicial" authority and that he was not involved in any judicial proceeding and his conclusions did not "in any way decide the rights of parties", though, an earlier Division Bench decision of the

Travancore-Cochin High Court in *Abu Backer v. Advocate-General of Travancore-Cochin State* AIR 1954 TC 331 had come to an exactly opposite conclusion that the Advocate-General was discharging quasi-judicial functions and that the decision of the Advocate-General "under Section 92 Civil Procedure Code whether the Consent asked for should be given or not, is a decision affecting the rights of the persons". Very little judicial support however there was for the view taken by the Travancore-Cochin High Court; only the Pepsu High Court in *Sadhu Singh v. Mangalgarh Mohatmim Dera* AIR 1956 Pepsu 65 followed the principle of that decision. But starting with *Dhian Das v. Jagat Ram*, 8 Ind Cas 1160 there is a catena of decisions in support of the view in *A.K. Bhaskar Vs. Advocate General*, . Notwithstanding the weight of judicial Precedents against him counsel for the petitioner did not hesitate in pressing his contention that the view in *Abu Backer's* case AIR 1954 TC. 331 should be accepted and referred to a number of Supreme Court decisions** in support of his contention. He also argued that excepting the case in AIR 1962 Mad 320 all the other cases* which have taken a different view are those in which the Advocate-General had given consent and urged _ that in cases where consent had been given no decision or determination was involved and so there was no scope for interference. We have examined the cases ** carefully. Those decisions are not helpful in coming to the conclusion that the Advocate-General functioning u/s 92 was performing a judicial or quasi-judicial act.

6. But counsel is correct in his submission that none of the cases had considered the question whether even if the order of the Advocate-General is administrative in character, it was amenable to correction in appropriate cases, particularly when consent had been denied, in proceedings under Article 226 of the Constitution.

7. In the light of the developments, or perhaps more correctly the restatement of long established principles of law in recent times, it appears to us that even administrative actions or the exercise of the discretionary power granted by statutes when it affects persons prejudicially, are amenable to judicial review in given circumstances. The rule in *Nakkuda Ali v. Jayaratne* 1951 AC 66 laid down by the Judicial Committee of the Privy Council and that in *R. v. Metropolitan Police Commr.*(1953) 2 All ER 717 that the Rules of natural justice would be applicable only when a body or authority was acting in a judicial or quasi-judicial capacity have been replaced by the principle that even authorities acting administratively have the duty to act fairly and justly and that when they had not done so, their decision, conclusions or orders can be set aside in writ proceedings. An important English decision on the subject in *Re H. K. (An Infant)*. (1967) 1 All ER 226. K was entitled to enter the U. K. on the immigration officer being satisfied that he was under 16 years of age. The officer however took the view that he was at least 16. The order refusing K was sought to be quashed and the argument was that the officer was acting in a judicial "capacity. Lord Parker. C. J., after stating that the officer was not acting in a judicial or quasi-judicial capacity, said that even if he were not, he still had to act fairly

which meant that K should have been given an opportunity of satisfying him as to his age. and for that purpose he will have to let K know what his immediate impression was so that K could disabuse him of it. The learned Judge added :

"I appreciate that in saying that, it may be said that one is going further than is permitted on the decided cases because heretofore at any rate the decisions of the courts do seem to have drawn a strict line in these matters according to whether there is or is not a duty to act judicially or quasi-judicially."

Salmon, L. J. said that the officer had to act "fairly in accordance with the ordinary principles of natural justice." Blain, J. emphasised more clearly the duty to act fairly:

"I would only say that an immigration officer having assumed the jurisdiction granted by those provisions is in a position where it is his duty to exercise that assumed jurisdiction, whether it be administrative, executive or quasi-judicial, fairly, by which I mean applying his mind dispassionately to a fair analysis of the particular problem and the information available to him in analysing it."

In *Sohmidt v. Secy. of State for Home Affairs* (1969) 1 All ER 904 a U. S. citizen who had been allowed into the U. K, for a limited period to study in a college at U. K. applied to the Home Secretary for an extension of stay. His application was rejected without giving him a hearing. Lord Denning after referring to cases in which it had been held that the Home Secretary was not bound to hear representations, observed that some of the judgments in those cases are based on the fact that the Home Secretary was exercising an administrative power and not doing a judicial act and further stated that such a distinction is no longer valid. Lord Denning went further in *R. v. Gaming Board* (1970) 2 All ER 528 wherein he categorised as a hearsay the view that the principles of natural justice apply only to judicial and not to administrative proceedings. In *Re Pergamon Press Ltd.* (1970) 3 All ER 535. Lord Denning expressed himself thus:

"I am clearly of the opinion, that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, although they are not judicial, nor quasi-judicial, but only administrative." Sachs. L. J. observed:

"To come to the conclusion that the inspectors had to display that measure of natural justice which would be regarded as fair procedure, it is, as recent decisions have shown not necessary to label the proceedings "judicial", "quasi-judicial", "administrative" or "investigatory": it is the characteristic of the proceedings that matter not the (precise compartment or compartments into which they fall."

In *R. v. Birmingham City Justice, Ex p. Chris Foreign Foods (Wholesalers), Ltd.* (1970) 3 All ER 945 Lord Parker, C. J. said:

"Much argument has been adduced in this case as to the exact position of the justice under this procedure. Was this a judicial function? Was it a judicial inquiry? Was it a quasi-judicial inquiry? Was he an administrator acting as the result of a

judicial inquiry? Was he throughout an administrator? What position was he in? For my part I find it quite unnecessary to come to any decision in the matter, any more than I did in *Re K. (H)*".

Later the learned Judge observed that the rules of natural justice were in a case such as that which was before him limited to openness, impartiality and fairness. And in *Breen v. Amalgamated Engineering Union* (1971) 1 All ER 1148 Lord Denning said :

"It is now well settled that a statutory body, which is entrusted by statute with a discretion, must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand, or as administrative on the other hand, or what you will. Still, it must act fairly. It must, in a proper case, give a party a chance to be heard, and Edmund Davies, L. J. adopted those "powerful observations".

The decisions referred to above in this paragraph are the restatement of the law in the light of the famous decision of the House of Lords in *Ridge v. Baldwin* (1963) 2 All ER 66 wherein the House of Lords disagreed with the view taken by the Court of Appeal relying on *Nakkuda Ali's* case 1951 AC 66 that the committee was acting only in an administrative capacity. The House of Lords reversed the decision on the ground that the committee had not, as found by the Court, observed the rules of natural justice.

8. The development of the law in India has been on similar lines. In *State of Orissa Vs. Dr. (Miss) Binapani Dei and Others*, the Supreme Court had to consider whether the declaration by the State Government of Orissa that Dr. Binapani Dei should be deemed to have retired on April 1962 subject to extension of service granted from April 16, 1962 till the afternoon of July 15, 1963, was liable to be interfered with in proceedings under Article 226 of the Constitution. Notwithstanding the finding that the order passed by the State Government was administrative in character it upheld the decision of the High Court setting aside the order of the State. The reasons are stated thus:

"It is true that some preliminary enquiry was made by Dr, S. Mitra. But the report of that Enquiry Officer was never disclosed to the first respondent. Thereafter the first respondent was required to show cause why April 16, 1907, should not be accepted as the date of birth and without recording any evidence the order was passed. We think that such an enquiry and decision were contrary to the basic concept of justice and cannot have any value. It is true that the order is administrative in character, but even an administrative order which involves civil consequences, as already stated, must be made consistently with the rules of natural justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting or explaining the evidence. No such steps were admittedly taken, the High Court was in our judgment, right in setting aside the order of the State."

In *Union of India v. Anglo Afghan Agencies* AIR 1908 SC 718, the same principle was again applied. The question was whether the petitioner under Article 226 of the Constitution had obtained import entitlement up to the value of the goods exported. The Textile Commissioner acted upon the report of the Committee appointed by him. and before the committee the respondents had no opportunity to present their case. He collected the evidence ex parte and did not disclose it to the respondents and without giving an opportunity to them to represent their case reduced the import entitlement. In dealing with the representations made by the respondents the Government of India also declined either to make available the evidence on which the Textile Commissioner had acted or to give a hearing to the respondents, "It was held:

"But the authority vested in the Textile Commissioner by the rules even though executive in character was from its nature an authority to deal with the matter in manner consonant with the basic concept of justice and fairplay. if he made an order which was not consonant with the basic concepts of justice and fairplay his proceeding was open to scrutiny and rectification by the Courts."

In *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, the principle of natural justice was applied. It should be applied the Court said, even in administrative enquiries as well. The inclusion of Naquishbund in the Selection Board, when he was himself one of the persons to be considered for selection, was held to vitiate the proceeding as violative of one of the basic principles of natural justice. The Court observed:

"Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is not questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries." Even an order administrative in nature affecting property will have to be made in a manner consonant with the rules of natural justice was reiterated in *The D.F.O., South Kheri and Others Vs. Ram Sanahi Singh*, though the right to the relief arose out of an alleged breach of contract. The action was that of a public authority invested with statutory powers. That the principle of natural justice applied to administrative orders was again restated in *The Keshav Mills Co. Ltd. and Another Vs. Union of India (UOI) and Others*, . The essential point. ruled their Lordships, "That has to be kept in mind in all cases is that the person concerned should have a reasonable opportunity of presenting his case and that the administrative authority concerned should act fairly, impartially and reasonably. Where administrative officers are concerned, the duty is not so much to act judicially as to act fairly."

The principles above stated do not appear really to be a new development of the law for it was so laid down as early as in 1863 in *Cooper v. Wandsworth Board of Works* (1863) 14 CBNS 180. This decision was noticed and a passage therefrom had been quoted by Chief Justice M. S. Menon in paragraph 9 of the judgment in

Kochunni Nayar v. District Collector. Allappu. 1957 KLT 1041. This decision seems to have been under an eclipse, or, as a recent writer has put it. "seems almost to have perished for lack of support, but in recent years, as we shall see, has been given the kiss of life." It is remarkable that the law had been laid down so early and if we may say so with great respect so lucidly. The facts were these. The Board of Works had power to demolish the plaintiff's house if the building had been erected without previous notice being given to the Board and the Board exercised the power and demolished the plaintiff's house. It was argued that while the words of the statute taken literally justified the board's act. its power was subject to the qualification that no man is to be deprived of his property without having an opportunity of being heard. The argument was accepted. In the words of Byles J.

"although there are no positive words in a statute requiring that the party shall be heard, yet the iustice of the common law will supply the omission of the legislature."

Erle, C. J., rested his judgment not solely on the ground that the board's act was judicial.

But the law has been applied to many exercises which in common understanding would not be at all more a judicial proceeding than would be the act of the district board in ordering a house to be pulled down."

For a long time now Courts have been claiming the right to interfere with the exercise of an administrative discretion. The 1891 dictum of Lord Halsbury in *Shanp v. Wakefield* 1891 AC 173 was characteristic of this.

"when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinionaccording to law and not humour. It is to be. not arbitrary, vague, fanciful, but legal and regular."

9. In a welfare State such as ours with a growing emphasis on administrative control which could interfere with the life, liberty and rights of citizens there should be the insistence that those who are invested with wide and varied powers act according to iustice and fairness, and who can guarantee this but the Courts entrusted with the jurisdiction such as that in Article 226 of the Constitution? There can be no doubt that this jurisdiction will enable the Courts to interfere in appropriate cases where administrative orders have affected the rights of parties or affected their interests in a substantial manner as to cause real and serious injury, if there has been violation of the principles of natural iustice. where it would apply. when there has been abuse of power, when the authority had acted in excess of the power conferred by statute. or when there has been no dispassionate application of the mind or where there was nothing to indicate that the mind that had been applied.

S. A. de Smith in his *Constitutional and Administrative Law*. second edition, deals

with abuse of discretionary powers at pages 589 onwards After referring to Padfield's case. (1968) 1 All ER 694 he has said:

".....a wide executive discretion was subject to judicial standards. The case shows unambiguously that English administrative law does recognise the principle that the French call *detournement de pouvoir*, or abuse of administrative power; and that misuse of power may be inferred from inadequate reasons or, indeed, so the Law Lords observed obiter, from the absence of any reason given in rebuttal when an aggrieved person has established a *prima facie* case".

10. To find out whether in the case of grant of the consent in writing or of refusal to give the consent rights are affected or there has been substantial injury, it is necessary to understand the scope and ambit of such grant or refusal of consent u/s 92 of the Code of Civil Procedure. We shall extract Section 92(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 possession 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) authorising 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."

One of the main purposes of the section has been indicated in a judgment of the Madras High Court *Davuluri Pitchayya and Another Vs. Divi Venkatakrishnamachari and Others*, and the Supreme Court in *Chairman Madappa Vs. M.N. Mahanthadevaru and Others*, has also emphasised the same

purpose in the following passage.

"The main purpose of Section 92(1) is to give protection to public trusts of a charitable or religious nature from being subjected to harassment by suits being filed against them. That is why it provides that suits (under that section) can only be filed either by the Advocate-General or two or more persons having an interest in the trust with the consent in writing of the Advocate General. The object is that before the Advocate General files a suit or gives his consent for filing a suit, he would satisfy himself that there is a prima facie case, either of breach of trust or of time necessity for obtaining directions of the Court."

We may add, as has been stated by the Madras High Court, that the Advocate-General must also be satisfied that the persons who institute the suit are solvent persons. This is necessary, for in the case of their failure in their action, they must be able to compensate, if not in full measure, to the extent of the costs awarded, the trouble and the expenses to which a public charitable or religious trust has been put. Further, it is also necessary to ascertain whether the persons approaching the Advocate-General are persons really interested in the trust, and are not those whose motives are impure. Further there must be a breach of trust or it must be shown that the direction of court is necessary. These matters, the Advocate-General has to satisfy himself. This satisfaction cannot be characterised as a purely subjective satisfaction. The main purpose of the section, which has already been referred to, the officer on whom the power has been conferred -- the Advocate-General; an expert in the field peculiarly suited by training and experience to view things objectively -- the necessity to safeguard public trust -- a duty of the State -- and the consequences of a refusal, all indicate that the Advocate General should act objectively. We are, however, not able to hold that he is to act either judicially or quasi-judicially.

11. One important aspect that has to be borne in mind is about the nature of the interest that the person approaching the Advocate General must have in order that he may satisfy the expression "having an interest in the trust" occurring in Section 92(1) of the Code of Civil Procedure. One of the learned Judges of the Madras High Court in *Kasturi Narasimha Suryanarayana alias Appa Rao Vs. Achuthana Lakshminarasimham and Others*, observed that the interest must be real and not remote, must be substantial and not illusory and it must be an existing interest, not a contingent one. But the action contemplated under the section is (one in the interest of the public and not merely for the vindication of the individual's personal rights. (See *Sugra Bibi Vs. Hazi Kummur Mia*, It has been ruled by the Supreme Court in the same decision that the action that is contemplated u/s 92(1) is a representative action. Even so, it is clear that the interest of the person seeking consent u/s 92 must be real and substantial and there can be no doubt that denial of consent by the Advocate General would or could cause serious injury. It cannot be said that such a person is not an aggrieved person and that he cannot sustain an application under Article 226 of the Constitution. The principle of the decision of the Supreme Court in *Godde*

Venkateswara Rao Vs. Government of Andhra Pradesh and Others, . We think will entitle him to approach this Court under Article 226. The Supreme Court said:

"A petitioner who seeks to file an application under Article 226 of the Constitution should "ordinarily" be one who has a personal or individual right in the subject-matter of the petition. A personal right need not be in respect of a proprietary interest: it can also relate to an interest of a trustee. That apart in exceptional cases, as "the expression "ordinarily" indicates, a person who has been prejudicially affected by an act or omission of any authority can file a writ even though he has no proprietary or even fiduciary interest in the subject-matter thereof." The Court followed its earlier decision in *The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others*, .

12. If the petitioner before us has been prejudicially affected by the conclusion reached by the Advocate General, he would be entitled to move this Court under Article 226 of the Constitution. This leads us to the question when a person can be said to be prejudicially affected as a result of the grant or refusal of the consent by the Advocate-General? The grant of the consent cannot, of course, prejudicially affect the grantee. It is urged that it would prejudicially affect the rights of those who opposed the grant of consent and who are likely to be impleaded in a suit as defendants and who would then be called upon to spend time and money and energy in defending the action. We do not think it would be open to the persons who are likely to be made defendants in the action to contend that they would be prejudicially affected by the grant of the consent. It is well established that the Advocate General does not determine any question that will affect the rights of parties. It will be open to the defendants to raise all the contentions that "they had raised before the Advocate-General or even all the contentions that are available to them in the action. None of their rights is affected by the consent granted by the Advocate-General. The inconvenience and temporary expenses caused by a suit being filed against such persons cannot be said to be such a prejudice which will enable those who opposed "the grant of consent to sustain a petition under Article 226 of the Constitution. After all no one has the right to say that no suit should be filed against him.

The only question therefore is whether a person seeking consent is prejudiced to such an extent as to sustain a writ application in cases where consent has been refused by the Advocate-General. In answering the question the provisions in Section 92(2) must play a significant role. Though it may be correct to say that a representative action, such as that contemplated by Section 92(1) in the matter of public trusts in addition to that provided generally in the case of all representative actions under rule 8 of Order I of the Code of Civil Procedure, has been provided for by Section 92(1), the section also imposes a restriction a very serious one, by Section 92(2) that no suit for any of the reliefs mentioned in Section 92(1) shall be instituted except in the manner provided by Section 92(1). This completely bars suits of the types enumerated in Section 92(1). The effect of refusal of consent by the Advocate General would thus be the grant of

complete immunity from any action of the nature detailed in Section 92(1) which can in given circumstances give a freedom to those in management to misuse trust funds and property. mismanage the trust, alienate trust property, in fact a freedom to act in such a manner as to ruin the trust. Such actions would have serious consequences as far as the persons interested in the trust are concerned. It naturally follows that they would be aggrieved by refusal of consent.

It was suggested in argument that the two Sub-sections should not be read together. It is impossible to accept this. The section has to be read as a whole. That is the normal way of understanding a section. This is in accordance with the well established rules of interpretation too. To be left without a remedy when a person's interests are adversely affected would cause substantial injury and he is certainly seriously prejudiced in cases where the refusal of consent was without any reason or without application of the mind dispassionately to the matters before the Advocate-General. Further considering the nature of the interest that he should have to approach the Advocate-General, we are of the opinion that he can legitimately claim that he has been so prejudiced. In such cases he is entitled to move the Court in writ proceedings.

13. Then the further question arises on what grounds he can seek the quashing, of the order of the Advocate-General. The order with which we are concerned, Ext. P-3, we have extracted at the beginning of the judgment. It is not contended that the petitioner had not been heard before the order was passed. It is not even suggested that the Advocate-General violated the principles of natural justice by taking extraneous matters into consideration or relied on materials which had not been made known to the petitioner. The only contention that has been urged before us is that the Advocate-General was obliged to apply his mind fairly and dispassionately to the questions that arose for consideration, and that his order being at least in certain circumstances amenable to judicial review must be a speaking order, giving the reasons for the refusal. The Supreme Court has ruled on numerous occasions that the orders in quasi-judicial proceedings must be speaking orders. *Madhya Pradesh Industries Ltd. Vs. Union of India and Others (UOI)*, ; *Mahabir Prasad Santosh Kumar Vs. State of Uttar Pradesh and Others*, . It is also an equally well established principle that an authority who decides a matter which can affect the parties must apply his mind fairly and with the care and attention that is required to the questions involved. The House of Lords in *Padfield's* case (1968) 1 All ER 694 had to consider this aspect. The Minister had given reasons for refusing to refer the complaint to the committee. When the legality of the decision was questioned, he argued that he had been under no duty to give reasons and that the fact that he had done so should not put him in a worse position. The House of Lords rejected this argument that his decision would not have been open to question if he had not given reasons. Lord Upjohn observed:

"That if a minister does not give any reason for his decision, it may be if circumstances warrant it that a court may be at liberty to come to the conclusion

that he had no good reason for reaching that conclusion and order a prerogative writ to issue accordingly".

14. The Supreme Court in *The State of Punjab and Others Vs. Bakhtawar Singh and Others*, said:

"That apart, the order of the Minister removing him does not disclose that he had applied his mind to the material on record. This order cannot be said to be a speaking order. It is arbitrary to the core, Such an order cannot be upheld".

And in 1971 *Smt. Sahodara Devi and Others Vs. Government of India and Another*, the Supreme Court had to consider the case of refusal to renew a lease under Rule 27 of the Cantonments Land Administration Rules, 1937 by the Joint Secretary who said in his letter

"that a lease under Rule 27 and Schedule VII could not be granted; but, if the appellants so desired, the Government were prepared to consider their case under Rule 28 (1) and Schedule VIII of those Rules".

This order was set aside by a single Judge of the High Court in proceedings under Article 226 of the Constitution and a direction was also issued to grant the renewal under Rule 27. In appeal the Division Bench of the High Court upheld the setting aside of the order but set aside the direction of the single Judge, to grant the license, and issued orders to the respondents to reconsider the request for renewal under Rule 27. That rule is in these terms:

"Special Lease for the Regularisation of Old Grants -- Notwithstanding anything contained in Rules 16 to 26 the Military Officer in any case where a site is held without a regular lease, may, on application by the holder, grant with the approval of the Central Government or such other authority as the Central Government may appoint for this purpose, a lease of the said land in the form set out in Schedule VII."

In further appeal before the Supreme Court, the Court held the power under the rule was discretionary and upheld the decision of the Division Bench of the High Court. The concluding part of the judgment stated that the refusal must be for sufficient reasons. We shall extract the relevant portion:

"The High Court, in directing a reconsideration of the case in accordance with law, was, therefore, quite correct, so that the application of the appellants must be decided afresh, after keeping in view the principle that the power to grant a lease under Rule 27 is discretionary; but the refusal should only be in suitable cases where sufficient reasons exist for that purpose." In (1971) 1 All ER 1148 Lord Denning stated "The giving of reasons is one of the fundamentals of good administration."

15. These principles we think must apply to a case where the Advocate-General refuses consent. From what we have stated earlier, a consent can be refused for all or one of many reasons; (1) the persons approaching the Advocate-General

may not have sufficient interest (2) their motives may not be pure (3) they may not be solvent (4) there may be no breach of trust and (5) direction of the Court may not be deemed necessary. The applicants can legitimately claim that they should be told for what reason or reasons the consent had been refused. If the refusal is for one of the first three reasons mentioned above, the Advocate-General himself can file a suit if he was satisfied that there was a breach of trust or that a direction was necessary, or any two other persons who do not suffer from any of those disqualifications may approach the Advocate-General afresh for consent. If the reason for refusal of consent is not known to be for one of the first three reasons, it is not likely, that any one else would approach the Advocate-General and it is most unlikely that the Advocate-General would file a suit himself, for the refusal of consent in such cases can only be because the Advocate-General was not prima facie satisfied that there was any breach of trust or that a direction was necessary. When the persons who approach the Advocate-General come before the Court and complain that they are personally aggrieved the Court is certainly entitled to know why the consent had been refused by the Advocate-General. The matter of refusal of consent therefore clearly stands on a footing quite different from a case where consent had been granted by the Advocate General. The Court must be satisfied in all cases of refusal that the mind of the Advocate-General had been fairly and dispassionately applied to the relevant facts before him. The only way of knowing it is by reading the order in the light of the facts and materials that were before him. So, the order must indicate that mind had been applied to those facts and materials. Where those facts and materials indicate a prima facie case, the order should show why they were not accepted and the consent was refused. In this particular case, the prior dissensions in the trust, the clamour for management, the methods adopted for getting the position of trustees, or manoeuvring to get into that position, and the allegations of breach of trust of a serious nature all indicate prima facie that all was not well with the affairs of the trust. So the order should have been a speaking order and reasons for refusal should have been discernible from it. If no reasons at all are seen, as in this case, we can only term the order as the Supreme Court did in *The State of Punjab and Others Vs. Bakhtawar Singh and Others*, as an arbitrary one. The order does not indicate anything. But for the fact that the Full Bench decision of this Court in *A.K. Bhaskar Vs. Advocate General*, might have influenced the Advocate-General in not giving reasons, the ruling in the House of Lords in *Padfield's case* (1968) 1 All ER 694 would have been attracted. Applying the principles of the decision of the Supreme Court in *The State of Punjab and Others Vs. Bakhtawar Singh and Others*, and in *Smt. Sahodara Devi and Others Vs. Government of India and Another*, and of the House of Lords in *Padfield's case* (1968) 1 All ER 694, we have to set aside the order, Ext, P-3.

16. We do not agree, with great respect, with the decision in AIR 1954 Trav-Co 331 . in so far as it has said that the Advocate-General acts as a quasi-judicial authority and that his order affects rights. The Advocate-General acts as a

statutory administrative authority performing the *parens patriae* jurisdiction of the State in regard to public trusts, and while acting thus can and does cause substantial injury at times; preventing the taking of a step in aid of vindicating a right and this can cause injury for Section 92(2) bars any action for the reliefs mentioned in Section 92(1). Nor are we able with equal respect, to agree with the decision in *A.K. Bhaskar Vs. Advocate General*, . The support sought to be derived for the conclusion arrived at in that decision from the decision in *State of Madras Vs. C.P. Sarathy and Another*, is no more available. The Supreme Court in *Rohtas Industries Vs. S.D. Agarwal and Others*, has explained that decision. The Court said that the decision in *State of Madras Vs. C.P. Sarathy and Another*,

"cannot be considered as an authority for the proposition that whenever a provision of law confers certain power on an authority on its forming a certain opinion on the basis of certain facts, the courts are precluded from examining whether the relevant facts on the basis of which the opinion is said to have been formed were in fact existed." And the rejection of the argument of Counsel that even treating the order as an administrative one, it is amenable to be corrected in proceedings under Article 226 of the Constitution on the ground that the Advocate-General decides nothing, does not. with due respect appeal to us. His conclusion to refuse consent can very adversely affect those who had applied for consent, certainly cause substantial injury. This aspect had not been considered in the decision. Indeed, this has not been considered in any of the numerous decisions on the subject to which our attention has been drawn and which were referred to by us earlier. None of these decisions also considered the distinction between granting and refusing consent. It is quite true, and we have already said so, that while granting consent no one is adversely affected, not even such prejudice as to sustain a petition under Article 226 is caused. But can the same be said while refusing consent ? The answer must be no in the light of what we have said

17-18. We allow this petition and set aside Ext. P-3 order. The Advocate-General will deal with the matter afresh and we are sure with the expedition required, in accordance with law and in the light of what is stated above. The parties will bear their respective costs.

Gopalan Nambiyar, J.

I agree that O. P. 1994 of 1969 has to be allowed and O. Ps. 829 of 1973 and 5622 of 1970 have to be dismissed. But as the route by which I travel, and the reasoning by which I arrive at the conclusion are different from those of the learned Chief Justice, I proceed to indicate them in a judgment of my own.

19. The scope and the object of Section 92 of the CPC has been considered in a number of judicial decisions. It would be enough to refer to the decision in *Davular Pitchayya and Another Vs. Divi Venkatakrishnamacharlu and Others*, which, after examining the earlier decisions, (some of them rendered with reference to Section 539 of the earlier Code of 1882 -- See for instance *Nicholas*

v. As-phar ILR (1897) Cal 218 -- ruled that the motive of the applicants, their solvency and the question of harassment to the trust from the proposed action, are relevant considerations to be taken into account by the Advocate-General in granting or withholding his consent. The section itself contemplates action only by two or more persons having an interest in the trust or by the Advocate-General himself, and only in cases of any alleged breach of any express or constructive trust, whether public, charitable or religious, or where direction of court is deemed necessary for the administration of a trust. It contemplates also suits covering certain reliefs enumerated in Clauses (a) to (h) of Section 92(1). All these are aspects on which the Advocate-General will have to apply his mind.

As observed by the Supreme Court in *Chairman Madappa Vs. M.N. Mahanthadevaru and Others*, :

"Section 92(1) provides for two classes of cases, namely, (i) where there is a breach of trust in a trust created for public purpose of a charitable or religious nature, and (ii) where the direction of the Court is deemed necessary for the administration of any such trust. The main purpose of Section 92(1) is to give protection to public trusts of a charitable or religious nature from being subjected to harassment by suits being filed against them. That is why it provides that suits under that section can only be filed either by the Advocate-General, or two or more persons having an interest in the trust with the consent in writing of the Advocate-General. The object clearly is that before the Advocate-General files a suit or gives his consent for filing a suit u/s 92, he would satisfy himself that there is a prima facie case either of breach of trust or of the necessity for obtaining directions of the Court." I do not think any quasi-judicial determination or decision is involved when the Advocate-General proceeds to institute the suit himself; nor, when he proceeds to consider the suitability of the action proposed to be launched by two or more persons claiming to be interested in the trust. The Section itself does not oblige him to give notice or afford opportunity to the parties interested; and, as has been repeatedly observed, the content and scope of the principles of natural justice must vary according to the varying needs and situations and circumstances. The fact that in deference to the advisability of affording a hearing, which has been pointed out in some of the earlier judicial decisions, the Advocate-General, in practice, issues notice and affords a hearing to the parties, is no ground to hold that the proceedings for granting sanction, are quasi-judicial in nature. In *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, and in *The Keshav Mills Co. Ltd. and Another Vs. Union of India (UOI) and Others*, the Supreme Court has noticed the passages from the English decisions which have stressed that the mere fact that notice was given or an opportunity afforded to the parties in enquiries for a preliminary satisfaction or finding on facts, cannot by itself make the process involved a quasi-judicial one.

20. When two or more parties interested make an application to the Advocate-General for his consent to institute the action what is it that the Advocate-General has to do ? It seems to me he has to do no more than find out whether

the applicants have made out a prima facie case for investigation by the court in which the suit is proposed to be filed. He does not decide the rights of the parties one way or the other, but only considers the question whether, on the facts and circumstances appearing, the matter is one in respect of which he can give his consent to the initiation of the action. The applicants cannot say that they have a right to obtain the Advocate-General's consent, any more than the opposite parties in the action can maintain that they have a right to see that no action is instituted against them, or, that the Advocate-General does not accord consent. A Full Bench of three Judges, of this Court in A.K. Bhaskar Vs. Advocate General, , differing from the prior Full Bench decision of the Travancore-Cochin High Court in AIR 1954 TC 331 held that the Advocate-General acting u/s 92 does not act quasi-judicially. The Pepsu High Court has followed the Travancore-Cochin view. (Vide AIR 1956 P&H 65 The Allahabad High Court in AIR 1955 AH 372, the Andhra Pradesh High Court in AIR 1957 AP 283 and in Shavax A. Lal and Others Vs. Syed Masood Hosain and Others, followed the Allahabad view. The Madras High Court in Haji K.M. Abdul Kasim and Others Vs. P.M.N. Mohammed Dawood and Others, also took the view that the power u/s 92 is only administrative and not quasi-judicial in nature. The prior Madras decisions are referred to in the said ruling. The Jammu and Kashmir High Court has also taken the same view. Isaac, J., who made the order of reference in the first instance, and the Full Bench of three Judges which referred this to a larger Bench, observed that the earlier Full Bench of this Court in A.K. Bhaskar Vs. Advocate General, , required reconsideration. On the nature of the power exercised by the Advocate-General. I agree with A. K. Bhaskar's case that it is not quasi-judicial.

21. But it was contended that even if the nature of function of the Advocate-General be administrative, an administrative order prejudicially affecting the rights of subjects would be subject to judicial review. For this, reliance was placed on numerous decisions of the Supreme Court, which it was said, had laid down that the border line of distinction between quasi-judicial and administrative orders was getting obliterated, and the distinction was fast evaporating. A.K. Kraipak and Others Vs. Union of India (UOI) and Others, and State of Orissa Vs. Dr. (Miss) Binapani Dei and Others, were, in particular referred to. In the view that I take, it is unnecessary to examine this aspect. I do not think that when the Advocate-General refuses consent, any "civil rights of the applicants are affected; nor do I think that anyone can be said to be pre-judicially affected by a grant or refusal of consent. I do not therefore propose to trench upon the thorny question whether, and if so, how far, an administrative decision prejudicially affecting the rights of subjects, is open to correction under Article 226. The decision of this case, can well be rested on a different ground altogether. I am in agreement with the principle stated by a Division Bench of the Madras High Court in Haji K.M. Abdul Kasim and Others Vs. P.M.N. Mohammed Dawood and Others, , where the matter was put thus:

"It may be that as in the case of Section 92, CPC 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."

Section 92(2), read with Section 92(1) of the CPC has barred a suit without the consent of the Advocate-General. It is this statutory provision, and not the Advocate-General's order, that affects the right of the applicants when consent is refused. And, as for granting consent, no one, I believe, has a right that no suit shall be instituted against him; much the less that no one shall consider whether there is any case for instituting a suit.

22. Certain English decisions appear apposite in the context. In *Wiseman v. Borneman* 1971 AC 297, the question considered was regarding the extent of applicability of the rules of natural justice to a judicial tribunal concerned with the decision on a preliminary point. Lord Reid observed:

"It is, I think, not entirely irrelevant to have in mind that it is very unusual for there to be a judicial determination of the question whether there is a *prima facie* case. Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a *prima facie* case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the party.

Even where the decision is to be reached by a body acting judicially there must be a balance between the need for expedition and the need to give full opportunity to the defendant to see the material against him. I do not think that a case has been made out that it is unfair to proceed as the statute directs." Lord Morris observed:

"We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only "fair play in action". Nor do we wait for directions from Parliament. The common law has abundant riches; there may we find what Byle- J., called "the justice of the common law" (1863) 14 CBNS 180." I hope to be spared the charge of unfairness and disrespect, if I pass by the judgment of Lord Guest and turn to that of Lord Donovan who observed;

"Both sides apparently agreed that the proceedings before the tribunal would be judicial. It would make no difference to my view whether they were or were not. But since this question could easily arise in some other context and require specific decision, I reserve my opinion upon it: and I do so having in mind what

was said in the Court of Appeal on a cognate point in *Inland Revenue Commr. v. Sneath* (1932) 2 KB 362 and *Rex v. Income Tax Special Commr.* Ex parte *Elmhirst* (1936) 1 KB 487." Lord Wilberforce stated:

"My Lords, I agree that this appeal should be dismissed, but I would base the decision on rather broader grounds than those stated in the courts below, for I cannot accept that there is a difference in principle, as to the observance of the requirements of natural justice, between final decisions, and those which are not final, for example, decisions that as to some matter there is a prima facie case for taking action."

After referring to the above decision and other authorities, Lord Denning observed in *Pearlbers v. Varty* 1971 (2) All ER 552:--

"Although the tribunal, in determining whether there is a prima facie case, is itself the custodian of fairness, nevertheless its discretion is open to review. If it should refuse an application on a ground which is arbitrary or capricious, the court can intervene by mandamus or declaration -- of *R. v. Adamson* -- or, if it should grant an application when there was no ground for it, or when they clearly ought to have heard the other side, again the court can intervene by prohibition or injunction. Needless to say, the court would only intervene in extreme cases where the tribunal had gone wrong. But that the court has power to intervene, I have no doubt."

In *R. v. Metropolitan Police Commr.* 1973-1 All ER 324, Lord Denning in considering the question whether there was a failure on the part of the Commissioner of Police to discharge his public functions in regard to obscene publications, observed:

"In *R. v. Metropolitan Police Commr.*, ex parte *Blackburn* (1968-1 All ER 763 we made it clear that, in the carrying out of their duty of enforcing the law, the police have discretion with which the courts will not interfere. There might, however, be extreme cases in which he was not carrying out his duty. And then we would. I do not think this is a case for our interference. In the past the Commissioner has done what he could under the existing system and with the available manpower. The new Commissioner is doing more. He is increasing the number of the obscene publications squad to 18 and he is reforming it and its administration. No more can be reasonably expected."

23. In the light of the above principles, I think that save in extreme cases, such, for instance, as where this Court is able to find that there has been no application of mind, or no exercise of discretion at all by the Advocate-General, there would be no ground for interference under Article 226. That principle is emphasised in *The State of Punjab and Others Vs. Bakhtawar Singh and Others*, , and in *the Commissioner of Police, Bombay Vs. Gordhandas Bhanji*, . A limited ground for judicial review is also thrown open by the line of decisions like *the The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, and the authorities which have followed in its wake, to which I need not

make reference.

24. Could it then be said that in the cases before us the Advocate-General has not exercised his discretion at all ? I am of the opinion that in. O. P. 1994 of 1969 the order is so laconic as not to indicate any application of the mind by the Advocate-General to the considerations to which he is required to bestow attention. There is no material from which the court can be satisfied that the Advocate-General applied his mind and exercised his discretion in refusing consent to the applicants. On this short ground I agree that O. P. No. 1994 of 1969 has to be allowed. The applicants, as persons who applied for consent to the Advocate-General, and whose applications were refused, have enough "interest" to sustain this application. There was no argument contra.

25. In the other two O. Ps. the Advocate-General has written out orders which unmistakably indicate the application of his mind to the facts and the consideration of the relevant factors in granting his consent. I can see no scope for interference in these writ petitions, and I would dismiss them both.