

(1961) 11 MAD CK 0021

In the Madras High Court

Case No : Writ Petition No. 1034 of 1961

Raju and Another

APPELLANT

Vs

Advocate General H.C. Buildings, Madras and Others

RESPONDENT

Date of Decision : 09-11-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, 91, 92
Constitution of India, 1950 — Article 165, 165(2), 226

Citation : AIR 1962 Mad 320 : (1962) ILR (Mad) 722

Hon'ble Judges : Jagadisan, J

Bench : Single Bench

Judgement

(1) The petitioners pray for the issue of a writ of certiorari or other appropriate writ under Art. 226 of the constitution to quash the order of the

learned Advocate General of Madras dated 6-1-1961 in sanction Appln No. 11 of 1960, preferred before him for the necessary consent for the

institution of a suit under S. 92 C.P.C.

(2) The petitioners are residents in the village of Sirunaickanpetti Dngual tauk, Mathurai Dt. and they are Roman Catholic Christians by religion.

The bulk of the population of the village of Sirunaickenpatti consists of Roman Catholic Christians. There is a Church in the village, St. Anthony

Church and there is also another church, the Church of S. Thomas situated on the top of a hillock near the village. The catholic Christians of the

village appear to have raised funds for levying contributions and subscriptions from all the Catholic and purchased statues, pictures, ornaments, and

carriage for carrying corpses to the burial ground and other articles necessary and useful for the Christian population residing in the locality.

Respondents 2 to 4 in this petition are stated to be functioning as trustees

managing the communal properties. The articles referred to above were entrusted to them for safe custody; they were bound to celebrate the festivals connected with the churches, and afford use of the articles to the members of the christian public as and when required. These respondents also made collections from their co-religionists in the village and incurred the necessary expensives for the upkeep and maintenance of the properties and for the conduct of the religious festivals. The second respondent is alleed to be ""nattamai"" or the communal head, and the third respondent is alleged to be the ""maniam"" possibly assisting the Nattamai. The 4th respondent is the accountant employed by the second and the third respondents to keep the accounts of the trust.

The petitioners allege that the 4th respondent has been lending out the surplus amounts of the trust available with him after meeting all charges and expenses to several Christian residents of the village, taking bonds and documents in his own name for and behalf of the community. This fund is described and wn as St. Sebastiar Koil common fund. It is now aparent that there is a faction in the village amongst the members of the Roman Catholic Christian community. The petitioners charge respondents 2 to 4 with having committed gross breach of trust in regard to the moneys belonging to the trustin having retained the surplus amount in their own hands without investement for the last two years and in having to refuse to render true and proper accounts to the other members of the community. It is also alleged that respondents 2 ans 4 failed in their duty to call for a meeting of the community and to consult them in matters relating to the common affairs of the community.

The ill-feeling between the petitioners" group and the respondents" group gradually developed and this led to respondents 2 to 4 denying the petitioners their un doubted privileges of participating in the public function in the church and refusing them to use of the furenal car to take corpses to the burial ground. The petitioner filed a suit in a representative caoacity under O.1 Rule 8 C. P.C. against respondents 2 to 4 in the O.S No.

226 of 1959 on the file of the District Munsif"s Court of Dindigul for a declaration that the funeral car under the management of respondents 2 to 4 belongs to the Roman Catholic community of srinaickenpatti and that all the members of the community are entitled to make use of it and that

respondent 2 to 4 should make the car available for the use of the community as such. This suit was decreed by consent of parties on 1-4-1960.

(3) Respondents 2 to 4 are firmly entrenched in their position as trustees in respect of the management of the Church and the communal properties.

They have also trust funds in their hands, if the allegation of the petitioners is true, in respect of which as trustees they were certainly liable not

merely to keep regular accounts but also to render accounts to the beneficiaries of the trust when called upon to do so. The petitioners therefore

contemplated the filing of a suit against respondent 2 to 4 and framed a plaint praying for the following reliefs:

(a) For an order for the removal of respondents 2 to 4 from their respective capacities in which they were functioning as trustee and accountants

thereof;

(b) for the appointment of new trustees from among the community in their places;

(c) for vesting the trust in the custody of new trustees to be appointed;

(d) for directing the respondents 2 to 4 to render a true and proper account of the receipts and disbursements relating to the trust during the period

of their management;

(e) to frame a scheme for the proper administration of the churches and their affairs in the interest of the Roman Catholic community of

Srirunaickenpatti.

This suit clearly fell in the ambit of S. 92 of the C. P. Code and the petitioners had therefore to approach the Advocate General of Madras, the

first herein, for consent and sanction. They accordingly preferred Sanction Appln. 11 of 1960 before him. This application is accompanied by the

copy of intended plaint. The Advocate General to the respondents 2 to 4 and hearing both sides, the petitioners and respondents 2 to 4, passed

an order on 6-1-1961 refusing consent. The following is the order: "Consent is refused.

(4) The petitioners feel aggrieved by the order of the learned Advocate General refusing consent and hence this petition has been filed. The

preliminary question that arises for whether the power exercisable by the Advocate General under S. 92 C.P.C. is a judicial power and whether

resultant act is a judicial order within the scope of a certiorari under Art. 226 of

the constitution. It is quite well settled and it can be taken to be established law without citation of any authority that certiorari will not lie unless the body or Tribunal whose proceedings are sought to be quashed has the legal authority to determine questions affecting rights of the subjects and owes a duty to act judicially.

(5) There is no completing statutory obligation on the part of the Advocate General to hear witness, to admit documentary evidence and to hold an

enquiry before granting and refusing consent when he moved under S. 92 C.P.C. Adherence to judicial forms of procedure is salutary, indeed

advisable to dispel fear or apprehension of arbitrariness in the mind of the aggrieved person. In *Davular Pitchayya and Another Vs. Divi*

Venkatakrishnamacharlu and Others, , Kumaraswami Sastri J. observed thus at page 131,

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.

The present practice of the Advocate General of this State is, so far as I know to hear concerned parties on both sides of the proposed suit before

granting or refusing consent. But the judicial procedure adopted by the Advocate General cannot determine the true nature of his official act.

Article 165 of the Constitution prescribes the following duty to the Advocate General for the state:

165(2) It shall be the duty of the Advocate General to give advice to the Government of the state upon such legal matters, and to perform such

other duties of a legal character; as may from time to time be referred or assigned to him by the Governor, and to discharge the functions conferred

on him by or under this Constitution or any other law for the time being in force.

(3) The Advocate General shall hold office during the pleasure of the Governor and shall receive such remuneration as the Governor may determine.

The Advocate General is a limb of the Executive qua his official capacity. The power to give or withhold consent to actions in regard to public

nuisance and in regard to public trust under Ss. 91 of the C. P. Code is a statutory power.

(6) The position of the Advocate General in relation to public trusts is similar to that of the Attorney General in England under the Sir Samuel

Romilly's Act. A proceedings under the Romilly's Act should have the consent of the attorney or Solicitor General and the consent should be

certified by him before the commencement of the proceedings. The object of the consent of the Advocate General, who is in the position of the

parens patriae over all public trusts, is to safeguard the trust against frivolous actions by impecunious persons. As pointed out by Sankaran Nair and

Spencer JJ. in Venkatesha Mallia Vs. Bammampalli Ramayya Hegade and Others, , cases may occur in which it might be inadvisable for the

Advocate General to grant sanction to a particular individual either on account of his character, personal motive or his solvency. The exercise of

the power of the discharge of a duty as a guardian of the trust to promote its interests or to shield it from vexatious actions, which is all that is called

for under S. 92 C.P.C., cannot amount to the performance of a judicial function.

(7) It is quite that the granting or refusing by the Advocate General under S. 92 C. P.C. is no judicial determination of any legal rights of the parties

to the intended action. All the questions in controversy between the parties to such an action have to be decided only by the court entertains the

suit The trust in respect of which the action is brought may not be a public trust and the court may hold that it is not of such a character. The alleged

acts of breach of trust with which the defendants in the suit are charged and may be wholly unfounded and they may fail. There cannot be judicial

order which is totally bereft of any determination or adjudication of legal rights binding the parties.

(8) It is now necessary to refer to the decision of the Travancore Cochin Highcourt in Abu Backer v. Advocate General T. C. State AIR 1954

Trav Co 331, where a Division Bench held that the decision of the Advocate General under S. 92 C.P.C. granting or refusing sanction is a decision

affecting the rights of the parties and that such a decision is a quasi judicial decision amenable to a writ of certiorari At page 337 Sankaran J.

observed as follows:

The order is one passed under S. 92 C.P.C. Code. Under that section the

Advocate General has been constituted the authority empowered to decide whether sanction or consent should be given to 2 or more persons having an interest in the public trust to institute the suit of the nature contemplate in that section. It is that section that the person seeking such sanction or consent should be person having an interest in the trust.....When the consent is sought for it is the duty of the Advocate General to come to a definite decision as to whether such sanction should be given or not.....It is equally obvious that he has to make a judicial approach to the question in controversy and to arrive at a decision after due consideration of the facts and the evidence made available to him.

It may be that the Advocate General does very often and perhaps invariably consider the question of the propriety of giving or withholding consent in a judicial manner. But the nature of the order does not depend upon the procedure adopted by him. An Executive act with the trappings of a judicial procedure is still an executive act, though overlaid with a judicial cover, and it cannot be invested with judicial character. With great respect to the learned Judges of the Travancore Cochin High Court they appear to have mistaken the form for the substance.

(9) In *Swami Shantanand Saraswati Vs. Advocate-General, U.P., Allahabad and Others*, a Division Bench of the Allahabad High Court have dissented from the view taken by the Travancore Cochin High Court. The learned judges of the Allahabad High Court held that the act of the Advocate General in giving his consent to the institution of a suit under S. 92 C.P.C. cannot be called a quasi judicial act and that it is merely an administrative or executive act. At page 376 A Garwala J. observed thus:

In giving his consent under S. 92 C.P.C. the Advocate General is not expected to decide the rights of the contending parties. Even if he has to hold an enquiry, he is merely to see whether there is a prima facie case that should be allowed to go to a court of law. When he gives his consent to the institution of a suit he does nothing more than this. By the consent which he gives for the institution of the suit, he does not affect the rights of the person against whom the suit is filed. That person has full opportunity to present his case before the court in which the suit has been filed. The court is not influenced in deciding the case by the fact that the Advocate General has

given his consent to the institution of the suit. It is therefore not a case in which there is any decision about a dispute or a claim.

I respectfully agree with this observation of the learned Judge.

(10) The relators who approach the Advocate General for sanction to institute a suit under S. 92 have no right to institute the suit without the

consent of the Advocate General. They must of course have sufficient interest in the trust as otherwise they would be incompetent to figure the

plaintiffs. The Advocate General himself may institute the suit claiming the reliefs provided for under S. 92 C.P.C. When the relators get his

sanction and file the suit; it is virtually the suit instituted by the Advocate General himself. The nature and the character of the suit is the same,

whether the Advocate General is *eo nomine* a party to the suit or permits other persons interested in the trust to file the suit. This is purely a matter

of procedure. I am unable to see how an act of the Advocate General permitting two or more interested persons to launch a suit against the trust or

refusing such consent to them can amount to discharge of a judicial function. In my opinion the act of the Advocate General in such matters in effect

amounts to his either having instituted the suit through the medium of the relators or his having refused to file a suit.

(11) A writ of certiorari under Art. 226 of the Constitution to quash the order of the learned Advocate General dated 6-1-1961 in sanction Appln.

11 of 1961 is therefore not maintainable. The petition is dismissed.

(11) Petition dismissed