

(1955) 12 P&H CK 0011

In the Punjab And Haryana At Chandigarh

Case No : Civil Miscellaneous Petns. No"s. 249 and 261 of 1954

Sadhu Singh Sunder Singh and Others

APPELLANT

Vs

Mangalgir and Mohatmim Dera and Another

RESPONDENT

Date of Decision : 23-12-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 1, 2, 92, 92(1)
Constitution of India, 1950 — Article 165(2), 226, 227

Citation : AIR 1956 P&H 65

Hon'ble Judges : Mehar Singh, J

Bench : Single Bench

Advocate : Kishori Lal, for the Appellant; Amar Singh Hotiwala, for Mangal Gir, Anukar Dass, A.A.G. for A.G. and Dara Singh, for Arjan Ban, for the Respondent

Judgement

Mehar Singh, J.—This judgment will dispose of two petitions Nos. 249 and 261 of 1954 under Article 226 and 227 of the Constitution. The facts and Circumstances out of which the petitions have arisen are these.

2. In petition No. 249 of 1954, Petitioners are three residents of village Dudian in Sang-rur District, and the Respondents are Mangal Gir as the mohatmim of Shiv Mandir Dudian and the Advocate-General. The Petitioners made an application u/s 92, CPC . to the Advocate-General to obtain his consent for institution of a suit against Mangal Gir Respondent for his removal from the position of mahatma of the Mandir on the grounds that he has not properly managed its property, has wasted its property, and has used the profits of the property for personal benefit, and that he is not a person of good character and so fit to hold that position.

The Advocate-General gave notice of the application of the Petitioners to the mahatma of the Mandir. He then took evidence of the parties and heard them. Thereafter by a detailed order, dated 16-10-1954, he came to the conclusion that the Petitioners have not shown that there exists any religious or charitable trust, that there has been any breach of trust by the mahatma, and that the mahatma is not a man of good character.

Upon these conclusions, he declined to give his consent for the institution of the suit by the Petitioners. In their petition the Petitioners aver that the Advocate-General has reached wrong conclusion in the case and that there was sufficient material before him to reach the conclusion that prima facie they were entitled to obtain his consent for the institution of the suit and so this Court, should issue a writ of certiorari under Article 226 quashing the order of the Advocate-General and give consent for the institution of the suit to them. Similar prayer is made under" Article 227.

3. In Petition No. 261 of 1954 again the Petitioners are three of village Chhaila, and the Respondents are the Advocate-General and Arjan Ban as mahatma of Dera Baba Nand Ban. The Petitioners made an application u/s 92, CPC to the Advocate-General to obtain his consent to file a suit against Arjan Ban Respondent for his removal from the position of the mahatma of the Dera and for appointment of a new mahatma in his place and for the proper taking of the accounts off" the Dera.

In this case also the Advocate-General gave notice of the application of the Petitioners to Arjan Ban Respondent. He then took evidence of the parties and heard them on the case. In his detailed order, dated 6-11-1954, he has reached the conclusion that there is not sufficient evidence for him to find that the mahatma has been misappropriating the property of the Dera or giving it away to his brother that proper accounts are being kept by the mahatma, and that the Petitioners are actuated by personal considerations and motives to make the application and thus the application is not made in good faith.

Upon these considerations he declined to give consent "for" the institution of the suit. In this case top the Petitioners aver that the conclusions of the Advocate-General are not justified by the material placed before him and there was enough material before him to come to the conclusion that prima facie the case was fit for him. to "give, consent for the institution of the suit The prayer under both the Articles, that is 226 and 227 is that the order of the Advocate Generable quashed and either he be direct-ad to reconsider the case and pass a proper order or this Court may pass an order giving Sanction to the Petitioners to institute the suit.

4. These two cases have been heard together because a common question of law is involved in them in that in that in either case it is contended on behalf of the Petitioners that the function of the. Advocate-General u/s 92, CPC is a judicial function and so this Court Interfere with his proceedings and orders, under, the; said Articles, and on the contrary the position taken on behalf of the Respondents, in each case is that the order of the Advocate-General is an executive or administrative order and this Court cannot interfere with the same under either or both of those Articles

5. The English Act from which at least part of the provisions of Section 92, CPC have been taken is 52 Geo 3, class 101, and Sections 1 and 2 of that Act, in so far as material for purposes of the present case, are-

1...in every case of a breach of any trust or supposed breach of any trust created for charitable purposes, or, whenever the direction or order of a court of equity shall be deemed, necessary for the administration of any trusts for charitable purposes, it shall be lawful for any two or more persons to present a petition to the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the great, seal, or Master of the Rolls for the time being, or to the Court of Exchequer, stating such complaint and praying such relief as the nature of the case may require;....

2. Provided always, and be it further enacted, that every petition so to be preferred as aforesaid shall be signed by the persons preferring the same, in the presence of and shall be attested by the solicitor or attorney concerned, for such Petitioners, and every such petition, shall be submitted to and be allowed by His Majesty's attorney or solicitor-general, and such allowance shall be certified by him before any such petition shall be presented.

The nature of the function of the Attorney General, under the said provisions was considered by Lord Eldon in *Ex Parte Skinner* (1817) 2 Mer. 453 (A)", and the observation of the learned Judge is reproduced in extenso at page. 421 in "*Sajedur Raja Chowdhuri v. Gour Mohun Das*. 24 Cal 418 (B). It runs

The intention of the Legislature in framing the Act (Romilly's) was to guard charitable trusts against abuse, and for that purpose to prevent such proceedings from being instituted as are too frequently instituted for no other reason than because it is known that the costs will be payable out of the charity funds. It was with this view that the Legislature provided for the signature of the Attorney-General, or in case of there being no Attorney, of the Solicitor-General; and I desire to have it understood that no petition under the Act ought to receive that signature, except upon the same deliberation that it would be thought fit to afford to the case if it were presented in the shape of an information.

The nature of the function of the Attorney General in granting a fiat for a writ of error in a criminal case came for consideration in *R. v. Newton* (1855) 24 LJ QB 246 (C), and Lord Campbell, C.J. observed:

I think this Court has no jurisdiction to review the decision of the Attorney General. I heartily concur in saying that in case of a misfeasance, where probable cause is shewn, a writ of error is a matter *ex debito iustitiae*, and that the Attorney General ought to grant his fiat. But it is a matter within his discretion in the exercise of a judicial or quasi judicial office, and when he has heard and decided, this, is not the Court before which his conduct can be questioned. If he acts improperly he may be complained of in Parliament, or he may be impeached or dismissed from his office by the Crown, and a successor appointed.

In this very case *Wightman*, J. remarked

As to the first point, whether the Attorney General is bound in cases of

misdeemeanor to grant his fiat ex parte into justified, I think upon good ground being shewn, he is. But it is a judicial matter in which he is to exercise a discretion and if he refuses his fiat this Court has no power to issue a mandamus to compel him.

The question was again considered by the Court of Appeal in *R.v. Comptroller-General of Patents, Designs, and Trade Marks*" (1899) 1 QB 909, (D), and with regard to the functions of the Attorney General in these matters Smith L.J. at pages 913 and 914 says

We know that he (Attorney General) has had from the earliest times to perform high judicial functions which are left to his discretion to decide. For example, where a man who is tried for his life and convicted alleges that there is error on the record, he cannot take advantage of that error unless he obtains the fiat of the Attorney General, and no Court in the kingdom has any controlling jurisdiction over him.

That perhaps is the strongest case that can be put as to the position of the Attorney General in exercising judicial functions. Another case in which the Attorney General is pre-eminent is the power to enter a nolle prosequere in a criminal case. I do not say that when a case is before a Judge a prosecutor may not ask the Judge to allow the case to be withdrawn, and the Judge may do so if he is satisfied that there is no case; but the Attorney General alone has power to enter a nolle prosequere, and that power is not subject to any control.

Another case is that of a criminal information at the suit of the Attorney General a practice which has, I am sorry to say, fallen into disuse. The issue of such information is entirely in the discretion of the Attorney General and no one can set such information aside. There are other cases to which I could refer to be found in old and in recent statutes, but I have said enough to show the high judicial functions which the Attorney General performs. There is one another matter to which I will refer before I come to the facts of this case.

In *Van Gilders Patent* (1888) 6 RPC 22 (E) the position of the Attorney General in these matters is stated in the judgments in the Divisional Court and in the Court of Appeal. I will read a passage from the judgment of Bowen L.J.: "At common law, the Attorney General is, when he is exercising his functions as an officer of the Crown, in no case that I know of, a Court in the ordinary sense". It follows that his decisions, when exercising such functions, were not subject to review by the Court of Queen's Bench, and are not now subject to review by the Queen's Bench Division or this Court.

It was with regard to the functions of the Attorney General in connection with a criminal information that Lord Eldon in *Ex Parte, Skinner* (A) observed that the same were his functions in cases coming under Sections 1 and 2 of 52 Geo. 3, class 101. The authorities are agreed that in England those functions of the Attorney General are judicial functions.

6. In the CPC of 1882 the Section parallel to Section 92 of the present Code was Section 539, and considering the nature of the function of the Collector under that section the learned Judges in 24 Cal. 418 (B), at p. 428 say

No doubt the language of this permission is in one respect not such as it ought to be. When the law directs that the consent of the Collector should be obtained as a necessary preliminary to the maintaining of a suit u/s 539, the Collector is required to exercise his judgment in the matter before giving his consent. This view is borne out by the observations of Lord Eldon in (1817) 2 Mer. 458 (A). But though the consent of the Collector is thus defective language in this one respect, we do not think that the defect is fatal to the case.

The Collector in giving his consent has to exercise his judgment in the matter, and see it only whether the persons suing are persons "who have an interest in the trust, but also what the trust is a public trust of the kind completed by the section, and whether there are prima facie grounds for thinking that there has been a breach of trust; and, as pointed out in the course of the argument; there is nothing to show that the Collector has not exercised his judgment as to the last two points.

It is only in regard to one matter, namely, that relating to the interest of the Petitioners in the trust, that the language of the permission may be taken to indicate that the Collector did not exercise his judgment. Though that is so, we think it is after all an irregularity in an order which the law requires should form a necessary preliminary to the institution of a suit, and such an irregularity in our opinion comes within the scope of Section 578.

So following the opinion of Lord Eldon in *Ex parte, Skinner* (A) the learned Judges of the Calcutta High Court have also taken the view. that the giving of the consent or permission u/s 539 (present Section 92) is a judicial function and the authority that has to exercise that function has to exercise its judgment whether or not it should give such consent or permission".

7. The first case that takes a contrary view is *Dhian Dass v. Jagat Ram*", 104 Pun Re 1910 (F), which was a revision from an order of the Collector of a District, granting permission u/s 539, CPC to a person to institute a suit for the removal of a mahant. The learned Chief Judge remarked that

the order is, in my opinion, an executive or administrative order only, and there is at present, in my opinion, no "case" of which the record can be called for and dealt with in revision.

The report of the case is short and there is no discussion of the matter except the observation of the learned Chief Judge as reproduced. It may be that the order of the Collector u/s 539 was not otherwise subject to the revision jurisdiction of the Chief Court as it was not a "case" and the Collector was not a Court subordinate to the Chief Court in this respect, but, as stated, the matter is not discussed in any detail.

8. The second case directly in point is "Abu Backer Adam Sait v. Advocate General Of T.C. State AIR 1954 TC 331 (G), in which the learned Judges have held (a) that in discharging the functions assigned to him u/s 92 CPC he (Advocate General) is discharging the duties of a legal character as contemplated by Article 165 (2), (b) that the decision of the Advocate-General under the said section, whether consent asked for should be given or not, is a decision affecting the rights of the persons, requires a judicial approach, and is a quasi judicial decision, and (c) that neither under Article. 226 nor under Article 227 has the High Court power to directly issue the sanction asked for or command the Advocate General to give such consent or sanction.

The learned Judges have discussed at length and elaborately to show that the functions of the Advocate General u/s 92 are-judicial functions and his conclusion is a quasi judicial decision.

9. Then there are two other recent cases on the same question and the one is "Shri manila Kasliwal v. Advocate General"(S) AIR 1955 Raj 166 (H), and the other is " Swami Shantanand Sarswati Vs. Advocate-General, U.P., Allahabad and Others, In the Rajasthan case the learned Judges merely observed that long mere errors; "Wary am Singh v. Amar Nath AIR 1954 SC 21 S (L)." It is in the light of these observations of their Lordships that the prayer of the Petitioners in each one of these cases is to be considered.

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

In this case there is not much of discussion of the question, although the case of AIR 1954 T.C. 331 (G) was brought" to the notice of the learned Judges, but they did not agree with the opinion expressed in that case. In the other case, that is, (S) Swami Shantanand Sarswati Vs. Advocate-General, U.P., Allahabad and Others, not only has the Travancore Cochin case been noticed, but there is an elaborate discussion by the learned Judges upon the basis of which they have reached the conclusion that the act of the Advocate General in giving his consent to the institution of a suit u/s 92 cannot be called a quasi judicial act, and; it is merely an administrative or executive act

The learned Judges rely upon 104 Pun Re 1910 (F) and also upon the distinction between a judicial "or quasi judicial act and an administrative or executive act as brought out by a large number of authorities referred to by them and then concluded as stated above.

10. In none of the three recent cases on the question, the case in 24 Cal 418 (B), was noticed, nor was the opinion of Lord Eldon in Ex parte Skinner (A).

(10a) Section 92 (1), CPC in so far as relevant for the present purposes, says

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,

and then follow the reliefs that may be claimed in such a suit. When this provision is considered along with Sections 1 and 2 of 52 Geo. 3, Clause 101, there is a good deal of similarity in the two provisions. In particular in both a highly placed/law officer of the Government is brought in and the proceedings or the suit cannot be instituted without his consent or concurrence. I have already shown that in regard to the functions of the Attorney General under the English Act there is ample authority that those functions are judicial functions.

The learned Judges of the Calcutta High Court maintained that the functions. of the Advocate General u/s 92 are also judicial functions. The elaborate discussion of the nature of the functions of the Advocate General by the learned Judges of the Travancore Cochin High Court supports this view. There appears to be no adequate reason why the functions of the Advocate General u/s 92 should be considered to be different in nature I, than the functions of the Attorney General under the English Act.

As pointed out in the Rajasthan case there is not much of discussion of the matter, but, though in the Allahabad case the matter has been discussed the provisions of the English Act and the cases, bearing upon the nature of" the functions of the Attorney General have not been noticed nor has the case in 24 Cal 418 (B), been noticed. On the whole, therefore," upon consideration of the cases referred to, I am of the opinion that the view taken by the learned Judges of the Travancore Cochin High! Court is the correct view and that the functions of the Advocate General u/s 92, Code of Civil Procedure, are judicial in nature and not administrative or executive.

11. It is plain that no mandamus can issue against the Advocate General ordering him to give his consent to the Petitioners in either case for institution of the suit. But the Petitioners ask for interference under Article 227; and by the issue of writ of certiorari under Article 226 and further that this Court may itself grant sanction for the institution of the suit. In Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, their Lordships of the Sup reme Court have again reiterated the conditions under which a certiorari will issue and those, conditions are:

1. Certiorari will be issued for correcting: errors of jurisdiction, as when an inferior Court or Tribunal acts without jurisdiction or, in excess of it, or fails to exercise it. (2) Certiorari will also be issued when the Court or; Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice. (3) The Court issuing a writ of certiorari acts in exercise of a

supervisory and not appellate jurisdiction.

One consequence of this is that the Court will not review findings of fact reached by the inferior Court or Tribunal, even if they be, erroneous. This is on the principle that a Court which has jurisdiction over a subject matter has jurisdiction to decide wrong as well as right, and when the Legislature, does not choose to confer a right of appeal against that decision, it would be defeating its purpose and" policy, if a superior Court were to rehear the case on the evidence and substitute its own findings in certiorari.

In this very case their Lordships have further observed that

It may ... be taken as settled that writ of certiorari can be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record.

The conditions under which interference is justified by the High Court under Article 227 are also settled by their Lordships of the Supreme Court and those conditions are two:

Firstly, interference can only be in cases of grave miscarriage of justice or flagrant violation of law: D.N. Banerji Vs. P.R. Mukherjee and Others, and

Secondly, it can be in appropriate cases order to keep the subordinate courts within bounds of their authority and not, for correcting mere errors; " Waryam Singh and Another Vs. Amarnath and Another,

It is the light of these observations of their Lordships that the prayer of the Petitioners in each one of these cases is to be considered.

12. It is nobody's case that the Advocate General has not acted within the scope of his jurisdiction u/s 92, and no question of jurisdiction is involved in these cases. There is no apparent error on the face of the record in so far as both the orders of the Advocate General are concerned, and there is no case of either grave miscarriage of justice or flagrant violation of law by the Advocate General in withholding his consent in these cases. It is thus apparent that interference in either of these cases is not possible either under Article, 227 or by a writ of certiorari under Article 226.

The learned Judges in the Travancore Cochin case have at length discussed the question whether the High Court can substitute its own decision for the decision of the Advocate General and I agree with them that there is no power in the High Court to do so. The jurisdiction is vested in the Advocate General alone and this Court has no power to either order him to give consent for the institution of the suit or to itself give such consent for that purpose. So that no relief as prayed for, in the circumstances, can be given to the Petitioners in either case.

13. If it was open to me to go into the merits; of the cases and I have already pointed" out that it is not so open to me, I would say that the Advocate General has thoroughly considered the cases after taking evidence of the parties and

hearing them and he has exercised his discretion correctly: but even if he has erred on a question of fact that cannot be ground for interference under either of the said two Articles.

14. In consequence, both the petitions fail and. are dismissed, but there is no order as to costs.