(1992) 08 KL CK 0028

In the High Court Of Kerala

Case No : O.P. No. 1098 of 1992 E

V. Abdul Azeez and Others — APPELLANT

Vs

The Alappuzha Bar Association and Another — RESPONDENT

Date of Decision : 16-08-1992

Acts Referred:

Advocates Act, 1961 — Section 24, 6
Constitution of India, 1950 — Article 12, 226
Kerala Advocates Welfare Funds Act, 1981 — Section 23

Citation : AIR 1993 Ker 201

Hon'ble Judges : K.P. Balanarayana Marar, J

Bench : Single Bench

Advocate : N. Viswanatha Iyer, for the Appellant; S.V.S. Ayyar and M.M. Abdul Aziz, for Bar Council of Kerala, for the Respondent

Final Decision : Allowed

Judgement

K.P. Balanarayana Marar, J.—Alapuzha Bar Association by a resolution adopted in an extraordinary general body meeting held on 10-1-1992 resolved to remove 12 members from the Bar Association. The resolution Ext. R1(b) describes them as retired hands. That resolution is under challenge in this original petition filed by the expelled members who seek a writ of certiorari or other appropriate writ or direction to strike down that resolution.

2. Before joining the Bar at Alapuzha, petitioners had been in service either under the Government of Kerala, the Government of India or public undertakings. They were duly enrolled as members of the first respondent Bar Association. The Alapuzha Bar Association was incorporated u/s 28 of the Travancore Companies Act. Article 4(1) of the Memorandum of Association stipulates that membership is open to all advocates and pleaders entitled to practice in all or in any of the Civil Courts of Travancore and permanently residing within the jurisdiction of Munsiff''s Court, Alapuzha. Petitioners are eligible to become members of the association.

3. Petitioners are also members of Kerala Advocates Welfare Fund. Such membership can be obtained only through a Bar Association. Petitioners have become members of the fund through first respondent association. They continue to be on the roll of advocates under the Bar Councils Act. They were expelled from the membership in violation of the relevant constitutional guarantees and principles of natural justice solely on the ground that they are retired personnel. First respondent has not informed them of the expulsion whereas they knew about removal of membership from newspaper reports. The resolution of expulsion from membership passed against petitioners is null and void. The extraordinary general body meeting at which the resolution was adopted has no legal sanctity. It also violates the constitutional guarantee available to petitioners to practice a profession of their choice. Petitioners seek a direction in the nature of a writ of certiorari to quash that resolution.

4. On behalf of first repondent a counter-affidavit was filed by the President raising the following contentions. The association is neither a statutory authority nor other authority within the meaning of Article 12 of the Constitution of India. The association does not discharge any public duty vis-a-vis the members of the association or the general public. It is a purely private body incorporated under the Travancore Companies Act and an existing company within the meaning of Section 3 of the Companies Act, 1956. Resolutions passed by the general body of the Executive Committee of the association are not orders or proceedings of either a quasi-judicial authority or an administrative authority. Such resolutions are not amenable to the writ jurisdiction of this Court under Article 226 of the Constitution.

5. Neither the membership in the Kerala Advocates Welfare Fund nor the right of petitioners to practice law as an advocate on the roll of the Bar Council is in any way affected by the action taken against them. The expulsion from the membership of the association does not violate any of the constitutional guarantees available to petitioners nor does it amount to violation of principles of natural justice.

6. The Executive Committee of the Bar Association had met on 13-12-1991. One of the members of the Executive Committee has raised an issue regarding certain complaints received from some members of the Bar. The said complaints related to certain unprofessional conduct on the part of those lawyers who have been practising after retirement from Government service or other services. The decision to expel petitioners was taken by the general body after being convinced of the fact that continuing of the membership of the petitioners as members of the association would not be in conformity with the spirit and tradition of the Bar Association which has been in existence for more than 50 years. None of the grounds raised in the original petition would justify the prayers in the original petition. Petitioners have an alternate and effective remedy under the ordinary Civil Courts. They are not entitled to seek either a writ in the nature of certiorari or other appropriate writ order or direction. The resolution is valid in law and

within the powers of the association. The resolution of the company is not amenable to the writ jurisdiction of this Court. The petition is therefore liable to be dismissed.

7. Heard counsel for petitioner and respondents.

8. The main contention advanced on behalf of the respondents is that a writ will not lie against the Bar Association, the association being one incorporated under the Travancore Companies Act and an existing company within the meaning of Section 3 of the Companies Act, 1956. It is urged that resolutions passed by the general body of the association are not orders or proceedings of a quasi-judicial authority or even an administrative authority. The High Court under Article 226 has power to issue a writ only for the enforcement of any of the rights conferred by Part-Ill of the Constitution and for any other purpose. But in order to enable petitioners to claim a writ of mandamus they have to establish that they have a legal interest and such interest is sought to be enforced to secure the performance of a public or statutory duty. Relying on the decision in The Praga Tools Corporation Vs. Shri C.A. Imanual and Others, , learned Counsel for respondents would contend that the condition precedent for the issue of mandamus is that there is in (sic) one claiming it a legal right to the performance of a legal duty by one against whom it is sought. It was held in that decision that the company being a non-statutory body and one incorporated under the Companies Act there is neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus nor is there in its workmen any corresponding legal right for enforcement of any such statutory or public duty. It is further observed that when a mandamus or an order in the nature of a mandamus cannot be issued against a company registered under the Companies Act, the Court cannot also grant a declaration about the illegality of an agreement in favour of the petitioners therein.

9. It is the contention of learned Counsel for respondents that the Bar Association will not come within "other authorities" in Article 12 of the Constitution. Since the association has not been invested with statutory power to issue binding directions to third parties, the association is not amenable to the writ jurisdiction under Article 226 of the Constitution, argues counsel. The tests to determine whether a body is an instrumentality or the agency of the Government were laid down by the Supreme Court in Chander Mohan Khanna Vs. The National Council of Educational Research and Training and other[OVERRULED], at pp. 77-78). They are ;

"The powers, functions, finances and control of the Government are some of the indicating factors to answer the question whether a body is "State" or not. Each case should be handled with care and caution. Where the financial assistance from the State is so much as to meet almost entire expenditure of the institution, or the share capital of the corporation is completely held by the Government, it would afford some indication of the body being impregnated with governmental character. It may be a relevant factor if the institution or the corporation enjoys monopoly status which is State conferred or State protected. Existence of deep and pervasive State control may afford an indication. If the functions of the institution are of public importance and related to governmental functions, it would also be a relevant factor. These are merely indicative indicia and are by no means conclusive or clinching in any case. The combination of State aid coupled with an unusual degree of control over the management and policies of the body, and rendering of an important public service being the obligatory functions of the State may largely point out that the body is "State".

The Supreme Court observed that these are only general principles but not exhaustive tests to determine whether a body is an instrumentality or agency of the Government and that even in general principles there is no cut and dried formula which would provide correct division of bodies into those which are instrumentalities or agencies of the Government and those which are not. On the principles evolved by the Supreme Court the National Council of Educational Research and Training (NCERT) was held to be not a State.

10. Counsel also relies on the decision in P.B. Ghayalod Vs. M/s. Maruti Udyog Ltd. and others, , where the Maruti Company was held to be not an instrumentality of State though Maruti Udyog Ltd. is a joint venture company of the Government of India and Suzuki Motor Company of Japan. The reason is that the financial assistance of the State is not so much as to meet the entire requirement of the Maruti Company and the Government of India is not the only source of financing the company. It does not enjoy any monopoly status in the manufacture and sale of motor vehicles and the activities of the company are not of vital importance to the country.

11. Attention is also drawn to the decision of the Supreme Court in Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, The Supreme Court observed that a writ petition is not an appropriate remedy for impeaching contractual obligations.

12. In The Divisional Personnel Officer, Southern Railway and Another Vs. T.R. Chellappan and Others, the Supreme Court held that the remedy of Article 226 is unavailable to enforce a contract qua contract. Though Article 226 is of wide amplitude to correct manifest injustice, contractual obligations in the ordinary course without even statutory complexion cannot be enforced, It is held that a writ petition merely to enforce an agreement entered into between the employees and the Co-operative Bank about giving certain percentage of promotions to existing employees is not maintainable.

13. The contention of the learned Counsel is that the relationship of a member with the association is contractual in character. The breach of a duty which the association owes to its members does not give a cause of action to petitioner to invoke the extraordinary remedy under Article 226 of the Constitution. Enrolment of members, expulsion etc. are governed by the bye-laws of the association and

not by any statute. Since the complaint is of violation of a breach of a contractual duty the remedy if at all is an action for damages. Learned Counsel would point out that there is no allegation in the petition that any provision of any statute is violated by the expulsion of petitioners from the association, nor is there any allegation that the membership is given in pursuance to a statutory obligation. It is for the association to decide whether a person can be admitted as a member or not. If that right inheres in the association it has every right to expel a member. The expulsion of petitioners are therefore beyond challenge in an original petition under Article 226, according to counsel.

14. On the other hand, learned Counsel for the petitioners urges that the Bar Association has a public duty to the members of the association, since the implementation of the Kerala Advocates Welfare Fund Act. Counsel points out that the provisions of the Act and Rules create a legal right/duty relationship between the members and the association. When such a relationship exists the Bar Association has a statutory duty to admit advocates as members. I am referred to the decision in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, The Supreme Court observed that the words "any person or authority" used in Article 226 are not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant, according to Supreme Court, is the nature of the duty imposed on the body and that must be judged in the light of positive obligation owed by the person or authority to the affected party. If a positive obligation exists mandamus cannot be denied. The Supreme Court further observed that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute and that mandamus is a very wide remedy which must be easily available to reach injustice wherever it is found. Technicalities should not come in the way of granting that relief under Article 226.

15. In order to appreciate the contentions raised on both sides and to ascertain whether the Bar Association has a statutory or a public duty to the members of the association it is only appropriate to refer to the relevant provisions of the Kerala Advocates Welfare Fund Act (for short) and the Rules framed thereunder. The Act was enacted to provide for the constitution of a welfare fund for the payment of retirement benefits to Advocates in the State of Kerala. Advocate as defined in Section 2(a) means a person whose name has been entered in the State roil of Advocates prepared and maintained by the Bar Council of Kerala u/s 17 of the Advocates Act, 1961 and who is a member of a Bar Association. Bar Association means an association of Advocates recognised by the Bar Council u/s 13, Section 3 directs the Government to constitute a fund called the Advocates Welfare Fund, A trustee committee has to be constituted to administer the fund. Section 15 enables every advocate practising in any court in the State and being a member of a Bar Association recognised by the Bar Council to apply to the trustee committee for admission as a member of the fund in such form as may

be prescribed and on paying the requisite subscriptions. Every Bar Association has to intimate the Bar Council a list of its members as on 31 st March of every year on or before 15th of April of that year. All associations of advocates known by any name functioning in any court centre may apply to the Bar Council for recognition and registration. The decision of the Bar Council regarding the recognition and registration of a Bar Association shall be final. The payment from the fund shall be made on cessation of practice. The schedule to the Act specifies the amount payable. Section 23 of the Act as amended by Act 21 of 1989 stipulates the every vakalat filed by an advocate shall be affixed with a welfare stamp in addition to the court-fee stamps affixed thereon and no vakalat shall be valid unless so stamped.

16. The rules framed under the Act regulate the printing and distribution of welfare stamps. The Secretary of the Bar Council shall be the custodian of the stamps and he shall maintain the relevant registers mentioned in Rule 6(2) of the Rules. Sub-rule (3) of that Rule says that sale of stamps by the Bar Council shall be to the Bar Association on request made by the Associations. The President and Secretary of every Bar Association shall be responsible to the Bar Council for the distribution of stamps to its members. They shall maintain proper accounts pertaining to the same, and for this purpose shall maintain the relevant registers, one of them being a stock register showing the stock of stamps.

17. Every application u/s 15 of the Act for admission as a member of the fund has to be made in form No. 3 signed by the applicant. The form has to be attested by the President and Secretary of the Bar Association of which he is a member. The form of the register of members admitted to the welfare fund shall be in form No. 5. Column (4) of that form relates to the name of the Bar Association in which he is a member.

18. On a careful reading of the various Sub-Clauses contained in Rule 6 of the Welfare Fund Rules the position that emerges is this. The Secretary of the Bar Council is the custodian of welfare stamps and he shall maintain the relevant registers. Stamps shall be sold by the Bar Council to the Bar Associations on request made by the associations. The responsibility for distribution of stamps to its members is on the President and Secretary of every Bar Association. They are bound to maintain proper accounts and relevant registers including a stock register. It would thus appear that welfare stamps can be sold by the Bar Council only to a Bar Association and an Advocate can get the stamps only from the Bar Association of which he is a member. An advocate can become a member of the fund only on presenting an application which has to be attested by the President and Secretary bf the Bar Association of which he is a member. A statutory duty has thus been enjoined on the President and Secretary of every Bar Association to purchase welfare stamps from the Bar Council, sell the same to its members and to attest the application by a member of the association for admission to the welfare fund. The Bar Association has a further statutory duty to intimate the Bar Council a list of its members as on 31st March of every year. That has to be sent

on or before 15th April of that year. The sale of welfare stamps has to be made to a Bar Association recognised by the Bar Council. Certain statutory duties have therefore been conferred on every Bar Association which are to be performed by its President and Secretary. Those duties include attestation of the application of a member of the association for admission to the welfare fund and sale of welfare stamps to the members of the Association. Petitioners are admittedly members of Alapuzha Bar Association and they had been already admitted as members of the welfare fund. Respondents therefore owe a positive obligation to the petitioners in the matter of maintaining the relevant registers relating to the purchase of welfare stamps as well as distribution of stamps to petitioners. By the impugned resolution a classification is seen made among the advocates, one class of advocates being persons who had joined the profession after serving the State or Central Government or any other authority and others who had joined the Bar straightway after enrolling as an Advocate. Neither the Welfare Fund Act nor the Rules contemplate such a classification or division among the Advocates. Petitioners who had been admitted as members of the welfare fund are eligible to continue as members. In order to enable them to get the benefits of the fund they have to make the necessary contributions. Every vakalat filed by an Advocate has to be affixed with a welfare stamp. Since the stamps can be sold by the Bar Association only to one of its members the right of petitioners to practice the profession of law will be affected in case they are not supplied with the requisite number of welfare stamps. To practice the profession, petitioners have to file vakalats before courts and other authorities and those vakalats are to be affixed with a welfare stamp. If petitioners cease to be members of the Bar Association there is no possibility of the sale of welfare stamps to them with the result that they will be prevented from practising the profession which will amount to a violation of a fundamental right to practice a profession. As observed by the Supreme Court in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, the words "any person or authority" used in Article 226 are not to be confined to statutory authorities and instrumentalities of the State alone. They may cover any other person or body performing a public duty or a statutory duty. The Bar Association is performing a statutory duty in the matter of purchase and distribution of welfare stamps. Any member of the Bar Association who is bound to affix every vakalat filed by him with a welfare stamp can get the same only through the Bar Association of which he is a member. When once that right is infringed consequent to the expulsion by the Bar Association every member has a right to get the statutory duty of the Bar Association enforced by resorting to the extraordinary remedy under Article 226 of the Constitution of India.

19. In this connection learned Counsel for respondents would point out that petitioners could purchase welfare stamps from the Bar Association and that the expulsion will not disentitle them from getting welfare stamps. The contention is that petitioners had only ceased to be members of the association whereas their right to practice law is not in any way affected by the resolution. One fails to

understand as to how petitioners are in a position to practice law when they are not able to get welfare stamps which can be sold by the Bar Association only to members of the association. Expulsion from membership of the Bar Association will therefore virtually disable petitioners from practising the profession. That disability is caused on account of the action of the Bar Association in expelling petitioners from the membership of the association. There has thus been violation of a statutory duty on the part of the Bar Association.

20. Now regarding the relief to be granted. It is strenuously contended by learned Counsel for respondents that a writ of certiorari will not lie against the Bar Association. The relief claimed in the petition is a writ or direction in the nature of certiorari or any other appropriate writ or direction to quash the resolution of the Bar Association. A writ of certiorari can be issued only to correct the errors of a court or a quasi-judicial body, argues counsel. The decision in Radeshyam Khare and Another Vs. The State of Madhya Pradesh and Others, is cited by the counsel. The three requisites in order that the act of a body may be quasi-judicial were laid down by the Supreme Court. They are : The body of persons (i) must have legal authority; (ii) to determine questions affecting the rights of parties and (iii) must have the duty to act judicially. The determining test for ascertaining whether an act authorised by a statute is a quasi-judicial act or an administrative act is whether the statute has expressly or impliedly imposed upon the statutory body the duty to act judicially as required by the third condition. It is observed that the question whether or not there is a duty to act judicially must be decided in each case in the light of the circumstances of the particular case and the construction of the particular statute with the assistance of the general principles laid down in judicial decisions. It is held that where an authority which is not a court is empowered by the statute to decide a dispute between parties and there is nothing in the statute to the contrary, the authority is under a duty to act judicially and the decision of the authority is a quasi-judicial act. The object of the writ of certiorari is to keep the exercise of powers by judicial and quasi-judicial tribunals within the limits of the jurisdiction assigned to them by law and to restrain from acting in excess of their authority. The contention is that the Bar Association is not a quasi-judicial authority whereas it is an association of individuals which does not exercise any quasi-judicial function. The Bar Association had been registered as a company under the Travancore Companies Act and an existing company under the provisions of the Companies Act, 1956. That being so it cannot be said that the association is a quasi-judicial authority. In that view a writ of certiorari may not lie against the association.

21. The question of issue of a writ of mandamus does not arise, according to the counsel for respondents since there has not been a demand for justice and refusal. Counsel would point out that a demand for justice and its refusal must precede the filing of a petition asking for direction or writ of mandamus. Counsel would also point out that a writ of mandamus is not claimed in the original petition. On the other hand, learned Counsel for petitioners urged that

appropriate relief can be granted by the court in the nature of a writ of certiorari or in the nature of a writ of mandamus or other appropriate direction in order to meet the ends of justice and to prevent injustice. Pointed attention is made to the observation of the Supreme Court in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, that mandamus is a very wide remedy which must be easily available to reach injustice wherever it is found.

22. In order to claim a writ of mandamus petitioner must have a legal right to enforce the performance of the alleged duty. In other words, before mandamus is issued it must be shown that a duty towards the petitioner has been imposed upon by a statute. If that be so, mandamus will lie against a private person or a body if he or the body is entrusted with a public duty by statute and he or the body has failed in the performance of such duties. It is not necessary that the person or the body should hold a public office. What is required is that there must be an obligation on the person or the body imposed by the statute. When that person or body commits default which constitutes a breach of duty an individual can compel that person or body to exercise that power. A statutory duty having been imposed on the Bar Association by the Act and the Rules and the expulsion of petitioners from the association amounts to a violation of such duty a writ of mandamus will lie against the Bar Association to compel them to exercise those duties. The result of such a direction will be to enable petitioners to continue as members of the Bar Association without which it will not be possible for them to practice the profession of law.

23. Regarding issue of writ of certiorari, these writs are usually issued not only to quash the decision of an inferior court but also to quash the decision of any administrative body or tribunal which comes within the ambit of the term "quasi-judicial". The contention is that the Bar Association is not a local authority to determine questions affecting rules of subjects and unless there is an order of determination by such a local authority certiorari will not lie. That the Bar Asociation is a private body cannot be disputed. But a writ of certiorari would lie against a private institution or body if it is created by a statute with the power to inflict civil consequences upon individuals or to decide the disputes between them or such body or institution has been so constituted or managed that it may be held to be an agency or instrumentality of the State within the meaning of Article 12 of the Constitution. True the Bar Association is not created by a statute. But its decision to expel petitioners visits certain civil consequences on the petitioners. Though not created by a statute the Bar Association has some statutory functions and duties to perform in relation to the purchase and sale of welfare stamps and the recommendation of an advocate for admission to the welfare fund. An injustice has therefore been done to the petitioners by expelling them from the Bar Association disabling them from practising the profession. The retention of the resolution will only amount to perpetration of injustice. As observed by the Supreme Court in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and

Others, this Court has to set right the injustice wherever it is found. Though a writ of certiorari or a writ of mandamus in the technical sense may not lie it is possible for this Court to issue a writ in the nature of certiorari to quash the resolution. What is required is annulling of the resolution. A writ in the nature of mandamus need not be issued since the quashing of the resolution by itself is sufficient to grant proper relief to petitioners. When once the resolution is quashed petitioners continue to be members of the Bar Association and such continuance will enable them to get the requisite stamps from the Bar Association and practice the profession. A direction in the nature of mandamus to the Bar Association to permit them to continue as members is therefore unnecessary.

For the aforesaid reasons the original petition is allowed and the resolution Ext. R1(b) is quashed.

24. Before parting with the case I express my disapprobation of the manner in which petitioners were expelled from the Bar Association. They were admitted as members and continuing as such and were admitted to the Advocate Welfare Fund as well. From the resolution it appears that they were expelled since they were ''retired hands''. The members of the association who voted the resolution should have realised that the members of the legal profession occupy a high status and carry high responsibilities. From them a much higher standard of conduct and caution is expected. They are not only the agents of the persons who engaged them in a case but are also officers of the court expected to assist the court in the administration of justice by all means in their power. Sri S. C. Sarkar in "Hints on Modern Advocacy and Cross-examination", Fourth Edition, 1985 says at page 39 thus:

"Lawyers owe a duty towards their colleagues. They should do everything to encourage the spirit of comradeship and brotherhood and to avoid ''the barren graces of the nil admirari''. There is no profession which binds its members in closer fraternity than the profession of law."

The learned author observed that the Bar is a democratic institution and the members whatever their standing may be are entitled to equal treatment and the same privilege. A junior appearing as his opponent is entitled to be treated by the senior with the consideration and deference due to an advocate of equal standing. It is observed that fraternity in the Bar levels down all inequalities and rounds off angularities. The learned author quotes the following observation of Justice Walsh:

"There is no more truly democratic profession in the world, and there is no stronger trade union. Every man from the moment of his call has the same rights and privileges as the most eminent of his colleagues excepting of course the law officers and the King''s counsel .... within the profession everyone is on the same social level."

25. Petitioners may have been called to the profession after the service of the

State Government or the Central Government or other authorities. That should not have been taken as disqualification to practice the profession nor can their right be denied for the reason that the professional prospects of other advocates are adversely affected by their entry. Before closing the doors on petitioners the sponsors and supporters of the resolution should have considered the rich experience petitioners have over the years. Before concluding the attention of the Bar Association is drawn to the following observation of Justice Hidayatulla, former Chief Justice of the Supreme Court.

"A lawyer is a kind of person who may be born but a lot of making goes into a real lawyer and in the end is rather made than born."

