

(1926) 03 MAD CK 0092
In the Madras High Court

Vaithilinga Pandara Sannidhi Audhinakartha Tiruvaduthurai
Adhinam

APPELLANT

Vs

Sadasiva Iyer and Others

RESPONDENT

Date of Decision : 08-03-1926

Acts Referred:

Citation : AIR 1926 Mad 826

Hon'ble Judges : Srinivasa Aiyanger, J

Bench : Single Bench

Judgement

Srinivasa Ayyanger, J.—This and the other applications in the connected suits are in the name and on behalf of the Secretary of State for India in Council for the purpose of his being added as a party to the suit presumably as party defendant. The main object of each of the suits is to obtain a declaration that the Madras Hindu Religious Endowments Act I of 1925 is invalid and ultra vires, and on the basis of such declaration the plaintiff has asked for a relief by way of injunction which is merely a relief consequent on the declaration.

2. The plaintiff in each of the cases is the head of a mutt or religious endowment and the only defendant to each of the actions is the Board of Commissioners for the Madras Religious Endowments, a body, it may be observed in passing, created and constituted by the said Act.

3. The question for determination, therefore, is whether on the application I should direct the Secretary of State being added as party defendant in these Suits. The question is of considerable importance and of great difficulty though I did not realize the full extent of either till I was more than half-way through the hearing. It has been argued with much learning and light, and also some little warmth on both sides, and I took time to consider my judgment not only having regard to the importance of the question to the parties, but also to the general principle on which alone it seemed to me that a satisfactory solution can be arrived at. If it had been an ordinary case, I should probably have had very little difficulty in persuading the parties to agree to the addition of the party on

conditions which may be regarded as equitable in the circumstances.

4. It was with this view that almost at the very commencement of the discussion I asked the learned Advocate-General who appeared for the applicant whether he had any instructions to agree as to any conditions as to costs. He said he had none. Some days thereafter he again appeared before me and intimated that, so far as the applicant was concerned, he had definite instructions not to consent to any conditions. He, however, at the same time intimated that he had received a communication from the President of the Board of Commissioners to the effect that if in the action the plaintiff should fail, the Board of Commissioners would consent to only one set of costs being allowed to the defendants and that they would be willing to allow the Secretary of State to take such one set. It is obvious that the two things are not and cannot be the same, and that in these cases a set of costs to the Board of Commissioners must mean something very different to a set of costs to the Secretary of State, at any rate as at present represented in the action. Further I felt that such orders should, if at all, be passed only by consent of all parties. The plaintiff, however, refused to agree to any such arrangement and has asked me to decide the question raised, and having regard to the great importance of the matter, and the likelihood of its being taken up elsewhere, sooner or later, I have deemed it fit to deal with the application directly and dispose of it on its merits.

5. The first observation that falls to be made with regard to the present application is that it is one for joinder of a third party as party defendant, and made by the third party himself and not by the plaintiff or the defendant in the action. I have felt it necessary to state this because it seems to me that different considerations should apply to applications for joinder of additional parties when the party sought to be added is party plaintiff or party defendant and also when the application for such joinder is made by the party sought to be added or by either of the parties already on the record and if so, which of them. I will not pause to refer to all such considerations. In such a case as the present one, however, it is obvious that if a third party's application to be added as party defendant were opposed by both parties, I should have had very little hesitation in rejecting the application unless I were satisfied that the party sought to be added was not only a proper party but a necessary party. Having regard, however, in this case to the learned and strenuous argument in support of the application by Mr. Venkataramana Sao on behalf of the Board of Commissioners I have felt bound to regard it virtually as an application by both. The question thus resolves itself into this: Should the plaintiff in this case be compelled to litigate against not only the defendant of his choice against whom he has prayed for the reliefs consequent on the declaration but also against the Secretary of State? I did not understand either the learned Advocate-General who argued the application on behalf of the applicant, the Secretary of State, or even Mr. Venkataramana Rao for the Board of Commissioners, to argue that the applicant was a necessary party to the suit in the sense in which that expression is understood in the law relating to parties to actions, that is to say, in other words,

as a party without whom there can be no properly constituted suit, having regard to the cause of action alleged and the relief claimed. If it is to be only a question of a permissible party, then on principle it follows that such cannot generally be ordered when it is opposed by the person to fight whom he is so brought on the record. Thus, when "A" institutes a suit on title to recover certain property from "B", "C" should not be made additional plaintiff if "B" should object to it, except perhaps in the case of one possible, exception of the title to the property between A and C being alternative in its proper sense. The principle is even stronger in the case of a plaintiff as against whom another defendant is sought to be added. It is the plaintiff that comes to Court alleging a cause of action as against him. The very basic principle of judgments inter partes is that the judgments are not judgments in rem but declaratory and operative only as between them. The plaintiff being generally dominus litus, I fail to see on what principle of justice he can be compelled to fight against some other litigant not of his own choice unless such a process is required by a positive rule of law.

6. The question thus further resolves itself into this : whether in such an action the Secretary of State is a proper party having regard to the rules relating to the joinder of defendants. It was on this basis that the question was really argued by all the parties. It is C. 1 of the First Schedule to the Civil P.C. that lays down the rules regulating the joinder of parties. Rule 3, no doubt, relates to joinder of defendants, but both in form and substance it is merely permissive and relates only to what the plaintiff may do if he were so minded. It is Clause 2 of Rule 10 that applies to the present case. It provides that the Court may, on any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any person, who ought to have been joined as defendant or whose presence before the Court may be necessary in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit, be added.

7. It has not been suggested in this case that the applicant, the Secretary of State, is a person who ought to have been added as party defendant in the suit. The contention was that the presence before the Court of the Secretary of State in this case would be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit. If the expression in this clause had not been the word " necessary" but merely "desirable" a great deal might have been said for the argument adduced in support of the application. But at no stage of the discussion was I able to understand the learned gentleman that argued in support of the application to make out that the presence before the Court of the Secretary of State was necessary. The necessity referred to in the clause is for the purpose of enabling the Court effectually and completely to adjudicate upon and settle all the questions involved in a suit. It is obvious that this clause cannot be read as requiring that all persons who have, or claim to have, or are likely to have, any sort of right, title or interest in respect of any portion of the subject-matter of a

suit should all be made parties.

8. If it be borne in mind that the suit by a plaintiff for certain reliefs is. against certain persons as defendants, and that judgments of civil Courts are not judgments in rem, then it follows that the questions involved in the suit are only questions with regard to the right set up and the relief claimed on the one side and denied or" withheld on the other. The expression therefore " all the questions involved in the suit can only be questions as between the parties to the litigation. The phrase "to enable the Court effectually and completely to adjudicate upon and settle" would seem really to indicate that the addition of the party should be ordered only if in the opinion of the Court in the absence of the party it cannot effectually and completely adjudicate and settle all the questions. In these cases there is no question of the Court not being able to effectually adjudicate and settle any question. So far as I was able to see, the entire argument in support of the, application was. based on the position that in the absence of the Secretary of State the Court would not completely adjudicate upon and settle all the questions involved in the suit. In other words the contention was. that the Secretary of State was a proper party to every suit in which any question was raised with regard to the legality of any statute, and that in the absence of the Secretary of State as a party in any such suit there can be no completeness of adjudication within the meaning of the rule. I confess that at first I was a little impressed with this argument. But as against this, there are found heaps of cases in the reports both in this country and elsewhere in which the question of whether a particular legislative enactment was intra or ultra vires was decided merely as between the parties to the litigation without any representation in the suit either of the Crown or of the public. But it may, no doubt, be remarked that in none of those cases the question has been raised or decided. The only case that has been cited before me in which there can be said to be any indication with regard to this matter is. the case of *Cunningham v. Tomez Homma* [1903] A. C. 151.

9. The question in that case was whether a. particular provision was ultra vires of a Provincial Legislature and the Attorney-General of the Province was allowed to intervene at some stage. There is no decision in the case as to, whether he was- either a necessary or proper party and their Lordships of the Judicial Committee do not even refer to it. I am unable, therefore to regard it as a decision at all bearing on the point.

10. The case of *Esquimalt & Nanaimo Railway Company v. Wilson* [1920] A.C. 358 was also cited for the applicants and relied upon. The property which was the subject-matter of that action had been the subject of a grant by the Crown and the question that arose was whether in such an action the Attorney-General of the Province was a necessary party. At page 364 (App. Cas. Lord Buckmaster, who delivered the judgment of their Lordships of the Judicial Committee, observes as follows:

The learned Judges of the Court of Appeal from whose judgment their Lordships

feel compelled to differ upon this point, do not refer to the rights of the Crown which may be affected, but base their opinion solely on the ground that the Crown is not affected by the result and that consequently a mere declaratory order against the Crown would be of no value. But for the reservation of the rights already referred to, their Lordships would have agreed with this conclusion.

11. At page 368 (App. Cas.) occurs the following sentence:

It is true that in these circumstances certain rights which the Crown possesses, if the grant be good, will be interfered with.

and at" page 369 their Lordships concluded by saying that they,

therefore, think that the Crown is affected in this matter, so that the presence of the Attorney-General is proper and necessary for the determination of justice.

12. It is not contended in this case that by reason of any adjudication as between the original parties to the action, the rights of the Secretary of State would, in any manner or measure, be affected. It is, therefore, not a case falling under the rule that the officer representing the Crown is a necessary party to every action as the result of which the rights of the Crown may be affected. The question would, therefore, have to be determined merely on a consideration of, whether in the absence of the Secretary of State as a party to the action it is impossible to have a complete adjudication upon and settlement of all the questions involved in the suit. All the learned gentlemen that appeared at the Bar and argued the point on behalf of the various parties state that they were unable to find any decision bearing directly on the point.

13. I have, therefore, to arrive at a conclusion on first impression and on what I conceive to be the general principles applicable. The conclusion I have thus arrived at is this : If the expression all questions involved in the suit should be regarded as absolute and not merely relative be the parties before the Court, then the Secretary of State may in this case be regarded as a proper party and not otherwise. But it seems to me that there is neither principle nor authority that can be discovered for regarding such an expression as all the questions involved in a suit appearing in a rule relating to joinder of parties as absolute and not relative.

14. The whole scheme of the Civil Procedure seems to me to point to a suit being regarded as a suit for relief as against definite defendants, as a trial being one only as between the parties and an adjudication as one only binding them. If a plaintiff should claim certain property, and it should be regarded that the question involved in the suit is generally whether he is the owner of the property and not whether as against any other particular person, he is entitled to certain rights over property, very serious consequences are sure to ensue and procedure in our Courts of law is certain to become exceedingly complicated and much more disastrously prolonged than it is at present.

15. At this stage I may with advantage refer to two decisions that have been

cited at the Bar. Mr. S. Srinivasa Iyengar for the plaintiff referred to the Case of Moser v. Marsden [1892] 1 Ch. 487. In that case the plaintiff, the patentee of a machine, brought the action against the defendant for using a machine which he alleged was an infringement of his patent. One Mont-forts, the maker and patentee of the defendant's machine, applied to be added as defendant alleging that the judgment in the action would injure him and that the present defendant would not efficiently defend the action. The Court of appeal consisting of Lord Justice Lindley and Lord Justice Kay reversing the decision of the Court below, held that Mont-forts not being directly interested in the issues between the plaintiff and the defendant, but only indirectly and commercially affected, the Court had no jurisdiction to add him as a defendant. Lord Justice Lindley at pages 489 and 490 (1 Ch.) observes as follows:

But reliance is placed on the following words of the rule, which provide for adding the names of parties "whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter." But what is the question involved in this action? The question, and the only question, is whether what Marsden is doing is an infringement of the plaintiff's patent.

16. And again, later on, that eminent Judge says:

Can it be said that the rule prevents the plaintiff from proceeding against a defendant without having to litigate with everybody who may be in any way affected, however indirectly, by the action ? It appears to me that it does not. The counsel for the applicant grounded his argument on the allegation that Montfort's interest would be affected by the decision in this action. It is true that his interest may be affected commercially by a judgment against the defendant, but can it be said that it would be legally affected ? Can we stretch the rule so far as to say that whenever a person would be incidentally affected by a judgment he may be added as a defendant ?

17. And Lord Justice Kay at pages 491 and 492 (1 Ch.) observes as follows:

No doubt the judgment in the present case may indirectly affect Montfort's patent ; but the answer to that is that whether it would affect it or not, this rule does not apply to such a case. Montfort says that the defendant will not contest the case properly, and will not conduct the defence so energetically as he would. But we cannot help that.

18. It seems to me that if ever a case can be conceived which would fall directly within the words of the rule already referred to this was such a case. There was a defendant, who, when sued by the plaintiff for infringement of a patent right, sought to justify his action on the patent right of a third party ; and if the terms of 01. 2 of E. 10 should be taken absolutely as contended for, it would have seemed to be a clear case in which, for the purpose of effectually and completely adjudicating upon and settling all questions involved with regard to the patent right of the plaintiff, it was not only proper but necessary that this

other patentee should have been added as party defendant. But the Court of appeal said no and decided that he was not a proper party on the ground, I take it, that the words of the rule should be construed not absolutely but relatively. It is a very strong case and I confess almost repugnant to common sense. But the words of the statute that their Lordships of the Court of Appeal were considering were identical with the words which I have to consider and it has not been shown that this decision of the learned Judges has ever been overruled. It must also be observed that their Lordships refused to make the other patentee a party to the action even though they came to the conclusion that by reason of the decision the commercial interest of the other party would be seriously affected.

19. Mr. Radhakrishnayya referred to *Norris v. Beazley* [1877] 2 C.P.D. 80. It was an action on a bill of exchange against the acceptor, originally, and the defendant sought to add the name of a company which he alleged was the party really liable and which had also in the same matter a counter claim against the plaintiff. Justice Coleridge makes in that case observation which I may here re-produce. At p. 83 (2 C.P.D.) that learned Judge observes:

Now this, although it is not a case of making a person a plaintiff against his will, is certainly the case of making a person a plaintiff in respect of a defendant as to which he does not desire to be a plaintiff without his consent.

20. Again that learned Judge at p. 81 (2 G.P.D.) lays down that

the defendant to be added must be a defendant against whom the plaintiff has some cause of complaint, which ought to be determined in the action, and that it was never intended to apply where the person to be added as defendant is a person against whom the plaintiff has no claim and does not desire to prosecute any.

21. He proceeds thus:

It seems to me that this application is answered, and that it was not intended that persons in the position of this Company should be added as defendants, merely for the convenience of another defendant. It seems to me that it is the more important to construe this rule strictly, because it is obvious that, in many cases, if the defendant's contention is right, its provisions might be made use of in a manner exceedingly harassing the plaintiffs, by forcing them to include in their actions persons against whom they do not seek to proceed, and to mix up their rights as against one person, with questions of a highly complicated nature arising between themselves and the others.

22. At p. 85 (2 C.P.D.) Justice Denman says:

I am quite clear, however, that the Court ought not to bring in any person as defendant against whom the plaintiff does not desire to proceed unless a very strong case is made out, she wing that in the particular case justice cannot be done without his being brought in.

23. The foregoing observations seems to me to lay down in very clear and unmistakable terms the principle applicable to such a case as the present. On these principles I cannot possibly see my way to add the applicant as a party defendant to the action. I am further unable to understand why the Secretary of State is sought to be made a party to the action at all. The only suggestion on which such a joinder can be supported is that it is necessary that the declaration that the Act is ultra vires should be obtained in the presence of the Secretary of State. But the Secretary of State so far as the Civil P.C. is concerned represents merely the Government or the Sovereign and can under the present system be regarded if at all only as part of the legislative machinery. There is no principle for even suggesting that any declaration as against him will be effectual and binding as against all other possible persons such as Committees and other bodies and officers that may be constituted or created under the Act now in question.

24. There is no cause of action alleged against the applicant, and no relief whatever claimed against him. On a proper construction of the rule I feel constrained to hold that the applicant is not a proper party to the suit. The plaintiffs have complained of certain actions by the Board of Commissioners which would undoubtedly be unlawful but for the Endowments Act. They, therefore, ask for an injunction on the ground that the Act which is held up as a shield by the defence is really not available to them because it is illegal and ultra vires.

25. The declaration, therefore, as against the defendants must be regarded as merely ancillary to the relief claimed. On principle and authority I have, therefore, come to the conclusion that the Secretary of State is neither a necessary nor a proper party and that as the plaintiffs oppose his being joined as additional defendant I would not be justified in adding him as a party defendant even as a person brought in merely to look on and see fair play to use the words of Lord Macnaughten in the case of *Duke of Bedford v. Ellis* [1901] A.C. 1. Even as a sort of harmless and permissible party I am satisfied he could not be added when such addition is opposed by the plaintiff and more so when on behalf of the applicant, there has been an express refusal to submit to any condition as to costs.

26. Having regard to the number and variety of legislative bodies and authorities in the country at the present day, paramount, imperial, local, delegated, subordinate, etc., I feel that questions of ultra vires are certain to be raised in the Courts in increasingly large numbers of cases and I refuse to contemplate with equanimity the prospect, of the Secretary of State for India being required by every defendant to be made a party in every one of them.

27. In the result the application must be dismissed with taxed costs for the plaintiffs in each of the cases and it is ordered accordingly.