the Act is a summary remedy in addition to the ordinary remedy and not in substitution thereof. It cannot, therefore, be held that if a mortgagor does not avail of that remedy or if his petition is dismissed without holding that his right to redeem had got extinguished, he is debarred from filing a suit for redemption of the land in the civil Court within the period of limitation provided under the Limitation Act. It is only if the Collector holds that the mortgage does not subsist and the mortgagor has no right to redeem it, that he will be debarred from filing any suit other than a suit to set aside that order of the Collector under section 12 of the Act, which has to be filed within one year of the date of the order. Such was the case in *Kaura and another* v. *Ram Chand and another* (2), on which great reliance has been placed by the learned counsel for the respondents, but the ratio of which cannot be applied to the facts of these appeals.

(6) For the reasons given above, I am of the opinion that the suits filed by the appellants against the respondents were maintainable and were not barred under any provision of the Act and that the decision on the preliminary issues should have been rendered in favour of the plaintiffs-appellants. I accordingly decide all the preliminary issues in favour of the plaintiff-appellants, set aside the judgments and decrees of the learned Single Judge in all the three cases and remand them to the learned trial Court for decision on merits. In the circumstances of the case, there is no order as to costs.

DHILLON, J.—I agree.

N.K.S.

Before R. S. Narula & M. R. Sharma, JJ.

BAWA AMRITA NAND GIR,—*Petitioner.*

versus

THE ADVOCATE-GENERAL, PUNJAB & OTHERS,—*Respondents.*

C.W. 3077 of 1970.

April 10, 1974.

Code of Civil Procedure (Act V of 1908)—Section 92—Constitution of India (1950)—Article 226—Advocate-General while giving

(2) A.I.R. 1925 Lahore 385.

consent to the institution of a suit under section 92—Whether acts judicially or in a quasi-judicial capacity—Order under section 92 granting consent—Whether amendable to the Writ jurisdiction of the High Court—Advocate-General refusing such consent for extraneous, irrelevant or non-existent reasons—Writ of mandamus—Whether can be issued directing him to do his duty.

Held, that where an officer or other authority is not bound by any rule of law to hold an enquiry and to act strictly in accordance with the facts and circumstances of the case as they emerge from the enquiry, he does not act judicially or quasi-judicially. A judicial or quasi-judicial act involves a decision as to the rights of the parties and affects their interests. Section 92 of the Code of Civil Procedure, 1908, does not require the Advocate-General to hold any enquiry or to give any opportunity of hearing to the party which is likely to be affected by the giving of his consent thereunder. While giving his consent under this section he does not also give any decision on the merits of the controversy one way or the other and it is open to the Court in which the action permitted by him is brought to entertain and decide any questions of law or of facts which are raised before it by the concerned parties. Hence on the application of the tests of distinction between the administrative or executive functions and orders on the one hand, and judicial or quasi-judicial functions on the other, it has to be held that the Advocate-General, while giving his consent to the institution of a suit to two or more persons under section 92 of the Code does not act either judicially or in a quasi-judicial capacity.

Held, that an order passed by an Advocate-General under section 92 of the Code granting consent to the institution of the suit is impregnable in proceedings under Article 226 of the Constitution and is not amendable to the Writ jurisdiction of the High Court. However, in a case where the Advocate-General refuses to exercise the duty enjoined on him by section 92 of the Code for reasons which are either extraneous or irrelevant or non-existent, it is open to the High Court to issue a writ in the nature of Mandamus directing him to do the duty enjoined on him by the section.

Case referred by the Hon'ble Mr. Justice R. S. Narula to a Large Bench on 1st September, 1971, for decision of an important question of law involved in the case. The Division Bench consisting of Hon'ble Mr. Justice R. S. Narula and Hon'ble Mr. Justice M. R. Sharma finally decided the case on 10th April, 1974.

Petition under Articles 226 and 227 of the Constitution of India praying that a writ in the nature of Certiorari, Mandamus or any other appropriate writ, order or direction be issued quashing the impugned order, dated 4th June, 1970, passed by respondent No. 1.

Roop Chand and Mr. M. Puri, Advocates, *for the petitioner.*

H. L. Mital, Advocate, *for the respondent.*

REFERRING ORDER

NARULA, J,—On or about December 10, 1946, Nanak Chand and four others filed a suit against Amrita Nand Gir petitioner and one Somwar Gir alias Jiwan, for a declaration to the effect that the gift made by Somwar Gir (defendant No. 2 in that suit) in favour of the petitioner (defendant No. 1 in that suit) regarding Dharamshala Chainpuri together with shops and temples attached thereto situate in bazar Nauhrian and the shops and houses situate in bazar Bhairon within the *abadi* of Jullundur City, was unlawful and null and void, and based on wrong facts and that Amrita Nand Gir defendant (petitioner before me) could have no right in the aforesaid property mentioned in the deed of gift. Annexure 'A' to the writ petition is a copy of the plaint of that suit. The suit was dismissed by Shri Tek Chand, Senior Subordinate Judge, Jullundur, on December 7, 1948, without framing issues on merits as it was held that the plaintiffs should have brought a suit for possession as the property was not proved to be wakf property and the plaintiffs were out of possession. That jugdment was later set aside by the High Court on October 12, 1955, on the finding that the case had not been properly tried and that comprehensive issues covering all the points in dispute between the parites should have been framed and decision given upon them. The suit was remanded to the trial Court for decision accordingly.

(2) In the post-remand proceedings, the suit was disposed of by Shri Chetan Dass Jain, Senior Subordinate Judge, Jullundur, on January 16, 1956. A copy of that judgment is Annexure 'B' to the writ petition. It was held that the gift by defendant No. 2 in favour of defendant No. 1 held good so long as the Bhaikh did not intervene and so long as some public spirited Sevak of the institution did not take necessary action under section 92 of the Code of Civil Procedure for the removal of defendant No. 1 (writ-petitioner) from the institution on account of his unworthy acts in claiming adverse title to it. Nanak Chand and others, the plaintiffs in that suit, preferred Regular First Appeal 78 of 1956, against the judgment and decree of the trial Court dismissing their suit. That appeal was, however, dismissed by Tek Chand J., on August 14, 1957, on account of non-prosecution, as the plaintiffs-appellants had failed to deposit the

printing charges for the preparation of the appeal paper-book despite grant of several opportunities. Annexure 'C' is a copy of the High Court order.

(3) Gian Chand and four others then moved the Advocate-General for the State of Punjab for his consent in writing under section 92 of the Code of Civil Procedure for instituting a suit for removal of the writ-petitioner and for dispossessing him from the management of Dharamshala Chainpuri. The requisite sanction was granted by Shri S. M. Sikri (now the Chief Justice of India), the then Advocate-General on November 28, 1960. A copy of the plaint of the suit which was then filed in pursuance of the said sanction is Annexure 'E' to the petition. That suit was ultimately dismissed by the judgment of Shri Ranjit Singh Sood, Subordinate Judge, First Class, Jullundur, dated October 29, 1962 (Annexure 'F'). Regular First Appeal 102 of 1963, preferred by the plaintiffs in that suit was dismissed by a Division Bench of the High Court (S. B. Kapoor and I. D. Dua, JJ.), on October 20, 1965, on account of non-prosecution. A copy of that order is Annexure 'G' to the petition.

(4) Thereafter the present respondents 2 to 6 (none of whom was a plaintiff in either of the two previous suits) made an application (copy Annexure 'H') to the Advocate-General, Punjab, for his sanction under section 92 of the Code of Civli Procedure for filing a suit for the removal of the defendant (the writ-petitioner) from the management of the trust property known as Bagichi Chainpuri, and for hte appointment of a new Manager of the institution and vesting the property in the new Manager and for directing the defendant to deliver possession of the trust property, and render accounts, etc. The present petitioner filed written objections to the grant of permission under section 92. A copy of those objections is Annexure 'I' to the petition. After hearing counsel for both sides, Shri Hira Lal Sibal, Advocate-General, Punjab, passed a detailed order (copy Annexure 'J') granting the sanction prayed for and directing respondents 2 to 6 to file a plaint in the office of the Advocate-General, Punjab, by the 15th of August, 1970.

(5) It is the common case of the parties that the plaintiff was filed, signed by the Advocate-General, and suit in pursuance thereof (copy Annexure R. 1) filed in the Court of the District Judge,

Jullundur. It is at this stage that the present petition was filed by Bawa Amrita Nand Gir on September 19, 1970, to quash the order of the Advocate-General (Annexure 'J') under section 92 of the Code of Civil Procedure as being illegal, without jurisdiction, unconstitutional and improper.

(6) The only ground on which the petition has been pressed before me by Chaudhry Roop Chand, the learned Advocate for the petitioner, is that the Advocate-General had no jurisdiction to grant permission under section 92 of the Code to the respondents, as they are deemed to be bound by the judgment of the competent civil Court in the two previous cases on principles of constructive *res judicata*. It may be noticed that though the suit filed by Nanak Chand, etc., was a representative suit filed under Order 1 Rule 8 of the Code, the second suit has not been filed in a representative capacity. Chaudhry Roop Chand, however, submitted that according to the law laid down by their Lordships of the Supreme Court in *Ahmad Adam Sait and others* v. *M. E. Makhri and others* (1) (paragraphs 15 to 17 of the A.I.R. report), a suit filed under section 92 of the Code is as much a representative suit as one filed under Order 1 Rule 8 of the Code and binds everyone, irrespective of his being or not being a party to the suit. Mr. H. L. Mital, learned counsel for respondents 2 to 6 has on the other hand argued that in giving permission under section 92 of the Code, the Advocate-General has not given any decision on the rights of the contesting parties which are affected by the permission, but has merely opened the gates of the Court for his clients, and that all pleas like that of constructive *res judicata* can be taken by the writ-petitioner in his defence to the suit on merits. He has further urged that in any event this Court has no jurisdiction in exercise of its powers under Article 226 of the Constitution to set aside the order of the Advocate-General under section 92 of the Code, as that is a purely administrative decision which is not amenable to a writ in the nature of certiorari. Mr. Roop Chand has tried to repell that argument on the basis of the judgment of a learned Single Judge of the Pepsu High Court (Mehar Singh, J., as he then was) in *Sadhu Singh, Sunder*

(1) A.I.R. 1964.

Singh and others v. *Mangalgir, Mohatmim Dera and another* (2). Following the judgment of the Travancore Cochin High Court in *Abu Backer Adam Sait and others* v. *Advocate-General of Travancore Cochin State and others* (3), and differing from the view which had been taken by the Chief Court of Lahore in *Dhian Das* v. *Jagat Ram* (4), as also the view taken by the Rajasthan High Court and the Allahabad High Court in *Shrimali Lal Kasliwal and others* v *Advocate-General and others* (5), and *Swami Shantanand Sarswati* v. *Advocate-General, U.P. Allahabad and others* (6), respectively, the learned Judge held that the functions of the Advocate-General under section 92 of the Code are judicial in nature and not administrative or executive, and, therefore, such decisions are amenable to a writ under Article 226 of the Constitution on a question of jurisdiction, or on account of there being a patent error of law apparent on the face of the record.

(7) Besides relying on the judgments of the Allahabad and Rajasthan High Courts to which reference has already been made, Mr. H. L. Mital has referred me to the Full Bench judgment of the Kerala High Court in *A. K. Bhaskar* v. *Advocate-General* (7), wherein the law laid down by the Travancore Cochin High Court in the *case of Abu Backer Adam Sait and others* (supra) was expressly overruled, the law laid down by the learned Single Judge of the Pepsu High Court was not approved, and the view of the Allahabad and Rajasthan High Courts was adopted. Wanchoo, C.J. (as he then was), who prepared the judgment of the Division Bench of the Rajasthan High Court in *the case of Shrimali Lal Kasliwal and others* (supra), observed that the function of the Advocate-General under section 92 of the Code cannot be called a judicial or *quasi-judicial* function, and, therefore, there is no question of revising it under Article 227, or issuing a writ under Article 226 compelling him to do anything. The view taken by the Tranvancore Cochin High Court was expressly dissented from by the Division Bench of

(2) A.I.R. 1956 Pepsu 65.
(3) A.I.R. 1954 Travancore Cochin 331.
(4) 104 Punjab Record 1910=8 I.C. 1162.
(5) A.I.R. 1955 Rajasthan 166.
(6) A.I.R. 1955 Allahabad 372.
(7) A.I.R. 1962 Kerala 90.

the Rajasthan High Court in that case. *Swami Shantanand Sarswati's case* (supra) had been decided by a Division Bench of the Allahabad High Court consisting of Raghubar Dayal and Aggarwal, JJ. They had taken the same view after dissenting from the view of the Travancore Cochin High Court and approving the view of the Lahore High Court in *Dhian Das* v. *Jagat Ram* (supra). In *Dhian Das's case,* Sir Arthur Reid, C.J., had declined to entertain a revision petition against an order of the Collector under section 539 of the Civil Procedure Code, 1882 (corresponding to section 92 of the Code of Civil Procedure, 1908), on the ground that the order was an executive or administrative one, and, therefore, it could not be said that any case of which record could be called for and dealt with in revision had been decided.

(8) There is an apparent conflict of authorities between the various High Courts on the question whether the order of the Advocate-General of a State under section 92 of the Code is or is not amenable to a writ under Article 226 of the Constitution. As already indicated, the Division Benches of the Allahabad and Rajasthan High Courts and a Full Bench of the Kerala High Court have taken a view in favour of the rsepondents. A learned Single Judge of the Madras High Court has also taken the same view in *Raju and another* v. *Advocate-General H. C. Buildings, Madras, and others* (8). The judgment of the Travancore Cochin High Court does not exist in the eye of law as it has already been overruled. Though I am substantially inclined to follow the concensus of authorities on this point, I feel that it is not proper for me sitting in Single Bench to differ from the view taken by the learned Single Judge of the Pepsu High Court (who later became a Judge and then the Chief Justice of this Court). It would, in the circumstances of the case, be appropriate if this point, on the decision of which practically the fate of the whole case hangs, should be decided by a Division Bench in the very first instance particularly when an appeal under clause 10 of the Letters Patent would lie against my judgment whichever way it goes, as a matter of right.

(9) I, therefore, direct that the papers of this case may be laid before my Lord, the Chief Justice for passing appropriate orders under

(8) A.I.R. 1962 Madras 320.

proviso (b) to rule 1 of Chapter 3-B of Volume V of the Rules and Orders of this Court. The costs of the present proceedings shall abide the result of the writ-petition.

JUDGMENT

NARULA, J.—(10) My order, dated September 1, 1971, whereby I directed that the papers of this case may be laid before the learned Chief Justice for constituting a Division Bench for the hearing and disposal of this writ petition, may be read as a part of this judgment. I had asked for the assistance of another learned Judge of this Court to decide the writ petition because I was *prima facie* not in agreement with the view taken by the learned Single Judge of the Pepsu High Court (Mehar Singh, J., as he then was) in *Sadhu Singh Sunder Singh and others* v. *Mangalgir, Mohatmim Dera and others* (2), and I was more inclined to agree with the view taken by the High Courts of Allahabad, Rajasthan, Madras, Kerala and Andhra Pradesh, on the question whether the written consent given by the Advocate-General of a State under section 92 of the Code of Civil Procedure to file a suit covered by that section can or cannot be quashed by a writ in the nature of *certiorari*. It is the common case of both sides that the impugned order of the Advocate-General would be amenable to such a writ only if it can be considered to be a judicial or quasi-judicial order. No question of quashing the order by a writ in the nature of *certiorari* can arise if the consent given by the Advocate-General in writing under section 92 of the Code amounts to a mere administrative order.

(11) As early as in 1910, the question whether such an order is only an executive or administrative one came up for consideration before the Chief Court of Punjab in *Dhian Das* v. *Jagat Ram* (9). While rejecting a petition for revision of an order passed by the Collector of a district granting permission under section 539 of the Code of Civil Procedure, 1882 (corresponding to section 92 of the 1908 Code), to institute a suit for the removal of a Mahant, it was observed by Reid, C.J., that the order of the Collector was only an executive or an administrative order and was, therefore, no 'case' of which the record could be called for and dealt with in a petition for revision under section 70(1)(a) of the Punjab Courts Act

(9) 1910 Punjab Record 104=8 Indian cases 1160.

(XVIII of 1884) as amended by the Punjab Courts Act (XXV of 1899). It was held that while granting permission to file the suit, the Collector (who was ordinary a Court) did not act as a Court, but exercised the powers vested in the Advocates-General in the Presidency towns. In *Swami Shantanand Sarswati* v. *Advocate-General, U.P., Allahabad and others* (6), a Division Bench of the Allahabad High Court (Raghubar Dayal and Agarwala, JJ.) dismissed a petition under Article 226 of the Constitution and refused to quash the order of the Advocate-General giving his consent to the institution of a suit under section 92 of the Code of the main ground that the said order constituted merely an administrative or an executive act and could not be called a quasi-judicial one. It was observed that neither section 92 nor any other provision of the Code required the Advocate-General to hold any enquiry or to give any opportunity of hearing to the party which might be affected by the giving of his consent. It was held that where an officer or other authority is not bound by any rule of law to hold an enquiry and to act strictly in accordance with the facts and circumstances of the case as they appear from the enquiry, he cannot be said to be acting judicially or quasi-judicially. It was further observed that a judicial or a quasi-judicial act must involve a decision as to the rights of the parties and must affect the interests of one or the other of the parties; and in giving his consent under section 92, the Advocate-General is not expected to decide the rights of the contending parties even if he has to hold an enquiry, but he has merely to see whether there is or is not a *prima facie* case that should be allowed to go to a Court of law. He does not affect the rights of the person against whom the suit is intended to be filed as such a person has full opportunity to present his case before the Court in which the suit is filed. The Court is not to be influenced in deciding the case by the fact that the Advocate-General has given his consent to the institution of the suit.

(12) A Division Bench of the Rajasthan High Court (Wanchoo, C.J., and Sharma, J.) held in *Shrimali Lal Kasliwal and others* v. *Advocate-General and others* (5), that the function of the Advocate-General under section 92 of the Code cannot be called a judicial or quasi-judicial one, and, therefore, there is no question of revising such an order of the Advocate-General under Article 227 or issuing a writ under Article 226 compelling him to do anything under that

provision. The application under section 92 of the Code was pending before the Advocate-General at the time of the filing of that writ petition. The writ-petitioners approached the Rajasthan High Court for a suitable writ, order or direction to the State Government to appoint some other officer under section 93 of the Code as the Advocate-General who was otherwise the only authority to deal with the matter, was alleged to be biased against the petitioners. Reliance was placed before their Lordships of the Rajasthan High Court on the judgment of the Travancore Cochin High Court in *Abu Backer Adam Sait and others* v. *Advocate-General of Travancore Cochin State and others* (3), wherein it had been held that the order passed by the Advocate-General under section 92 of the Code is quasi-judicial and is, therefore, amenable to a writ in the nature of *certiorari* under Article 226 of the Constitution. The Rajasthan High Court declined to accept the view of the Travancore Cochin High Court taken in *Abu Backer's case,* and held that inasmuch as the Advocate-General himself can file a suit under section 92 of the Code or in the alternative give permission to two or more persons to do so, such a function exercised by the Advocate-General cannot be called judicial or quasi-judicial.

(13) In *K. M. Abdul Kasim and others* v. *P. M. N. Mohamed Dawood and others* (10), the decision of the Muslim Wakfs Board under section 55(2) of the Muslim Wakfs Act, 1954, permitting another person to file a suit was held to be not equivalent to a judicial or a quasi-judicial decision affecting the rights of the parties. The decision to permit another person to file a suit was described as an administrative act, and, therefore, held to be outside the purview of correction by the issue of a writ of *certiorari.* Reliance for that decision was placed on the judgment of the Rajasthan High Court in the *case of Shrimali Lal Kasliwal and others* (supra) and on the judgment of the Allahabad High Court in *Swami Shantanand Sarswati's case* (supra). The learned Single Judge of the Madras High Court did not apply to the case before him the law which had been laid down in *Abu Baker's case.* The same view was taken by another learned Single Judge of the Madras High Court in *Raju and another* v. *Advocate-General H. C. Buildings, Madras, and others* (8). While dismissing a petition under Article 226 of the Constitution for quashing an

(10) A.I.R. 1961 Madras 244.

order of the Advocate-General under section 92 of the Code on the ground that the same was not maintainable, *Abu Backer's case* was dissented from and the Allahabad view in ***Swami Shantanand Sarswati's case*** (supra) was followed.

(14) The view taken by the Travancore Cochin High Court in *Abu Backer's case* was subsequently overruled by a Full Bench of the Kerala High Court (successor to the Travancore Cochin High Court) in *A. K. Bhaskar* v. *Advocate-General* (7). It was observed that notwithstanding the fact that the Advocate-General has to form an opinion and has to come to a conclusion one way or the other while acting under section 92 of the Code, his decision under that provision does not amount to a judicial or a quasi-judicial order as he does not decide anybody's rights and does not affect the right of the defendants to the proposed suit to defend the same on all possible grounds available to them in law. On that basis it was held that the action of the Advocate-General under section 92 of the Code giving or declining to give his consent cannot be judicially reviewed by the High Court under Article 226 of the Constitution. A division Bench of the Andhra Pradesh High Court took the same view in *Shavax A. Lal and others* v. *Syed Masood Hosain and others* (11), while holding that the grant of the consent in writing by the Advocate-General does not amount to a judicial function.

(15) The *case of Sadhu Singh Sunder Singh and others* (supra) decided by the Pepsu High Court is the only case in which the order of an Advocate-General under section 92 of the Code was held to be amenable to a writ of *certiorari*. That judgment was expressely based on the law which had by then been laid down in *Abu Backer's case*. The judgment of the Travancore Cochin High Court in *Abu Backer's case* having since been overruled by the successor High Court of that Court, the very bottom of the judgment of the learned Single Judge in the *case of Sadhu Singh Sunder Singh and others* (supra) has been knocked out. With the greatest respect to the learned Judge who decided the *case of Sadhu Singh Sunder Singh and others*, I am, therefore, constrained to hold that the view taken by the Pepsu High Court in that case cannot be said to be sound. I am unable to agree with Chaudhry Roop Chand that in spite of the

(11) A.I.R. 1965 Andhra Pradesh 143.

basis of the judgment of the learned Single Judge of the Pepsu High Court having subsequently been knocked out, that judgment alone lays down the correct law, and the view taken by the Allahabad, Rajasthan, Madras, Kerala and Andhra Pradesh High Court is incorrect.

(16) So far as the nature of the functions of an Advocate-General in such matters is concerned, it appears to me to be beyond doubt that while acting under that provision an Advocate-General does not give any decision on the merits of the controversy one way or the other and it is open to the Court in which the action permitted by the Advocate-General is brought to entertain and decide any questions of law or of fact which are raised before it by the concerned parties. The distinction between administrative or executive functions and orders on the one hand and judicial or quasi-judicial functions on the other has been succinctly brought out by the Supreme Court in *Province of Bombay* v. *Khushaldas S. Advani* (12). Applying those tests I hold that the Advocate-General while giving his consent to the institution of a suit to two or more persons does not act either judicially or a quasi-judicially capacity.

(17) Though observations have been made in some of the judgments referred to above to the effect that any order of an Advocate-General under section 92 of the Code is not subject to the scrutiny of a High Court under Article 226 of the Constitution, it is neither necessary for me to go so far, nor am I in fact inclined to hold that even in a case where an Advocate-General refuses to exercise the duty enjoined on him by the statute (section 92) for reasons which are either extraneous or irrelevant or non-existent, this Court would be helpless. As at present advised, I am of the view that in such an eventuality it would be open to this Court to issue to the concerned Advocate-General a writ in the nature of *mandamus* directing him to do the duty enjoined on him by section 92. So far as an order giving his consent to the institution of a suit is, however, concerned, I am firmly of the view that it is impregnable in proceedings under Article 226 of the Constitution.

(18) For the foregoing reasons this petition must fail and is accordingly dismissed with costs.

SHARMA, J.—I agree.

B.S.G.

(12) A.I.R. 1950 Supreme Court 222.