Mahant Sri. Jagannath Ramanuj Das and Another

Vs

The State of Orissa and Another

Petition No. 405 of 1953

(CJI M. C. Mahajan, B. K. Mukherjea, Ghulam Hasan, S. R. Dass, Vivian Bose JJ)

16.03.1954

JUDGMENT

MUKHERJEA J. –

These two connected matters are taken up together for the sake of convenience and may be disposed of by one and the same judgment. Petition No. 405 of 1953 has been presented to this court under article 32 of the Constitution and the petitioners are the Mahants or superiors of two ancient and well-known religious institutions of Orissa, both of which have endowments of considerable value situated within and outside the Orissa State. An Act, known as the Orissa Hindu Religious Endowments Act, was passed by the Orissa Legislative Assembly functioning under the Government of India Act, 1935, in the year 1939 and it received the assent of the Governor-General on the 31st August, 1939. The object of the Act, as stated in the preamble, is "to provide for the better administration and governance of certain Hindu religious endowments" and the expression "religious endowment" has been defined comprehensively in the Act as meaning all property belonging to, or given or endowed for the support of Maths or temples or for the performance of any service or charity connected therewith. The whole scheme of the Act is to vest the control and supervision of public temples and Maths in a statutory authority designated as the Commissioner of Hindu Religious Endowments and to confer upon him certain powers with a view to enable him to exercise effective control over the trustees of the Maths and the temples. The Commissioner is required to be a member of the Judicial or Executive Service of the Province and his actions are subject to the general control of the Provincial Government. For the purpose of meeting the expenses of the Commissioner and his staff, every Math or temple, the annual income of which exceeds Rs. 250, is required under section 49 of the Act to pay an annual contribution at certain percentage of the annual income which increases progressively with the increase in the income. With this contribution as well as loans and grants made by the Government, a special fund is to be constituted as provided by section 50 and the expenses of administering the religious endowments are to be met out of this fund.

In July, 1940, a suit, out of which the Case No. 1 of 1950 arises, was instituted in the court of the District Judge of Cuttack by a number of Mahants including the two petitioners in the petition under article 32 before us, praying for a declaration that the Orissa Religious Endowments Act of 1939 was ultra vires the Orissa Legislature and for other consequential reliefs. The validity of the Act was challenged substantially on three grounds, namely, (i) that the subject matter of legislation was not covered by Entry 34 of List II in Schedule VII of the Government of India Act, 1935; (ii) that the contribution levied under section 49 was, in substance, a tax and could not have been imposed by the Provincial Legislature; and (iii) that as the provisions of the Act affected the income of properties situated outside the territorial limits of the Province, the Act was extra-territorial in its

operation and hence inoperative. All these contentions were overruled by the District Judge of Cuttack, who by his judgment, dated the 11th September, 1945, dismissed the plaintiffs' suit. Against that decision, an appeal was taken by the plaintiffs to the High Court of Orissa and the appeal was heard by a Division Bench, consisting of Jagannadhadas and Narasimham JJ. The learned Judges by two separate but concurring judgments, dated the 13th September, 1949, affirmed the decision of the District Judge and dismissed the appeal. It is against this judgment that Case No. 1 of 1950 has come to this court.

During the pendency of the appeal in this court the Constitution came into force on the 26th, January, 1950, with its chapter on fundamental rights, and the Orissa Hindu Religious Endowments Act also has been amended recently by the State Legislature of Orissa by Amending Act II of 1952. In view of these changes the present application under article 32 of the Constitution has been filed by two of the Mathants who figured as plaintiffs in the Declaratory Suit of 1940 and the application has been framed comprehensively so as to include all points that could be urged against the validity of the Orissa Hindu Religious Endowments Act on the basis of the provisions of the Constitution. It is conceded by both the parties that in these circumstances it is not necessary for us to deal separately with the appeal. The decision, which we would arrive at in the petition under article 32, will be our pronouncement on the validity or otherwise of the different provisions of the impugned Act.

It may be stated at the beginning that the Orissa Hindu Religious Endowments Act of 1939 follows closely the pattern of the Madras Hindu Religious Endowment Act of 1927 which has been now replaced by a later Act passed by the State Legislature of Madras in 1951 and described as the Madras Hindu Religious and Charitable Endowments Act has been upon which the validity of the Orissa Act has been attacked before us are substantially the same as were urged in assailing the constitutional validity of the Madras Act, in Civil Appeal No. 38 of 1953 (The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar), the judgment in which has just been delivered ([1954] S.C.R. 1005.). The grounds urged can be classified conveniently under two heads. In the first place, some of the provisions of the impugned Act have been challenged as invalid on the ground that they invade the fundamental rights of the petitioners guaranteed under articles 19(1)(f), 25, 26 and 27 of the Constitution. The other branch of the contention relates to the provision for levying contribution on religious institutions under section 49 of the Act and this provision has been impeached firstly on the ground that the contribution being in substance a tax, it was beyond the competency of the Provincial Legislature to enact any such provision. The other ground raised is, that the payment of such tax or imposition is prohibited by article 27 of the Constitution.

The general questions relating to the scope and ambit of the fundamental rights embodied in articles 19(1)(f), 25, 26 and 27 of the Constitution in connection with Maths and temples have been discussed fully in our judgment in the Madras appeal referred to above and it would not be necessary to reiterate these discussions for purposes of the present case. We can straightaway proceed to examine the different provisions of the Act to which objections have been taken by the learned counsel appearing for the petitioners in the light of the principles which this court has laid down in the Madras appeal. It may be said that many of the impugned provisions of the Orissa Act correspond more or less to similar provisions in the Madras Act.

Section 11 of the Act has been objected to on the ground that it vests almost an uncontrolled and arbitrary power upon the Commissioner. This section corresponds to section 20 of the Madras Act and as has been pointed out in our judgment, in the Madras appeal, the powers, thought seemingly

wide, can be exercised only to ensure that Maths and temples are properly maintained and the endowments are properly administered. As the object and purpose for which these powers could be exercised have been indicated precisely, we do not think that it could be said that the authority vested in the Commissioner is in any way arbitrary or unrestricted. The explanation attached to the section only makes it clear that the general power conferred upon the Commissioner extends to passing of interim orders as the Commissioner might think fit.

Section 14 lays down the duties of the trustee and the care which he should exercise in the management of the affairs of the religious institutions. The care, which he has to exercise, is what is demanded normally of every trustee in charge of trust estate and the standard is that of a man of ordinary prudence dealing with his own funds or properties. This is a matter relating to the administration of the estate and does not interfere with any fundamental rights of the trustee. For the same reason, we think, no objection could be taken to the provision of section 28 which lays down that the trustee of a temple shall be bound to obey all orders issued under the provisions of the Act by the Commissioner. If the orders are lawful and made in pursuance of authority properly vested in the officer, no legitimate ground could be urged for not complying with the orders. The sections of the Act, to which serious objections have been taken are sections 38, 39, 46 47 and 49. Sections 38 and 39 relate to the framing of a scheme. A scheme can certainly be settled to ensure due administration of the endowed property but the objection seems to be that the Act provides for the framing of a scheme not by a civil court on under its supervision but by the Commissioner, who is a mere administrative or executive officer. There is also no provision for appeal against his order to the court. Under section 58 of the Madras Act, although the scheme is to be framed by the Deputy Commissioner, an appeal lies against his order to the Commissioner in the first place. A party aggrieved by the order of the Commissioner again has a right of suit in the ordinary civil court, with a further right of appeal to the High Court. It seems that sub-section (4) of section 39 of the impugned Act, as it originally stood, allowed the trustee or any person having an interest in the institution to file a suit in a civil court to modify or set aside an order framing a scheme; and under section 40, the order made under section 39 could be final only subject to the result of such suit. Sub-section (4), of section 39, however, was deleted by the Amending Act of 1952, and under the new sub-section (4), the order passed by the Commissioner has been made final and conclusive. Strangely, however, section 41 of the Act has still been retained in its original shape and that speaks of an order settling a scheme being set aside or modified by the court. Obviously, this is careless drafting and the Legislature did not seem to have adverted to the apparently contradictory provisions that it made. The learned Attorney-General, appearing for the State of Orissa, has also conceded that these sections require redrafting. We think that the settling of a scheme in regard to a religious institution by an executive officer without the intervention of any judicial tribunal amounts to an unreasonable restriction upon the right of property of the superior of the religious institution which is blended with his office. Section 38 and 39 of the Act must, therefore, be held to be invalid.

There is nothing wrong in the provision of section 46 itself but legitimate exception, we think, can be taken to the proviso appended to the section. Under the law, as it stands, the Mahant or the superior of a Math has very wide powers of disposal over the surplus income and the only restriction that is recognised is that he cannot spend the income for his own personal use unconnected with the dignity of his office. The purposes specified in section 46 are all conducive to the benefit of the institution and there is no reason why the discretion of the trustee to the spending of surplus for such purposes also should be still further restricted by directions which the Commissioner may choose to issue. Section 47(1) lays down how the rule of cy pres is to be applied not merely when the original purpose of the trust fails of becomes incapable of being cared out either in whole or in part by reason of subsequent events, but also where there is a surplus left after

meeting the legitimate expenses of the institution. Objection apparently could be raised against the last provision of the sub-section, but as sub-section (4) of section 47 gives the party aggrieved by any order of the Commissioner in this respect to file a suit in a civil court and the court is empowered to modify or set aside such order of the Commissioner, we do not think that there is any reasonable ground for complaint.

The only other section that requires consideration is section 49 under which every Math or temple having an annual income exceeding Rs. 250 has got to make an annual contribution for meeting the expenses of the Commissioner and the officers and servants working under him. The first question that arises with regard to this provision is, whether the imposition is a tax or a fee; and it is not disputed that if it is a tax, the Provincial Legislature would have no authority to enact such a provision. This question has been elaborately discussed in our judgment in the Madras appeal referred to above and it is not necessary to repeat the discussions over again. As has been pointed out in the Madras appeal, there is no generic difference between a tax and a fee and both are different forms in which the taxing power of a State manifests itself. Our Constitution, however, has made a distinction between a tax and a fee for legislative purposes and while there are various entries in the three lists with regard to various forms of taxation, there is an entry at the end of each one of these lists as regards fees which could be levied in respect of every one of the matters that are included therein. A tax is undoubtedly in the nature of a compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law. But the essential thing in a tax is that the imposition is made for public purposes to meet the general expenses of the State without reference to any special benefit to be conferred upon the prayers of the tax. Taxes collected are all merged in the general revenue of the State to be applied for general public purposes. Thus, tax is a common burden and the only return which the taxpayer gets is the participation in the common benefits of the state. Fees, on the other hand, are payments primarily in the public interest but for some special service rendered or some special work done for the benefit of those from whom payments are demanded. Thus in fees there is always an element of quid pro quo which is absent in a tax. Two elements are thus essential in order that a payment may be regarded as a fee. The first place, it must be levied in consideration of certain services which the individuals accepted either willingly or unwillingly. But this by itself is not enough to make the imposition a fee, if the payments demanded for rendering of such services are not set apart or specifically appropriated for that purpose but are merged in the general revenue of the State to be spent for general public purposes. Judged by this test, the contribution that is levied by section 49 of the Orissa Act will have to be regarded as a fee and not a tax. The payment is demanded only for the purpose of meeting the expensed of the Commissioner and his office which is the machinery set up for due administration of the affairs of the religious institution. The collections made are not merged in the general public revenue and are not appropriated in the manner laid down for appropriation of expenses for other public purposes. They go to constitute the fund which is contemplated by section 50 of the Act and this fund, to which also the Provincial Government contributes both by way of loan and grant, is specifically set apart for the rendering of services involved in carrying out the provisions of the Act. We think, therefore, that according to the principles which this court has enunciated in the Madras appeal mentioned above, the contribution could legitimately be regarded as fees and hence it was within the competence of the Provincial Legislature to enact this provision. The fact that the amount of levy is graded according to the capacity of the payers though it gives it the appearance of an income-tax, is not by any means a decisive test.

We are further of opinion that an imposition like this cannot be said to be hit by article 27 of the Constitution. What is forbidden by article 27 is the specific appropriation of the proceeds of any tax in payment of expenses for the promotion or maintenance of any particular religion or religious

denomination. The object of the contribution under section 49 is not the fostering or preservation of the Hindu religion or of any denomination within it; the purpose is to see that religious trusts and institutions wherever they exist are properly administered. It is the secular administration of the religious institutions that the Legislature seeks to control and the object, as enunciated in the Act, is to ensure that the endowments attached to the religious institutions are properly administered and their income is duly appropriated for purpose for which they were founded or exist. As there is no question of favouring any particular religion or religious denomination, article 27 could not possibly apply.

The result is that, in our opinion, the only sections of the Act, which are invalid, are sections 38, 39 and the proviso to section 46. The application under article 32 is, therefore, allowed to this extent that a writ in the nature of mandamus would issue restraining the Commissioner and the State Government enforcing against the petitioners the provisions of the sections mentioned above. The other prayers of the petitioners are disallowed. No separate order is necessary in Case No. 1 of 1950, which will stand dismissed. We make no order as to costs either in the petition or in the appeal.

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