

Commissioner of Hindu Religious Endowments and Others

Vs

B. Samitra and Others

Civil Appeal No. 128 of 1971

(CJI A.N. Ray, M.H. Beg, Jaswant Singh JJ)

20.02.1976

JUDGMENT

JASWANT SINGH, J. -

1. This appeal by special leave is directed against the judgment and order dated September 19, 1969, of the Orissa High Court in O.J.C. No. 1759 of 1968 allowing the writ petition filed by respondents Nos. 1 to 3 herein and quashing the orders dated May 2, 1967, July 22, 1968, and December 5, 1968, passed under Sections 27 and 68 of the Orissa Hindu Religious Endowments Act, 1951 (Orissa Act II of 1952) hereinafter referred to as 'the Act'.

2. Briefly stated, the facts giving rise to this appeal are : On June 23, 1966, about 40 villagers of village Bantala in Nayagarh Sub-Division of Puri district filed an application before the Assistant Commissioner of Endowments, Orissa, for appointment of non-hereditary trustees under Section 27 of the Act of Shiva temple known as "Sri Lokenatheshwar Mahadev" situate in the said village alleging that villagers from 11 villages worshipped and offered 'bhog' to 'Lokenatheshwar Deb' installed in the temple which is more than hundred years old and possessed about 24 acres of land endowed by the ancestors of the villagers; that a new temple in place of the old one which was in a dilapidated condition had been constructed with the labour and money contributed by the villagers; that marfatdars, respondents Nos. 1 to 3 herein, were mismanaging the affairs of the institution and were not regularly performing the seva and puja, etc. of the said deity. On July 31, 1966, the said respondents were directed to submit returns as required under Section 17 of the Act.

3. On August 4, 1966, the Inspector of Endowments was directed to make an enquiry and to submit a report regarding the allegations made by the said villagers. Pursuant to the said directions, the Inspector submitted his report on September 6, 1966, stating inter alia that the temple was a public temple which had been recently constructed by the villagers and marfatdars; that the villagers of Bantala and marfatdars came from one family and the persons managing the institution did not receive notice from him nor showed him the accounts and suggesting the names of five persons for appointment as trustees.

4. On November 4, 1966, a proclamation inviting objections regarding the suitability of persons suggested by the Inspector for appointment as non-hereditary trustees was issued to which the aforesaid respondents objected claiming that the institution was a private one and even if it be held to be a public religious institution, they were the hereditary trustees.

5. After making a summary enquiry in the presence of the villagers including respondents Nos. 1 to 3, the Additional Assistant Commissioner of Religious Endowments passed an order on May 2,

1967, holding that the institution was a public one and appointing five non-hereditary trustees under Section 27 of the Act. The Additional Assistant Endowments Commissioner did not, however, record any finding whether the respondents Nos. 1 to 3 were hereditary trustees or not.

6. Aggrieved by this order, respondents Nos. 1 to 3 preferred on May 15, 1967 a revision application under Section 9 of the Act before the Commissioner of Hindu Religious Endowments, Orissa, Bhubaneswar. On May 27, 1967, the appointed trustees filed a petition under Section 68 of the Act for obtaining possession of the institution and its endowments from respondents Nos. 1 to 3. On November 10, 1967, respondents Nos. 1 to 3 filed a petition under Section 41 of the Act claiming that the institution was a private one. It was alternatively claimed by the said respondents that even if the temple be held to be a public one, they could not but be held to be hereditary trustees.

7. On July 22, 1968, an order directing delivery of possession of the institution and its endowments to the appointed trustees was passed under Section 68 of the Act by the Assistant Commissioner of Endowments, Orissa. On December 5, 1968, the aforesaid revision application filed by respondents Nos. 1 to 3 was dismissed by the Commissioner of Hindu Religious Endowments and the Inspector of Endowments was directed to execute the writ of delivery of possession. On December 26, 1968, the Inspector of Endowments made a report saying that the writ had been executed and possession as directed had been delivered to the appointed trustees on December 11, 1968.

8. On December 23, 1968, respondents Nos. 1 to 3 filed a petition under Articles 226 and 227 of the Constitution, being O.J.C. No. 1759 of 1968, before the High Court of Judicature, Orissa, challenging the aforesaid orders dated May 2, 1967, July 22, 1968 and December 5, 1968 and praying that the said orders be quashed. In the said writ petition, it was contended by respondents Nos. 1 to 3 that the aforesaid orders dated May 2, 1967, passed by the Additional Assistant Endowments Commissioner appointing non-hereditary trustees of the institution under Section 27 of the Act and order dated July 22, 1968 passed by the Assistant Endowments Commissioner directing delivery of possession of the institution and its properties to the non-hereditary trustees under Section 68 of the Act encroached upon the property rights of the respondents and were without jurisdiction and void having been passed without determining under Section 41 of the Act as to whether the institution was a private or a public one and without further determining as to whether the respondents were hereditary trustees.

9. The said writ petition was contested on behalf of the appellants on the grounds that the scheme of the Act showed that provisions of Section 27 of the Act were independent; that the exercise of the power under Section 27 was subject to final decision in appropriate proceedings under Section 41 of the Act and that it was erroneous to contend that the provisions of Section 27 could not be invoked without prior determination of the aforesaid questions under Section 41 of the Act. It was, however, conceded on behalf of the appellants at the hearing of the writ petition before the High Court that the impugned orders could not be supported and were liable to be quashed as even a summary enquiry had not been made before appointment of non-hereditary trustees under Section 27 of the Act. It was also conceded on behalf of the appellants that as an order under Section 27 encroached upon the property rights of respondents Nos. 1 to 3 and even a summary enquiry is required to be made by observing the principles of natural justice, the said respondents should have been given a full opportunity to substantiate their case to the effect that the institution and its properties were private and they were hereditary trustees. It was, however, strongly contested on behalf of the appellants that the stand of respondents Nos. 1 to 3 that the orders dated May 2, 1967 and July 22, 1968 could not be passed without prior determination of the aforesaid questions under Section 41 of

the Act was not correct.

10. After examining the relevant provisions of the Act and the Rules and taking into account the fact that respondents Nos. 1 to 3 had not been afforded an opportunity to substantiate their case and no evidence had been taken by the Assistant Endowments Commissioner which might have prima facie gone to show that the institution was a public one and the said respondents were not hereditary trustees, the High Court held that the concession made on behalf of the appellants herein was well founded; that it would be reasonable to confine the application of Section 27 only to cases where in respect of the disputed institution, there had been a prior determination of the controversial rights mentioned in Section 41 and that before the Assistant Endowments Commissioner could proceed under Section 27 of the Act to appoint non-hereditary trustees in respect of the religious institution, it was necessary for him to come to a finding that the institution was a public one and there were no hereditary trustees thereof in existence and in order to come to such a finding, he should have completed an enquiry under Section 41 which coupled with Section 44 provided for a judicial determination of these very questions. The High Court further held that since marfatdari rights was itself property and the Act had no application to private endowments and respondents Nos. 1 to 3 were admittedly in possession of the institution and its properties, they could not be divested of the same without a finding that the institution was public and they were not hereditary trustees.

11. It would be advantageous at this stage to reproduce the ultimate conclusions arrived at by the High Court :

Before the Assistant Endowments Commissioner proceeds under Section 27 to appoint non-hereditary trustees in respect of a religious institution, he must first come to a finding that there are no hereditary trustees already in existence. In order to come to such a finding he must first make an enquiry under Section 41, which taken along with Section 44, provides for judicial determination of this very question, involving the property rights of a citizen, by the Assistant Commissioner himself, after notice to the parties and taking evidence. If no determination of this question is made, it will be open to the Assistant Commissioner to start an enquiry under Section 41 suo motu. It is only after the completion of the enquiry under Section 41 that he can come to a finding about the existence or otherwise of hereditary trustees and only thereafter he can proceed to appoint non-hereditary trustees. It is also open to him, in the course of the proceeding under Section 41, to pass interim orders for preserving the institution and its properties and also for safeguarding the rights of the aggrieved party pending final determination of the controversy. Any order passed straightaway under Section 27 which has the effect of dispossessing the hereditary trustees of their property without first resorting to an enquiry under Section 41, would be illegal and contrary to the scheme of the Act.

12. At the hearing of this appeal, Counsel for the appellants has reiterated the stand taken by this clients in the High Court.

13. The short question that arises for determination in this case is whether the Assistant Endowments Commissioner had jurisdiction to proceed under Section 27 of the Act without a prior decision of the disputes about the nature of the institution and the existence or otherwise of the hereditary trustees.

14. For a proper determination of the aforesaid question, it is necessary to refer to a few provision

of the Act and the rules made thereunder in so far as they are relevant for the purpose of this appeal.

15. Section 1(2) makes the Act applicable to all Hindu public religious institutions and endowments. It excludes from its purview Hindu private religious institutions and endowments.

16. Section 3(xiii) of the Act defines 'religious institution' as under :

3. (xiii) 'religious institution' means a math, a temple and endowments attached thereto or a specific endowment and includes an institution under direct management of the State Government.

17. A 'religious endowment' is defined in Section 3(xii) as follows :

3. (xii) 'religious endowment' or 'endowment' means all property belonging to or endowed for the support of maths or temples or given or endowed for the performance of any service or charity connected therewith or of any other religious charity, and includes the institution concerned and the premises thereof and also all properties used for the purposes or benefit of the institution and includes all properties acquired from the income of the endowed property :

* * * *

18. Section 27 of the Act provides as under :

27. (1) The Assistant Commissioner shall, in cases where there is no hereditary trustees in respect of each religious institution other than maths and specific endowments attached thereto, and in making such appointments the Assistant Commissioner shall have due regard to the claims of persons belonging to the religious denomination for whose benefit the said institution is chiefly maintained.

19. Section 41 of the Act runs thus :

41. (1) In case of a dispute the Assistant Commissioner shall have power to enquire into and decide the following disputes and matters :

(a) whether an institution is a public religious institution;

(b) whether an institution is a temple or a math;

(c) whether a trustee holds or held office as a hereditary trustee;

(d) whether any property or money is of religious endowment or specific endowment;

##(e) * * * *(f) * * * *(g) * * * ##

Provided that the burden of proof in all disputes or matters covered by clauses (a) and (d) shall lie on the person claiming the institution to be private or the property or money to be other than that of a religious endowment or specific endowment as the case may be.

20. Section 44 which makes provision for appeals runs thus :

44. (1) Any person aggrieved by any order passed by the Assistant Commissioner under Section 41 or sub-sections (1) and (6) of Section 42 or Section 43 may, within thirty days from the date of receipt of the order under Section 41 or Section 43 or from the date of the publication of the order under Section 42 as the case may be, appeal to the Commissioner.

(2) Any party aggrieved by the order of the Commissioner under sub-section (1) or under sub-section (1) or (6) of Section 42 may appeal to the High Court within thirty days from the date of the order or publication thereof as the case may be.

21. Section 68 deals with delivery of possession of a religious institution, its record, accounts and properties to its trustee or executive officer.

22. Section 73 which bars the jurisdiction of ordinary courts lays down that no suit or other legal proceeding in respect of the administration of a religious institution or in respect of any matter or dispute for determining or deciding which provision is made in the Act shall be instituted in any court of law, except under, and in accordance with, the provisions of the Act.

23. Section 74 which relates to the procedure at enquiries and appeals and service of notice is in these terms :

74. (1) In relation to all proceedings before the Commissioner or the Assistant Commissioner, the orders in pursuance of which are under the provisions of this Act appealable to the High Court, the Commissioner or the Assistant Commissioner as the case may be, shall have the powers vested in a court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters :

- (a) discovery and inspection;
- (b) enforcing the attendance of witnesses, and requiring the deposit of their expenses;
- (c) compelling the production of documents;
- (d) examining witnesses on oath;
- (e) granting adjournments;
- (f) reception of evidence taken on affidavit; and
- (g) issuing commissions for the examination of witnesses,

and may summon and examine suo motu any person whose evidence appears to him to be material and shall be deemed to be a Civil Court within the meaning of Sections 480 and 482 of the Code of Criminal Procedure, 1898.

(2) The Commissioner and the Assistant Commissioner shall with respect to all such proceedings be deemed to be persons acting judicially within the meaning of the Judicial Officers' Protection Act, 1850.

(3) The Court hearing on appeal from the order of the Commissioner may direct further enquiry or modify or set aside such order as the Court may deem fit; and unless the appeal is summarily dismissed the Commissioner shall be given an opportunity of being heard before the order passed by him is interfered with in any manner; provided that the operation of the order of the Commissioner shall not be stayed pending the disposal of the appeal.

24. Section 76(1) confers on the State Government general power of making rules to carry out all or any of the purposes of the Act. Sub-section (2) of the section specifically enumerates the matters with respect to which the rules can be made and clause (d) thereof enables the State Government to make rules regarding holding of enquiries, summoning and examination of witnesses and production of documents.

25. Rule 43 of the Rules framed under Section 76(d) of the Act provides :

In relation to all proceedings before the Commissioner or the Assistant Commissioner against whose orders an appeal lies to the High Court under the provisions of the Act, the Commissioner or the Assistant Commissioner as the case may be shall follow the provisions of the Civil Procedure Code, the Indian Evidence Act and the G.R.C.O. of the Orissa High Court as far as practicable and in so far as they are consistent with the Act and the Rules. In every other case the enquiry will always be of a summary nature and shall be conducted as in respect of suits of small cause nature with due notice to persons affected by the enquiry.

26. It is important to note that the Assistant Commissioner can appoint non-hereditary trustees under Section 27 of the Act only where two conditions are satisfied, viz. (1) that the religious institution is not an excepted one and (2) that there is no hereditary trustee of the institution. For the exercise of the power by the Assistant Commissioner under this section, it is, therefore, absolutely necessary that either there should be no dispute about the public nature of the institution and the non-existence of hereditary trustees or in case, there is a dispute about any of these matters, a prior determination of such dispute under Section 41 of the Act has been made. Without such preliminary determination if an appointment of a non-hereditary trustee is made under Section 27 of the Act and a direction is given regarding delivery of possession of the institution, etc. under Section 68 of the Act, it would be manifestly illegal and without jurisdiction. A careful scrutiny of the provisions of the Act makes this position amply clear. As pointed out by the High Court, Section 27 does not in terms provide that Assistant Commissioner should make an enquiry as to whether the institution is public or private and whether there are hereditary trustees of the institution or not. These questions have to be gone into under Section 41 of the Act which specifically deals with the investigation and decision of disputes in respect thereof. Consequently, a prior determination under Section 41 that the institution is public and has no hereditary trustee is a sine qua non for appointment of trustees under Section 27 of the Act.

27. This view also gains strength from the fact that there is a marked difference as regards the procedure to be followed in respect of proceedings under Sections 27 and 41 of the Act. Whereas an enquiry, if any, in proceedings under Section 27 of the Act because of the non-appealable nature of the order passed thereunder in view of Section 44 of the Act is of a summary character in which the affected person does not get a reasonable chance of presenting his entire case and evidence is not required to be recorded verbatim, it is otherwise in case of proceedings under Section 41 of the Act where the enquiry has to be judicial and elaborate in view of the fact that the parties are entitled as a

matter of right to be heard in support of the claim and to adduce evidence in proof thereof (see *Ramkrishna Padhy v. Ramesh Chandra Das* (AIR 1959 Cri 98 : ILR 1958 Cut 686 : 25 Cut LT 5)). In the latter case, because of the complicated nature of the questions involved and the appealable character of the orders that may be passed thereunder, the Commissioner or the Assistant Commissioner has to act like a court and is required to follow, as far as practicable, the provisions of the Code of Civil Procedure, the Indian Evidence Act and the G.R.C.O. of the Orissa High Court in so far as they are consistent with the Act and the Rules. This becomes clear from a conjoint reading of Section 74 of the Act and Rule 43 of the Rules framed under the Act. It would also be relevant to notice that there is no provision in Section 27 of the Act identical to the one contained in Order 21, Rule 63 of the Code of Civil Procedure to the effect that the summary decision given thereunder would be subject to the decision that may be given under Section 41 of the Act. It has also to be pointed out that successive determination of questions under Sections 27 and 41 of the Act is not possible in view of the doctrine of *res judicata*. It is also significant that the safeguard relating to appeal both on a point of fact and law (see *Sri Sadasib Prakash Brahmachari, Trustee of Mahiprakash v. State of Orissa* ((1956) 22 Cut LT 235 : AIR 1956 SC 432 : 1956 SCR 43) and the intervention of the High Court which is available in respect of orders made under Section 41 of the Act is not available in case of orders under Section 27 of the Act. The non-availability of the valuable right of an appeal in respect of an order under Section 27 of the Act is of fundamental importance and leads to the irresistible conclusion that Section 27 cannot exist in isolation and determination of the aforesaid questions is necessary under Section 41 of the Act before non-hereditary trustees can be appointed.

28. There can, therefore, be no manner of doubt that the Assistant Endowments Commissioner has no jurisdiction to appoint a non-hereditary trustee of a religious institution under Section 27 of the Act without prior determination of the questions that the institution is a public one and has no hereditary trustees.

29. We are fortified in our view by the decision of this Court in *Sri Jagannath Ramanuja Das v. State of Orissa* (AIR 1954 SC 400 : 1954 SCR 1046 : (1954) 20 Cut LT 293). In that case, the Bihar State Board of Religious Trusts constituted under the Bihar Hindu Religious Trusts Act, 1950 (I of 1951) passed an order in exercise of the powers conferred on it under Section 59 of the Act asking the appellant to furnish to the Board a return of income and expenditure of the temple known as 'Salouna Asthal'. The appellant replied saying that the Asthal was a private institution and not a religious one within the meaning of the Act; that the properties appertaining to the temple did not constitute a religious trust and the appellant was not a trustee within the meaning of the Act. On getting an unfavorable answer, the appellant made an application to the High Court of Patna under Article 226 of the Constitution challenging the demand which was dismissed. On the matter being brought before this Court by the appellant, the aforesaid order of the Board was quashed and the respondent was directed not to interfere with the properties appertaining to the 'Salouna Asthal' without obtaining the necessary declaration under Section 43 of the Act.

30. Before concluding we would like to observe that we are not at all impressed by the submission made on behalf of the appellants that if the interpretation placed on the provisions of Section 27 and 41 of the Act by the Orissa High Court is taken as correct, it would become difficult to exercise effective control on public religious institutions as proceedings under Section 41 take long time. As rightly observed by the High Court, the courts are meant to interpret the law as it stands. It is not their function to legislate and to imagine difficulties. The argument cannot also be countenanced as it overlooks the explanation appended to Section 7 whereunder the Commissioner has been given power to pass such interim orders as he may deem necessary for the proper maintenance,

administration and management of religious institutions and endowments when a dispute concerning the same is pending.

31. We also find it difficult to accept the submission made by Counsel for the appellants that in view of the fact that a duly verified application on proper court fee is necessary for determination of the questions enumerated in Section 41 of the Act, no enquiry under the said provisions of the Act can be held suo motu by the Assistant Endowments Commissioner. The fact that it may be necessary for a private individual to make an application on proper court fee to the Assistant Commissioner for determination of any of the disputes enumerated in Section 41 cannot, in the absence of a specific prohibition, debar the said authority from taking action suo motu under the said provisions of the Act. This is, however, a matter with which we are not concerned in the present appeal as respondents Nos. 1 to 3 had made an application under Section 41 of the Act in which unfortunately no proceedings were taken by the Assistant Commissioner.

32. For the foregoing reasons, we are satisfied that the High Court was right in holding that it was only after completion of the enquiry under Section 41 of the Act and determination of the questions that the religious institution was not public and there were no hereditary trustees thereof that the Assistant Commissioner could appoint non-hereditary trustees and pass orders regarding delivery of possession to them of the institution.

33. In the result the appeal fails and is hereby dismissed.

</html