

## **BOMBAY HIGH COURT**

Ramlal Kaluram Mishra

Vs.

The Charity Commissioner

First Appeal No. 672 of 1957 in Miscellaneous Application No. 158 of 1954

(Datar, J.)

09.12.1960

### **JUDGMENT**

**Datar, J.**

1. In 1924 the appellant built a temple called Shri Badrinarayan Mandir at the village Sirsode (Bahadurpur), Taluka Parola, District East Khandesh, and installed an idol of Shri Badrinarayan in it. The temple was built on one of his lands with his own money. On May 27, 1927, he made an endowment of some immovable and movable properties for the expenses and management of the temple and also appointed some trustees. A deed of trust was executed by him in that behalf.

2. On February 20, 1942, the appellant applied to the First Class Sub-Judge, Registrar, East Khandesh, requesting that a form prescribed under Section 5 of the Bombay Public Trusts Registration Act, 1935, be sent to him so that he might fill it up and forward the same to the Registrar. Upon this application the learned Sub-Judge passed the following order on February 21, 1942:-

"C.O.C. to report whether trust is registered. If it is not registered, inform the applicant of it and to apply to get it registered. Also call upon the trustees to get the trust registered by sending notice."

On March 7, 1942, the learned Sub-Judge directed that notice be issued regarding this application. Then on some subsequent date (it is not clear on which date) the learned Sub-Judge passed the following order:-

"From the affidavit of Pralhad Vaidya I am satisfied that Badrinarayan Temple is not a public trust. This notice and the affidavit and inquiry papers are therefore filed."

After the Bombay Public Trusts Act, 1950, came into force, the appellant again made an application on May 20, 1952, to the Assistant Charity Commissioner appointed under the said Act. He filled up the necessary form, but made it clear that he was sending the form duly filled in by him under Section 18 without prejudice to his right to contend that Shri Badrinarayan Temple was a private trust and, therefore, the provisions of the Bombay Public Trusts Act, 1950, did not apply to such private trust. The enquiry was conducted by the Assistant Charity Commissioner upon this application, under Section 19 of the Act, and on May 3, 1954, the Assistant Charity Commissioner held that the temple of Shri Badrinarayan was a public trust and, therefore, it had to be registered under the provisions of the Bombay Public Trusts Act. Thereafter the appellant preferred an appeal to the Charity Commissioner under Section 70(1) of the Act. Before the Charity Commissioner two points were raised. First, it was contended that, in view of the earlier decision recorded by the Sub-Judge, Registrar under the Act of 1935, the authorities under the Bombay Public Trusts Act of 1950 were precluded from again going into the question as to whether the temple of Shri Badrinarayan was or was not a public trust. Secondly, it was contended that, in view of the deed of trust, it was clear that the temple of Shri Badrinarayan was not a public but a private trust. The Charity Commissioner considered these contentions and held that, despite the finding made by the Sub-Judge, Registrar under the old Act of 1935, he could go into the question as to whether the temple was a public trust or not, and make his finding thereon. On merits the learned Charity Commissioner affirmed the finding of the Assistant Charity Commissioner, holding that the deed of trust made it clear that the temple in question was a public trust. Accordingly, the appeal was dismissed on October 21, 1954.

3. Thereafter the appellant approached the District Court, West Khandesh, under the provisions of Section 72(1) of the Act. The learned District Judge, before whom the application came up for hearing, affirmed the decision of the Charity Commissioner and dismissed the application. The present appeal has been filed by the appellant under the provisions of Section 72 of the Act.

4. Mr. Gupte, who appears for the appellant, has first contended that, inasmuch as the present proceedings had been started as far back as in the year 1952, it is the unamended Section 72 that would apply, and if that were so, the learned District Judge before whom the application under Section 72 came up for hearing had to take evidence before making his own finding on the question raised before him. Section 72(2), as it stood before the amendment, so far as material, reads as follows:-

"The court after taking such evidence as it thinks necessary, may confirm, revoke or modify the decision or remit the amount of the surcharge and make such orders as to costs as it thinks proper in the circumstances."

It was by Act No. LIX of 1954 that this sub-section was amended, and after the amendment the sub-section read as follows:-

"The court after taking evidence if any, may confirm, revoke or modify the decision or remit the amount of the surcharge and make such orders as to costs as it thinks proper in the circumstances."

Without considering as to whether the unamended Section 72(2) applied or not, I will assume that the contention made by Mr. Gupte in this behalf is correct. But then, is it a case where the learned District Judge had been asked to consider the evidence which was tried to be adduced on behalf of the appellant before him and he rejected it without giving proper reasons for its rejection? It seems to me that, when the application was filed before the learned District Judge under Section 72, by exh. 11 the appellant produced as many as 20 documents on March 25, 1955. On the next adjourned date, that is to say on April 16, 1955, these documents were shown to the Government Pleader who appeared on behalf of the Charity Commissioner, and he stated below exh. 11 that certified copies of the documents produced by the appellant be exhibited. Then on June 20, 1955, issues were framed by the learned District Judge and the case was adjourned to July 21, 1955, for list of witnesses. The roznama of the case shows that on July 21, 1955, the parties did not put in any list of witnesses. Thereafter, when the hearing commenced, such of the documents as were certified copies to which the learned Government Pleader did not raise any objection were allowed to go in evidence and were duly exhibited. Therefore, from the roznama and from the manner in which the hearing was conducted before the learned District Judge, it seems to me that at no stage of the trial was there any application made before the learned District Judge that the appellant was producing some more documents or other evidence and that the learned District Judge should consider that application and allow the documents or the other evidence to be tendered by the appellant. Therefore, this is not a case where it could be said that the learned District Judge rejected any evidence that was sought to be tendered by the appellant on his behalf. Further, even under the unamended section, it was only when the learned District Judge found it necessary to take any evidence that the parties could be called upon to produce that evidence, if available, at the trial. Thus it seems to me that under the unamended section, it was the requirement of the Court, and if the Court found that any evidence was necessary, then the Court had to record that evidence at the trial. Therefore, it seems to me there is no substance in the contention raised by Mr. Gupte in this behalf.

5. Then Mr. Gupte secondly argued that, in view of the finding-or as Mr. Gupte calls it "the decision"-recorded by the Sub-Judge, Registrar under the old Act of 1935, the authorities-the Assistant Charity Commissioner and the Charity Commissioner-and the Court under Section 72 of the Act were precluded from considering the question which had already been decided under the old Act by the Registrar appointed under that Act. To support this contention Mr. Gupte called my attention to the provisions of Section 6 of the old Act of 1935. Section 6, so far as material, provided:

"A Registrar may either on his own motion or upon the petition of a person having an interest in a public trust hold an enquiry in the prescribed manner to ascertain (1) whether

a trust is a public trust."

Mr. Gupte rightly compared the provisions of Section 6 of the old Act with those of Section 19 of the present Act of 1950, and submitted that there is a good deal of similarity between the two sections. To this extent Mr. Gupte's contention seems to be correct. He has also invited my attention to the provisions of Section 5 of the old Act, which are more or less similar to the provisions of Section 18 of the new Act. But the question arises, if a finding has been made by the Registrar under the old Act, whether that finding could be regarded as conclusive and final so far as a particular trust in respect of which such finding has been made is concerned. It seems to me that having regard to the provisions of the Act of 1935, the finding such as was made was made only for the purposes of that Act. If the Registrar found that a particular trust was not a public trust, as in the instant case, then the manager or the trustee of that trust was not bound to comply with the other provisions of the Act. It is pertinent to note that in the old Act there were no provisions corresponding to the provisions of Section 72 of the present Act. Further, in the present Act, we have the provisions of Section 79. Section 79 provides:

- (1) Any question, whether or not a trust exists and such trust is a public trust or particular property is the property of such trust, shall be decided by the Deputy or Assistant Charity Commissioner or the Charity Commissioner in appeal as provided by this Act.
- (2) The decision of the Deputy or Assistant Charity Commissioner or the Charity Commissioner in appeal, as the case may be, shall, unless set aside by the decision of the court on application or of the High Court in appeal, be final and conclusive.

It is significant to note that there were no such provisions in the old Act of 1935. Now, it seems to me that, even in a case where a trust had been held to be a public trust under the old Act, the trustee or the manager of such trust has to again make an application under Section 18 of the present Act, and if upon such application the authorities under the present Act holding an enquiry find that the trust is really a public trust, then it has got to be registered under the provisions of the present Act. Thus if a trust has been held to be a public trust, then the finding made by the authorities under the old Act cannot preclude the authorities under the present Act from considering that question afresh under the provisions of the present Act and making their own finding on the question as to whether there is a public trust or not. Putting the matter negatively, I should think that, in a case where the authorities under the old Act held that a particular trust was not a public trust, it would be still open to the authorities under the new Act to come to a contrary conclusion if such a contrary conclusion were justified as a result of an enquiry to be made by them under the provisions of Section 19 of the Act. Mr. Gupte relied upon the provisions of Section 85 of the present Act. Section 85(2) provides:--

"On the date of the application of the provisions of this Act to any public trust or class of public trusts under Sub-section (4) of Section 1...the provisions of the Act specified in Schedule A which apply to such trusts or class of trusts shall cease to apply to such trusts

or class of trusts."

I have read this section more than once and it is a little difficult to see how this section can be relied upon by Mr. Gupte to support the submission that he has made before me on this question. What this sub-section provides is that, if the provisions of the present Act apply to a public trust, then the provisions of the old Act which had been made applicable to such trusts shall pro tanto cease to apply. In this case, such a position does not at all arise. Rightly or wrongly, the Registrar came to the conclusion that the trust in question was not a public trust. Therefore, the provisions of the earlier Act had not at all been made applicable; but then, if after the coming into force of the new Act the Charity Commissioner or the Assistant Charity Commissioner, as the case may be, has got to hold an enquiry and find out, whatever the decision under the earlier Act, as to whether a particular trust is a public trust or not, I do not see how it would be contended for the appellant that the earlier decision operated as *res judicata* to the contention now raised on behalf of the Charity Commissioner. It is not, therefore, possible to accept the contention made by Mr. Gupte in this behalf.

6. Finally, it was contended that, regard being had to the terms of the deed of trust, it could not be stated that it was the intention of the founder of the trust to create a public trust and not a private trust. Mukherjea on the Hindu Law of Religious and Charitable Trust, 1952, edn., p. 185, observes:-

"...A private trust providing for the material or spiritual benefit of individuals and families could not rank as a charitable trust in English law which must be public in its character. In Hindu law however, it is competent for a donor to create a religious trust, the benefit of which is confined to the members of a particular family or the disciples of a particular religious preceptor. So far as Debutter endowment is concerned the essential test to distinguish a private from a public place of worship is, whether the right of worshipping the idol is limited to the members of a particular family or group or extends to all persons professing the Hindu religion."

In a recent decision of the Supreme Court reported in *State of Bihar v. Sm. Charusila Dasi*<sup>1</sup>, their Lordships of the Supreme Court held:

"In order to determine the question whether an endowment is public or private, the cardinal point to be decided is whether it was the intention of the founder that specified individuals are to have the right of worship at the shrine, or the general public or any specified portion thereof. In accordance with this theory, it has been held that when property is dedicated for the worship of a family idol, it is a private and not a public endowment, as the persons who are entitled to worship at the shrine of the deity can only be the members of the family, and that is an ascertained group of individuals. But where the beneficiaries are not members of a family or a specified individual, then the

endowment can only be regarded as public, intended to benefit the general body of worshippers."

The definition of a "public trust" includes a temple, and a "temple" has been defined in Sub-section (17) of Section 2 as meaning

"a place by whatever designation known and used as a place of public religious worship and dedicated to or for the benefit of or used as of right by the Hindu community or any section thereof as a place of public religious worship."

Now, the terms of the deed of trust, in my view, make it clear that the temple in question had been dedicated to a section of the Hindu community. An official translation of the deed of trust is upon the record and is at exh. 22. In this document, the founder, who is the executant thereof, has first stated that he had built

"by dint of my reason...and with inspiration from Shri Badrinarayan, the temple of Sri Badrinarayan in the field of my ownership, bearing Survey No. 322."

In order that the management of this temple should be properly carried on for a long time, the donor stated that he kept the land and set apart a "naktanemnuk" (cash amount) for the temple and framed rules for the purpose as to how the management of the temple should

<sup>1</sup>(1959) AIR S.C. 1002

be carried on. He also stated that the whole management was to be carried on according to rules framed by him. A part of the building of the temple is a dharmashala. In the document, the dharmashala is described as follows:

"It is built in the South East corner of the temple of Shri Badrinarayan. The same admeasures 24 1/2 feet in length from East to West and 19 3/4 feet in breadth from South to North."

It is also mentioned in the document that

"the open land mentioned in para 2, sub-para E, has been given for growing flowers, Tulsi plants, etc. for accommodating the people coming to the fair held in honour of the said deity and for celebrating festivals."

It appears that there is a well built of stones. The donor says that he has reserved the right to take water from the well for two days in a week for the garden of the Devasthan. Further it is stated:

"Besides all caste Hindus desirous of having the 'Darshan' have a perpetual right to take water from the said well."

On the occasions of festivals it is provided in this document that

"Dindi parties from various places shall be called and Bhajan shall be held and food shall be given to them and to Atit Abhyagat (religious mendicants)."

In para (7) of the document it is stated as follows:-

"The Devasthan of Shri Badrinarayan is established for caste (sprashya) Hindus. The untouchables and non-Hindus are permanently prohibited from entering the Sabha Mandap of the Deity. The caste Hindus should enter the Sabha Mandap and get the worship etc. of the Deity performed by the Pujari. They are at full liberty to have the 'Darshan' from the Sabha Mandap. If anybody wants to perform an 'Abhishek', ten annas shall be charged as tax for only the 'Avartana', one rupee four annas and five rupees and four annas for 'Laghu Rudra' or Eleven Ekadashmi with recitation of Pavamanas and then only the 'Abhishek' shall be performed. Unless the tax is received, 'Abhishek' shall not be performed."

Mr. Gupte emphasizes the fact that it is only on the payment of what he describes as a tax that a devotee will be allowed to have the "Abhishek" performed. Now, I do not see how, only because some amounts are charged for the performance of several Abhishekas, the trust ceases to be a public trust and would be only a private trust. It is not uncommon to see in all public temples that whenever a particular kind of Abhishek or worship is desired by a devotee, the management of the trust levies either a fee or some charge in order to defray the expenses which may be incurred by the temple. Mr. Gupte also emphasized the fact that in the "Gabhara" it is only the Pujari and the founder of the trust that will be entitled to enter. I do not see how, only because the Pujari or the founder, who is the managing trustee under this document, is at liberty to go into the sanctum sanctorum of the deity, the public or a section of the public are prohibited from entering the temple and taking a darshan of the deity installed in it. In para. 11 it is stated that the land and the amount: given to the Devasthan has become of the ownership of the Devasthan. Besides these properties, whatever movable property, utensils, etc. that may be there is also described as of the ownership of the Devasthan. Further it is stated:

"Whatever income in the form of offerings before the Deity is received the same shall be credited to the Khata of the Devasthan and shall be spent for the Devasthan."

Now, if offerings are made to the deity and are credited to the Devasthan and are eventually spent for the Devasthan, I should think that this circumstance goes a long way in showing that the dedication in this case was in favour of a section of the Hindu community. I have already stated that there is a building attached to the temple which is described as a dharmashala. The learned author Mukherjea has observed at page 187:

"..When a temple has a Sadavart or Dharamsala attached to it which is open to the Hindu public, it is a circumstance in favour of the temple being a public one."

Mr. Gupte contended that, even the caste or Sprashya Hindus had no right of going into the temple as they desired, and that it was only by leave and licence of the founder that the caste Hindus were allowed to go into the temple and have a darshan of the deity. This contention does not appear to be borne out by the recitals in the deed of trust. In more than one place it is made abundantly clear by the founder that the Devasthan or the institution had been established for the Sprashya or caste Hindus. It cannot be doubted that the caste Hindus are an unascertained and unascertainable section of the Hindu community, and even according to the definition of a "temple" as given in the Act, there is no doubt in my mind that the temple such as was founded by the appellant is a public temple meant for a section of the Hindu community.

7. The appeal is dismissed with costs.

Appeal dismissed.