ORISSA HIGH COURT

Ramachandra Tripathy

Vs

Maguni Tripathy

Second Appeal No. 84 of 1947

(Jagannadhadas and Narasimham, JJ.)

28.03.1950

JUDGMENT

Jagannadhadas, J.

1. Defendant is the appellant in this second appeal. It arises out of a suit brought by the plaintiff for a declaration that he is the Purohit of the deity of Kapileswar in Chonomeri, and that he is the Guru of the Archakas of the said deity, and for the issue of a permanent injunction restraining the defendant from interfering with his rights as such Purohit and Guru. Both the plaintiff and the defendant trace their title from a common ancestor, Madhab Tripathi, who had two sons, Kapila and Harekrishna. The last descendant in the male line of Harekrishna was one Dasarthi who died unmarried at a young age in or about 1927. The defendant is his sister's son. The plaintiff is the descendant of the said common ancestor Madhab Tripathi, through Kapila. His father, one Agadhu, was a daughter's son in the male line of Kapila. But it is the plaintiff's case that the said Agadhu was adopted to one Lokenath, the brother of his maternal grand-father, Jugalo, was a direct agnatic descendant of Kapila so that in law Agadhu was also an agnatic descendant of Kapila through Lokanath. The plaintiff was therefore according to his case an agnatic descendant of Kapila through his father Agadhu. It is the case of both parties that for a very considerable time, the duties of the Purohit of this temple and of the Guru of the Archakas, were being performed by the members of the family of Madhab Tripathi. It is not very clear from the plaint whether the alleged right was being enjoyed by the two branches of Madhab Tripathi's family jointly or in severalty by some arrangement of partition, but in his evidence the plaintiff says that both sharers perform the service by turns and sometimes jointly. The plaint proceeds on the footing that the plaintiff as an agnate is the successor to the rights of Dasarathi Tripathi, the last agnatic descendant of Harekrishna's line in preference to the defendant who is Dasarathi's sister's son, without any clear indication whether Dasarathi was only a part-owner of the rights the rest being already vested in him. However that may be, the plaintiff would be the full owner of the said rights if his case is established. The defendant contested the suit on various grounds. He denied that the plaintiff's father Agadhu was adopted to Lokanath and asserted that plaintiff was only a cognate heir of late Dasarathi, remoter than himself. He put forward a will by the late Dasarathi in his favour. He maintained that the plaintiff's suit was not maintainable being one not appertaining to a civil right. He further contended that the suit was barred by limitation. The

Courts below have held against the defendant on all these points and hence this second appeal.

2. It cannot be disputed that if plaintiff's father Agadhu is not the Bon of Lokanath, he would, in relation to Dasarathi, be only the daughter's grandson of a collateral agnate and thus would be remoter in heirship than the defendant who is Dasarathi's sister's son. Both the Courts below however have held it clearly established that the plaintiff's father Agdhu, who is the Daughter's son of one Jugal, was adopted to Jugolo's brother, Lokanath, relying on the recognition of Agadhu as such adopted son in various documents, viz., Exs. 1 to 7. The factum of such adoption must therefore be taken to have been conclusively established between the parties and is not challenged in second appeal. Learned counsel for the appellant however has attempted to argue that the adoption of Agadhu by Lokanath was invalid in law inasmuch as he was the daughter's son of his own brother, Jugal. There is no trace of any such contention in the Courts below. It is no doubt true that the adoption of a daughter's son is not recognised as being valid according to general Hindu law. (See Privy Council case in *Bhagwan Singh v. Bhagwan Singh*[1], But it is also recognised that such an adoption is valid by custom. Such a custom is now well established in South India, (see *Vayidinada v. Appu*[2], *Ranganayakamma v. Somasundara Rao*[3], and *Sooratha Singa v. Kanaka Singa*[4], The question of the validity of adoption of the daughter's son being therefore one which depends on proof of custom cannot be permitted to be taken for the first time in second appeal, when the Courts below assumed its validity without any objection being raised. It is not at all unlikely that no such objection was raised in the Courts below, because the parties are Oriya Brahmins of Ganjam District which until 1936 formed part of the Madras Province, and who presumably followed the laws and customs relating to adoption as prevalent in the Madras Province. It is noteworthy that in the case in *Ranganayakamma v. Somasundara Rao, A. I. R. (7) 1920 Mad. 451 : (43 Mad. 876)(SUPRA)*, where this custom was upheld on the evidence of various instances of such adoptions, 22 of such instances related to Oriya Brahmins of Ganjan District. See *Ranganayakamma v. Somasundara Rao, A. I. R. (7) 1920 Mad. 451 at p. 465, Col. ii : (43 Mad. 876)*(Supra) The attempt to raise this question therefore in second appeal must be disallowed.

3. As regards the defence that the defendant was entitled to the rights of the deceased Dasarathi Tripathi, under the alleged will, Ex. a, the plaintiff answered the same by putting forward a release-deed, Ex. i executed by the father of the defendant as his guardian. Both the Courts below have held and, quite rightly, that Ex. a is not a will, but is a settlement deed requiring registration and that therefore the defendant can derive no rights under it. This defense has not been pressed before us. As regards the plea of limitation, raised by the defendant, both the Courts below have concurrently found that since the date of Dasarathi Tripathi's death in or about 1927, the plaintiff has been performing the duties of his alleged office and no question therefore of any limitation arises. This contention also has not been repeated before us.

4. The only question that has been strongly argued before us in this appeal is that the rights asserted by the plaintiff in this suit are not civil rights and that the suit is not of
a civil nature and therefore the suit is not maintainable. This is the only substantial question in this appeal. It is urged that there can be no civil right to officiate as a Purohit or as a Guru, that the members of the public are entitled to choose whomsoever they like to minister for them as their Purohit or as their Guru and that no declaration can be granted recognizing such a right in one person, nor can any injunction be issued restraining another person from officiating as a Guru or Purohit. It has been pointed out that the Courts below have proceeded on the erroneous

view that the question as to whether there is such a civil right or not depends on whether it carries any emoluments and that they' assumed without any basis that, the rights asserted by the plaintiff amount to an office carrying certain emoluments.

5. There can be no doubt that the right to Officiate as a priest or as a Guru simpliciter is not a civil right and that no suit lies to enforce the same. This is well settled as appears from the cases in *Hira Pandey v. Bachu Pandey*[5], *Ahmed Hussain v. Ghulam Ali*[6], *Dinanath Jha v. Ganesh Dutt*[7], and *Tholappala Charlu v. Venkata Charlu*[8], A distinction has however been made as regards cases where the ministration of priestly services amounts in law to "property" or to an "office". Explanation to Section 9 of the Civil Procedure Code, recognizes that a right to property or an office may be one of a civil nature, notwithstanding that it may depend entirely on the decision of questions as to the religious rights or ceremonies. While therefore a right to officiate as a priest of a particular community or in a particular locality has not been normally recognized as offending against the general right of the public or of the members of a community to choose whomsoever they may like for purposes of spiritual ministration, such a right has been recognized where it amounts to an office attached to an institution such as a temple. Religious and priestly offices attached to temples and the like institutions have been in vogue in the country by long-standing custom and are recognised by law as a species of property. The restriction thereby implied, if any, on the freedom of choice of a priest or other religious minister by the person requiring ministration is one that is in the larger interests of orderly and disciplined administration of such institutions. An office so attached to an institution may exist whether with or without emoluments and whether the emoluments incidental thereto are gratuitous or obligatory. When the question whether there is such an office is in issue, the fact that there are emoluments of a non-gratuitous character payable out of the funds of the institution, has generally been considered as relevant though the absence thereof is not always decisive. In support of what has been stated above, it is sufficient to refer to the following cases : *Krishnama v. Krishnaswami*[9], *Amrito Moyee v. Bhogiruth Chundra*[10], *Kali Kanta v. Gouri Prosad*[11], *Dino Nath v. Pratap Chandra*[12], *Dwarka Missar v. Ram Pratap Missir*[13], *Debendra Narain v. Satya Charan*[14], *Bhashyam Konayamma v. Rangacharayulu*[15], and *Satish Chandra v. Dharanidhar Singha*[16], Cases have also recognized as between members of a family, a species of property in priestly services, though not amounting to an office, where it has been found that for generations past, the priestly family has developed a reputation and a sanctity which attracts to it a large body of pilgrims who on account of sentimental attachment make substantial offerings to the members of the family, who minister to their religious needs and in particular where such ministration is connected with certain large and reputed pilgrim centres such as in the cases of Gayawals, Pragwals, Gangaputras and Pandas. (See *Lachmanlal v. Baldeo Lal*[17], *Mt. Sarda Kunwar v. Gajananda*[18], See also *Mahadev Vajulu v. Mathura Suryaprakasam*[19], *(Contra)*. The question for consideration in this case has to be decided with reference to these well-settled principles. In the present case what is claimed by the plaintiff is not the right to officiate as the priest of a particular class or in a particular locality, but the right to officiate as a priest in a particular temple, and as a Guru of the Archakas of the temple. At this stage, it may be convenient to deal with the question of the right as a Purohit and the right as a Guru separately. It is necessary to deal with the evidence on record relating to these as the Courts below have not correctly appreciated the legal principles to the same.

6. As regards the right to Parohitship the plaintiff's evidence is as follows :

> "I receive, remuneration on different occasions when I perform Purohit work such as I receive Rs. 6 as Dakhina and Rs. 2 for cloth. On Makar day I receive Prasad. On Sivaratri I offer Bhog and receive Prasad on Mesa Sankranti I receive Bhog and take Prasad. In the Jaistha, I perform the marriage of the deity Kapileswar. I receive cloth, Dakhina and rice. On Binayak Chatruthi I get Prasad on performing Puja. All these are performed in the temple of Kapileswar and I do these works as Purohit."

He also says the remuneration for Purohit is met from the temple funds. He is supported in his evidence by one of the temple trustees, P. W. 2, an old man of 60 who though only a trustee for the last four years has been a resident of the place all along, and speaks to the plaintiff's family performing the Purohit's work in the temple for generations and speaks to the plaintiff himself doing Purohit work for about thirty years. This evidence is supported by other witnesses, P. Ws. 3, 4 and 5. The defendant both in the plaint as well as in his evidence as D. W. 4 admits this, in essence, inasmuch as it is also his case that his ancestors have been doing this Purohit service and have been getting emoluments therefor. His plea in the written statement while admitting these facts is that it was in the nature of a moral right and not a civil right. His most important witness, D. W. 3, the managing; trustee of the temple also admits that the family has been performing the Purohit services from generation to generation and that the emoluments therefor are paid from the temple funds and are entered in the accounts, though he would have it that prior to Purushottam Tripathi, a person used to come from Phasiguda and work as the Purohit for the temple. On this evidence, there can be no reasonable doubt that as a fact the family to which the plaintiff belongs has been performing Purohit services in the temple for some generations at least from the time of Purushottam, and that the remuneration for the same is being paid out of temple funds. Whether this is enough to make out a hereditary claim to an office of the Purohit in the temple as against the temple authorities or not, it appears to me that as between the members of the family and the
parties to this litigation, this is enough to make out that it is an office of a civil nature and is an item of property as between members of the family. Learned counsel for the appellant urges that there can be no right to an office unless it is clear that there is a compellable duty attached to it and cites *Ayyanachariar v. Sadagopa Chariar*[20], He relies on the evidence of D. W. 3, the managing trustee to show that there is no such compellable duty attached to this supposed office. It appears to me however that the plaintiff cannot be denied relief on this ground. In cases where the office has been claimed on the footing that it is attached to a temple, it must be taken as implicit in the very pleading of the plaintiff that he admits the existence of such a duty and the plaintiff in his evidence also virtually admits the same. D. W. 3 no doubt states in his evidence that there is no compulsion to do the Purohit work and that he can appoint any person he likes to be the Purohit of the deity He has given no instances of his having so appointed any different person at any time other than a member of this family and he admits that the Arohakas and Purohits of the temple are coming from generation to generation. It is to be noticed that in the various reported cases where such religious offices attached to a temple have been recognised, there is no specific discussion as to the compellable obligation attached to such office which suggests that such obligation is assumed from the fact that the office is found to be hereditary. In the circumstances, I have no difficulty in holding that the claim of the plaintiff to the Purohitship of the temple amounts to a right to an office recognizable in law and that he has substantiated the same.

7. As regards the claim of the plaintiff to be the Guru of the Archakas of the temple, the evidence stands on a somewhat different footing. It would appear that what he has to do as the Guru of the Archakas is to give the Karna Mantra to the Archaka and to teach him the Puja Bidhan (rules of worship) and that the person who receives this Mantra pays nothing fixed as Dakhina and that each gives according to his means. (See the evidence of P. W. 4). It would appear no doubt that the plaintiff's family have been rendering services as Guru of the Archakas hereditarily in the same way as they have been performing the duties of the Purohit of the temple. It is probably meant to be the plaintiff's case that he is the Guru of the Archakas inasmuch as he is the Purohit of the temple but this is not so specifically stated. The plaintiff himself states in his evidence as follows;

> "The duties of the Guru is to give them (Archakas) Mantra and to teach them Puja Nyasa. I never force them to take Mantra, but they are bound to come to me for Mantra as there is nobody else to give them Mantra."

He also admits that defendant's forefathers have also initiated some of the Archakas. P. W. 2 says :

> "In case an Archaka does not desire to take Mantra from the Guru he can take from an agnate, failing which he cannot get salvation, He can get Mantra from anybody."

There seem to be as many as nearly 100 Archakas connected with this temple according to the evidence of witnesses. While no doubt the Archakas are connected
with the temple, it is not unlikely that the plaintiff's family, being the Purohit of the temple, has in fact, been ministering as the Guru of the Archakas. It may have been possible to make out such an office if it was established that no person could officiate as an Archaka of this deity unless he received the Mantra and the Puja Nyasa from a member of the plaintiff's family and accepted him as his Guru. Indeed that is what the plaintiff himself claims to be the position in his evidence, but he is not supported in it by his witness, P. W. 2. There being, therefore, no necessary connection made out on the evidence between the duties of the plaintiff's family connected with the temple and his ministration of services as the Guru for the Archakas, it cannot be held that the plaintiff has established a civil right to the Guruship which he has claimed as an office appurtenant to the temple. The trial Court has given a decree in favour of the plaintiff in respect of the Guruship also without adverting to the difference in the nature of the evidence relating to the two. The appellate Court however thinks that what the plaintiff asks is his right to be the Guru of the Archakas of the deity in his capacity as the Purohit and what he has found is this alleged limited right. In so finding, he has made a note that the plaintiff's right cannot affect or interfere, in any way with the defendant's right to minister to the spiritual needs of the Archakas by being their Guru in his own individual-capacity independent of the office of the Purohit of the deity. This limitation has been incorporated in the modified decree that he has passed. It is doubtful whether such a limitation is workable. It seems to me however that, as pointed out by me above, there is no evidence in this case which establishes that there is an office of the Guru of the Archakas attached to this temple with the limitation specified or that the Guru-ship is incidental to the office of the Purohit. I am, therefore, of the opinion that the claim of the plaintiff to the office of the Guruship of the Archakas of the temple has not been made out. This, however, does not mean that if there is any usage of the institution whereby an Archaka receives

the Mantra and the Puja Bidhan from a member of the plaintiff's family as a matter of spiritual sentiment, this is in any way intended to be affected. That is a matter for internal regulation by the appropriate temple authorities.

8. In the result, therefore, the appeal must be allowed in so far as the claim of the plaintiff to the right of the Guru of the Archakas is concerned and must be dismissed with reference to his claim as the priest of the temple. The decree of the Courts below will be modified accordingly. In the circumstances, there will be no order as to costs of this appeal.

Narasimham, J.

9. I agree that the appeal should be partially allowed as suggested in the judgment of my learned brother. The main question of law for consideration is the maintainability of the suit under Section 9, Civil Procedure Code

10. The reliefs asked for by the plaintiff are (i) a declaration that he is the Purohit of the deity of Kapileswar of Chanameri village; (ii) a declaration that he is the Guru of the Archakas of the said deity.

11. It was the common case of both the parties that the right to the Purohitship of the said deity was all along vested in the family of Madhab Tripathy, their common ancestor. They claimed it as a hereditary right and the main dispute was whether the plaintiff or the defendant had the preferential right.

12. Certain specific duties in the temple were ascribed to the Purohit such as offering Puja and Bhog during Shibaratri, performance of marriage of the deities in the temple in Jaistha and performance of Puja on Binayaka Chaturthi day. For performing such duties the Purohit was receiving certain emoluments and perquisite from temple funds. The question for consideration, therefore, is whether the Purohitship of the temple of Kapileswar is an ' office' within the meaning of the Explanation to Section 9, Civil Procedure Code As early as 1879, the Privy Council in *Krishnama v. Krishnasami, 2 Mad. 62: (6 I. A. 120 P. C.)(Supra)* approved a decision of the Madras High Court in *Narasimma Chariar v. Sri K. T. Chariar*[21]*,* to the effect that claim to certain pecuniary benefits and payments in kind in respect of performance of certain religious services in a temple was entertainable in a civil Court. The construction of the expression 'office', however, came up for consideration later in *Srinivasa Thathachariar v. Srinivasa Aiyangar, 9 M. L. J. 355(SUPRA)*, where Subrahmania Aiyar C. J. observed :

> "Now the term 'office' in the sense with which we are concerned, implies, of course, a duty in the officeholder to be discharged by him as such."

and he relied on Kent's Commentaries where it was pointed out:

> "Offices consist in a right, and corresponding duty, to execute a public or private trust and to take the emoluments belonging to it."

O'Farrell J., in a separate concurring judgment observed :

> "In order that an office may exist there must be a duty enforceable by deprivation or other temporal sanction. Where there is no duty or a duty enforceable merely by moral or social sanctions, there can be no office."

In *Sri Ranga Chariar v. Rangasami Battachar, 32 Mad. 291 : (3 I. C. 881)(supra)*, the question for decision was whether a suit for certain honour (First thirtham) in a temple was maintainable and it was held that where the honour in question was a remuneration for a hereditary office involving both secular and religious duties inseparable from the office, a suit was maintainable. In coming to this conclusion the High Court relied on the finding of the lower Court to the effect that the plaintiffs as office-holders were bound to perform certain duties in the temple. In *Chunnu Dattu v. Babu Nandan, 32 all. 527 : (6 I. C. 223)(Supra)* while dismissing a suit for declaration that the plaintiff was entitled to perform certain religious pageants in Benares, the High Court of Allahabad (at p. 588) laid emphasis on the absence of any obligation on the plaintiff to undertake any responsibility in the matter of pageants. In *Mahomed Sahib v. Sayed Sahib, A. I. R. (3) 1916 Mad. 379 : (28 i. C . 459(supra)* also Tyabji J., pointed out that the "existence of something which may be described as the duties of the person holding office" is a necessary part of that which is connoted in the term 'office.' In *Lachman Lal v. Baldeo Lal, A. I. R. (4) 1917 Pat. 37 : (2 Pat. L.*
J. 705)(supra) while discussing the case of Gayawals, Mullick J. pointed out that the essential of an office is a duty to some person enforceable by law custom or usage. To a similar effect are the following observations of Krishnan J. in *Venkatachariar v. Ponappa*[22]*,*

> "It is clear that to constitute an office, one, if not the essential, thing is the existence of a duty or duties attached to the office which the office-holder is under a legal obligation to perform and the non-performance of which may be visited by penalties such as suspension, dismissal etc."

In *Chinnaswami Thathachariar v. Singaracharia*r[23]*,* also while discussing the duty of an office attached to the well-known temple at Conjetveram, Srinivasa Aiyangar J., pointed out:

> "An office in connection with such institutions must really be regarded as a bundle of duties liable to be performed by the same persons under a particular designation and carrying with it certain emoluments.' In a recent decision reported in *Ramaswami Goudan v. Lakshmana Reddi*[24]*,* also it was emphasised that the conception of an office involves a corresponding obligation to perform the duties of the office.

13. There is thus sufficient authority to support the view that the expression 'office' in the Explanation to Section 9, Civil Procedure Code, means a position which has some duties attached to it to be performed by the holder of the office and which are enforceable by law, custom or usage. It is true that generally such offices are attached to institutions like temples, muths etc. But there may be offices of a purely personal nature attached to no institution at all. In the present case, however, any discussion about an office which is not attached to an institution would be merely academic because the Purohitship in question is claimed in respect of the temple of Kapileswar. It is therefore unnecessary to discuss how far a claim to a bare personal

office would come within the scope of Section 9, Civil Procedure Code, regarding which there seems to be some apparent conflict of authorities (see *Gour Mani Devi v. Chairman of the Panihati Municipality, 6 I. C. 864: (12 C. L. J. 75)(supra)* and *Debendra Narain v. Satya Charan, A. I. R. (14) 1927 Cal. 783: (54 Cal. 614)(supra).*

14. Though, ordinarily, emoluments are attached to an office, and some emoluments have actually been claimed in the present litigation, there may be offices without emoluments at all (see *Sayad Hashim Saheb v. Huseinsha, 13 Bom. 429 and Ram Bayan v. Bapu Ram, 15 Cal. 159.)(supra)*

15. Therefore, the crucial test in considering whether the claim to the Purohitship of the temple of Kapileswar is a claim to an office or not is whether there are duties attached to the Purohitship which are enforceable by law, custom or usage, whether by deprivation or other temporal sanction (to quote O'Farrell J.). The plaintiff stated that he has the right to per. form the duties of Purohitship and if for any reason he is unable to perform the same his representative would do it. He thus admits that it is a
duty east on his family. The Managing Trustee, Mohan Bisoi (d. w. 3), doubtless stated that there was no compulsion to do the Purohit's work and that he could appoint anyone else as Purohit but no instance in which anyone outside the family has been appointed as Purohit in recent times his been proved. Though no clear evidence as to the method of enforcement of the duties of the Purohit has been led, it seems to be impliedly admitted by the parties that right claimed is a hereditary right enforceable either by custom or usage. The appellant himself elicited in the cross-examination of the plaintiff (P. W. 1) that the Commissioner of Endowments, Orissa, exercises control over the temple by appointing trustees and that "everything is in writing in the Endowment Office." Therefore, the duties of the office of a Purohit of the temple can be enforced in accordance with the provisions of Section 17, Orissa Hindu Religious Endowments Act, 1939, by the trustee or by the Commissioner of Endowments under his general powers of superintendence and control. There is thus temporal sanction behind the duty of the Purohitship in the temple and it is not a case of mere social or moral sanction. I would therefore agree with my learned brother that the claim to the Purohitship is a claim to an office and as such is maintainable in civil Court.

16. As regards the claim to the Guruship of the Archakas I would agree with my learned brother that it is not a claim to an office.

17. In the result I agree with the order proposed by my learned brother.
Appeal partly allowed.

Cases Referred.

[1]21 all 412: (26 i. a. 153 P.C)
[2]9 Mad. 44 (f. b.)
[3] A.I.R. (7) 1920 Mad. 1451 : (43 Mad. 876)
[4] A.I.R. (7) 1920 Mad. 648: (43 Mad. 867)
[5] A.I.R. (3) 1916 Pat. 215 : (1 Pat. L. J. 381)
[6] A. I. R. (6) 1919 Pat. 313 : (52 I. C. 866)
[7] A. I. R. (16) 1929 Pat. 103 : (8 Pat. 677)
[8]19 Mad. 62 : (5 M. L. J. 209)

[9]2 Mad. 62 : (6 I. a. 120 P. C.)
[10]15 Cal. 164
[11]17 Cal. 906
[12]27 Cal. 30 : (4 C. W. N. 79)
[13]10 I. C. 41 : (13 C. L. J. 449)
[14] A.I.R. (14) 1927 Cal. 783 : (54 Cal. 614)
[15] A.I.R. (15) 1928 Mad. 851 : (110 I. C. 782)
[16] A.I.R. (27) 1940 P. C. 24 at p. 28 : (I. L. R. (1940) Kar. P.C. 47)
[17] A.I.R. (4) 1917 Pat. 37 : (2 Pat. L. J. 705)
[18] A.I.R. (29) 1942 all. 320 : (I. L. R. (1942) all. 821)
[19] A.I.R. (2) 1915 Mad. 597 : (24 I. C. 204)
[20] A.I.R. (26) 1939 Mad. 757: (189 I. C. 190)
[21]6 M. C. R. 449
[23] A.I.R. (15) 1928 Mad. 377 : (109 I. C. 771)
[24] A.I.R. (26) 1939 Mad. 886 : (I. L. R. (1940) Mad. 40)