

ORISSA HIGH COURT

Ramakrushna Padhy

Vs

Ramesh Chandra Das

A.H.O. No. 10 of 1958

(R.L. Nahasimham, C.J. and G.C. Das, J.)

09.10.1958

JUDGMENT

R.L. Narasimham, C.J.

1. This is an appeal under Clause 10 of the Letters Patent of the Patna High Court (which is applicable to Orissa by virtue of the Orissa High Court Order 1948) against the judgment (in appeal) of a single Judge of this Court in Miscellaneous Appeal No. 81 of 1956. That appeal was filed against the appellate judgment of the Commissioner of Hindu Religious Endowments, Orissa (hereinafter referred to as the Commissioner) passed under Section 44 of the Orissa Hindu Religious Endowments Act 1951 (Orissa Act No. II of 1952 - hereinafter referred to as the new Act) dismissing an appeal against the order of the Assistant Commissioner of Hindu Religious Endowments Orissa (hereinafter referred to as the Assistant Commissioner) passed under Section 41 of that Act declaring a particular religious institution to be a public one and one Ramesh Chandra Das and his agnates to be the hereditary trustees of the same. A preliminary objection was taken to the entertainability of this appeal on the ground that the judgment of the single Judge was passed in second appeal and that consequently by virtue of clause 10 of the Letters Patent a further appeal to a Division Bench of this Court will not lie in the absence of a certificate of fitness from the Judge concerned. This point is of considerable importance affecting many decisions of the Commissioner pending in appeal in this Court and it is desirable to give an authoritative decision.

2. The material clauses of the Letters Patent of the Patna High Court may now be referred to.

3. Clause 10 (omitting immaterial portions) is as follows :-

"An appeal shall lie from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in exercise of the appellate jurisdiction by a court subject to the superintendence of the High Court) of one Judge of the said High Court, and notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a Judgment of one Judge of the said High Court.

made on or after the first day of February, 1929 in the exercise of appellate jurisdiction by a court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal."

The aforesaid clause makes it clear that if the judgment of a single Judge of this court is passed in exercise of appellate jurisdiction "in respect of a decree or order made in exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court" an appeal shall lie only if the single Judge concerned declares that the case is a fit one for appeal.

4. In the present case the Commissioner's order was, passed in exercise of his appellate jurisdiction over the Order of the Assistant Commissioner conferred by the new Act and the judgment of the single Judge of this Court was also passed in exercise of the High Court's appellate jurisdiction, If the Commissioner be held to be a "court subject to the superintendence" of this High Court while passing the appellate order in question, it is apparent that a further appeal will not lie except under a certificate of fitness from the single Judge concerned. It was however, urged that the Commissioner was not a "court subject to the superintendence" of this High Court and that consequently, the earlier part of Clause 10 of the Letters Patent would apply and the party had a right of appeal to a Division Bench of this Court against the judgment of a single Judge, without any such certificate.

5. The order of the Assistant Commissioner was passed under Section 41 of the new Act; the order of the Commissioner on appeal was passed under Sub-Section (1) of Section 44; and the order of single Judge of this Court was passed under Sub-Section (2) of Section 44 of the new Act. Can it be said that the Commissioner while exercising his appellate jurisdiction under Sub-Section (1) of Section 44 is a 'court subject to the superintendence' of this court ? The answer to this depends on a careful scrutiny of the relevant provisions of the new Act and also of the relevant provisions of the Letters Patent - bearing in mind the distinction between a 'court' on the one hand and a 'quasi judicial tribunal' on the other.

6. The Letters Patent were issued by His Majesty on the 9th February, 1916 when the Government of India Act 1915 was in force, Section 107 of the Act conferred on every High Court powers of superintendence over "all courts for the time being subject to its appellate jurisdiction". Hence when in the Letters Patent the words "courts subject to the superintendence of the said High Court" were used, it is obvious that the authority concerned was referring to courts over which the High Court had powers of superintendence under Section 107 of the Government of India Act 1915; in fact, that section is expressly referred to in a portion of that Clause. A scrutiny of clauses 11 and 20 of the Letters Patent would further show that a distinction was made between the ordinary civil and criminal courts on the one hand and other courts subject to the superintendence of the High Court on the other, Thus, clause 11 says that the High Court shall be a court of appeal.

"From the civil courts of the Province of Bihar and Orissa and from all other courts subject to the superintendence of the High Court". Similarly, clause 20 says that the High Court of Judicature at Patna

"shall be a court of appeal from the criminal courts of the Province of Bihar and Orissa and from all other courts subject to the superintendence of the High Court".

Clauses 9, 10, 11 and 12 of the Letters Patent are placed under the heading "Civil Jurisdiction of the High Court". Hence, when clause 10 refers to a 'court subject to the superintendence of the High Court' it means –

- (i) the ordinary civil courts functioning in the Province of Bihar and Orissa; and
- (ii) any other court dealing with civil rights subject to the superintendence of the said High Court.

7. The power of superintendence conferred by Section 107 of the Government of India Act, 1915, included both judicial and administrative superintendence. But in the corresponding section of the Government of India Act 1935 the power of superintendence was limited to administrative superintendence only, and judicial power was taken away by Section (2) of Section 224. Later, in Clause (1) of Article 227 of the Constitution the old provision was restored and the High Court was invested with both judicial and administrative superintendence over "all courts and tribunals throughout the territories in relation to which it exercises jurisdiction".

Neither in the Government of India Act of 1915 nor in the Government of India Act of 1935 was the word 'tribunal' used. That word was inserted, for the first time, in clause (1) of Article 227 of the Constitution. Mr. A. Das on behalf of the appellant urged that the use of the words 'court' and 'tribunal' in juxtaposition in that clause would show that a tribunal, even though it may be exercising judicial functions, will not be a "court subject to the superintendence" of this High Court within the meaning of Clause 10 of the Letters Patent. He further urged that the functions of the Commissioner and the Assistant Commissioner, as described in the new Act, would show that they were only administrative tribunals exercising quasi judicial functions in respect of certain matters.

8. The previous Act dealing with Hindu Religious endowments in Orissa was the Orissa Hindu Religious Endowments Act, 1939 (Orissa Act 4 of 1939 - hereinafter referred to as the old Act). There the Commissioner alone was the statutory authority and there was no express provision for the appointment of an Assistant Commissioner. Under Section 7 of the old Act the Commissioner may be a member of either the Judicial Service or the Executive Service in the province of Orissa.

Section 8 stated that in the discharge of his duties he shall be under the general control of the Provincial Government. He was given extensive administrative powers over public Hindu religious endowments, maths and temples. It is unnecessary to refer to them in detail. The general scheme of the old Act was that whenever he passed an order affecting the civil rights of parties, these parties had the right of suit for challenging his order.

This Section 29 conferred power on him to take disciplinary action against a trustee. But his order was subject to appeal to the civil court. Similarly Section 30 prescribed certain disqualifications for a trustee and also gave a right of appeal to the District Court, against any decision of the Commissioner as to whether a hereditary trustee was so disqualified or not. Section 33 conferred power on the Commissioner in association with another officer to be appointed by the Provincial Government, to frame a scheme for the better administration of a temple; and Sub-Section (4) of that section conferred a right on the aggrieved party to institute a suit in the civil court to modify or set aside the scheme. There were similar provisions in respect of maths (see Sections 38 and 39). Section 47 dealt with cy pres application of the endowed

property subject to right of suit in a civil court, under Sub-Section (4) of that section - for alteration or modification of that order. The procedure to be followed by the Commissioner while holding enquiries was not embodied in the old Act but was made a part of the rules known as the Orissa Hindu Religious Endowment Rules 1939.

Rule 66 of these rules required the Commissioner to take evidence of witnesses, on oath or affirmation in 'open office'. Rule 90 stated that for the purpose of enquiry by the Commissioner the provisions of the Civil Procedure Code, the Evidence Act, and the Circulars of the Patna High Court, shall apply so far as they may be consistent with the rules. There were some other provisions dealing with the power to issue commissions, to examine records, to hold local inspections etc.

9. It will thus be seen that under the old Act the Commissioner was essentially an administrative officer though he was required to decide certain matters in a judicial way. He may be a member of either the Judicial Service or the Executive Service. He was under the administrative control of the Government in respect of administrative matters. Where, however, his decision or determination affected the rights of parties, the aggrieved party was given a right of appeal or right of suit in the civil court.

The expression 'court' was defined in Sub-Section (3) of Section 6 of the old Act as meaning "civil court constituted under the Bengal, Agra and Assam Civil Courts Act, 1887". In preparing schemes for temples or maths (Sections 33 and 38) another officer to be selected by the Provincial Government was associated with him.

Doubtless the procedure prescribed by the Commissioner for his enquiry was very similar to that applicable to enquiries by civil courts. Witnesses were required to be examined in open office and he had powers very similar to those of civil courts with regard to the enforcement of the attendance of witnesses admissibility of evidence, etc. But he was not given the special protection under the Judicial Officers Protection Act, 1850.

10. In the new Act radical changes were brought about especially in the functions of the Commissioner and his subordinate, namely the Assistant Commissioner. The new Act was passed in 1952, but further amendments were made to the same in consequence of the decision of the Supreme Court in *Sri Jagannath v. State of Orissa*¹. by the amending Act of 1954 (Orissa Act 18 of 1954). By this Act the expression 'court' was taken away from the interpretation clause (Section 3) and another statutory authority designated as Assistant Commissioner should be members of the Judicial Service not being; below the rank of a subordinate Judge or Munsif respectively. There was no section corresponding to Sub-Section (1) of Section 8 of the old Act, stating that in the performance of his duties the Commissioner shall be under the control of the State Government. He is an independent statutory authority. Doubtless, in respect of certain functions such as appointment of subordinate staff (See Section 5-A) he was subject to the control of the State Government. But the general control of the State Government over all his actions was taken away. In the new Act wherever civil rights of parties were affected by the Commissioner's order a right of appeal to the High Court was given. Thus Sub-Section (5) of Section 28 gave the hereditary trustee of a temple aggrieved by any disciplinary order passed by the Commissioner a right of appeal to the High Court. Sub-Section (3) of Section 35 conferred a similar right of appeal to the High Court by the Hereditary trustee of a math against an order of the Commissioner declaring him to be subject to certain disqualifications specified in that section Section 41 conferred power on the Assistant Commissioner to decide any dispute as to whether an institution was a public religious institution or a temple or a math, or whether the trustee held

office as a hereditary trustee, and other matters. Section 42 conferred power on the Assistant Commissioner and the Commissioner to frame a scheme for the better administration of religious institution after holding an enquiry in accordance with the provisions of the Civil Procedure Code relating to trial of suits. The provision in the old Act providing for the association of another officer to be nominated by the Government with the Commissioner in preparing a scheme was deliberately omitted. Similarly, the right to file a civil suit for modifying the scheme prepared by the Commissioner or the Assistant Commissioner was taken away. But a right of appeal to the High Court was conferred by Section 44. The order of the Assistant Commissioner regarding cy pres application of funds under Section 43 was made appealable to the Commissioner and then to the High Court under Section 44. Section 74 stated that in relation to all proceeding before the Commissioner or the Assistant Commissioner orders in pursuance of which were appealable, to the High Court, the said officers shall have all the powers of a court under the provisions of the Civil Procedure Code while trying a suit. Sub-Section (2) of that section conferred on such officers the protection generally given to indicial officers under the Judicial Officers Protection Act, 1850.

11. The main changes brought about by the new Act are, therefore, fairly clear. The Commissioner and the Assistant Commissioner were both required to be officers of the Judicial Service of the State. Doubtless they had both judicial and administrative functions, but even in the exercise of their administrative functions they were required to approach the question with a judicial mind. Whenever their orders affected rights of parties a right of appeal to the High Court was given to the aggrieved party and moreover in respect of those functions they were given most of the powers of a Civil Court while trying a suit and were also conferred special protection under the provisions of the Judicial Officers Protection Act. This substitution of a right of appeal to the High Court for a right of suit in the civil court as provided in the old Act is very significant. The Commissioner and the Assistant Commissioner being themselves members of the judicial service and being required to act judicially, there was no point in conferring on the party aggrieved by their decision a right of suit again in the ordinary civil court. Hence only a right of appeal was conferred thereby involving the assumption that, for all practical purposes, these officers were themselves exercising the functions of a civil court. It is only where their orders are of an interim nature such as an order under Section 36 that the aggrieved party was given a right to establish his claim in a court of law. But where their orders finally decide rights between parties such as an order under Section 41 or 42 that right of appeal for the High Court was conferred. In the old Act the Commissioner's status as a mere administrative officer was recognized by providing for a right of suit in the civil court against his orders which affect the rights of parties.

12. It is true that the new Act makes a clear distinction between the functions of the Commissioner and the Assistant Commissioner on the one hand and those of the ordinary 'courts of law' on the other. Thus in Sub-Section (3) of Section 36, Sub-Section (8) of Section 65, and in Section 73 the expression 'court or law' is used which, in the context, may mean either an ordinary civil or criminal court of the State.

Hence, though Mr. Das is right in saying that the Commissioner and the Assistant Commissioner (Even in the discharge of their judicial functions under the Act which are appealable to the High Court) are not 'court of law' as ordinarily understood, the question still remains whether they are "courts subject to the superintendence of the High Court" within the meaning of Clause 10 of the Letters Patent.

13. In the present case we are concerned with the order passed by the Assistant Commissioner under Section 41 of the new Act. A dispute was raised before him as to whether a particular institution was a public one or whether some persons were hereditary trustee of the same. That section confers jurisdiction on him to decide that dispute and by virtue of Section 74 already referred to he is conferred the powers of a civil court under the Civil Procedure Code while trying a suit, and he is also given protection under the provisions of the Judicial Officers Protection Act. The appellate order of the Commissioner was passed under Sub-Section (1) of Section 44 of the new Act. While hearing appeal he has also got the powers of a civil court by virtue of Section 74 of the Act, and his order is subject to appeal to the High Court under Sub-Section (2) of Section 44. I see no reason why the Assistant Commissioner and Commissioner, while exercising their functions under Sections 41 and 44 of the new Act, should not be held to be 'courts' though they may not be correctly designated as 'civil courts' in the State.

14. The main distinction between a "court" on the one hand and a "quasi judicial tribunal" on the other has been discussed in innumerable decisions both in England and in India. But as there are recent decisions of the Supreme Court on the subject it is unnecessary to discuss them at great length I may only refer to *Royal Aquarium and Summer and Winter Garden Society v. Parkinsen*², where it was pointed out that a functionary may in some matters function as an administrative authority and in certain other matters he may function as a court. Thus, Parliament though primarily a deliberative and legislative body also functions as a court in some matters. In the well known case of *Shell Co. of Australia v. Federal Commissioner of Taxation*³, it was pointed out that though a tribunal may have some of the trappings of a court it may not be a court. In *Cooper v. Wilson*⁴, the reports of the Ministers Powers Committee of Parliament regarding judicial and quasi-judicial functions was quoted with approval and this decision has also been cited with approval in *Bharat Bank Ltd.*

*Delhi v. Employees of Bharat Bank Ltd., Delhi*⁵, *Maqbool Hussain v. State of Bombay*⁶, and *Brajnandan v. Jyoti Narain*⁷, and *Virindra Kumar v. State of Punjab*⁸, Hence I am quoting the relevant passage at length.

"A true judicial decision presupposes an existing dispute between two or more parties and then involving four requisites : (1) The presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact the ascertainment of the fact by means of evidence adduced by the parties to the dispute, and often with the assistance of argument by, or on behalf of, the parties on the evidence; (3) if the dispute between them is a question of law the submission of legal arguments by the parties and (4) a decision which disposes or the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law. A quasi-judicial, decision equally presupposes an existing dispute between two or more parties and involves (1) and (2) but does not necessarily involve (3) and never involves (4). The place of (4) is in fact taken by administrative action the character of which is determined by the Minister's free choice."

The decision of the Assistant Commissioner under Section 41 of the new Act fulfils all the

aforesaid tests. There must first be a dispute for his decision; he is required to hold enquiry under the provisions of the Civil Procedure Code to ascertain questions of fact; he is also required to apply the law to decide whether an institution is a public institution or not and whether a person has a hereditary right of trusteeship over the same. His ultimate decision must be based on his findings of fact in the dispute and on his application of the law to the facts so found. He is himself an officer of the Judicial Service trained in doing this work. His decision is binding on the parties, subject to the right of appeal conferred by Section 44. Under such circumstances there can be no escape from the conclusion that he functions as a "Court". His decision is not subject to the approval of the Government so as to attract the principle laid down in AIR 1956 SC 66. In AIR 1956 SC 153, it was observed :

"It may be stated broadly that what distinguishes a Court from a quasi-judicial tribunal is that it is charged with a duty to decide dispute in a judicial manner and declare the rights of parties in a definitive judgment. To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it.

And it also imports an obligation on the part of the authority to decide the matter on a consideration of the evidence adduced and in accordance with law. When a question, therefore, arises as to whether an authority created by an Act is a Court as distinguished from a quasi-judicial tribunal, what has to be decided is whether, having regard to the provisions of the Act, it possesses all the attributes of a Court".

15. In my opinion, in a proceeding under Section 41 or 44 of the new Act the Assistant Commissioner and the Commissioner possess all the attributes of a court and none of the attributes of an administrative tribunal. Mr. Das urged that sometimes it may happen that disputes under Section 41 of the new Act are raised not by third parties but by the Endowments Department themselves and that it was inconceivable that in a controversy between the Department on the one hand and a third party on the other, any decision taken by the Assistant Commissioner could be said to be a decision by a 'court'. This argument however overlooks the dual nature of the functions exercised by the Commissioner and the Assistant Commissioner. They have undoubtedly administrative functions of a far-reaching nature as referred to in the various sections of the new Act dealing with the control of religious institutions, staff, budget and other matters connected with endowments. Hence, if during inspection by subordinate officers of the Endowments Department it is found that a particular religious institution which is a public institution has not been brought under the provisions of the new Act, a dispute may be started, but once the Assistant Commissioner sits to decide the dispute under Section 41 he becomes a purely judicial officer exercising only judicial functions. It was further urged by Mr. Das that Sub-Section (3) of Section 74 of the new Act required the High Court, while hearing an appeal from the order of the Commissioner, to give the Commissioner an opportunity of being heard and that if the Commissioner was really functioning as a court, it would be inconceivable that an appellate court would implead the lower court as a party and give it an opportunity of being heard. This argument also does not appeal to me. Though, ordinarily in appeals against decisions of lower courts that court is not made a party, in the appellate stage there are sometimes exceptional instances, such as contempt proceedings in which the court itself may be made a party. But merely because at the time of the hearing of the appeal, the lower court

is made a party it will not cease to be a court if it performs all the functions of a court mentioned above; and moreover Sub-Section (3) of Section 74 is a special statutory provision and it cannot alter the essential nature of the functions of the Commissioner and the Assistant Commissioner.

16. Mr. Das then draw our attention to Sub-Section (2) of Section 35 of the new Act which says that when the Commissioner makes a declaration under that Sub-Section as to whether a hereditary trustee has incurred the disqualifications specified in that sub-section he is required to obtain the prior approval of the State Government. He relied on the observations in *Labour Relation Board Saskatchewan v. John East Iron Works⁹*, to the effect that where the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by high considerations of policy also, the authority so deciding will not be a court and contended that the statutory requirement in Sub-Section (2) of Section 35 of the new Act about the Commissioner obtaining his prior approval of the State Government would show that his decision has no finality or binding character (which is one of the essential attributes of the decision of a court) and that questions of, policy may also be involved. According to him therefore, the Commissioner while passing an order under the aforesaid provisions of the Act cannot be said to be functioning as a court. There may be some force in this contention, but in this appeal we are not called upon to decide about the nature of the functions of the Commissioner while acting under Sub-Section (2) of Section 35, but only with the nature of the functions of the Commissioner and the Assistant Commissioner while acting under Sections 44 and 41

respectively, read with Section 74 of the new Act. The Act does not say that decisions under those sections are subject to the prior approval of the State Government or any other authority. On the other hand, the Act expressly says in Sections 73 and 74 that such decisions should be arrived at in a judicial manner by officers acting judicially, and are final and binding on the parties subject of course to the right of appeal to the High Court.

17. In my opinion, therefore, the Commissioner while exercising appellate powers under Sub-Section (1) of Section 44 and the Assistant Commissioner while passing an order under Section 41 of the new Act function only as a 'Court' and not as a quasi-judicial tribunal though it cannot be said that either of them functions as a 'civil court' as ordinarily understood. But the powers of superintendence of the High Court under Clause (1) of Article 227 of the Constitution extend not only over regular civil courts in the State but also over other 'courts' and hence the Commissioner acting under Sub-Section (1) of Section 44 of the new Act is a "court subject to the superintendence of the High Court" within the meaning of Clause 30 of the Letters Patent of the Patna High Court. The judgment of a single judge of this Court in Miscellaneous Appeal No. 81 of 1956 will not be appealable unless the requisite certificate of fitness under that Clause is obtained.

18. The appeal is therefore rejected as not maintainable. There will be no order for costs.

G.C. Das, J.

19. I agree.

Appeal rejected.

Cases Referred.

¹ AIR 1954 SC 400

²3892-1 OB 431

³1931 App Cas 275

⁴(1937) 2 QBD 309 (341)

⁵ AIR 1950 SC 188

⁶ AIR 1953 SC 825

⁷ AIR 1950 SC 66

⁸ AIR 1956 SC 153

⁹1949 AC 134