
(2009) 06 OHC CK 0008
In the Orissa High Court

Benudhar Hota and Others

APPELLANT

Vs

Jagannath Nayak and Others

RESPONDENT

Date of Decision : 22-06-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Criminal Procedure Code, 1973 (CrPC) — Section 145

Citation : (2009) 108 CLT 349 : (2009) 2 OLR 922 Supp

Hon'ble Judges : A.S. Naidu, J

Bench : Single Bench

Judgement

A.S. Naidu, J.—This is an appeal u/s 44 of the Orissa Hindu Religious Endowments Act, 1951 (for short O.H.R.E. Act). The Judgment dated 5th June 1999 passed by the Deputy Commissioner of Endowments in F.A. No. 5/1994 is assailed in this appeal. On the basis of a petition filed by Respondent No. 1 u/s 41 of the O.H.R.E. Act. praying for a declaration that the institution of Deity Sri Jagannath, Balabhadra & Subhadra Bijee at village Kulba is a private Deity & the properties described in the schedule of the petition were private endowment of Respondent No. 1, O.A. No. 16/1980 was registered in the Court of Addl. Asst. Commissioner of Endowments, Sambalpur.

2. In the petition it is averred that Sanandram Naik, the father of Respondent No. 1 migrated to village Kulba from Bilaigarh situated in the district of Sundargarh ages back. At the relevant time no temple or Hindu Religious Institution existed in village Kulba which had population of tribals mostly. Sanandram Naik installed the case Deity in a portion of his house & appointed a Pujari to perform the Seva Puja of the deity & latter on a "Mandap" was constructed for performing Kirtan & other religious functions. It is further alleged that he had set apart some lands more fully described in Schedule "B" of the petition for Seva Puja of the Deity. According to Respondent No. 1 his father was managing the affairs of the deity & after his death Respondent No. 1 was managing the same. In the year 1972 a pucca temple was constructed out of his own funds on a piece of land on which he purchased. He had appointed one

Gokulananda Hota as Pujari, but then the said Gokulananda surreptitiously got his name recorded in respect of the lands during settlement operation. Thereafter he was removed & one Daya Das was appointed as Pujari. It is alleged that on being instigated by the son of Gokulananda Hota, the villagers, claimed the institution to be a public religious endowment & tried to disturb in the Nitikantis of the Deity. Consequently, he was constrained to file a petition u/s 41 of the O.H.R.E. Act for declaration that the institution was his private institution & for other consequential reliefs.

3. The villagers, who were impleaded as Opposite Parties filed a joint written statement mainly taking the stand that no notice as mandatorily required under Order 1, Rule 8 of C.P.C. having been published, the petition filed u/s 41 of the O.H.R.E. Act"was liable to, be rejected on that ground alone. It is further averred in the written statement that the villagers of "Kuluba" & "Banki Bahal" had installed the deity about 50 to 60 years back out of public funds. Construction of the Temple, Mandap, etc. were made out of public contributions. It is further averred that villagers used to manage the institution & they had a right to worship the Deity & the institution was a Public Religious Endowment.

4. On the basis of the aforesaid pleadings the Addl. Asst. Commissioner framed five issues.

In order to substantiate the case Respondent No. 1 got examined eight witnesses & exhibited 4 documents. On behalf of the villagers eight witnesses were also examined & eight documents were exhibited. After discussing the evidence in extenso the Addl. Asst. Commissioner held that the institution not a private institution but wets a public religious institution & that the properties described in the Schedules "A" & "B" of the petition were religious endowments & Respondent No. 1 was its hereditary trustee.

5. Being aggrieved by the said order, the villagers filed an appeal in the Court of Deputy Commissioner of Endowments u/s 44(1) of the O.H.R.E. Act. The said appeal was registered as F.A. No. 13/1982 the Respondent also field a cross objection assailing the finding that institution was not his private institution. The Deputy Commissioner heard the appeal & cross objection & dismissed the same. Against the said order both the contesting parties filed appeal before this Court, which was registered as M.A. No. 340/1984. The main ground taken before this Court in the aforesaid appeal was that the Deputy Commissioner who heard F.A. No. 13/92 had recorded the evidence at the trial stage in the capacity of Addl. Asst. Commissioner. The appeal was allowed by this Court by Judgment dated. 25.9.1986, the Judgment passed in F.A. No. 12/82 was set aside & the matter was remitted back to the Commissioner for de novo disposal. After hearing parties, the Commissioner held that the institution was a public religious endowment & Jagannath Naik was the hereditary trustee. The said Judgment was once again assailed before this Court in M.A. No. 354/1987, by Hindu Public. Jagannath Naik after receiving notice appeared & filed cross appeal in M.A. No. 354/ 1987 challenging the portion of the Judgment holding that the institution

was a public religious endowment. By Judgment dtd. 6.4.1993 this Court, on being satisfied that the mandatory requirement of issuance of notice to the Hindu Public under Order 1, Rule 8 of C.P.C. was not followed, set aside the Judgment & remitted the matter to the Court of Addl. Asst. Commissioner, Sambalpur for issuance of fresh notice under Order 1, Rule 8 of C.P.C. & to proceed with the proceeding de novo on the basis of the materials already on record & to be placed by the parties.

6. In consonance with the said direction the Addl. Asst. Commissioner once again took up the matter & after appreciating the case of all the parties & discussing the evidence held that the Institution of Sri Jagannath, Balabhadra & Subhadra to be a public religious institution & that Shri Jagannath Naik the Petitioner was the hereditary trustee of the said institution. The said order was challenged before the Deputy Commissioner of Endowments in F.A. No. 5/1994. Jagannath Naik also filed a cross objection in F.A. No. 5/1994 Assailing the finding that the Institution is a "public religious institution." The Deputy Commissioner after going through the materials dismissed the appeal as well as the cross appeal & confirmed the Judgment dtd.21.12.1993 passed by the Addl. Asst. Commissioner, Sambalpur in O.A. No. 16/1980. The said Judgment as stated earlier is assailed in this Miscellaneous Appeal.

7. Section 44 of the O.H.R.E. Act gives a wide power to the High Court inasmuch as in appeal the High Court can go into both facts & law. It is also well settled that Section 100 of the C.P.C. is not applicable to appeals to the High Court filed u/s 44 of the O.H.R.E. Act See Raghunath v. Nityananda reported in ILR 1963 Cutt. 257 & Saraswati v. Harekrishna reported in 1971 (2) CWR 558. In view of the aforesaid authoritative pronouncement, this Court meticulously went through the inter se pleadings & scrupulously examined the evidence adduced, both oral & documentary.

8. According to Respondent No. 1, Jagannath Naik who was the Petitioner before the Addl. Asst. Commissioner of Endowments, his father Sanandram Naik established the institution over his own lands appertaining to Plot No. 263 & 263/2 under Khata No. 11 & endowed the same in favour of Lord Jagannath, Balabhadra & Subhadra. The Records of Rights (Ext. 1) reveals that the lands stood recorded in the name of Sri Jagannath Mahaprabhu represented through Sanandram Naik as Marfatdar. On the basis of such facts Jagannath claims for a declaration that the Institution is a private Institution Deities & he is the hereditary trustee.

Addl. Asst. Commissioner has declared the institution to be a Public Religious Institution & properties mentioned therein to be Public Religious Endowments, but then held that Respondent No. 1, Jagannath Naik, is the hereditary trustee of the Institution. The said order was assailed in F.A. No. 3925 Respondent No. 1 filed a cross objection challenging the finding arrived at by the Addl. Asst. Commissioner to the effect that the Institution was a public by nature. The Appellate Court dismissed the appeal & confirmed the findings of the Trial Court.

Assailing the said order the Hindu Public have preferred this appeal. Admittedly, Respondent No. 1 has not filed any cross objection before this Court challenging the public nature of the institution. In view of the aforesaid facts the finding of the Addl. Asst. Commissioner to the effect that the institution is a Public Religious Institution which was confirmed by the Deputy Director III appeal has not attained finality. Thus, the only dispute which needs to be considered in this Miscellaneous Appeal is as to whether Respondent No. 1 is the hereditary trustee of the Institution of Sri Jagannath, Balabhadra & Subhadra situated at village Kulba which is Public Religious Endowments or not.

The designation "Hereditary Trustee" has been defined under Sub-section VI of Section 3 of the O.H.R.E. Act to be the trustee of a religious institution, succession to whose office devolves by hereditary right since the time of the founder or is regulated by custom or is specifically provided for by the founder, so long as such scheme of succession is in force.

The word "trustee" has been defined in Sub-section (XVI) of Section & means a person by whatever designation known, in whom the administration of a religious institution & endowment are vested, & includes any person or body who or which is liable as if such person or body were a trustee.

A person claiming to be a hereditary trustee has to establish mainly three facts; (1) the succession to such office devolves by hereditary right since the time of the founder, (2) the succession to such office is regulated by custom & (3) it is specifically provided by the founder according to a scheme of succession so long as such scheme is in force.

Only on the ground that a person was in management or was treated as a Trustee for a very long period, would not be sufficient for a declaration that he was a hereditary trustee. See *Kashinath v. Dibakar* reported in ILR 1961 Cutt 458).

9. To succeed to the office of hereditary trustee a person has to establish that from the time of the founder of the Institution he or his family had been holding the office of the trustee as of right, as per the scheme of succession laid down by the founder. In other words, if there is interruption of trusteeship, there can be no question regarding acquisition of hereditary trusteeship. In the case hand, admittedly there is no scheme & the decision as to whether Respondent No. 1 was the hereditary trustee or not has to be arrived at on the basis of the oral & documentary evidence adduced in the case.

10. Mr. Mishra, Learned Counsel for the appellants, submits that the question as to whether Respondent No. 1 was the hereditary trustee or not need not be decided in the case mainly because he had not made such a prayer in the petition filed by him u/s 41 of the O.H.R.E. Act before the Addl. Asst. Commissioner. Perusal of the prayer made in the petition filed u/s 41 of the O.H.R.E. Act reveals that Respondent No. 1 only sought for a declaration that the suit Deity is a private Institution & the properties in the schedules are private

endowment of Respondent No. 1. According to him as there is no specific prayer for declaration that he was the hereditary trustee the Courts below acted illegally in declaring Respondent No. 1 as the hereditary trustee.

11. The said proposition according to this Court is not proper. When a party puts of a claim that a religious institution is his private endowment, the claim for hereditary trusteeship of the said institution becomes inherent to the said claim. In the case of *Dhruba Charan Swain and Ors. v. Jagannath Panda and Anr.* reported in 26 (1960) C.L.T. 293 it was held as follows:

When the Respondents claimed the temple to be a private temple, claiming hereditary ownership over the deity was inherent there, & that included their claim of hereditary trusteeship in case the temple was a public one.

In view of the above settled position, even if Respondent No. 1 had not claimed to declare him as a hereditary trustee, his specific case was that the suit institution was his private endowment, in the event the Court is satisfied while holding the institution to be a Public Religious Endowment can declare Respondent No. 1 to be the hereditary trustee. But then the said declaration depends upon the facts & circumstances of the case & subject to satisfaction of other criteria. It would be therefore prudent to first decide the nature of the institution & thereafter proceed to examine the claim of hereditary trusteeship.

12. As has been stated earlier according Respondent No. 1 the village Kulba was mostly inhabited by tribals & there was no Hindu Temple in the said village & the father of Respondent No. 1 installed the Deities in a portion of his house, the aforesaid submission is, however, strongly repudiated. It is needless to say that though most of the present day Hindu Public Temples had been founded ages back as private temples, by efflux of time, there are instances, where the same have become public in nature. Some of the private temples have acquired great deal of religious reputation either because of their location or other circumstances. They have attracted large number of devotees gradually in course of time & have become public temples. Consequently, the members of the public or a Section thereof either worship or take part in the religious functions. In such a case the temple would clearly be a "public temple" even if the same was originally a "private temple" or its origin is unknown or lost in antiquity. As such the character of the particular temple has to be decided on the basis of various circumstances & the Courts have to address themselves to various questions such as;

- (i) Is the temple built in such imposing manner that it may prima facie appear to be a public temple?
- (ii) Are the members of the public entitled to worship in that temple as of right?
- (iii) Are the temple expanses met from the contributions made by the public?
- (iv) Whether the Sevas & ceremonies conducted in the temple are attended & celebrated by public?

(v) Have the management as well as the devotees been treating the temple as a public temple?

The Supreme Court in the case of *Goswami Shri Mahalaxmi Vahuji Vs. Ranchhoddas Kalidas and Others*, has elaborately dealt with the aforesaid aspect & circumstance, it is by no means a decisive *Lakshmana v. Subramania* reported in one is a relevant. In the case of concluded that though appearance of a temple AIR 1924 PC 44, the Judicial Committee while dealing with a temple, which is initially a private temple, held that the conduct of the Mahant showed that he had held out & represented to the Hindu Public that the temple was a public temple at which all Hindus might worship & the inference was therefore that he had dedicated it to the public. A reading of the aforesaid decision leads to a conclusion that the decision as to whether a institution is a public one or a private one depends on the inference to be derived from the evidence as to the way in which the temple & its endowments had been dealt with.

13. In the case at hand, though there is no specific evidence with regard to the year when the Deities were installed, but then it appears that they were installed some time in the year 1930. Exts.1 & 2 are the Record of Rights published during 1936 settlement & 1977 settlement respectively. In both these documents the properties stood recorded in the name of the Deity through the father of Respondent No. 1 & thereafter Respondent No. 1 as Marfatdar's. O.P.W.4 admitted in his evidence that in course of "Pratistha Ceremony" the public selected Respondent No. 1 to take "Sankalpa" as a Headman of the village. Respondent No. 1 has been examined as P.W.1. He admitted that he has no direct knowledge with regard to the installation of the Deity, but then he stated that he had constructed the new temple. In cross-examination, however, he failed to tell the total expenditure incurred for such construction. He also admitted that the proceeding u/s 145 of Cr.P.C. were initiated with regard to the Deities land. According to P.W.2 several people had come for Darshan of the Deities out of their own. Will & without any interruption from any quarter & that the temple is situated in the middle of the village. P.W.6 has admitted that Respondent No. 1 was the Mukhia of the village & as such he acted as "Karta" during ceremonial worship. P.W.8 has admitted that hundreds of persons take part in the Car Festival of the Deities & that no permission is required to be taken for participating in the function. O.P.W.1 in his deposition has stated that the villagers founded the temple. The Addl. Asst. Commissioner & the Deputy Commissioner, it appears, have discussed oral evidence in extenso. Mr. Mishra, Learned Counsel appearing for the appellants also took pains to place the evidence before this Court once again.

14. After going through the evidence, both oral & documentary, this Court is satisfied that the suit Institution is a Public Religious Endowment & the finding to that effect needs no interference.

15. So far as the management of the Institution is concerned, though there is some material to reveal that the father of Respondent No. 1 & thereafter

Respondent No. 1 was the recorded Marfatdar of the suit institution, no clinching evidence has been adduced to arrive at a conclusion that they were in sole management. The oral evidence as well as the documentary evidence clearly reveals that the public participating the day to day Nitikantis. There are also materials to reveal that they contributed for the purpose of construction of the temple as well as for holding Nitikantis. That apart the institution does not have enough landed property of his own so as to enable a single family to maintain it. No records or accounts are produced by Respondent No. 1 to establish the fact of management. There is also some evidence to reveal that Gokulananda looked after the management for some time thus there was disruption.

16. Considering all these facts & after going through the evidence once again this Court, while upholding the finding given by the Courts below to the effect that the Institution is a Public Religious Endowment set aside the finding that Respondent No. 1 is its hereditary trustee & holds that the suit institution is a Public Religious Endowment without any hereditary trustee & it is open for the Endowment authorities to constitute a non-hereditary trust board.

With the aforesaid modification, the M.A. is disposed of.