

(1969) 09 OHC CK 0029
In the Orissa High Court
Case No : O.J.C. No. 1759 of 1968

Bhramarbar Santra and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 19-09-1969

Acts Referred:

Constitution of India, 1950 — Article 226

Orissa Hindu Religious Endowments Act, 1951 — Section 27, 41, 41(1), 44, 68

Citation : AIR 1970 Ori 141 : (1970) 36 CLT 897

Hon'ble Judges : G.K. Misra, C.J; R.N. Misra, J

Bench : Division Bench

Advocate : A.B. Misra, for the Appellant; S. Mohanty, for the Respondent

Final Decision : Allowed

Judgement

G.K. Misra, C.J.—The facts of the case may be stated in brief. In Tune 1966 an application was filed u/s 27 of the Orissa Hindu Religious Endowments Act 1951 (Orissa Act II of 1952) (hereinafter referred to as the Act), by 40 villagers alleging that the temple of Sri Lokenath Iswar Deb installed in village Bantala, in Nayagarh Sub-Division of the district of Puri, is a public temple, of which the petitioners in this writ application are the marfatdars. The maifatdars were treating the properties of the temple as their private properties. The nitis of the Deity were almost on the point of being stopped. The applicants prayed that non-hereditary trustees should be appointed for the management, of the temple. On 31-7-66 the petitioners were directed to submit accounts. On 4-8-66 the Inspector of Endowments was directed to furnish a report as to whether the endowment was public or private. On 6-9-66, the Inspector, after a local enquiry, reported that the temple was constructed by the villagers and the marfatdars and that the petitioners were in management. It was further reported that the villagers of Bantala and the Marfatdars come from one family and the members of the public from different villages come to the deity for Darshan,, and do Puja as a matter of right. He came to the conclusion that the institution was a public

temple and suggested the names of five persons for appointment as non-hereditary trustees. On 4-11-66 the Assistant Endowments Commissioner invited objections by proclamation against the proposed personnel of the board of non-hereditary trustees. On 17-11-1966 the petitioners filed their objection claiming the institution to be private and that they were the hereditary trustees. On 28-1-67 the villagers filed a petition of complaint against the petitioners. On 2-5-67 the Additional Assistant Endowments Commissioner held that the institution was a public temple. He did not record any finding whether the petitioners were hereditary trustees or not; approving the suggestion of the Inspector of Endowments he appointed five non-hereditary trustees. Opposite party No. 4 is one of the trustees representing the five non-hereditary trustees so appointed. A direction was given that the marfatdars (petitioners) would hand over charge of the Institution and its properties to the trust board within a week. On 15-5-67 the petitioners filed a revision, u/s 9 of the Act, against the order dated 2-5-67. On 27-5-67, the non-hereditary trustees filed an application u/s 68, for delivery of possession of the institution and its properties. By his order dated 22-7-68, the Assistant Endowments Commissioner directed delivery of possession as prayed for. In the meantime, on 10-11-67 the petitioners filed an application u/s 41 of the Act for a declaration that the institution was private and that they were the hereditary trustees thereof. On 5-12-68 the revision case was dismissed by the Endowments Commissioner, and the Inspector of Endowments was directed to execute the writ of delivery of possession. On 25-12-68 the Inspector of Endowments submitted a report that the writ was executed on 11-12-68. The writ application was filed on 23-12-68, it was admitted on 24-12-68 and interim stay of the operation of the order for delivery of possession was granted.

2. The petitioner's case is that the order of the Additional Assistant Endowments Commissioner dated 2-5-67, appointing non-hereditary trustees of the institution u/s 27 of the Act and the order passed by the Assistant Endowments Commissioner on 22-7-63 directing delivery of possession of the institution and its properties to the non-hereditary trustees u/s 68, are without jurisdiction. Their stand is that without a determination u/s 41 of the Act as to whether the institution is private or public and a further determination as to whether the petitioners are hereditary trustees, the order passed u/s 27 appointing non-hereditary trustees and the order directing delivery of possession, passed u/s 68 encroach on the private rights of the petitioners and are without jurisdiction and void. The writ application has been filed under Articles 226 and 227 of the Constitution to quash the aforesaid two orders.

3. The stand taken on behalf of the Endowments Commissioner is that it is open to him to pass an order u/s 27 and Section 68 without determination of the aforesaid questions u/s 41. Mr. Mohanty, however, conceded that the impugned orders in this particular case cannot be supported and are liable to be quashed inasmuch as there was no enquiry at all by the Endowments Commissioner before appointing non-hereditary trustees u/s 27 of the Act. He further conceded

that an order passed u/s 27 encroaches on the property rights of the petitioners, and even a summary enquiry is to be made by observing the principles of Natural Justice and the petitioners should be given full opportunity to substantiate their case that the institution and its properties are private and that they are the hereditary trustees. He, however, seriously opposed the stand taken on behalf of the petitioners that such orders cannot be passed without first determining those questions in a proceeding u/s 41 of the Act,

4. The concession of Mr. Mohanty, that without first recording a finding that a prima facie case was established that the institution was public and that the petitioners were not the hereditary trustees, the order for appointment of non-hereditary trustees u/s 27 and the direction for delivery of possession u/s 68 are without jurisdiction, is well founded. It is now well settled that a marfatdari right itself is a property right. Besides, the petitioners are admittedly in possession of the temple and its properties. They cannot be divested of the same, without a finding that the institution is public and they are not hereditary trustees thereof. The Act has no application to private endowments. The Assistant Endowments Commissioner merely depended on the report of the Inspector of Endowments for such a finding.

The Inspector was not examined as a witness and the Inspector's report based on a local enquiry of his own is purely hearsay and is inadmissible in evidence. The petitioners were not given any opportunity to substantiate their case and no evidence was taken by the Assistant Endowments Commissioner in support of the institution being public. There is not even a finding that the petitioners were not hereditary trustees. The Assistant Endowments Commissioner is a judicial officer and he should not have acted like a purely administrative officer, in taking away an institution like this. The Supreme Court upheld the constitutionality of the Act largely on the reason that determination of such matters would be made by officers recruited from the Judicial Service. The Additional Assistant Endowments Commissioner and the Assistant Endowments Commissioner in passing the aforesaid orders dated 2-5-67 and 22-7-68 respectively and the Endowments Commissioner in dismissing the revision by his order dated 5-12-68. have acted contrary to law being wholly oblivious of the principle that property rights of persons would be dealt with in a judicial manner. The concession made by Mr. Mohanty is sufficient to quash the aforesaid orders and allow the writ application.

5. Mr. Misra for the petitioners, however, contends that the aforesaid orders are without jurisdiction until there is first a determination of the two controversial questions u/s 41 of the Act. He urges that the matter goes to the root of the question and should be decided in this writ application as it is often noticed that the Endowments Commissioner and the Assistant Endowments Commissioner usually usurp jurisdiction and act arbitrarily in encroaching upon private property rights.

We are satisfied that the contention raised by Mr. Misra is a very important one

and directly arises for consideration in this writ application and accordingly proceed to decide the same.

6. Section 41 is in Chapter V and deals with enquiries. It runs thus:

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

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

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

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

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

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

By Section 1(2) the Act is made applicable to all Hindu public religious institutions and endowments. Any religious institution or endowment which is private does not come within the purview of the Act. In this connection it is to be noted that in the original Orissa Act II of 1952, Section 1(2), Explanation II enacted that every institution shall be presumed to be public until the contrary is proved. Explanation II was omitted by the Orissa Hindu Religious Endowments (Amendment) Act, 1954 (Orissa Act 18 of 1954).

The dispute In this case comes directly within the ambit of Section 41(1) (a), (c) and (d). The petitioners claim that the temple is a private religious institution, that they are the hereditary trustees of the temple, and that the properties attached to the temple are nominal Debottar. Where a property is recorded in the name of the deity, but in reality was not dedicated and the donor enjoys it, in exercise of his own right, title and interest, then the debottar is nominal. Under Clause (d) the Assistant Endowments Commissioner is to decide whether the property is the private property of the petitioners or of a public religious endowment Even if the claim that the Debottar is nominal is not sustained, yet the Endowments Commissioner would have no jurisdiction over the institution if the temple is private. In such a case the Debottar would be real but yet not public. That Clause (d) carries the aforesaid connotation appears clear from the proviso laying down that the burden of proof under that clause would lie on the person claiming the property or money to be other than that of a religious endowment. It is further to be noted that the burden of proof in respect of the petitioner's claim that they are the hereditary trustees is not on them,

7. Thus, the Assistant Endowments Commissioner has full jurisdiction to decide the disputes u/s 41(1) (a), (c) and (d). The jurisdiction of the Civil Court in this

respect is barred by Section 73(1) which lays down that no suit or other legal proceeding in respect of the administration of a religious institution, or in respect of any other matter on dispute, for determining or deciding which provision is made in this Act, shall be instituted in a court of law except under, and in conformity, with, the provisions of this Act. As the jurisdiction of the Civil Court is barred in respect of the aforesaid matters, there is a provision for appeal made in Section 44 first to the Endowments Commissioner and then to the High Court.

8. Section 44 runs thus:

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

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

The Assistant Endowments Commissioner is selected from the rank of Mun-sif while the Endowments Commissioner Is to be a person not below the rank of a Subordinate Judge. Thus Sections 41 and 44 provide a complete machinery for determination of civil rights enumerated In Section 41.

9. Section 74 prescribes the procedure for enquiries, appeals and service of notice. Sub-sections (1) and (3) which are relevant may be extracted:--

"74. Procedure at enquiries and appeals and service of notice: (1) in relation to all proceedings before the Commissioner or the Assistant Commissioner, the orders in pursuance of which are, under the provisions of this Act, appealable to the High Court, the Commissioner or the Assistant Commissioner as the case may be, shall have the powers vested in a court under the CPC V of 1908, when trying a suit in respect of the following matters:--

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

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

(2) * * * * (3) The court hearing an appeal from the order of the Commissioner may direct further enquiry or modify or set aside such order, as the Court may deem fit; and unless the appeal is summarily dismissed, the Commissioner shall be given an opportunity of being heard before the order passed by him is interfered with in any manner;

Provided that the operation of the order of the Commissioner shall not be stayed pending disposal of the appeal."

The entire CPC is not made applicable to enquiries and appeals. It is only to such enquiries in which the orders passed under the provisions of the Act are made appealable to the High Court, that Section 74 applies. In respect of proceedings in which the orders are not made appealable to the High Court, neither the Commissioner nor the Assistant Commissioner shall exercise the powers vested in a civil court, as laid down in Sub-sections (1). As against orders passed u/s 41, an appeal lies to the High Court. So, in the trial of disputes coming within the ambit of Section 41, the matters referred to in Clauses (a) to (g) of Section 74(1) would apply.

10. Section 76 deals with the power to make rules. Sub-section (1) says that the State Government may make rules to carry out all or any of the purposes of the Act, not inconsistent therewith. Sub-section (2) (d) confers power on the State Government to make rules with reference to the powers of the Commissioner or the Assistant Commissioner to hold enquiries, to summon and examine witnesses, and to compel production of documents.

This clause also indicates that the whole of the CPC is not applicable to such enquiries.

Rule 43 of the Rules made u/s 76(d) of the Act runs thus:--

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

This rule confers wide powers on the Commissioner or the Assistant Commissioner in respect of enquiries u/s 41 inasmuch as they can apply to the provisions of the Civil Procedure and the G.R.C.O. unless they are inconsistent with the provisions of the Act and the Rules.

It would, however, appear that in respect of proceedings in which orders are passed against which no appeal lies to the High Court, the enquiry will be of a summary nature and shall be conducted as in respect of suits of small cause nature with due notice to the persons affected by the enquiry.

11. An order passed u/s 27 of the Act is not appealable to the High Court. The enquiry made under that Section would, therefore be of a summary nature and would be conducted as in respect of small cause suits. In small cause suits the evidence is not recorded verbatim; only a gist of the statement made by the witness is noted.

12. Section 27 occurs in Chapter III under the caption "Religious Institutions other than Maths and specific Endowments attached thereto". Sub-section (1) of this Section runs thus:

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

"Religious institution" has been defined in Section 3 (xiii) as meaning

"a math, a temple and endowments attached thereto, or a specific endowment and includes an institution under direct management of the State Government."

"Religious endowment" is defined in Section 3 (xii) -- leaving out the provisos and explanations attached to the definition -- as

"property belonging to or given or endowed for the support of maths or temples or given or endowed for the performance of any service or charity connected therewith or of any other religious charity and includes the institution concerned and the premises thereof and also all the properties used for the purpose or benefit of the institution and includes all properties required from the income of the endowed property,"

Section 27(1) thus gives power to the Assistant Endowments Commissioner to appoint non-hereditary trustees. The condition precedent to the exercise of jurisdiction is the non-existence of hereditary trustees in respect of the religious institution. Before the Assistant Commissioner seizes jurisdiction to appoint non-hereditary trustees in respect of a religious institution, he must have come to a finding that (i) the institution is public and (ii) it has no hereditary trustees.

13. The moot question is whether the Assistant Commissioner could, in a proceeding u/s 27, determine the controversy as to whether the institution is public or private and whether there are hereditary trustees or not. The section does not, in terms, lay down that the Assistant Commissioner should make an enquiry on these matters. It follows that there must have been a prior

determination that the institution is public with no hereditary trustees. It is only then that he could proceed with the appointment of non-hereditary trustees and in doing so he shall have due regard to the claims of persons belonging to the religious denomination.

14. Such a construction seems to be reasonable in view of the fact that an elaborate enquiry has been provided for the determination of these very matters in a separate proceeding u/s 41, with right of appeal u/s 44. These matters involve civil rights and cannot be bartered away by resorting to a summary enquiry u/s 27, unless the legislative intention is expressly indicated therein. The Legislature cannot be expected to have simultaneously provided for two independent types, of enquiries in relation to the same matters--one of a summary nature as contended by Mr. Mohanty and another with elaborate safeguards. The fact that no appeal has been provided against an order passed u/s 27 would make it abundantly clear that such rights are not to be determined u/s 27, Section 27 also does not specify that a determination thereunder would be subject to a decision u/s 41. In fact, if there is an earlier decision u/s 27, relating to those disputes, further determination of the same matters u/s 41 would be hit by the general principles of *res judicata*. Sections 27 and 41 are not analogous to Order 21, Rule 58 and Order 21, Rule 63 of the Civil P. C. which expressly prescribe that a summary decision under Order 21, Rule 58 would be subject to the decision in a suit, under Order 21, Rule 63.

15. A comparison of the rights accruing under Sections 27 and 28 would reinforce the aforesaid conclusion. Section 28 deals with the power to suspend, remove or dismiss trustees.

"28, Power to suspend, remove or dismiss trustees: (1) The Commissioner or the Assistant Commissioner as the case may be may suspend, remove or dismiss the trustee whether hereditary or non-hereditary of such a religious institution--

(a) for persistent default in the submission of budgets, accounts, reports or returns, or in payment of contributions or other dues payable to Government;

(b) for wilful disobedience of any order issued under the provisions of this Act by the State Government or the Commissioner or Assistant Commissioner;

(c) for any malfeasance, misfeasance, breach of trust or neglect of duty in respect of the trust or alienation of the trust property in contravention of this Act, or the Orissa Hindu Religious Endowments Act, IV of 1939;

(d) for any misappropriation of, or improper dealing with, the properties of the institution of which he is the trustee;

(e) for unsoundness of mind or other mental or physical defect or infirmity which makes him unfit for discharging the functions of a trustee.

(2) When it is proposed to take action under Sub-sections (1), the Commissioner or the Assistant Commissioner, as the case may be, shall frame charges against

the trustee concerned, give him an opportunity of meeting such charge of testing the evidence adduced against him, and of adducing evidence in his favour; and the order of suspension, removal or dismissal shall state the charges framed against the trustee, his explanation, and the finding on each charge with the reasons therefor.

(3) Pending the disposal of the charges framed against the trustee, the Commissioner or the Assistant Commissioner may place the trustee under suspension and appoint a fit person to discharge the functions of the trustee.

(4) A trustee who is suspended, removed or dismissed by an Assistant Commissioner under Sub-sections (1), may, within one month from the date of the receipt of the order of suspension, removal or dismissal, appeal to the Commissioner against such order in the prescribed manner and the Commissioner shall pass such orders on the appeal as he may think fit;

Provided that no appeal shall be entertained, unless the person affected by the order complies with it and makes over charge of his office and unless such a condition is waived by the Commissioner at his discretion.

(5) Any hereditary trustee aggrieved by an order passed by the Commissioner under Sub-section (1) or under Sub-sections (4) may, within thirty days from the date of receipt of the order, appeal to the High Court and the Court may either summarily dismiss the appeal or, after hearing the parties, pass such orders as the Court may deem fit.

(6) A hereditary trustee so suspended, removed or dismissed may be allowed such maintenance as may be fixed by the Commissioner considering the financial condition of the institution and the rules made in this behalf."

16. The section confers a right of appeal and second appeal where a hereditary trustee or non-hereditary trustee is suspended, removed or dismissed on the various grounds enumerated in that section. Further, when a hereditary trustee is suspended, removed or dismissed, he is allowed a maintenance to be fixed by the Commissioner.

17. If Section 27 is construed as conferring the power on the Assistant Commissioner also to decide whether an institution is public or private, or whether it has hereditary trustees, it is difficult to imagine why there would be no corresponding safeguards similar to those provided in Section 28. Deprivation of a private institution from the domain and control of the hereditary trustees, as an inroad on private rights, is not less serious than suspension, removal or dismissal of a trustee. It would therefore, be reasonable to confine the application of Section 27 only to cases where in respect of the disputed institution there has been a prior determination of the controversial rights mentioned in Section 41. To treat Section 27 as conferring power on the Assistant Commissioner to seize jurisdiction before determining the dispute u/s 41 would, in effect, amount to trifling with the safeguards provided under the Act

against arbitrarily taking away private property rights of persons.

18. Section 68 deals with putting the trustee or the executive officer in possession. This section comes into operation only where a person has been appointed the trustee or executive officer and/or is discharging the functions of a trustee in accordance with the provisions of the Act. If the order of appointment is made u/s 27, then Section 68 would confer power to take possession of the religious institution and the properties attached thereto. Section 63 is therefore, more or less ancillary to Section 27. It follows that if the order passed u/s 27 is without jurisdiction, the order for delivery of possession passed in pursuance of that order, cannot also be sustained.

19. In *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., and Mahant Sri Jagannath Ramanuj Das and Another Vs. The State of Orissa and Another*, the attack on the Act on the basis of inroad into private rights inconsistent with Article 19(1)(f) was negatived on the ground that the determination of these rights would be done by judicial officers just as it would be done in a civil suit, with a right of appeal to the High Court. Sections 38 and 39 of the old Orissa Hindu Religious Endowments Act, 1939, were declared ultra vires because important civil rights were left to be decided by executive authorities without the intervention of the Civil Court. The present Act was held to be constitutionally valid on account of the amendment whereby judicial officers were to make full-fledged enquiries before the rights of private persons were extinguished. We are, therefore, clearly of opinion that the Assistant Endowments Commissioner had no jurisdiction to appoint non-hereditary trustees before disposing of the application u/s 41 of the Act.

Even if no application u/s 41 had been filed by the petitioners, the Assistant Commissioner should have started a proceeding u/s 41, on the application of the villagers filed in June 1966 or suo motu. Without doing so, by an administrative fiat, he called for accounts and started to exercise control over the institution.

20. Indeed, it is remarkable that though the petitioners filed an application u/s 41 on 10-11-1967, the Assistant Commissioner did not so far proceed to make any enquiry thereunder. Doubtless, administrative and judicial functions have been combined in these functionaries. But it has been clearly indicated by this Court in several judicial pronouncements that while deciding disputes these officers are to act strictly judicially and with a mind absolutely free from bias especially as they have also administrative control over these institutions.

21. Our conclusion gets considerable Support from *Ram Saroop Dasji Vs. S.P. Sahi*, Special Officer-in-charge of The Hindu Religious Trusts and Others, In that case, the Bihar State Board of Religious Trusts, u/s 59 of the Bihar Hindu Religious Trusts Act, 1951 (Act I of 1951) asked the appellant to furnish to the Board a return of the income and expenditure of the Asthal. The appellant challenged the jurisdiction of the Board. The Supreme Court held that the Act

applied to public and not to private trusts. The Board had not given much evidence to establish that the trust was public. There was an earlier determination by the High Court in 1943 (in First Appeal 10 of 1941) that the trust was private; the Bihar Act was passed subsequent to the decision of the High Court. Their Lordships took the view that in the absence of some evidence to the contrary, the appellant was entitled to say that the Salouna Asthal and the properties appertaining thereto did not constitute a public trust. They accordingly quashed the order of the respondent-Board calling upon the appellant to file a statement of income and expenditure with regard to the properties of the Asthal. A writ was issued prohibiting the respondents from interfering with the right of the appellant in the management of the Asthal and its properties unless and until the respondents obtained the necessary determination that the Salouna Asthal was a public trust. Here also, unless the Assistant Commissioner first establishes that the petitioners were not the hereditary trustees of the disputed institution, it will not be open to him to proceed u/s 27 to appoint non-hereditary trustees in their place. Such a finding can only be arrived at in a proceeding u/s 41. The fact that in the Supreme Court case there was an earlier decision of the High Court case there was an earlier decision of the High Court that the institution was private, makes no difference in principle inasmuch as the same question was to be re-determined in an appropriate proceeding under the Bihar Act.

22. It has been very strenuously contended by Mr. Mohanty that unless Section 27 is construed as conferring powers on the Assistant Endowments Commissioner for exercising interim control, public religious institutions and endowments would be mismanaged. According to him, a proceeding u/s 41 would be a long drawn affair and would necessarily be dilatory as a first appeal and a second appeal are provided for u/s 44.

This argument does not appeal to us. The moment a dispute is started u/s 41, the Assistant Endowments Commissioner should, without delay, enquire into the matter and once he gets seisin he can also pass interim orders for the preservation of the religious institution. The interim order would vary according to the facts and circumstances of each case. But in no circumstance can the Assistant Endowments Commissioner be permitted to arbitrarily exercise jurisdiction u/s 27 and defer the enquiry u/s 41. It is not the function of this Court to legislate. If the legislative intention is not clear on the facts of Section 27, it is not for this Court to imagine supposed difficulties and then give a construction that would meet these difficulties. On the plain language of Section 27, there is no provision for enquiry into such matters thereunder, nor is there any provision in the rules made under that section to make such enquiry. It is always open to the Legislature to intervene if its object is to avoid administrative difficulties.

In this particular case, though the application u/s 41 had been filed by the petitioners on 10-11-1967, no enquiry has been started as yet--though both the Assistant Commissioner and the Commissioner were aware of the pendency of

the proceeding u/s 41, when they passed their orders dated 22-7-1968 and 5-12-1968. Till now the proceeding has not been disposed of. It is difficult to imagine how judicial officers could prolong such an important matter for over two years. There may be administrative difficulties created by mismanagement, malfeasance or misfeasance unless non-hereditary trustees are appointed u/s 27. But we have also to consider the nature of the civil consequences arising out of the exercise of jurisdiction u/s 27 without a prior determination of the proceeding u/s 41.

In our view, the civil consequences resulting from arbitrary exercise of such jurisdiction are clearly much worse than those arising from temporary mismanagement or malfeasance by the party claiming the institution to be private until the public character of the institution is established after due enquiry.

23. At any rate, interim orders to safeguard the interests of the institution can be passed even in the enquiry u/s 41 itself if it is taken up expeditiously.

Section 7 of the Act corresponds to Section 11 of the old Act of 1939. That section runs thus:

7. Powers and duties of the Commissioner:--

(1) Subject to the provisions of this Act, the general superintendence of all religious institutions and endowments shall vest in the Commissioner.

(2) The Commissioner may do all things which are reasonable and necessary to ensure that the religious institutions and endowments are properly administered and that their income is duly appropriated for the purposes for which they were founded or exist.

Explanation-- The Commissioner shall have power to pass such interim orders as he deems necessary for the proper maintenance of a religious institution or the proper administration of a religious endowment including the power to pass such orders, if any when necessary, for the proper management of any institution when a dispute concerning the same is pending in a Court."

It would be clear from the Explanation that the Commissioner shall have power to pass such interim orders as he deems necessary for the maintenance of religious institutions or for the proper administration of religious endowments. That the Commissioner has such power is laid down in *Mahant Sri Jagannath Ramanuj Das and Another Vs. The State of Orissa and Another*, where their Lordships were considering Section 11 of the old 1939 Act. The following passage is relevant:

"As the object and purpose for which these powers could be exercised have been indicated precisely, we do not think that it could be said that the authority vested in the Commissioner is in any way arbitrary or unrestricted. The explanation attached to the section only makes it clear that the general power conferred on the Commissioner extends to passing of interim orders as the Commissioner

might think fit."

Similarly, though u/s 74 (3) it is prescribed that the operation of the order of the Commissioner shall not be stayed pending disposal of the appeal it was clearly laid down by the Supreme Court in *Sri Sadasib Prakash Brahmachari Vs. The State of Orissa*, that the High Court has got inherent powers to pass interim orders for doing justice. The relevant passage runs thus:

"It is pointed out that as a result of a scheme being put into operation immediately, the Mahant may be deprived of the effective possession of the math and hence of the wherewithal to file an appeal within the very short time that is allowed, as also of the resources to conduct the appeal in the High Court or to maintain himself during its pendency which may take years. There is not much force in this contention. In so far as the question of filing of an appeal is concerned, there should be no difficulty as the provision relating to appeals in *forma pauperis* would be applicable and can be availed of if the circumstances call for it. In so far as any situation may arise which may call for financial facilities for conducting the appeal, or for interim maintenance, the learned Attorney-General suggests that the appellate Court would have inherent power and discretion to give appropriate directions for supply of funds out of the trust estate and that, in any view, such power and discretion have to be implied in the provision for an appeal so that the said right of appeal may not become illusory. Having regard to the suggestion thus put forward, which we accept, we cannot hold that the provision in Section 74(3) that the operation of the order of the Commissioner framing a scheme is not to be stayed pending disposal of the appeal, brings about an unreasonable restriction."

24. For the aforesaid reasons we reject the contention of Mr. Mohanty that Section 27 should be construed as conferring authority on the Assistant Endowments Commissioner for determining questions coming u/s 41 (1) (a) (c) and (d).

25. Mr. Misra placed before us a number of documents to show that the institution was private. He placed reliance on the Settlement Reports of the years 1906 and 1932 and on the fact that in 1965 the Endowments Commissioner did not claim the institution as a trust estate under Chapter II-A of the Orissa Estate Abolition Act, 1951, whereunder the intermediary interest vested in the State, Whatever that may be, the questions whether a trust is public or private and whether the properties are private or trust properties are questions which involve investigation of complicated facts and recording of evidence, and such investigation cannot be done in writ proceedings--See *Moti Das Vs. S.P. Sahi, The Special Officer In Charge of Hindu Religious Trusts and Others*, . Hence, it is unnecessary for us to examine the evidentiary value of these documents. We cannot, however, part with this case without observing that the aforesaid documents by themselves would have cautioned the Additional Assistant Endowments Commissioner to be more careful before he decided, merely on the basis of the report of the Inspector of Endowments, that the institution was a

public institution and that the petitioners were not hereditary trustees.

26. On the aforesaid analysis, the position may be summed up as follows. Before the Assistant Endowments Commissioner proceeds, u/s 27, to appoint non-hereditary trustees in respect of a religious institution, he must first come to a finding that there are no hereditary trustees already in existence. In order to come to such a finding he must first make an enquiry u/s 41, which taken along with Section 44, provides for judicial determination of this very question, involving the property rights of a citizen, by the Assistant Commissioner himself, after notice to the parties and taking evidence. If no determination of this question, is made, it will be open to the Assistant Commissioner to start an enquiry u/s 41 suo motu.

It is only after the completion of the enquiry u/s 41 that he can come to a finding about the existence or otherwise of hereditary trustees and only thereafter he can proceed to appoint non-hereditary trustees. It is also open to him, in the course of the proceeding u/s 41, to pass interim orders for preserving the institution and its properties and also for safeguarding the rights of the aggrieved party pending final determination of the controversy. Any order passed straightway u/s 27--which has the effect of dispossessing the hereditary trustees of their property--without first, resorting to an enquiry u/s 41, would be illegal and contrary to the scheme of the Act.

27. In the result, we allow this writ application with costs against the Commissioner of Endowments--opposite party No. 1 and quash the impugned orders passed under Sections 27 and 68 of the Act, as also the order passed in revision by the Endowments Commissioner on 5-12-1968, by issuing a writ of certiorari. A writ of mandamus be issued prohibiting the opposite parties from interfering with the rights of the petitioners in the management of the disputed institution and the properties appurtenant thereto, unless and until the Assistant Commissioner of Endowments obtains the necessary determination that the institution is public and the petitioners are not the hereditary trustees thereof. Hearing fee Rs. 200 (Rupees two hundred).

R.N. Misra, J.

28. I agree.