

**(1970) 09 OHC CK 0010**

**In the Orissa High Court**

**Case No : Miscellaneous Appeal No. 102 of 1967**

Hajari Jena and Others

APPELLANT

Vs

Hajari Maharana and Others

RESPONDENT

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**Date of Decision : 02-09-1970**

**Acts Referred:**

Orissa Hindu Religious Endowments Act, 1951 — Section 3, 41

**Citation : (1970) 36 CLT 1317**

**Hon'ble Judges : G.K. Misra, C.J;B.K. Patra, J**

**Bench : Division Bench**

**Advocate : A.B. Misra, for the Appellant; S. Mohanty and R.C. Mohanty, for the Respondent**

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## **Judgement**

B.K. Patra, J.—This is an appeal against an appellate order of the Commissioner of Orissa Hindu Religious Endowments upholding an order passed by the Assistant Commissioner declaring that the temple of Shri Gopinath Jew at Deogan is a public temple without hereditary trustees. Some members of the public represented by the Respondents filed an application u/s 41 of the Orissa Hindu Religious Endowments Act, 1951 (Orissa Act 2 of 1952)(hereinafter referred to as the Act) for a declaration that the institution referred to above is a public temple having no hereditary trustees. It is alleged ,that? about 100 years ago one Benu Padhan of Deogan endowed a land on which Babaji Ram Das constructed a temple and installed therein the idols of Gopinath, Balaram, Hanuman and Gurundi Gopal. He also reclaimed some jungle lands and endowed the same for the Sebak Puja of the deities. In the successive settlements held in the Ex-State of Nayagarh where the disputed institution is situate the Raj Sarkar has been recorded as the marfatdar of the deities and the ancestors of the Appellants and after them the Appellants themselves have been recorded as mere sebasis. None of the family members of the Respondents had ever installed the deities or endowed properties to them. As the Endowment Department began treating the Appellants as hereditary trustees of the institution, the Respondents were obliged to institute the proceeding u/s 41 of the Act before the Assistant

Commissioner.

2. The Appellants in their written statement filed before the Assistant Commissioner denied the averments made in the petition that Babaji Ramdas had constructed the temple and had installed the deities therein and that he endowed the lands for the upkeep of the institution. Their case is that their ancestor Gangadhar Paikray was the founder of the temple and its endowments and that the management of the temple and its endowments have since then been in the hands of the members of Gangadhar's family. They admitted that in the successive settlements, Raj Sarkar had been recorded as the marfatdars of the deity but explained that according to the practice prevalent in the Nayagarh State, such description only indicated that the State Government had general superintendent and control over the religious institutions of the State. They, therefore, prayed for dismissal of the application.

3. The issues that the Assistant Commissioner framed are these:

1. Is the case maintainable as it is?

2. Are the opposite parties the hereditary trustees of the above institution?

3. Did Ram Das Babaji found the disputed institution?

4. Has any outsider ever taken any part in the management and administration of the institution

in question?

5. Has any outsider endowed any property to the deity in question? It will be noticed that no issue was framed as to whether the temple is private or public. 4. The expression "temple" is defined in Section 3(xv) of the Act to mean a place by whatever designation known, used as a place of public religious worship and dedicated to, or for the benefit of, or used as of right by, the Hindu community, or any class or section thereof, as a place of public religious worship and also includes any cultural institution of mandap or library connected with such a place of public religious worship. The expression "hereditary trustee" is defined in Section 3(vi) of the Act to mean 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 secession is in force. A temple which is private in the sense that members of the public have no right of Darsan or worship therein is outside the purview of the Act. On the other hand, public religious institutions are those where the public can go as of right for Darshan and worship of the deity. Such institutions which admittedly come within the purview of the Act are further classified into those in respect of which there are hereditary trustees and those in respect of which there are no hereditary trustees in which case non-hereditary trustees are appointed by the Endowment Department in accordance with the provisions of the Act, Section 41 of the Act which deals with enquiries, in so far as is material, may be quoted:

41. (1) In case of a dispute the Assistant Commissioner shall have power to inquire 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;

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.

It is therefore clear that when a dispute arises whether the religious institution is a public or private temple, the burden to prove that it is a private temple lies on the person who asserts it, in this case on the Appellants. Although in the written statement cited by the Appellants, there is no specific averment that the disputed institution is a private temple to which members of the public have no right of access, they have in paragraph 3 denied the averments made in paragraphs 1, 2 and 3 of the petition in which, as already indicated, the Petitioners (Respondents herein) had alleged that the temple was constructed by Babaji Ramdas and it was he who had installed the deities therein and endowed properties thereto. It was, therefore, necessary for the learned Assistant Commissioner to have framed an issue as to whether the temple is a private or a public one. Instead of doing so, in paragraph 5 of the order passed by him, he proceeded on the assumption that the disputed institution is a public temple. This is what the learned Assistant Commissioner has stated:

The few admitted facts in this case are that the disputed institution is a public Hindu temple as defined u/s 3(xv)....

5. It is argued on behalf of the Respondents that although the Appellants in the written statement filed by them had denied the allegation that the temple was a public one, they did not raise this objection during the course of hearing and consequently, the learned Assistant Commissioner was justified in assuming that the temple was a public one and he then proceeded to consider the further question whether the Appellants are hereditary trustees thereof. Mr. A.B. Misra appearing for the Appellants has vehemently denied that any such concession was made by him at the time of trial and invited our attention to the memorandum of appeal filed by the Appellants before the Commissioner wherein they had repeated their prayer that the temple might be treated as a private one, although they prayed in the alternative that in case it was decided to be a public one the Appellants might be declared as hereditary trustees thereof.

6. The learned Commissioner also appears to have proceeded on the assumption

that the question whether the institution is a public or private is no more in dispute. In ground No. 4 of the appeal memo filed in this Court, the Appellants state-

For that it should have been held that the institution is a nominal debottar and a private temple of the Appellants? family or that in the alternative it should have been held an excepted temple with the Appellants as hereditary trustees.

7. In the absence of a specific issue regarding the public or private nature of the temple, the attention of the parties was naturally not concentrated on this aspect of the case. We, therefore, feel that this is a fit case which should go back to the learned Assistant Commissioner on remand.

8. We accordingly allow this appeal, set aside the orders passed by the Courts below, and remand the case to the. Assistant Commissioner with a direction that he should frame a fresh issue as to whether the temple is a public or private one and thereafter dispose of the case afresh according to law. Parties shall be at liberty to adduce fresh evidence on all, the issues. In the circumstances, the parties will bear the costs incurred by them so far in all the Courts.

G.K. Misra, C.J.

9. I agree.