

(1971) 04 OHC CK 0014

In the Orissa High Court

Case No : Miscellaneous Appeal No. 81 of 1970

Madan Pati and Others

APPELLANT

Vs

Birabara Das and Others

RESPONDENT

Date of Decision : 16-04-1971

Acts Referred:

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

Citation : (1971) 37 CLT 575

Hon'ble Judges : B.K. Patra, J

Bench : Single Bench

Advocate : B. Mohapatra and P.C. Mishra, for the Appellant; D. Mohanty, for the Respondent

Final Decision : Allowed

Judgement

B.K. Patra, J.—The Appellants filed an application u/s 41 of the Orissa Hindu Religious Endowments Act, 1951 (hereinafter referred to as the Act) before the Assistant Endowment Commissioner for a declaration that they are the hereditary trustees of the deities Dadhibaman Jew and Laxminarayan Jew of mouza Singarpur. Their case is that the original foundation of the institution has been lost in antiquity and nothing is at present known as to who founded the institution. But from time immemorial, members of their family have been the marfatdars of the deities and managing the affairs thereof and the trusteeship is devolving hereditarily on members of the family. They complained that shortly before the filing of the application, the opposite parties who are some of the villagers had by coercion obtained from the Appellants an agreement wherein the latter were forced to acknowledge that it is the villagers who are managing the affairs of the deities. It is contended that the recitals contained in the document are false and had been obtained from them by coercion. Although the institution being a public one the villagers have a right of Darshan of the deities, they have absolutely no hand in the management of the affairs thereof.

2. The opposite parties denied the allegations in the petition and stated that the

deities had been installed by the villagers and it is they who endowed properties to the deities from time to time and have been managing the affairs thereof. According to them, the Petitioners are mere Sevakas of the institution and it is in that capacity that they are in possession of some of the deities' lands, but they are not marfatdars of the deities and do not manage the affairs of the institution. They rely in support of their contention on the registered deed of agreement dated 25-7-1967 executed in their favour by the Appellants in which the latter had admitted that the villagers as a whole are the marfatdars of the deities and that they (Appellants) are mere servants of the institution.

3. In support of the Petitioner's case, they examined five witnesses. Nine witnesses were examined for the Respondents. Several documents were also led in support of their respective cases. The Additional Assistant Commissioner of Endowments after a consideration of the oral and documentary evidence on record came to the conclusion that the institution is an ancient one but there is no satisfactory evidence to show as to who founded the institution. He, however, accepted the case of the Appellants that the members of their family have been acting as marfatdars of the deities for more than 150 years and that excepting some sporadic interference by the members of the public in the recent past, the villagers have had no hand in the management of the deities affairs. Relying on the theory of lost grant the learned Addl. Assistant Commissioner came to the conclusion that when for the last 150 years, the Appellants and their ancestors have been acting as Marfatdars of the, deities, it must be held that they have been doing so since the time of the founder. He, therefore, allowed the application filed by the Appellants. On appeal, the Endowment Commissioner reversed the decision of the Addl. Assistant Commissioner. Relying on certain entries made in what are called the Minute Books maintained by the villagers he thought that in between the years 1950 and 1965 the villagers had in their meetings discussed matters relating to the affairs of the deities, and relying on this circumstance he thought that the Appellants were not managing the affairs of the deities but are mere Sevakas. Aggrieved by the decision of the Commissioner, the original Petitioners have filed this appeal.

4. The several documents filed on the Appellants' side, namely, Robakaris of the year 1884, and the P. S.R.S. and C.B. Khatians show that the debottar properties are recorded in the names of the deities represented by marfatdars who all belong to the Appellants' family commencing from Chandra Pati. We get from the evidence of p.w. 5 that Chandra Pati's sons were Achut and Sadei. Achut had two sons Gobinda and Dama. Dharmu is Gobind's son and Dharmu's two sons are Madan Petitioner No. 1 and Mohani, Sadei's son is Mukund and the latter's son is Baraju. Baraju had three sons Banamali, Maheswar and Daitari. Maheswar's son is Bansi who is Petitioner No. 2 and has been examined as p.w. 5. Daitari's son is Gourang Petitioner No. 3. There is no evidence to show how the deities' properties were recorded before Chandra Pati. There is also no evidence to show who had founded the institution. Not a single scrap of paper has been filed on the Respondents' side to show that in any of the public records relating to the

properties of the disputed deities anybody other than the members of the Appellants' family had ever been recorded as marfatdar of the deities. According to the Respondents, there is a Gramya Mangala Sabha in the village Singarpur and that the villagers occasionally meet and discuss the affairs relating to the deities and that the proceedings are recorded in the minute books maintained by the Sabha. In support of this contention, some minute books have been produced. Although the earliest of such books filed on the Respondent's side is of the year 1948, the entries therein do not at all relate to the affairs of the deities but are in connection with settlements made by the Village Committee of certain other disputes in the village which have nothing to do with the administration of the affairs of the deities. It is for the first time on 2-5-1965 that the villagers in their meeting decided to take up the management of the affairs of the deities and to make suitable arrangements for the same. This is definitely after the Appellants filed their application u/s 41 of the Act on 22-6-1963 before the Assistant Commissioner. These are therefore in the nature of self-serving documents to which no weight can be attached. In fact, before they formally took up this matter for discussion in the village Committee they appear to have been guilty of their interference with the affairs of the deities which led the Appellants to file the application u/s 41 of the Act for a declaration that they are the hereditary trustees of the institution. I, therefore, find that the documentary evidence on record fully supports the Appellant's case that they and before them the members of their family have been managing the affairs of the deities since about 100 years.

5. So far the oral evidence goes, p.w.s. 1 to 4 who are members of the Parichha family of the deities stated that the Petitioners as marfatdars manage the affairs of the deities and meet the expenses of the Seba Puja and Jani Jattras, that they collect the usufruct of the lands of the deities and keep the same with them and the members of the public do not participate in the management nor make any contributions for the Seba Puja and Jani Jattras. Petitioner No. 2 examined as p.w. 5 has naturally supported his own case. On the Respondents' side o. p.w. 3 Laxmidhar Sahu stated that his great grand-father Makunda Sahu brought the deities to the village and installed them there and that the villagers endowed properties to the deities. Obviously he has no personal knowledge about what he stated and his evidence stands uncorroborated. He has not produced any document to support his testimony. He does not know who the villagers are who endowed properties to the deities. Admittedly, there is litigation between him and the Petitioners. O. p.w. 4 says that he heard that Makunda Sahu and Giridhari Sahu had brought the deities to the village. His evidence therefore is also hearsay. According to him, there are documents to show that it is the villagers who had appointed the members of the Pati family (Petitioners' family) as marfatdars. But no such document has been produced. Like o. p.w. 3, he is also in litigating terms with the Appellants. O. p.w.s. 1 and 2 who assert that the villagers look after the affairs of the deities have not produced a single scrap of paper in support of their contention and it is not explained how if the villagers

were managing the affairs of the deities, the names of the Appellants and their ancestors have been recorded in public papers as marfatdars. O. p.w. 5 who Acts as Purohit of the deities admits that he gets remuneration from the Appellants. O. p.w. 6 claims that his family members do Seba Puja of the deities for two months in a year but this claim is not supported by any documents. All that O. p.w. 7 says is that the affairs of the deities are sometimes discussed in the Grama Sabha. Assuming that it does so, it does not in any way establish the claim of the villagers that they are the marfatdars of the deities. O. p.w. 8 says that he acts as a drummer for the deities and has been appointed by the villagers. He, however, admitted in cross examination that he was working at Calcutta and came to the village only about two months before he deposed in Court. His evidence was rightly rejected by the Assistant Endowment Commissioner. After careful analysis of the oral evidence on record I find that the oral evidence let in on Petitioner's side which gets considerable corroboration from the documentary evidence should be believed in preference to the oral evidence let in on the Respondents' side which apart from lacking in inherent merit, does not fit in either with the unimpeachable direct documentary evidence on record or with the circumstances of the case. It is unfortunate that the learned Endowment Commissioner has not properly discussed the evidence. I am, therefore, satisfied on a perusal of the oral and documentary evidence on record that the Appellants and before them their ancestors have been managing the affairs of the deities since the last about 100 years.

6. 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 succession is in force. Undoubtedly, the onus to establish this is on the Appellants who claim to be the hereditary trustees of the institution. It is not the Appellants' case that their claim to be the hereditary trustee is either regulated by custom or is specifically provided for by the founder. They have therefore to establish not only that the succession to the office of the trusteeship devolves by hereditary right, but also that the line of succession by inheritance has commenced from the time of the founder. As already indicated, the Line of succession is traceable only from the time of Chandra Pati, an ancestor of the Appellants and there is no evidence as to who founded the institution. I am conscious of the fact that the expression "since the time of the founder" occurring in the definition of "hereditary trustee" was not there in the Orissa Hindu Religious Endowments Act, 1939, but has been newly added in the 1951 Act. The intention of the Legislature is therefore clear that to constitute a hereditary trustee, it has to be proved that the succession to the office of trusteeship by hereditary right had commenced from the founder of the institution. The Act, however, has not laid down any precise method by which this fact has to be proved. All that it requires is that the Court must be satisfied that the line of succession has commenced from the founder. Disputes regarding the right of hereditary trusteeship may arise, as it has arisen in this case more

than 100 years after the foundation of the temple. It is certainly not possible in such cases to have any direct oral evidence and in many cases it may also not be possible to have any documentary evidence to trace succession to the office of trusteeship from the days of the founder. It is to meet such contingencies that the Supreme Court in *Ambika Prasad v. Ram Ekbal Rai* (1966) VI S.C.D. 485, has laid down that if a thing or a state of things is shown to exist, an inference of its continuity within a reasonably proximate time both forward and backward may sometimes be drawn. This principle was adopted by J.K. Misra, J. in *Dhruba Charan Swain and Ors. v. Jagannath Panda and Anr.* 26 (1960) C.L.T. 293, wherein the learned Judge while dealing with the proof of hereditary trustee ship as that expression is defined in the Act laid down that when a founder is unknown and the time of the founder is not known and there is no deed regarding the foundation, one has to rely upon the theory of lost grant and has to presume that the system, as is obtaining from the time immemorial, was the system, that has been continuing from the time of the founder. This principle was latter on adopted by G.K. Misra, J. (as be then was). In *Chintamani Pati v. Krishna Chandra Panda* 34 (1968) C.L.T. 1111 and Ors. and recently by a Bench of this Court in *Raja Bahadur Sri A.N.M.H. Mohapatra v. Bidyadhnr Nayak M.A.* No. 75 of 1958.

7. Applying the principle referred to above, and having regard to the fact that during the last about hundred years, the members of the family of the Appellants bad held the office of the trusteeship continuously and in the absence of any evidence that the members of any other family ever held the marfatdary right, I am clearly of the view that the Appellants must be deemed to be hereditary trustees of the disputed institution.

8. I would accordingly allow this appeal, set aside the order of the Endowment Commissioner and restore that of the Assistant Commissioner. The Respondents shall pay the costs of this appeal to the Appellants.