

(1981) 12 OHC CK 0026
In the Orissa High Court
Case No : Misc. Appeal No. 158 of 1979

Mahanta Srikrushna Chandra Das

APPELLANT

Vs

Rajkishore Mohanty and Others

RESPONDENT

Date of Decision : 10-12-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96

Constitution of India, 1950 — Article 226

Orissa Hindu Religious Endowments Act, 1951 — Section 19, 35, 35(3)

Citation : AIR 1982 Ori 123 : (1982) 53 CLT 444

Hon'ble Judges : N.K. Das, J

Bench : Single Bench

Advocate : S. Misra 1 and S.K. Nayak, for the Appellant; P.C. Misra, S.P. Misra and D. Das, for the Respondent

Final Decision : Partly Allowed

Judgement

N.K. Das, J.—Appellant was the recognised Mahant of Khambakul Math, P.S. Balikuda in the District of Cuttack. The Commissioner of Endowments has recommended u/s 35 of the Orissa Hindu Religious Endowments Act to the Government for approval to disqualify the appellant from continuing as Mahant for a period of five years. The appeal is directed against that order. The charges levelled against the appellant were that he sold away 7.08 acres of land though permission had been obtained by him to execute permanent lease-deeds in respect of the said lands; he spent money for construction of the temple without plan and estimate being sanctioned by the Commissioner, he alienated some land of the institution either by himself or by his authorised agent without permission; he also alienated some Anabadi land without permission in his own name; he wilfully and persistently defaulted in discharging his duties and also defaulted in payment of contributions. He was asked to show cause and after causes were shown, the learned Commissioner of Endowments has held that the appellant has committed breach of trust in respect of funds of the institution and there has been persistent and wilful default in payment of contribution and was thus

disqualified to continue as Mahant under Clauses (c) and (f) of Section 35 of the Orissa Hindu Religious and Endowments Act.

2. A preliminary objection was taken by the counsel for the respondents that this miscellaneous appeal is not maintainable. He contended that the present appellant had filed a writ petition vide O.J.C. No. 1546/79 which was dismissed on 27-11-79 and in that writ petition he had challenged the validity of the charges levelled against him as well as the order of the Commissioner recommending to Government to disqualify him. The following order was passed by this Court in the aforesaid writ petitions

"Heard Mr. Misra (1). Dismissed. Hearing of M.A. 158/79 be expedited. Prayer for leave to appeal Under Article 134-A(b) of the Constitution is rejected."

The question that arises for consideration is whether the present appeal filed u/s 35 (3) of the Orissa Hindu Religious Endowments Act, 1951 is not maintainable in view of the aforesaid order in O.J.C. No. 1546/79. Apparently, the order is not a speaking one and no reason has been assigned for the order. It also does not appear that it is an order passed on merits. In *Daryao and Others Vs. The State of U.P. and Others*, , the Supreme Court was considering a petition made under Article 32 of the Constitution before the Supreme Court after dismissal of a petition under Article 226 by the High Court. A Bench of five Judges of the Supreme Court held that if a writ petition filed by a party under Article 226 is considered on the merits as a contested matter and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings. If the petition filed in the High Court under Article 226 is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Article 32. If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar. If the petition is dismissed in limine, without passing a speaking order then such dismissal cannot be treated as creating a bar of *res judicata*. In the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of *res judicata*. The same view has been reiterated by the Supreme Court in *P.D. Sharma Vs. State Bank of India*, ; *Workmen of Cochin Port Trust Vs. Board of Trustees of The Cochin Port Trust* and *Another*, and *Hoshnak Singh v. Union of India* . It would thus appear that if a writ petition was filed and it has been dismissed at the stage of admission without assigning any reason and without a speaking order, it cannot be said that it operates as a bar to the statutory appeal. In the instant

case, the statutory appeal had already been filed and during the pendency of the statutory appeal, the writ petition was tiled and this Court also directed to depose of the appeal expeditiously. This would rather indicate that this Court was not inclined to interfere with the order of the Commissioner of Endowments while exercising its extraordinary jurisdiction as a statutory appeal was pending. In other words, when the appellant had already taken recourse to the alternative remedy available to him, this Court did not interfere. It cannot be said that the writ petition was disposed of on merits.

3. Mr. Misra, the learned counsel for the respondents, has relied on *Collector of Customs, Calcutta Vs. East India Commercial Co. Ltd.*, ; *Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat*, ; and *Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh*, . Relying on these decisions, he contends that the order of the Commissioner of Endowments has already merged in the order of the High Court in the writ petition and there is no order available to be considered in the present appeal. In the aforesaid decisions, statutory appeals or statutory revisions had been filed and had been disposed of and the decisions were on merits. If an appeal or revision, as provided under law, is filed against a decision, and the appeal or revision is disposed of on merits, undoubtedly the decision appealed against or sought to be revised merges in the judgment or order of the higher forum. It has also been held in *Daryao and Others Vs. The State of U.P. and Others*, (referred to above) that if the order appealed against merges in appeal, then that can operate as a *res judicata*. There cannot be any doubt about the well-settled proposition that the order of the lower forum merges in the decision in appeal or revision. But that principle is not applicable in the present case. In my opinion, the principles laid down by the Supreme Court in *Daryao's* case (*supra*) are squarely applicable to the present case. There has been no decision on merits in O.J.C. No. 1546 of 1979 and thus it cannot operate as a bar to the present appeal.

4. u/s 1"9 of the Orissa Hindu Religious Endowments Act, there cannot be any sale, mortgage or exchange or lease for a term exceeding five years without sanction of the Commissioner of Endowments. In the instant case, the appellant admittedly had obtained permission for executing permanent leases, but instead of that he has executed sale deeds. Undisputedly, he had not obtained any permission to sell the lands. By selling the lands, according to the appellant, more money has come to the funds of the institution than what the institution would have got by executing lease-deeds-These facts may be true, but it was incumbent on the part of the appellant to obtain the sanction for executing sale deeds. The next charge relates to spending money on construction work without approval of plan and estimate by the Commissioner. It is not disputed that while sanctioning execution of lease deeds as aforesaid, the Commissioner had put a rider that the money so obtained would be deposited in the bank and would be spent, subsequently. But the appellant has not done so. After obtaining the money he spent a major part thereof in construction of temple and placing orders for materials for such construction. It is contended by the learned counsel

for the appellant that the appellant has not misappropriated any money, but has spent in construction of temple- There is no provision for obtaining prior approval of the plan and estimate by the Commissioner for such construction. The appellant had shown this matter in the budget which has been approved by the Commissioner. He has undoubtedly spent the money in construction work and placing orders for materials for such construction. These may have been approved by the Commissioner in the budget, But the fact remains, the appellant did not keep the money in bank at the first instance to be spent subsequently with prior sanction of the Commissioner 43 directed by the Commissioner while sanctioning transfer of immovable properties. As regards charge of alienating nine plots of land, it has been found by the Commissioner that seven plots have not been sold and two plots have been sold by one Iswar Ch. Mohapatra who was a Gumasta in the institution during the time of the Guru of the appellant as well as during the time of the appellant It appears that the Gumasta has transferred two items of property. As regards the charge of alienation of Anabadi lands, there is no proof at all. Relating to default in payment of contribution, it is not disputed and is evident from Ext. H series that the appellant had been paying the contribution regularly, but subsequently there was demand for excess amount on revision of the contributions and that amount has not been paid. This was very recent and the appellant also does not deny this fact and he wants to make the payment.

5. According to Section 35 of the Act, a hereditary trustee of a Math shall be declared disqualified, amongst other reasons if he has committed breach of trust in respect of any of the properties of the institution or if he persistently or wilfully defaults in discharging his duties or functions under the Act or any other law for the time being in force or in payment of contribution or other dues payable to endowment fund From the discussions made above, it would appear that the appellant has sold properties when he was permitted to lease out the same. He did not deposit the consideration money in bank, but spent a portion out of it in construction of temple; two items of property have been transferred by his Gumasta; and the excess demand made after due payments have not been paid. A careful consideration of the aforesaid facts would show that in respect of expenditure met for construction of the temple there was no misappropriation. Nowhere there was any allegation of misappropriation against the appellant, nor there is any material to show that he has utterly and consistently mismanaged the properties of the institution. Some stray cases have been found. P.W. 1 who has been examined in this case does not say how he is interested in the Math and also does not say that he is a disciple of the Mahant. In view of these circumstances, I hold that whatever laches have been found on the part of the appellant, those cannot be said to be very grave and as such disqualification for five years does not seem to be appropriate. The appellant has already been out of office for more than two years. In view of such position, interests of justice will be properly served if he is not disqualified for any further period.

6. In the result, the appeal is allowed in part. The disqualification of the appellant

is limited only up to this date, namely, the date of the judgment and it is held that he is not disqualified for further period. The management of the institution should be handed over to the appellant immediately, No costs.