

(1989) 03 OHC CK 0010

In the Orissa High Court

Case No : Miscellaneous Appeal No. 238 of 1981

Mitrabhanu Naik and Others

APPELLANT

Vs

Jaleswar Panigrahi and Others

RESPONDENT

Date of Decision : 14-03-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27
Orissa Hindu Religious Endowments Act, 1951 — Section 3, 41, 44(2)

Citation : (1989) 68 CLT 333

Hon'ble Judges : G.B. Patnaik, J

Bench : Single Bench

Advocate : R.K. Mohapatra, for the Appellant; R. Mohanty, for the Respondent

Final Decision : Allowed

Judgement

1. This appeal under Sub-section (2) of Section 44 of the Orissa Hindu Religious Endowments Act (hereinafter referred to as the "Act") is directed against the appellate decision of the Commissioner of Endowments reversing a decision of the Additional Assistant Commissioner of Endowments in a suit filed by one Narayan Panigrahi, father of Respondents 1 and 2 u/s 41 of the Act claiming to be the Hereditary Trustee of the Deity, Samaleswari Thakurani. Bijje at village Chhatabar. P.O. Malti-Gunderpur, in the district of Sambalpur.

2. The suit was filed by said Narayan for the aforesaid declaration and for cancellation of appointment of opposite parties 6 to 12 in the said suit as members of the non-hereditary trust board, on the allegation that the Deity Samaleswari Thakurani is a public deity and had been installed at village Chhatabar and from the time of Narayan's ancestors, their family members are continuing to do the Sevapuja and management of the Deity without any obstruction or assistance from any person. It was also asserted that all the assets and properties of the Deity are in possession of the applicant and said Narayan was recognised as the hereditary trustee of the Deity. Though the foundation of the Deity is not known, yet from generation to generation the

family members of Narayan having been recorded as hereditary trustee and being in possession of the properties of the Deity, in the eye of law they are to be declared as hereditary trustees of the deity. It is only in July, 1976, opposite parties 6 to 12 served a notice on Narayan to make over the charge of the properties and therefore, he filed the suit u/s 41 of the Act for the relief as aforesaid. During the pendency of the said suit, Narayan having died, his two sons who are Respondents 1 and 2 in the present appeal were substituted.

3. Opposite parties 6 to 12 in the suit contested the suit by filing a joint written statement. Opposite parties 1 to 5 did not contest and remained ex parte. Opposite parties 6 to 12 denied all the allegations made in the application. It is their positive case that the Gountia of the village appointed one "Padhi Brahmin" for performing the Sevapuja of the Deity and after the "Padhi Brahmin" the applicant was permitted by the villagers to possess the property in lieu of performing the Sevapuja. It is the villagers who are taking part in the management of the affairs of the Deity and are also paying contribution. As Narayan encroached upon the Deity's property the villagers got dissatisfied and a non-hereditary trust board was appointed u/s 27 of the Act and it is that trust board which is functioning since then. Opposite parties 6 to 12 are the members of the new trust board which was appointed on 3-9-1976. It was stoutly denied that the Petitioner's family were continuously managing the affairs of the Deity and, therefore, it was contended that the application u/s 41 of the Act was liable to be dismissed.

4. On these pleadings, the Additional Assistant Commissioner of Endowments framed four issues and on issue No. 3, namely whether the Petitioner is the hereditary trustee of the institution or not, came to hold that the Petitioner failed to discharge the onus that they were in management of the suit institution as marfatdars since the time of the founder and therefore, they were not entitled to be declared as hereditary trustees of the institution. In view of the said finding, the Assistant Commissioner dismissed the suit.

5. On an appeal being carried, the learned Commissioner of Endowments reversed the decision of the Assistant Commissioner and came to the conclusion that the Appellants therein and their ancestors were the hereditary trustees and they were entitled to a declaration as such and accordingly allowed the appeal. It is this appellate judgment of the Commissioner which is being impugned in the present miscellaneous appeal.

6. Mr. Mohapatra, the learned Counsel for the Appellants, raises two contentions in assailing the appellate judgment of the Commissioner:

(I) The sole basis of the commissioner's conclusion that the applicant's family are in continuous management of the affairs of the Deity is the entry in the Record-of-Rights of three different Settlements (Exts. 1, 2 and 3) and the same is based on misreading of those Record-of-Rights as well as non-consideration of other materials on record and, therefore, the conclusion is unsustainable in law;

and.

(ii) In view of the admitted fact that the possession has been vested with a non-hereditary trust board by appointment of such a board as early as on 1-6-1969 disproves the Claimant's case of continuity of possession from generation to generation and, therefore, the declaration made by I the commissioner cannot be sustained.

Mr. Mohanty the learned Counsel for the Respondents 1 and 2, on the other band, contends that the origin of the Deity not being known and the claimant's ancestors having been found to be in possession of the properties of the Deity and being in management of the same from generation to generation, as reflected through the different Records-of-rights, the only legal conclusion that can be arrived at is that the applicants are the hereditary trustees and, therefore, the conclusion of the commissioner remains unassailable. The learned Counsel further urges that the cause of action for the application u/s 41 of the Act is appointment of a non-hereditary trust board on 3-5-1976 and, therefore, that cannot be construed to be a ground for rejecting the applicant's claim for hereditary trusteeship if the applicant is found to be the hereditary trustee on the available materials on record,

7. Before examine the correctness of the rival submissions with reference to the evidence on record it would be appropriate to notice the law on the subject. "Hereditary Trustee" has been defined in Section 3(vi) 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 "Trustee" has been defined in Section 3(xvi) to mean, a person by whatever designation known, in whom the administration of a religious institution and endowment is vested, and includes any person or body who or which is liable as if such person or body were a trustee. In view of the definition of "Hereditary Trustee", unless it is proved that the hereditary right is devolved continuously and uninterruptedly from the time of the founder of the institution the trustee cannot be considered to be a "hereditary trustee". The definition of "hereditary trustee" make it amply clear that a claim of hereditary trusteeship can be proved in three distinct ways: (i) when succession to such" office devolves by hereditary right since the time of founder; (ii) when succession is regulated by custom or (iii) when it is specifically provided for by the founder according to the scheme of succession so long as such scheme is in force. It was held by this Court in the case of Mohan Sahu and Ors. v. Sashibhusan Padhi and Ors. 48 (1979) C.L.T. 23, that the fact that a person was a trustee for along, period would not be sufficient for a declaration that he was a hereditary Trustee. Chief Justice Narasimham, in one of the earliest cases, in - Biswnath Das and Anr. v. Jagannath Misra and Anr. 31 (1965) C.L.T. 189 enunciated the law on the subject:

...It is sufficient to say that a person cannot succeed in his claim to be a hereditary trustee unless he shows that from the time of the founder of the

institution his family has been balding the office of trustee as of hereditary right, provided further that such a scheme of succession has been in force all along....

These principles were again reiterated in a recent decision of this Court in the case of Gopinath Das Adhikari and Ors. v. Sri Chaitanya Mahaprabhu and Ors. 62 (1986) C.L.T. 576. It is of course true that in certain cases where the name of the founder is not known or the time of foundation is not known and a particular state of affairs has been found to have continued for a sufficient length of time, the courts have applied the theory of lost grant, since no other explanation would be available for continuance of such state of affairs for a sufficient long period. Where therefore, it has been found that parties have been able to prove long continued possession in assertion of a right courts of law have come to the conclusion that the said right should be presumed to have had a lawful origin and a further presumption may be available that the acts necessary for creation of such right were done. This view finds support from the decisions of this Court in Dhruba Charan Swain and Ors. v. Jagannath Panda and Anr. 26 (1960) C.L.T. 293. Chintamani Pati v. Krishna Chandra Panda and Ors. 34 (1968) C.L.T. 1111, Krushna Mohan Panda and Ors. v. Radhashyam Panda and Ors. 1971 (2) C.W.R. 379, and a Bench decision of this Court in the case of Raja Bahadur A.N.M.R. Mohapatra v. Bidyadhar Nayak ILR 1971 Cutt 578. While laying down the law in the aforesaid terms, a word of caution has been given that the presumption may not be drawn in every case particularly when the definition of "Hereditary Trustee" in the new Act has inserted the expression "since the time of the founder which was not there in the old Act. To the same effect are the decisions of this Court in Bhagirathi Mohapatra and Ors. v. The Deity Sukarmala Thakurani and Ors. 43 (1977) C.L.T. 108 and Balunkeswar Dev and Ors. v. Kulamani Panda and Ors. 51 (1981) C.L.T. 169. In a recent decision of this Court in the case of Lingaraj Samantaray and Others Vs. Sri Sidhabaladevjew, , the position was again reiterated,

8. Bearing in mind the aforesaid position of law, I shall now examine the evidence on record. Before applying my mind to the evidence on record, it is necessary to dispose of an application filed by the Appellants under Order 41; Rule 27, Code of Civil Procedure, praying therein to take some documents as additional evidence which, according to the Appellants, being public documents do not require any formal proof. By order dated 2-4-1985, it was directed that the said application shall be considered at the time of hearing. Even though the documents in question are public documents and may have a great bearing on adjudicating the lis between the parties, yet the Appellants have not been able to make out a case for permitting them to adduce additional evidence. The pre-conditions for accepting additional evidence as contained in Order 41, Rule 27 have not been satisfied. Accordingly, the said application is rejected.

9. Now coming to the evidence on record, at the outset it may be noticed that no document has been placed by the claimant claiming hereditary right either to indicate the origin of the endowment of any particular line of succession to the

same, even if it has not been established as to who founded the Deity and who made the endowment in favour of the Deity. The main stand of the applicant in the application u/s 41 is that the applicant and his ancestors have been performing the Sevapuja of the Deity and are also in possession of the properties attached to the Deity. Though P.W. 2 in his evidence states that his family members have been in management of the affairs of the Deity, since long, yet he is not able to produce any records documents or accounts in support of his said assertion. Even in his cross-examination, he candidly admits that he is not in a position to tell as to who was the Marfatdar prior to Sridhar. P.W. 1 is a co-villager. Though he has tried to support the claimant's case, yet he also admits that he has not seen the performance of Sevapuja and management of the Deity prior to Sridhar Pujari. His evidence is totally unworthy of credit. He is not in a position to tell about the income or expenditure nor even can he tell about the fact as to when the Deity was installed and who was doing the Sevapuja prior to Sridhar.

On behalf of the opposite parties who are the present Appellants, however, evidence has been led to indicate that the Deity was installed by one Raja Balabhadra Dev and the said Raja had given some lands. It is their consistent evidence that the family of the applicant no doubt used to perform Sevapuja of the Deity and were possessing the lanes in lieu of services rendered, but it is the villagers who, used to manage the affairs of the temple. O.P.W.2 in his evidence states that one Padhi family were the Pujaks of the Deity prior to Panigrahi's family, who filed the application u/s 41. It is only when Bamadeb Padhi became blind and his son did not agree to perform the Sevapuja, the Panigrahi family came to perform the Sevapuja. O.P.W. 3 in his evidence supports the defence case to the effect that the Deity was founded by the Raja Saheb and also Stated that Panigrahi family came to perform puja only after Padhi family failed to perform the same. Even P.W. 1 also admits in his cross-examination that Bamadeb Padhi was the Pujari. This being the position, it is difficult to come to the conclusion that Panigrahi family who filed the application u/s 41 and their ancestors and forefathers were performing the Sevapuja and were in continuous possession and management of the affairs of the Deity: The learned Commissioner un-doubtedly very much relied (upon the entry in the Records-of-Rights of three Settlements (Exts. 1, 2 and 3) which are of the years 1861, 1913 and 1925. But the entry therein cannot be construed to be the conclusive evidence to prove that the Panigrahi family were in continuous possession and management of the affairs of the Deity. On the other hand, the evidence on record clearly establishes the fact that the members of the public were managing the affairs of the Deity and, therefore, it must be held that the claimant has failed to establish that succession to the office in question devolved by hereditary right on them since the time of the founder so as to bring the claimant within the definition of "hereditary trustee", as defined in Section 3(vi) of the Act.

10. It further transpires from the materials on record that the management has been vested in a non-hereditary trust board since 1-6-1969. The application u/s

41 was filed only in the year 1976 after the second board was formed by the Commissioner on 3-5-1976. Since the management itself has been taken away and has been vested in a non-hereditary trust board since 1969, thereby divesting the claimant of their right of trusteeship, the burden would be still more heavy on the claimant to establish their claim to the hereditary trusteeship. It would be obligatory for the claimant to prove that since the time of the founder, the ancestors of the claimant are in exclusive management of the institution and the succession to the office of trusteeship has devolved by hereditary right without any break since the time of the founder till the date of dispute. In view of my discussions of the evidence earlier and conclusions thereon, I cannot but hold that the claimant has utterly failed to discharge the burden and the Commissioner of Endowments committed gross error in coming to the conclusion that the right of hereditary trusteeship has been established by the claimant. I would accordingly set aside the order of the Commissioner and hold that the claimants (Respondents 1 and 2 in this appeal) have failed to establish that ever since the time of the founder of the institution their ancestors have been continuing as hereditary trustees from generation to generation and accordingly their application u/s 41 of the Act must be rejected.

11. In the net result, therefore, the judgment of the Commissioner of Endowments is set aside and the decision of the Additional Assistant Commissioner of Endowments in O.A. No. 21 of 1976 is affirmed. This miscellaneous appeal is allowed, but however, in the facts and circumstances of the case, there will be no order as to costs.

Appeal allowed.