

(1971) 11 OHC CK 0011

In the Orissa High Court

Case No : Original Jur. Case No. 42 of 1970

Nabaghan Naik and Others

APPELLANT

Vs

Sadananda Das and Another

RESPONDENT

Date of Decision : 29-11-1971

Acts Referred:

Constitution of India, 1950 — Article 226

Orissa Hindu Religious Endowments Act, 1951 — Section 28, 3, 35, 36, 7

Citation : AIR 1972 Ori 188

Hon'ble Judges : S.K. Ray, J;B.K. Patra, J

Bench : Division Bench

Advocate : R.C. Patnaik, P.K. Sengupta, A.K. Misra and G. Rath, for the Appellant; R. Mohanty, M. Patra, B.K. Dagara, S. Mohanty and S.C. Mohapatra, for the Respondent

Final Decision : Allowed

Judgement

Ray, J.—This is an application by some of the villagers of Ampore for quashing the order dated 5-1-70 of the Endowments Commissioner appointing O. P. No. 1 as the interim, trustee in respect of the religious institution known as Ampore Muth. This order of the Endowments Commissioner is appended to the application as Annexure 3.

2. The Muth is a public institution. It has four deities installed within its precincts. Vast landed properties have been endowed for their seba-puja and other purposes connected with the institution. One Adhikari Rama Krushna Das is the recorded Marfatdar in respect of it.

The said Marfatdar alienated the endowed properties by executing two SebaSamarpan Patras. one in 1929 and the other in 1930, both in favour of one Parameswar Das. The villagers challenged these alienations in T. S. No. 18 of 1942 and succeeded in getting a judicial declaration that those alienations were invalid. He again executed two Seba-Samarpan Patras in favour of O. P. No. 1. one on 17-2-68 for a consideration of Rs. 5,000/- and the second on 12-11-68

for Rs. 8,000/-. These alienations were again challenged by the villagers in O. S. No. 45 of 1968, and a permanent injunction against opposite party No. 1 was sought for. In this suit a receiver has been appointed to manage the properties of the Muth.

3. There is no controversy that the aforesaid Muth is a public Hindu Religious institution which means that the dedication is for the use and benefit of the public.

4. Some of the petitioners along with the other villagers apprised the Endowments Commissioner of the cross mismanagement and illegal alienations of the Marfatdar by an application dated 14-10-68 and requested him to take appropriate action u/s 7 of the Orissa Hindu Religious Endowments Act by appointment of an interim trustee. Upon this, notice was issued to the Mahant as to why interim trustee shall not be appointed and proceedings u/s 28 shall not be instituted and an inquiry by the Assistant Endowments Commissioner into the management of the institution was ordered. The Asst. Endowments Commissioner upon inquiry found that there was mismanagement in the institution and recommended, on the suggestion of the villagers, one Dhobei Das for appointment as interim trustee. The Endowments Commissioner by his order dated 6-6-69 appointed Dhobei Das as interim trustee. This order is appended to the petition as annexure 1.

5. On 4-8-69, opposite party No. 2 made an application before the Endowments Commissioner (opp. party No. 2) for being recognised as hereditary trustee on the basis of documents of transfer of Marfatdari interest from the recorded Marfatdar, and till determination of that Question to be appointed as interim trustee in place of Dhobei Das. The opposite party No. 2 that very day recalled his previous order and appointed opposite party No. 1 as interim trustee, while directing to start a proceeding for determining the validity of the claim of the opposite party No. 1. As soon as the petitioners became aware of this order dated 4-8-69, contained in annexure 1. they filed an application on 26-11-69 for recall-ins the order dated 4-8-69. This matter was posted to 6-1-70 for hearing, by order of Sri D. P. Sharma, the then Endowments Commissioner. Thereafter when Sri B. K. Misra became the Endowments Commissioner, he, suo motu disposed of the matter ex parte on 5-1-70 a day earlier than the fixed date.

6. The main opposition to this application is by opposite party No. 1 who has been appointed as interim trustee under the impugned order of the Endowments commissioner. The attitude of the Endowments Commissioner is lukewarm in this matter. He has filed a counter in this case, where he has stated that there would have been no difficulty to reconsider the impugned order dated 5-1-70 on a subsequent date if the petitioners had moved him in the matter, and the learned counsel for the Endowments Commissioner also has to objection to give an opportunity to the petitioners now to be heard in the matter.

7. Two questions have been raised by learned counsel for opposite party No. 1.

First Section 7 of the Orissa Hindu Religious Endowments Act confers an absolute discretion on the Endowments Commissioner in the matter of passing interim orders as may be deemed necessary for the proper maintenance of a religious institution or proper administration of a religious endowment when a dispute concerning the same is pending and since the impugned order has been so passed in the exercise of his discretion it cannot be quashed. Secondly, the petitioners have no locus standi to invoke the jurisdiction under Article 226 of the Constitution of India as none of their existing and specific legal rights has been infringed and as such this application must fail in limine.

8. The first question is now taken up. This involves examination of the ambit and scope of the power conferred u/s 7 of the Orissa Hindu Religious Endowments Act, 1951 (Act No. 11/52). Section 7 runs as follows:--

"7. Powers and duties of 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 exist. Explanation:--

The Commissioner shall have power to pass such interim orders as he deems necessary for the proper maintenance of a Court."

It would be noticed that the religious institution or the proper administration of a religious endowments including the power to pass such orders if and when necessary for the proper management of any institution when a dispute concerning the same is pending in section opens with the expression "subject to the provisions of this Act." To my mind this clause would govern Sub-section (2) and also the explanation. Thus, the powers which the Commissioner may exercise and the duties which he may perform under this section must be in regard to matters not otherwise provided in this Act and in areas not otherwise covered. Section 28 deals with Commissioner's powers to suspend, remove, or dismiss a trustee whether hereditary or non-hereditary of a religious institution. Sections 35 and 36 deal with the subject-matter of declaring a hereditary trustee disqualified and filling up vacancies. All these sections confer a jurisdiction on the Endowments Commissioner which is undoubtedly judicial. They also confer on him the powers to make interim orders. These sections clearly circumscribe the powers of the Commissioner to pass an interim order u/s 7. No such interim order can be passed until the Commissioner has, first of all put the trustee under suspension u/s 28 of the Act and has declared him to be disqualified and thereby causing a vacancy. Therefore, the Commissioner by an interim order passed u/s 7 cannot divest a hereditary trustee of his right of management. Any such order, passed in violation of Sections 28, 35 and 36 of Act 11/52 would be beyond his jurisdiction. Similar view was taken by a Division Bench of this Court in the case

of Sarat Kumar Mohanty v. Gourhari Samantaray (1955) 21 CLT 93. In this case Section 11 of the Orissa Hindu Religious Endowments Act. 1939, was being construed. Section 11 runs as follows:--

"11. Subject to the provisions of this Act and of any rules made under it and of any scheme settled or deemed to be a scheme settled under this Act, the general superintendence of all religious endowments shall vest in the Commissioner and he may do all things which are reasonable and necessary to ensure that maths and temples are properly maintained and that all religious endowments are properly administered.

Explanation:-- The general powers of superintendence of the commissioner shall include the power to Pass such interim orders as he deems necessary in the interests of the proper maintenance of a math or temple or the administration of a religious endowment."

In 1951 Act Section 11 of 1939 Act has been substantially reproduced by splitting it up into two sub-sections. So the interpretation of Section 11 of 1939 Act given by a Division Bench of this Court will directly apply to this case in interpreting Section 7. Their Lordships in the aforesaid case held:

"The power vested by Section 11 of the Hindu Religious Endowments Act. 1939, should be read subject to the other provisions of the Act and of any scheme settled or deemed to be settled under it."

and further said that it is an error to think that Section 11 is an over-riding section, and that all other provisions of the Act must be read as subordinate to it. Thus, the impugned order appointing opposite party No. 1 as an interim trustee u/s 7 of the Orissa Hindu Religious Endowments Act 1951 would be ultra vires and without jurisdiction. Any order of a statutory body passed in excess of jurisdiction is liable to be quashed in exercise of powers under Article 226. So even though the order (annexure 3) is construed as a pure administrative order it is on the very ground of having been passed in excess of jurisdiction, liable to be quashed.

9. There is another approach to this question. On the basis of the application of the villagers dated 14-10-68 an inquiry was instituted by the Assistant Commissioner of Endowments. A notice had been issued to the hereditary trustee asking him to show cause why a proceeding u/s 28 of the Orissa Hindu Religious Endowments Act shall not be started against him. The petition of the villagers contained allegations of the nature contemplated under Sections 28 and 35 of the Orissa Hindu Religious Endowments Act. After holding an inquiry the Assistant Commissioner recommended appointment of 6ne Dhobei Das as an interim trustee. Sub-section (2) of Section 28 provides that when it is proposed to take action under Sub-section (1) of Section 28, the Commissioner or the Assistant Commissioner may frame charges and pending disposal of the charges may place the trustee under suspension and appoint a fit person to discharge the functions of the trustee. It will be seen from the notice served on the hereditary

trustee that he was given a copy of the petition of the villagers dated 14-10-1968 which contained all the charges against him. In the context of these facts, though the order of appointment of interim trustee is purported to have been passed u/s 7 of the Act it must be referable to one as passed u/s 28 of the Hindu Religious Endowments Act, because where an authority acting under a statute passes an order purporting to be one under a section which will make that order without jurisdiction but will be with jurisdiction if deemed to have been passed under another section, then such order must be referable to the appropriate section which will uphold its validity rather than make it void. As already stated, the hereditary trustee had been asked to show cause against the proposed action u/s 28 and to meet the allegations of malfeasance and misfeasance. Therefore, such an order was passed in course of a judicial proceeding, because there is no manner of doubt that a proceeding u/s 28 or Section 35 and Section 36 is a judicial proceeding. The 1st. order dated 6-6-69 of the Endowments Commissioner appointing Dhobei Das as interim trustee was passed after hearing the villagers, and after noticing the hereditary trustee. That was recalled and subsequently another appointment was made by order dated 4-8-69 which was passed ex parte. This order must be deemed to have been passed in the proceeding which commenced on the application of the villagers dated 14-10-68. It was therefore, highly improper for the Endowments Commissioner to substitute a judicial order by another order passed ex parte. Accordingly, the villagers again moved the Endowments Commissioner for recalling the order dated 4-8-69. After some adjournments the matter was finally posted for hearing to 6-1-70. A day prior to that he administratively disposed of the objection petition by an order which is impugned here. Thereby two things were done. A judicial order for?) quasi-judicial proceeding was converted into a pure administrative proceeding by overriding the decision of his predecessor-in-office to treat the matter in a judicial manner, and taking away from the petitioners their right of hearing which they had not only by reason of their being parties to the proceeding, but also by reason of the previous order by which they were directed to be heard on 6-1-70. This amounts to gross disregard of all the principles of natural justice, and shows an utter arbitrariness which appears to have transgressed all bounds of reasonableness in that the Endowments Commissioner having decided to act judicially overnight changes his mind and acts capriciously.

10. The impugned order in the context of aforesaid facts gives a clear indication that the Endowments Commissioner did not act in a fair and just manner. Even in exercise of administrative power certain rules of natural justice have to be observed. In *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, the Supreme Court has said:--

"The concept of rule of law would lose its vitality if the Instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously."

At another place, their Lordships have said:--

"With the increase of the powers of the administrative bodies it has become necessary to provide guidelines for the just exercise of their powers. To prevent the abuse of that power and to see that it does not become a new despotism. Courts are gradually evolving the principles to be observed while exercising such Powers. In matters like these public good is not advanced by a rigid adherence to precedents. New problems call for new solutions. It is neither possible nor desirable to fix the limits of quasi-judicial power."

Assuming, in the present case, that a proceeding for reviewing the order dated 4-8-69 was administrative, the Endowments Commissioner having decided to proceed judicially in the matter cannot overnight change his original stand and in effect dismiss the application prematurely. This is the sort of despotism and capriciousness which the Supreme Court conceived of in the aforesaid Kraipak's case.

11. My aforesaid conclusions thus are: (a) The proceedings, in which the impugned order annexure 3 was passed, were judicial notwithstanding that the said order or its previous orders were purported to have been passed u/s 7 of the Orissa Hindu Religious Endowments Act.

(b) Even if it is an administrative order the same has been passed capriciously and despotically in violation of all principles of natural justice.

(c) The impugned order even if it be assumed to be one passed u/s 7 would be in excess of jurisdiction.

The impugned order is for all the aforesaid reasons, liable to be quashed.

12. The next point is whether the villagers have a locus standi to maintain the writ application. The petitioners belong to the Hindu community of village Ampore where the religious institution is situated. The institution is a public one and the petitioners claim to be interested in this endowment. They claim as members of general public a right to offer worship to the deities and offer their prayers. This claim is not denied by the Endowments Commissioner. In face of this claim, it is futile to contend that the petitioners are not persons interested in this endowment. Under general law of religious endowments, such persons can file suits against the Mahant if he is himself guilty of misappropriation of the endowed property and against the alienee if the Mahant transfers such property without any legal necessity and the Mahant is unwilling and unable to act. In such cases, the plaintiff cannot claim to recover possession but he may sue to have the transfer set aside and for any other consequential relief which may be adapted to the circumstances of a particular case. (See. The Hindu Law of Religious and Charitable Trusts by B. K. Mukherjee, 1952 Edn. 369). Further, the expression "persons having interest" has also been defined in Section 3 (x). According to this definition a person having interest, in case of a math, means a person professing the Hindu religion, and in case of a temple a person who -

visits or is entitled to visit the temple for darsan of the deity or to attend at the performance of worship or service in the temple or who is in the habit of attending such performance or of partaking in the benefit of the distribution of gifts thereat. The petitioners therefore, are all persons having interest. "A person having interest" as defined in this Act is given some status and some rights under provisions of this Act. A few instances may be cited. In scheme proceedings u/s 42 persons having interest shall be consulted. In fixing standard scales of expenditure in respect of religious institutions other than maths u/s 34 and in respect of maths u/s 37. a person having interest has a locus standi to make suggestions to the Endowments Commissioner. A person having interest has a right of appeal u/s 44 from an order published u/s 43 (4). Thus, the petitioners are persons having sufficient interest in the endowments, recognized under the general law and also conferred expressly by Statute and those interests would obviously be jeopardised if the properties of the religious institution are transferred, mismanaged or unauthorisedly alienated. In this case the petitioners were being prejudiced by the impugned order and their interests prejudicially affected by placing the management of the institution in the hands of one who had illegally grabbed the properties of the institution under an illegal transfer. Further, as persons having interest, the petitioners had raised a matter of dispute before the Endowments Commissioner who had entertained it and had allowed the petitioners a locus standi to be heard in the matter and had posted the same to a date for hearing and thus they were prejudiced by the impugned order.

13. In this connection, reliance was placed by the petitioners on some decisions. The first decision is of the Supreme Court in the case of *Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others*, . It has been there held:

"Article 226 confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. It is therefore, clear that persons other than those claiming fundamental right can also approach the Court seeking a relief thereunder. The Article in terms does not describe the classes of persons entitled to apply thereunder: but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right. The right that can be enforced under Article 226 also shall ordinarily be the personal or individual right of the petitioner himself though in the case of some of the writs like habeas corpus or quo warranto this rule may have to be relaxed or modified."

Again it has been said.

"A personal right need not be in respect of a proprietary interest: it can also relate to an interest of a trustee. That apart in exceptional cases as the expression "ordinarily" indicates a person who has been prejudicially affected by an act or omission of an authority can file a writ even though he has no proprietary or even fiduciary interest in the subject-matter thereof."

14. Next is the case of R. Lakshminarayanan Vs. V.A. Maruthappa Nainar and Others, . In this case an existing rice mill-owner who had objected to the installation of a fresh rice-mill in the locality contended that he had been prejudicially affected by the grant of permit under the Rice Milling Industry (Regulation) Act for installation of a fresh rice-mill, had sufficient interest to give him locus standi to make an application for certiorari under Article 226. Their Lordships have said that when a certiorari is sought, the Court generally looks for some personal interest of the applicant in the matter and something more substantial and related to the applicant than due observance of law by authorities. But there may arise cases where other persons may be affected and genuinely aggrieved by excessive abuse of powers. There, their Lordships therefore say:

"The requirements as to the standing of an applicant for certiorari cannot be circumscribed by any narrow limitation, of necessity it would vary according to the law administered, the illegality alleged, and the grievances suffered. The right to apply for relief deeming himself aggrieved, if that is the test, is one thing making out a case for the issue of a certiorari is a different thing. That would depend on a judicial scrutiny of the record in relation to and his establishing one or other of the recognized grounds for quashing. The necessity for judicial scrutiny when a person comes to Court complaining against an act of commission or omission of an administrative authority regulating trade, business or occupation under law which prejudicially affects him, springs from the concept of supremacy of the rule of law and the authority of the Court to determine the legality of the Act."

15. The third decision on which reliance was placed was the case in (1963) 5 Ori 97. It was there held that it is an individual right of each member of the resident-public within the Municipality to insist on compliance with Municipal rules conducive to the general good of the community of which each such individual is a competent member.

16. Reliance was placed by Mr. S. C. Mohapatra. learned counsel for opposite party No. 1 on three decisions for the proposition that the petitioners have no locus standi to maintain their application under Article 226. They are (1) In Re: Abdul Khader Saheb, (2) G. Ramappa and Others Vs. Secretary to the Revenue Dept. and Others, : and (3) Himalayan Tile and Marble (Pvt.) Ltd. Vs. Francis V. Coutinho and Others, . These cases are all distinguishable on facts. Two of the cases relate to land acquisition proceedings, and it was held that the person for whom the land is being acquired is not a person interested either to compel the Government to acquire if it drops the acquisition proceedings or to get a locus standi to claim to set aside the award u/s 18 of the Land Acquisition Act. The second case relates to assignment of some Poramboke lands (which is Government land) and it was held that the villagers can have no locus standi to challenge such assignment.

17. For the aforesaid reasons I am of opinion that the petitioners have a locus

standi to maintain this petition.

18. In the result, therefore, the impugned order dated 5-1-70 (annexure 3) is quashed and the Endowments Commissioner is directed to dispose of the application for review which had been posted to 6-1-70 for hearing on merits.

In the circumstances, there would be no order for costs.

Patra, J.

19. I agree.