

(1963) 09 OHC CK 0014
In the Orissa High Court
Case No : Civil Revision No. 68 of 1962

Nabaghana Samal and Others APPELLANT
Vs
Bhagawata Gossain and Others RESPONDENT

Date of Decision : 16-09-1963

Acts Referred:

Orissa Hindu Religious Endowments Act, 1951 — Section 19, 25, 4, 73, 73(1)
Orissa Hindu Religious Endowments Rules, 1959 — Rule 13, 14

Citation : AIR 1965 Ori 76 : (1964) 30 CLT 112

Hon'ble Judges : R.L. Narasimham, C.J; R.K. Das, J

Bench : Division Bench

Advocate : R.N. Misra and R.C. Patnaik, for the Appellant; Raghunath Das and Raghunath Patnaik, for the Respondent

Final Decision : Allowed

Judgement

Narasimham, C. J.

1. This is a revision against an order dated 24-2-62 passed by the Munsif of Athgarh, in Title Suit No. 17 of 1961 holding that the Civil Court's jurisdiction to decide the dispute involved in that litigation was not ousted by Section 73 of the Orissa Hindu Religious Endowments Act, 1951 thereafter referred to as the new Act)

2. The said suit was brought on behalf of two public deities in village Ballipur by several members of the public under the provisions of Order 1, Rule 8, C. P. C. The principal defendants were the marfatdars (defdts. 3 to 6) of the deities. it was alleged that they made unauthorised alienations of the properties of the deities by four registered kabalas on the 6th April 1960 in favour of defendant No. 1.

3. The main reliefs asked for by the plaintiffs were:

(i) a declaration that the alienations were illegal and should therefore be set aside;

(ii) restoration to possession of all the alienated properties in favour of the plaintiff-deities. A preliminary objection was taken to the maintainability of the suit on the ground that the matter should have been decided, in the first instance, by the Commissioner of Hindu Religious Endowments u/s 25 of the new Act and that the aggrieved party may then seek relief in the Civil Court. A direct suit In the Civil Court, without the intervention of the Endowments Commissioner, in the first instance, was said to be barred u/s 73 of the new Act. This is the sole point for consideration in this Civil Revision.

4. Sub-section (1) of Section 19 of the new Act declares that no transfer by exchange, sale, mortgage or lease, for a term exceeding five years, of any Immovable property belonging to an endowment shall be made except with the sanction of the Commissioner. It further says that any transfers made without such sanction shall be invalid and inoperative. The institution is admittedly a public temple, and the alienations also took place after the coming into force of the new Act. Hence the transfer would be invalid and inoperative by virtue of Sub-section (1) of Section 19. Section 25 (which is a new provision made after the new Act was brought into force from January 1, 1955) may now be quoted:

"25 (1) Recovery of trust property unlawfully alienated:--in case of any alienation in contravention of Section 19 of this Act, or Section 58 of the Orissa Hindu Religious Endowments Act (IV of 1939) of any Immovable property belonging to or given or endowed for the purpose of any religious institution, the Commissioner after summary enquiry as may be prescribed and, on being satisfied that any such property has been so alienated, may send a requisition to the Collector of file district to deliver possession of the same to the trustee of the institution or a person discharging the functions of the said trustee. The Collector in exercising his powers under this Section shall be guided by rules, made under the Act. Any person aggrieved by the order of the Collector may institute a suit in the civil Court to establish Ms right."

The rules prescribed under the aforesaid section are contained in Rules 13 and 14 of the Orissa Hindu Religious Endowments Rules, 1959. Section 25 and the aforesaid rules authorise the Endowments Commissioner to make a summary enquiry with a view to determine or decide whether there was any alienation in contravention of Section 19 of the new Act and if he is satisfied that there was any such contravention, he may send a requisition to the Collector of the district for delivery of possession of the alienated property and any person aggrieved by the order of the Collector may institute a suit in the Civil Court to establish his right. Though the enquiry by the Endowments Commissioner is expressly stated to be a summary enquiry, Rule 13 says that the Commissioner shall fix a date for hearing, examine witnesses produced by either party, make a memorandum of the substance of the evidence and also hear the parties and then satisfy himself as to whether the alienations have been made in contravention of Section 19 of the new Act.

Rule 14 says that the Collector on receipt of a requisition from the Commissioner,

shall, after giving notice to the person in possession of the property, put the trustees in possession of the same. Thus the enquiry u/s 25 is clearly a judicial enquiry in which the aggrieved party is given full opportunity to be heard and the satisfaction of the Endowments Commissioner is required to be based on the finding arrived at in that enquiry. The Collector merely acts as an executing authority to implement the decision of the Commissioner and the only remedy of an aggrieved party who is dispossessed by the Collector in pursuance of such a requisition is to file a civil suit to establish his right. It will be noticed that Section 25 does not say that the Commissioner's jurisdiction to proceed under that section arises only if some-one raises a dispute before him. He may proceed either suo motu or he may proceed on receipt of an application by an interested party.

The very reliefs, which the plff. petitioners have asked for in this litigation, viz., declaration that the alienations were unlawful and restoration of possession of the alienated properties to the deities could be given by the Commissioner through the Collector u/s 25 of the new Act after a summary enquiry. The question therefore is whether under the scheme of the new Act a direct suit in the Civil Court without applying to the Commissioner u/s 25 would be barred.

5. It is true, as pointed out by the Privy Council in a well known AIR 1940 105 (Privy Council) that the exclusion of the jurisdiction of the Civil Court is not to be readily inferred, but such exclusion must either be explicitly expressed or clearly implied. It was urged on behalf of the opposite party that there was such an express exclusion by Section 73 of the new Act which runs as follows:

"73. Bar of suits in respect of administration of religious institutions.--(1) No suit or other legal proceeding in respect of the administration of a religious institution or in respect of any other matter or dispute for determination or deciding which provision is made in this Act, shall be instituted in any Court of law, except under and in conformity with the provision of this Act.

(2) Nothing contained in this section shall affect the right of the trustees, appointed under this Act, of a religious institution, to institute a suit to enforce the pecuniary or property rights of the institution, or the rights of such institution as a beneficiary."

Sub-section (i) Section 73 consists of two parts. The first part deals with suits or legal proceedings in respect of the administration of the religious institution and prohibits the institution of such a suit or proceeding, except under and in conformity with the provisions of the Act dealing with such administration. This part has obviously no application here. But the second part of this section says that where there is a provision in the new Act for determination or deciding a matter or dispute in respect of a religious institution, a suit can be brought only under, and in conformity with, that provision. The use of the words "determining" and "deciding" after the words "matter" or "dispute" would suggest that the Legislature was thinking of a "matter to be determined" and? a "dispute to be

decided" though the word "respectively" has not been used. It is true that the word "determine" itself involves a judicial approach. As pointed out in the Oxford Dictionary the word "determine" means:

"ending of a controversy or suit by the decision of a judge or arbitrator; judicial or authoritative decision or settlement of the matter at issue; the settlement of a question by reasoning or argumentation."

In a recent decision of the Supreme Court *Jaswant Sugar Mills Ltd., Meerut Vs. Lakshmichand and Others*, a similar interpretation was given to the expression "determination" occurring in Article 136 of the Constitution in the following words:

The expression "determination" in the context in which it occurs in Article 136 signifies an effective expression of opinion which ends a controversy or a dispute by some authority to whom it is submitted under a valid law for disposal "Determination must be judicial or quasi-judicial; purely administrative or executive direction is not contemplated to be made the subject matter of appeal to this Court."

Apparently, the Legislature wanted to include within the scope of Sub-section (1) of Section 73 of the new Act, not only those disputes which are decided by the Endowments Commissioner, but also those matters which are determined under the provisions of the Act, the only limitation being that they must be decisions or determinations which are judicial or quasi-judicial in character. The Commissioner himself is required to be a Judicial Officer (Section 4) and, as already pointed out while acting u/s 25 he has to decide the dispute or determine the matter in a judicial manner though in a summary proceeding. Hence, as a matter of mere construction it must be held that Section 25 is one of the provisions included in Sub-section (1) of Section 73 and no suit can be brought except under and in conformity with that section. A direct approach to the Civil Court ignoring the provisions of that section would be barred.

6. A scrutiny of Sub-section (2) of Section 73 confirms this view. That sub-section says that--

"The provisions of Sub-section (1) shall not apply to trustees appointed under the Act for the purpose of enforcing property rights of the institution."

Hence, if a trustee appointed under the Act wants to annul the alienations unlawfully made by his predecessor and to recover possession of the property his right to approach the Civil Court direct which would otherwise have been hit by the provisions of Sub-section (1) of Section 73 would thus be saved. Sub-section (2) of Section 73 thus gives a clue to the construction of Sub-section (1) also and by implication leads to the conclusion that those trustees of religious institutions who have not been appointed under the Act or those persons discharging the functions of such trustees, must conform to the provisions of Sub-section (1) if they want to recover possession of the property of the institution

unlawfully alienated.

7. It is true that Section 68 of the new Act confers power on the Endowments Commissioner and his subordinate officers to summarily put a trustee or executive officer appointed under the Act in possession of the properties of the institution which might have been unlawfully alienated by the previous trustees, but that section has no application, here because admittedly the plaintiffs are not trustees appointed under the Act.

8. It will be helpful to review the legislative history dealing with the prevalent provisions of the new Act, and also the corresponding provisions of the Madras Endowments Act on which the Orissa Acts are based. The Orissa Hindu Religious Endowments Act 1939 (hereinafter referred to as the old Act) was based mainly on the corresponding Madras Act (except for minor differences due to the difference in the administrative set up in the two States). Section 58 of the old Act prohibits alienation of certain types without the sanction of the Endowments Commissioner, but till 1963 there was no provision corresponding to Section 25 of the new Act conferring summary powers on the Commissioner to restore possession of the properties so unlawfully alienated, except as regards appointed trustees or executive officers who could apply to the Commissioner u/s 59 of the old Act, (which corresponds to Section 68 of the new Act). Non-appointed trustees, persons exercising the functions of trustees and persons otherwise interested in the institution could however file suits for recovery of possession of the property of the Endowment after obtaining the sanction of the Endowments Commissioner as provided in Sub-section (1) (a) of Section 54 of the old Act. This appears to be a mere enabling provision and did not prohibit a direct approach to the Civil Court by these persons.

Sub-section (2) of Section 54 of the old Act which barred the filing of civil suits was in the following terms:.

"Sections 92 and 93 and Rule 8 of Order I of the First Schedule of the Code of Civil Procedure, 1908, shall have no application to any suit claiming any relief in respect of the administration or management of a religious endowment and no suits in respect of such administration or management shall be instituted except as provided by this Act."

This sub-section is identical, in language, with Sub-section (3) of Section 73 of the Madras Religious Endowments Act, 1927 (prior to its amendment in 1946). There was a conflict of judicial opinion about the true meaning of the words "except as provided in the Act". One view was that they only meant "contrary to the provisions of the Act" and not that they were meant to lay down a positive and substantive provision. To resolve this conflict the Madras Legislature by the amending Act of 1946 added the words "and in conformity with the provisions of the Act" with a view to make it clear that it was a positive and substantive provision. There was again a further conflict as to whether the "administration or management of a religious institution would include the right to recover the

properties of an endowment in the hands of third parties. One view based on the Privy Council decision reported" in *Abdur Rahim v. Abu Mahomed Barkat Ali Shah*, 55 Ind App 96 : AIR 1928 PC 16) was that suits against third parties would not come within the scope of administration or management of religious institutions--see the decisions cited in *Sarveswaraswamy Vari Temple v. R. Veerabbadrayya* 1961 (1) AWR 250 The Madras Legislature therefore, when passed the new Madras Act (Madras Hindu Religious and Charitable Endowments Act) in 1961, in Section 93 cleared all ambiguity by using language identical with that used in Sub-section (r) of Section 73 of the new (Orissa) Act.

9. The new Act was passed by the Orissa Legislature in 1951 but it was not brought into force till 1955 as the constitutionality of the Madras Act itself was under challenge before the Supreme Court which finally disposed of the matter in *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, . Thereupon certain further amendments were made and the new Act was brought into force from the 1st January 1955. Till then the old Act of 1939 continued to remain in force but the Legislature felt that certain summary powers should be given to the Commissioner to recover possession of the property of the endowments Unlawfully alienated. Hence by Orissa Act 18 of 1953 a new subsection was inserted in section 58 of the old Act (Sub-section (2)) which corresponded to a large extent to Section 25 of the new Act. The only difference is that that new sub-section commenced with the words "without prejudice to the generality of his powers in Section 54 to institute suits" thereby making it absolutely clear that though he was given summary powers by that new sub-section to restore possession of the properties of an endowment the power to institute a suit u/s 54 of the old Act was not affected in any way.

10. Thus, prior to the coming into force of the new Act in January 1955, the position in Orissa was as follows;--

(i) The ban on direct appeal to civil courts was of a limited nature in view of the language used in Sub-section (a) of section 54 of the old Act. There was a doubt as to whether a suit for recovery of possession of properties of an endowment in the hands of third parties would come-within the scope of administration or management of a religious institution. There was also some doubt as to whether the words "except as provided by this Act" meant only "contrary to the provisions of the Act", in view of this doubt a court could take the view that a direct approach to the Civil Court in such cases was not barred either expressly or by implication in any of the provisions of the old Act, Section 54 (1) being only of an enabling nature and Section 58 (2) (as amended in 1953) bring itself subject to the provisions of section 54 of the old Act.

11. But when the new Act was brought into force in 1955 all these ambiguities were cleared up. The provision relating to ban on Civil suit (Section 73) was drafted in terms Identical with the language used in the new Madras Hindu Religious Endowments Act of 1951 (in section 83) so as to make it clear that apart from matters dealing with the administration of a religious institution any

other matter or dispute also would come within the scope of the ban, and by using the expression "except in conformity with the provisions of the Act" the Legislature made it farther clear that this was a positive and substantive provision which might be complied with. The summary power conferred on the Endowments Commissioner by Sub-section (2) of Section 58 of the Act was provided in a new Section (Section 25) without the restrictive words "without prejudice to the generality of his powers to institute suits." So far as appointed trustees or executive officers are concerned there was practically no change. They could apply for recovery of possession summarily u/s 68 of the new Act and appointed trustees could also directly approach the Civil Court under Sub-section (2) of Section 73 of the new Act.

12. Thus when the Orissa Legislature made these drastic changes being aware of the conflict of judicial opinion as regards interpretation of the corresponding provisions of the old Madras Act, full effect must be given to the intention of that Legislature, and it must be held that the general right of suit for non-appointed trustees or any other persons interested; in the institution, to directly approach the civil court is now canalised and they could apply for the same relief to the Commissioner u/s 25 of the new Act leaving it to the aggrieved party to go to the Civil Court.

13. The object of such a provision is obvious, apparently the legislature wanted that heavy expenditure and delay which are the necessary evils in civil litigation should be avoided in the first instance, for recovery of possession of properties of an endowment unlawfully alienated, because in many instances such expenditure ultimately falls on the endowment. It is true that in those limited classes of cases where a party aggrieved by the order of the Endowments Commissioner u/s 25 of the new Act goes to the Civil Court such delay and expenditure cannot be avoided, but in such instances the non-appointed trustees or other persons interested would be in the position of defendants in the Civil suit which is a great advantage. Moreover, in a large number of cases the summary power exercised by the Endowments Commissioner u/s 25 may prove effective and there may be no subsequent challenge in the civil court.

14. It is now necessary to refer to certain previous decisions of this Court on the subject-In Artatran Alekhagadi Brahma and Others Vs. Sudersan Mohapatra and Others, a suit by a certain body of worshippers under Order I, Rule 8 C.P.C. challenging the alienation of the endowed properties was held to be valid" and recovery of possession was directed to be given to the trustees. But that case dealt with an alienation made in) 1944 when the old Orissa Act was in force. I have already shown that under the old Act a direct approach to the Civil Court was not barred and consequently the aforesaid decision will not be of any help. Our attention was then drawn to a single Judge's decision of this Court in S. A. 264 (254?) of 1960 (Orissa) (not yet reported) disposed of on the 27th November, 1962. The judgment in that appeal was delivered by my learned brother and he has in a separate note attached to this judgment given the

special features which distinguishes that case from the present case. I have nothing more to add to what he has written on the subject.

15. For these reasons I hold in disagreement with the trial court, that the present suit is barred by Sub-section (i) of Section 73 of the new Act.

16. The Civil Revision is allowed, the order of the lower court is set aside, and the suit is dismissed, but there will be no order for costs.

DAS, J.

17. I agree with nay Lord the Chief Justice, but would like to add a few words.

18. Our attention was drawn to a case decided in Second Appeal No. 254 of 1960 (Orissa). As I was a party to that decision, I think I should clarify the position.

19. In that case an alienation in the nature of Seba-Samarpan Patra of 1952 was challenged in a suit in 1956, when the old Act (IV of 1939) was already repealed and the new Act came into force from 1-1-1955. u/s 58 of the old Act which corresponds to Section 19 of the new Act, alienation of certain kinds were prohibited in law. Here was no provision in Section 58 of the old Act for setting aside such allocation and for recovery of the alienated property. By Act XVIII of 1953 a new Sub-section (2) was added to Section 58. By that provision the Commissioner was authorised to make a summary enquiry to satisfy himself as to the propriety of the alienation and to send a requisition to the District Collector to deliver possession of the alienated property to the trustees etc., and in doing so the Collector was to be guided by the provisions of Section 59(2A) of the old Act, and a person aggrieved by the order of the Collector may seek his remedy by a suit in the Civil Courts but that section had ceased to have any effect from 1-1-1955 when the Endowments Act of 1939 was repealed. Section 19, however, made provision corresponding to Section 58 and for the first time a new provision was made in Section 25 of the new Act providing for the recovery of trust property which was unlawfully alienated. According to that provision the commissioner for setting aside alienations u/s 19 of the new Act or Section 58 of the old Act has to make an enquiry in the "prescribed" manner. If after such enquiry he is satisfied that such alienation was in contravention of the aforesaid provisions, he may send a requisition to the District Collector to deliver possession of the property to the trustees etc. The Collector while exercising his powers under the said section "shall be guided" by the rules made under the Act" and any person aggrieved by the order of the Collector may institute a suit in the Civil Court.

Thus while exercising the powers u/s 25, the Endowments Commissioner and the District Collector, as the case may be were to be guided by some specified rules made in this behalf. There was no such provision u/s 58(2) of the old Act and the Endowments Commissioner or the Collector of the District were not called upon to, follow any specific rules of procedure while making their enquiry under that Section. The addition of such provision in Section 25 of the new Act is therefore

quite significant. By the addition of these provisions in Section 25 of the new Act the Legislature obviously Intended that the Endowments Commissioner or the Collector, as the case may be, shall be guided" by specific rules of procedure while exercising their powers u/s 25. Thus, in the absence of such rules Section 25 became practically ineffective.

Admittedly rules u/s 19 (Rule 4) and u/s 25 (Rules 13 and 14) were framed and came into force only from 15-1-1959, i.e., long after that suit was "filed" in 1956. In 1956 when that suit was filed there were no rules made to give effect to Section 19 or Section 25, so that a party can take steps before the Endowments Commissioner for recovery of the properties alienated in contravention of Section 19 or old Section 58 (2), That suit was not in respect of the administration of any religious institution so as to come within the bar of Section 73. No doubt Section 73 could operate as a bar for civil suits in respect of other matters also, provided of course if there was effective machinery in the Endowments Act or Rules made thereunder for determination or decision of such matters. As seen above, there was no such provision in 1956 for giving appropriate relief in matters like recovery of property alienated in contravention of Section 19 or old Section 58. Necessarily, therefore, the Civil Court's jurisdiction was not ousted so far as the suit was concerned. That cast is therefore clearly distinguishable. In the present case, however, the position is quite different. Here the suit was filed long after the rules came into force and is therefore directly hit by Section 73(1) of the Act.