

(2016) 01 OHC CK 0007

In the Orissa High Court

Case No : M.S.A. No. 07 of 2011, (From the judgment dated 21.07.2011 passed by the learned Deputy Commissioner Endowment, Odisha, Bhubaneswar in F.A. No. 14 of 2006)

Narayani Thakurani and Shri Nilakantheswar Deb APPELLANT

Vs

Commissioner of Endowments RESPONDENT

Date of Decision : 08-01-2016

Acts Referred:

ORISSA HINDU RELIGIOUS ENDOWMENTS Act, 1951 — Section 3(iv), Section 41, Section 44(2)

Citation : (2016) 122 CutLT 438

Hon'ble Judges : D. Dash, J.

Bench : Single Bench

Advocate : M/s. S.K. Dey and Namita Pattnaik, Advocates, for the Appellants; M/s. S.N. Mohapatra, P.K. Panda and R.K. Routray, Advocates, for the Respondents

Final Decision : Dismissed

Judgement

D. Dash, J. - This appeal has been filed under section 44(2) of the Orissa Hindu Religious Endowment Act 1951 (in short "Act") against the judgment and order dated 21.07.2011 passed by the learned Deputy Commissioner Endowment, Odisha, Bhubaneswar in F.A. No. 14 of 2006. The appellant filed an application under section 41 of the Act to declare them as the hereditary trustees of the deity "Narayani Thakurani" & "Shri Nilakantheswar Deb" Bije at Jamarsuan, Post - Gadamrugasira in the District of Puri and the property owned by it.

2. The case of the appellants is that they are the hereditary trustees of the above deity. It is stated that the Commissioner of Endowment by order No. 2680(7) 293 N.P. dated 10.03.2005 has arbitrarily formed a Non-Hereditary Trust Board for the management of the affairs of the said deity in exercise of power under section 7 of the Act. According to them it came to their knowledge on 19.03.2005, when there was publication of the said order in the locality by beat of drums. It is also stated that so far as the properties standing recorded in the

name of the deities are concerned, the appellants have been recorded as the Marfatdars in the record of right published in the year 1977 as also in the consolidation record of right of the year 1999. It is further stated that the said properties were entrusted to one Bhagaban Das, father of late Chandra Das by the then intermediary long back in the year 1882 namely, Mahanta Bhagaban Ramanuj Dash of a Matha of Puri. After construction of the temple, the deities have been installed by said Mahanta and Bhagaban Das enjoyed the property and managed the entire affairs of the deities and the temple including the seba puja as if their family deities. It is next stated that the documents created at that time were lost because of improper keeping. However, in the settlement of the year 1891, 1910, 1927 and 1977, the name of late Chandra Das and his successors had appeared in the record of right.

The appellants claim to have been maintaining the deity since the time of their forefathers openly, peacefully and without any hindrance, to the knowledge of all concerned and the villagers have absolutely no role in that matter. According to them, the properties have been recorded under "Bijayapati Sthithiban Status" in the name of the forefathers of the appellants and then in the name of appellants as the Marfatdars indicating that they are the occupancy tenants having interest by way of succession and inheritance. It is also their case that since time immemorial, the properties are being enjoyed by the appellants. It has been next averred that Late Chandra Das had brought Narayani Thakurani and installed the same at Baniyan tree and kept it on the Bijie Sthali as described in schedule - B and C land which were originally the properties of Shri Nilakantheswar Deb, Marfat Late Chandra Das. It is stated that succession to the office trusteeship has been devolving by hereditary right since the time of the founder.

It is their claim that as the members of the family, they have been in management of the affairs of the deity as trustees and not as Sebayat-Marfatdars or in the capacity of simple managers. They assert to have succeeded to the office by way of hereditary rights since the time of founder. The institutions have all along been managed by the appellants and their forefathers when Hindu public have been allowed for darshan and offering prayer. But they have no right to participate in the management in any manner. The appellants have never been given any property just because of their performance of the seba pujas. It is alleged that some of the people of the locality for their political gain being in collusion with their officials have prepared a false report in getting the order of the Endowment Commissioner.

3. The respondent no. 4 to 10 who are the persons inducted in the Non-Hereditary Trust Board contested the proceeding by filing written statement. It is their case that the deity is in existence since creation of village which is much prior to the year 1982. According to them, initially the temple was there in thatched house and subsequently permanent constructions have been made. It is stated that "Shri Nilakantheswar Deb" is as incarnated and the deity "Narayani Thakurani" had been established by the villagers and other religious minded

people and they had endowed the land. The villagers had engaged pujakas for performing the seba pujas and only for connivance those sebakas had then been recorded as Marfatdars. It is also their case that Bhagaban Das was not the first Sebaka. Prior to him; other persons were engaged as Sebaka. It is next stated that in the Super Cyclone which had caused devastation in the year 1999, the temple of Narayani Thakurani was severely affected and thereafter the villagers have built the pucca temple by spending around a sum of Rs. 2.5 lakhs. They have also constructed a platform near it. The villagers had installed the deity and had brought the ancestor of the appellants for the purpose of performing seba puja of the deity. They claim to have been in management of the affairs of the deities and the temple all along and the recording of the name of the appellants in the record of right as Marfatdar is said to be just for connivance and those do not clothe them with any right as hereditary trustee. The recording of the lands is also said to be for the purpose of facilitating the payment of rent.

4. The learned Assistant Commissioner of Endowment on analysis of evidence let in by the parties in the backdrop of their rival pleadings has finally rejected the prayer as advanced by the appellants.

5. Being aggrieved by the said judgment and order, they carried an appeal which came to heard by the learned Deputy Commissioner of Endowment. After hearing, the learned Deputy Commissioner of Endowment having concurred with the findings of the learned Additional Commissioner of Endowment has dismissed the appeal finding no such infirmity in the judgment and order.

6. The conclusion arrived at learned Assistant Commissioner of Endowment upon consideration of evidence are the followings :

"(i) xxx xxx xxx Therefore, it can safely be concluded that the case institution is a public religious institution within the meaning of OHRE Act 1951."

"(ii) xxx xxx xxx in view of the analysis made above, I observe that the conditions as contemplated U/s. 3(vi) of the OHRE Act have not been satisfied and as such the petitioners are not liable to be declared as hereditary trustees. I do not find any clinching evidence on record to declare them the hereditary sebakas of the case institution." (Para - 9, page - 14).

(iii) In view of the findings arrived at the foregoing issues, I find that the petitioners have the cause of action to file the case and the case is maintainable. But from the findings in the foregoing issues, I find that the petitioners are not entitled to any reliefs as claimed for."

The ultimate order that has been passed by the learned Assistant Commissioners runs as under :

"The application of the petitioner is dismissed on contest without any cost. It is hereby declared that the case institution "Nilakantheswar Deb" and "Narayani Thakurani Bije" at Jamarsuan, Gadamrugasira, district Puri is a public religious institution within the meaning of Orissa Hindu Religious Endowment Act 1951

without having any hereditary trustees and the properties endowed in favour of the deities as described in schedule "A, B and C" are Religious Endowment."

7. The appellate authority scrutinizing the materials on record and viewing the respective case has held as under :

"(i) xxx xxx xxx the evidence before the court is not sufficient even to presume that the ancestors of the present appellant/petitioner have got any connection that the founder of the suit deity. So in these circumstances only because in Ext. 5 to 11 the ancestors present appellant have described as Marfatdar, the petitioner cannot be treated as hereditary Trustee of the institution. Moreover the document vide Ext. K it reveals that one Kapila Mishra is also the Marfatdar of the suit deity."

(ii) So considering the facts and circumstances of the case and in view of the discussion made above and the ratio of the decision discussed by the lower court. I do not find any infirmity in the judgment and order passed by the lower court and the same is confirmed."

8. Learned counsel for the appellants submits that the courts below have failed to properly appreciate the evidence on record. According to her, the evidence of P.W. 1 and 2 though describe the detail picture in establishing the case of the appellants and when nothing has surfaced in spite of their searching cross-examination, the same ought not to have been eschewed from consideration. It is also her submission that the evidence of respondent no. 1 has provided support to the evidence of P.W. 1 and 2.

It is next submitted that the recording of the name of the appellants and their predecessors in the record of right stretching over a period have not been given their due weightage. She however contends that the appellate authority without any application of mind has gone to confirm the findings of the original authority and commit the same mistake. Thus she urges that the judgment and order passed by the authority are liable to be set aside and the prayer as advanced in the application under section 41 of the Act is to be allowed.

9. Per contra, the learned counsel for the respondent no. 8 and 9 submits that the learned Assistant Commissioner of Endowment as well as Deputy Commissioner of Endowment having gone for detail scrutinization of evidence and having made proper evaluation of the same when have arrived at the same finding that the appellants are not the hereditary trustees of the institution, such concurrent finding of the fact are not liable to be disturbed in this appeal in the absence of any such glaring mistake or perversity.

It is his submission that the appellants in the present case have miserably failed to substantiate their case that they are the hereditary trustees of the institution by leading clear, cogent and acceptable evidence in either of the ways as required in view of the definition for the same. He also contends that merely because a person is in charge of administration of the deity, though as a trustee

can't make him hereditary Trustee unless the conditions thereto are fulfilled and that having not been done in the case, the prayer as advanced by the appellants has been rightly rejected by the original authority and also confirmed in the appeal.

10. In view of above rival submissions, the only question remains to be answered in this appeal is as to whether the appellants are the hereditary trustees of the said institution.

So, for the purpose it would be proper to refer the definition of the hereditary Trustees as contained in section 3(vi) of the Act as also few decisions delivered by this Court covering the subject.

"Hereditary trustee" has been defined to mean that 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 specifically provided for by the founder so long as such a scheme of succession is in force.

11. This Court dealing with the claim of hereditary trustees in case of *Danardan Mohapatra v. Pitambar Jena*, 2012(2) OLR-639 has held as under :

"It is well settled that in order to be the hereditary trustee of a religious institution, a person must prove that the office of the trusteeship has devolved upon by the hereditary right since the time of the founder. The trustee as defined in the Act means a person in whom the administration of a religious institution and its endowment are vested. If the deity is an ancestral one and the time of foundation is not known and the existing state of affairs is found to be continuing for a sufficient length of time without interruption, the theory of "lost grant" has been applied by the courts".

In *Dhurba Charan Swain and Others v. J. Jagannath Panda and Another*, 26 (1960) CLT 293, this Court held that where an office of the trustee has been held by the head of a family for four successive generations and there is no suggestion that the trusteeship had ever been held outside the family, such trusteeship would be regarded as hereditary. This view was reiterated in other decisions of this Court.

However, it has been cautioned in the case of *Mitrabhanu Nayak and Others v. Jaleswar Panigrahi and seven Others*, 68 (1989) CLT 333 as well as in the case of *Uchhaba Mohapatra and Others v. Sri Amruteswar Dev and Others*, 68 (1989) CLT 380 not to draw presumption with regard to the hereditary trusteeship in every case."

12. The following paras of the judgment in case of *Danardan Mohapatra and Others v. Pitambar Jena & Others* (supra) at this stage are worth noting :

"Taking into consideration the law as has been developed with regard to adjudicating a claim of hereditary trusteeship under the Act, it is clear that the decision as to whether a person is a hereditary trustee of a public religious

endowment, which includes Math and Temple, will depend upon the facts of each case and there cannot be a straight jacket formulae applicable to all cases. In the case of *Mitrabhanu Nayak and others* (supra), it was held, as per the definition of "hereditary trustee" that the 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 by the founder according to the scheme of succession, so long as such scheme is in force.

This Court further held that the fact that it appears that one was a trustee for a long period would not be sufficient for a declaration that he was a hereditary trustee. However, the presumption would arise when a party proves long continued possession in assertion of a right, that such right has a lawful origin and the further presumption, which may be available, is that the Acts necessary for creation of such rights were done. However, such presumption cannot be availed of in every case of claim of hereditary trusteeship in view of the definition of "hereditary trustee" in the Act, where the expression "since the time of the founder" has been inserted. Relying upon earlier judgments, this Court in the case of *Uchhab Mohapatra and Others v. Sri Amruteswar Dev and Others*, 68 (1989) CLT 380 held that the applicants, in order to succeed with regard to their claim of hereditary trusteeship of a religious institution must establish that the members of their family had been in charge of the management of the affairs of the deity as trustees and succession to their office devolved on them by hereditary right since the time of the founder and the said scheme was in force till the filing of the application under section 41 of the Act."

13. Now adverting to the case in hand, it is seen from the evidence of P.W. 1 and that is also the case of the appellants that one Mahanta of a Matha of Puri was the founder of the deity. When P.W. 2 has clearly stated that the temple was constructed by way of provision of the fund from the Government exchequer, the evidence let in by the appellants on being carefully gone through are found to be not sufficient to hold that the ancestors of the present appellants had any relation with the founder of the said deity. Therefore, just because in Ext. 5 to 11, the ancestors of the appellants have been described as Marfatdars, as per the above stated position of law, the same cannot lead to the finding that the appellants are the hereditary trustees of the institution, when there also remains another document Ext. A showing one Kapila Mishra to be the Marfatdar of the deity. Therefore, this Court does not find any such infirmity in the concurrent finding that when management of the institution was placed with the non-hereditary trustee by the competent authority, even if, members of the family had been acting as Marfatdars of the deity for certain period, the same is not sufficient to establish their case that they are the hereditary trustees in conformity and falling within the definition provided in the Section 3(vi) of the Act.

14. In view of aforesaid discussions, the appeal stands dismissed. However, there

shall be no order as to cost.