

(1971) 04 OHC CK 0023
In the Orissa High Court
Case No : A.H.O. No. 4 of 1964

Prasanna Kumar Praharaj and Another	APPELLANT
Vs	
Sri Jagannath Jew and Others	RESPONDENT

Date of Decision : 26-04-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 9
Constitution of India, 1950 — Article 13, 14
Orissa Hindu Religious Endowments Act, 1951 — Section 25, 3, 41, 68, 73(1)

Citation : (1971) 37 CLT 503

Hon'ble Judges : S. Acharya, J; R.N. Misra, J; B.K. Patra, J

Bench : Full Bench

Advocate : R. Mohanty, for the Appellant; S. Mohanty, R.K. Pal, B. Pal, A. Mohanty, D.P. Mohapatra and G.B. Patnaik, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, J.—This Letters Patent Appeal is directed against the judgment in a Second Appeal disposed of by Barman, J., as he then was. When this appeal came before a Division Bench for hearing, the correctness of an earlier Division Bench judgment of this Court in Nabaghana Samal and Others Vs. Bhagawata Gossain and Others, was doubted and the vires of Section 73 (2) of the Orissa Hindu Religious Endowments Act (2 of 1952) (hereinafter referred to as the Act) was questioned.

2. The Division Bench thereupon referred the appeal to be heard by a Full Bench under Rule 2, Chapter V. Part II of the Rules of the Court. It also formulated four points to be determined by the Full Bench. The points referred are the following ;--

(1) Whether the expression "trustee appointed under the Act" in Sub-section (2) of Section 73 of the Orissa Hindu Religious Endowments Act, 1951 includes all kinds of trustees, hereditary and non-hereditary, or whether it is confined to non-hereditary trustees;

(2) If Sub-section (2) of Section 73 of the Act is confined only to non-hereditary trustee appointed under the Act, as has been found in *Nabaghana Samal and Others Vs. Bhagawata Gossain and Others*, , is it hit by Article 14 of the Constitution?

(3) Whether the expression "to institute a suit to enforce the pecuniary or property rights of the institution or the rights of such institution as a beneficiary" would include only rights arising out of property or would extend to enforcing suits in respect of the property itself: and

(4) Whether suits to enforce the pecuniary or property rights of the institution or the rights of such institution as a beneficiary are excluded from the scope of Sub-section (1) of Section 73 of the Act.

We propose to deal first with the points and then with the appeal with reference to its facts.

3. Section 73 of the Act provides:

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

(2) Nothing contained in this section shall affect the rights of the trustee appointed under the 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." The word "trustee" has a statutory definition in Section 3 (xvi) and means a person by whatever designation known, in whom the administration of a religious institution and endowment, are vested, and includes any person or body who or which is liable as if such person or body were a trustee. There is also a statutory definition for the term "hereditary trustee" and Section 3 (vi) defines that term as referring to a trustee of a religious institution succession to whose office devolves by hereditary right since the time of the founder or is regulated by customs or is specifically provided for by the founder, so long as such scheme of succession is in force. In Section 3 (viii) "non-hereditary trustee" has been denned to mean a trustee who is not a hereditary trustee. Thus in the Act is to be found a very wide definition of the term "trustee". By definition only three classes of trustees are hereditary, namely, (i) trustees succession to whose office devolves by hereditary right since the time of the founder, (ii) trustees succession to whose office is regulated by custom, and (iii) trustees succession to whose office is specifically provided for by the founder so long as such scheme of succession is in force. The term "non-hereditary trustee" would mean all other trustees who are not hereditary.

4. The Act has maintained through" out a clear distinction between the two classes of trustees -- hereditary and non-hereditary. Section 27 of the Act provides for appointment of non-hereditary trustees and vests the power in the

Assistant Commissioner. There is no specific provision in the Act for appointment of a hereditary trustee because the process in which a trustee is treated as hereditary does not postulate any appointment.

5. The word "appoint" would normally mean the action of nominating to, or placing in, an office. The Corpus Juris defines the word "appoint" as "to designate or nominate." Choice of a particular person to fill a particular post constitutes the essence of appointment. The learned counsel for the Commissioner of Endowments placed before us the proviso to Section 42 (2) of the Act. It provides:--

"Provided that where provision is made in the scheme for the removal of a hereditary trustee, provision shall also be made therein for the appointment as trustee of the person next in succession who is qualified."

On this occasion the word "appointment" has been used with reference to the vacancy in the office of the hereditary trustee because provision for designating the person next in succession who may be qualified for appointment to that office is required to be made in the scheme.

6. It would, therefore, follow that the words "trustee appointed under the Act" occurring in Section 73 (2) of the Act are confined to non-hereditary trustees. The conclusion reached by the Division Bench in the case reported in Nabaghana Samal and Others Vs. Bhagawata Gossain and Others, was correct when it said that the words "trustees appointed under the Act" were confined only to non-hereditary trustees. That would be our answer to the first question.

7. We shall now proceed to answer the second point, namely, whether the provision of Section 73 (2) of the Act is ultra vires being hit by Article 14 of the Constitution.

The Orissa Hindu Religious Endowments Act of 1951 appears to have been framed more or less on the basis of the Madras Hindu Religious and Charitable Endowments Act (19 of 1951). It may not be out of place to mention here that immediately after the Madras Act was brought into the Statute Book, the vires of many of its provisions was questioned before the Madras High Court and the said Court accepted the contentions of the petitioners (vide AIR 1952 Mad 613 L. T. Swamier v. Commr., H. R. E. Madras). The Commissioner of Endowments carried an appeal to the Supreme Court and judgment was delivered in the Supreme Court on 16-3-54 (vide The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., upholding the Madras High Court's judgment in respect of certain provisions of the statute. An appeal from a judgment of this Court (in AIR 1950 Orissa 47 Gadadhar Ramanuj Das v. Province of Orissa) challenging the vires of some of the provisions of the earlier Act (Orissa Act 4 of 1939) was disposed of by the Supreme Court on 16-3-54. While disposing of that appeal and the connected writ petition under Article 32 of the Constitution, their Lordships took into account the provisions of Orissa Act 2 of 1952 and decided that some of the provisions of the Act were ultra vires.

Orissa Act 2 of 1952 was, therefore, not brought into force until the defects pointed out by their Lordships of the Supreme Court were amended under Orissa Act 18 of 1954. The Act was thereafter brought into force with effect from 1-1-55.

Section 73 (1) of the Act corresponds to the provisions of Section 93 of the Madras Act of 1951. Section 93 of the Madras Act provides:

"No suit or other legal proceeding in respect of the administration or management of a religious institution or any other matter or dispute for determining or deciding which provision is made in this Act shall be instituted in any Court of Law, except under and in conformity with, the provisions of this Act."

There is, however, no corresponding provision for Sub-section (2) of Section 73 of the Act. Section 77 of the Bihar Hindu Religious Trust Act. Section 80 of the Bombay Public Trust Act and Section 73 of the Rajasthan Public Trust Act have more or less similar provisions as contained in Section 73 (1) of our Act. None of these statutes has, however, a corresponding provision like Sub-section (2) of the Orissa Act.

8. Mr. Mohanty, the learned counsel for the appellants, contended that the provision of this sub-section is ultra vires because it discriminates between "trustees appointed under the Act" and "not appointed under the Act" though they are all trustees as denned u/s 3 (xvi) of the Act. It is conceded that in Section 73 (2) of the Act, a classification has been made of trustees into two such groups.

Article 14 of the Constitution forbids class legislation, but it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (2) that the differentia must have rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, but it is always necessary that there must be a relation between the classification and the object of the Act. This view of ours receives direct support from several decisions of their Lordships of the Supreme Court (see *The State of West Bengal Vs. Anwar Ali Sarkar*, ; *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, ; *Balaji Vs. Income Tax Officer, Special Investigation Circle*, ; *The State of Uttar Pradesh Vs. Kaushaliya and Others*, ; *State of Madhya Pradesh Vs. Bhopal Sugar Industries Ltd.*, ; *Rani Ratna Prova Devi Rani Saheba of Dhenkenal Vs. State of Orissa and Another*, and *Sri Venkata Seetaramanjaneya Rice and Oil Mills and Others Vs. State of Andhra Pradesh etc.*, .

In *Harakchand Ratanchand Banthia and Others Vs. Union of India (UOI) and Others*, it has been said:--

"When a law is challenged as violative of Article 14 of the Constitution it is

necessary in the first place to ascertain the policy underlying the statute and the object intended to be achieved by it. Having ascertained the policy and object of the Act the Court has to apply a dual test in examining its validity (1) whether the classification is rational and based upon an intelligible differentia which distinguishes persons or things that are grouped together from others that are left out of the group and (2) whether the basis of differentiation has any rational nexus or relation with its avowed policy and object".

9. Keeping the scheme of the Act in view we find that an intelligible differentia is perceptibly available distinguishing trustees who are not hereditary from the group of trustees who are hereditary. The classification of trustees into two such broad categories is not, therefore, open to challenge.

10. Sub-section (1) of Section 73 of the Act puts limitations on the jurisdiction of the Civil Court but Sub-section (2) thereof which is more in the nature of a proviso, saves the jurisdiction of the Court in certain specified matters. Thus it seeks to exclude the trustees appointed under the Act from the restrictions imposed by Sub-section (1) and thus confers a benefit on that class of trustees.

The question for examination, therefore, is whether there is any rational nexus or connexion of this differentiation with the avowed policy or object of the Act in order to justify the discriminating treatment.

11. There is no doubt that in respect of endowments hereditary trustees have higher rights than non-hereditary trustees. Sub-section (2) of Section 73 of the Act confers a right in regard to matters specified therein on non-hereditary trustees and does not require them to comply with the provision of Sub-section (1) of that section. It saves for them the right to institute suits to enforce the pecuniary or property rights of the institution or the right of such institution as a beneficiary without compliance of subsection (1). Thus while hereditary trustees are not entitled to institute suits or other legal proceedings in respect of administration of a religious institution or in respect of any other matter or dispute for determining or deciding which provision is made in the Act in any Court of Law except and in conformity with the provisions of the Act, non-hereditary trustees are entitled to enforce the pecuniary or property rights of the institution or the rights of the institution as a beneficiary in the Civil Court.

A hereditary trustee has a longer period of management than a non-hereditary trustee who is appointed only for a term not exceeding 5 years, u/s 27 (2) of the Act. Remedy under the Statute is available more or less in a summary manner and is bound to be cheaper as also quicker compared to suits in regular course. Thus in regard to enforcement of the rights of the institution at the instance of non-hereditary trustees, requirements to approach for summary reliefs from the authorities under the Act would have been intelligible and, in keeping with the spirit of the Act. If at all, hereditary trustees whose rights do not flow from appointments under the Act and who have permanent rights in the endowments could have been left to avail of the remedy in Civil Court in order to enforce the

pecuniary, property or beneficiary rights of the institution. Sub-section (2), however, contains provisions to the contrary. By limiting the exemption to trustees appointed under the Act, not only hereditary trustees, but the endowment or the deity itself mahants, persons having interest and the like are also kept out of the provision of Sub-section (2) of Sec. 73 of the Act.

12. The Act purports to provide for the better administration and governance of the Hindu Religious Institutions and the endowments, and with that end in view has vested in the Commissioner the general superintendence of all religious institutions and endowments and has authorised the Commissioner to do all things which are reasonable and necessary to ensure that the religious institutions and endowments are properly administered and their income is duly appropriated for the purposes for which they are founded or exist. The purpose or object of the statute being this, the endowments admit of no classification on the basis of their being managed by hereditary or non-hereditary trustees and no rational relation is manifest between the i classification underlying the provision in Sub-section (2) of Section 73 and the object sought to be achieved by the Act.

13. We find that the provision of Sub-section (2) of Section 73 of the Act does not pass the second test laid down by their Lordships of the Supreme Court in their various decisions and thus is hit by Article 14 of the Constitution. We accordingly answer question No. 2 by holding that Sub-section (2) of Section 73 of the Act is ultra vires the Constitution.

14. As we have held that subsection (2) of Section 73 of the Act is ultra vires the Constitution, there is no need to answer the third question which is confined to that sub-section. The learned counsel for all the parties before us are of the same view. We accordingly do not record any answer on that point.

There remains the fourth point for answer. We have already said that subsection (2) was intended to work as a proviso to Sub-section (1). Otherwise stated, in the three instances specifically referred to in Sub-section (2) of that section, when the suit was brought by a trustee appointed under the Act, special provision was made in Sub-section (2) to exempt those matters from the bar of Sub-section (1).

It has been held by their Lordships of the Supreme Court in *Sri Vedagiri Lakshmi Narasimha Swami Temple Vs. Induru Pattabhirami Reddy*, , with reference to the Madras Act.

"Section 93 of the Act does not impose a total bar on the maintainability of a suit in a Civil Court. It states that a suit of the nature mentioned therein can be instituted only in conformity with the provisions of the Act; that is to say, a suit or other legal proceeding in respect of matters not covered by the section can be instituted in the ordinary way. It therefore imposes certain statutory restrictions on suits or other legal proceedings relating to matters mentioned therein. Now, what are those matters? They are: (1) administration or management of religious institutions; and (2) any other matter or dispute for determining or

deciding which provision is made in the Act. The clause "determining or deciding which a provision is made in this Act", on a reasonable construction, cannot be made to qualify "the administration or management" but must be confined only to any other matter or dispute. Even so, the expression "administration or management" cannot be construed widely so as to take in any matter however remotely connected with the administration or management. The limitation on the said words is found in the Phrase "except under and in conformity with the provisions of this Act." To state it differently, the said phrase does not impose a total bar on a suit in a Civil Court but only imposes a restriction on suits or other legal proceedings in respect of matters for which a provision is made in the Act. Any other construction would lead to an incongruity, namely, there will be a vacuum in many areas not covered by the Act and the general remedies would be displaced without replacing them by new remedies."

We have already said that Section 93 of the Madras Act corresponds to Section 73 (1) of the Orissa Act. Therefore, these observations of their Lordships are relevant for determining the scope of Section 73 of the Act. Sub-section (2) deals with enforcement of pecuniary or property rights of the institution or rights of the institution as a beneficiary. There are provisions made in the statute to deal with these matters. For instance Section 25. Section 41 (d), (f) and (g) and Section 68 are some of the provisions in the Act which deal with these aspects.

Thus suits to enforce the three types of rights enumerated in the second subsection are matters covered by the first sub-section. In respect of trustees appointed under the Act, Sub-section (2) made a special provision which we have already found to be ultra vires. This is our answer to the fourth point.

15. " We shall now proceed to examine the facts of this case and decide the appeal on merit.

Within the ex-State of Nayagarh is situate a deity known as Shri Japannath Jew. It is a public deity and its management vested in the Debottar Department of the Ex-State of Nayagarh during the pre-merger period. On 29-12-47, an application was made by the original defendant No. 1, one of the seba-it-marfatdars for lease of 1.05 acres of land belonging to this deity and said to be in his possession. On 30-12-47, the Amin made a report recommending grant of lease (Ext. 4). The Debottar Officer on the same day submitted a note to the Deputy Superintendent incharge of Debottar Department objecting to the grant of lease. The papers were placed before the Deputy Superintendent and on the same day he directed grant of lease on payment of Nazar.

The Ex-Ruler of Nayagarh had already entered into the merger Agreement with the Dominion of India on 15-12-47 and from 1-1-48 that Agreement took effect. The administration of the erstwhile State of Nayagarh was taken over on behalf of the Dominion of India and under the Administration of Orissa Merged States Laws Order which came into force from 1-1-48 the administration vested in an administrator. From the various orders passed in the Lease case of the defendant

No. 1, it would appear that the record was corrected and full effect was given to the lease granted by the Deputy Superintendent of the Debottar Department. At that stage the Villagers raised an objection to the grant of the lease. On 15-5-48, the Administrator passed an order refusing to set aside the grant of lease and directed the Revenue Kanungo to correct the records and put up the matter before him by 31-5-48 (Ext. E). An appeal was carried to the Additional District Magistrate Nayagarh in Misc. Appeal No. 18 of 1950-51 and the appellate authority declined to interfere by order dated 15-11-50.

16. On 23-12-59, the present suit was instituted by the deity represented by two non-hereditary trustees appointed under the Act. It was alleged that the lease was invalid being contrary to the law in force in the Ex-State of Nayagarh and the lease was not for legal necessity and did not bind the deity. It was also contended that the Deputy Superintendent of the Debottar Department of the Ex-State of Nayagarh had no power to grant such lease. The dispute was, however, confined to only 91 decimals appertaining to the three plots as described in Ka Schedule of the plaint. The defendant No. 1 resisted the action and contended that the lease was valid and in accordance with law.

The learned Trial Judge decreed the suit. The appeal of the defendant No. 1 before the learned Subordinate Judge failed. Second Appeal No. 376 of 1962 was filed in this Court by the defendant No. 1. Barman, J. dismissed the appeal by his judgment dated 14-1-64 and affirmed the decrees of the Courts below. From his judgment it appears that two contentions were mainly advanced by Mr. R. Mohanty for the appellant:--

(1) The lease being an act of State was outside the purview of the Municipal Court; and

(2) The lease being of 1947 the suit in 1959 was barred by limitation under Article 91 of the Limitation Act. The learned Single Judge negatived the contention of the appellant that the grant of lease in December 1947 (before merger) and/or the recognition of the lease in May 1948 (after merger) constituted an Act of State. He held that the grant of lease was under a set of rules and jurisdiction was being exercised in May 1948 also under a set of rules. Neither of the two actions was done arbitrarily or in exercise of sovereign power. He also negatived the plea of limitation by holding that Article 134-A or Article 144 of the Limitation Act was applicable and as the suit had been filed within 12 years from the date of the lease it was within time. The learned single Judge, however, granted leave to appeal to a Division Court, and that is how the Letters Patent Appeal has been filed in this Court.

17. Mr. Mohanty for the heirs of the original defendant No. 1 who are now on record following the death of the original defendant No. 1 reiterates his contention regarding Act of State. He next contends that the defendant No. 1 was a temporary tenant and as permanent tenancy was being conferred on him it was really not a case of alienation. He also contended that the Courts below

had gone wrong in holding that the lease had to be granted by the Ruler. According to Mr. Mohanty the proper clause of the Lease Rules of 6-1-47 to apply to the facts of this case is Clause 7 and not Clause 9. Clause 7 authorised the Deputy Superintendent to pass final orders and as such the lease had been validly granted. The next contention of Mr. Mohanty was that the suit was not maintainable because it did not comply with the provision of Section 73 (1) of the Act.

18. We propose first to deal with the last contention of Mr. Mohanty as in case we uphold his contention that the suit was not maintainable, it may not be necessary for us to examine the various other contentions.

This suit in essence was one for recovery of possession on a declaration that the defendant No. 1 had acquired no permanent right under the lease in his favour. Section 25 of the Act provides thus:--

"In case of any alienation, in contravention of Section 19 of this Act or Section 58 of the Orissa Hindu Religious Endowments Act, 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 requisition to the Collector of the 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 his right."

Mr. Mohanty contends that Orissa Act 4 of 1939 was extended to the Ex-State of Nayagarh with effect from 1-1-48. The lease in question was actually granted on 30-12-47, but it was affirmed by the Order of the Administrator on 15-5-48. In case the lease is really found to be of May 1948 (as Barman, J. in this Court has found) the lease is in contravention of Section 25 of the Act. In case, however, the lease is of 30-12-47 (as from the pleadings of both the parties it transpires) then on the date of the lease there was prohibition against the lease and sanction u/s 58 of Orissa Act 4 of 1939 was not necessary.

With reference to the pleadings in this case particularly in Paragraph 6 of the plaint and Paragraph 9 of the written statement as also Ext. 5/b which is the order granting the lease, we find that the lease is really dated 30-12-47. The learned single Judge had taken a wrong view when he stated in Para. 5 of his judgment,

"On May 15, 1948 the impugned Order of lease by the Administrator was passed."

We shall proceed on the footing that the lease was granted on 30-12-47. Thus the provisions of the Endowments Act would have no application to the facts of the case because Orissa Act 4 of 1939 was never in force then in the Ex-State of Nayagarh. The dispute has to be determined without any reference to the Orissa

Hindu Religious Endowments Act of 1939 or Orissa Act 2 of 1952.

19. The Order of the Ruling Chief dated 6-1-47 (Ext. 2) was the law in force in relation to grant of leases by the Debottar Department. From the contents of the Rules and the tenor thereof it is clear that the Ruling Chief was not acting as the Administrator of the Debottars while he passed the Order dated 6-1-47 providing the Rules but he was acting as the head of the State. The order, therefore, shall be taken to have full statutory effect. The Deputy Superintendent of the Debottar Department was exercising the powers of the Revenue Commissioner and the powers of the Chief Minister in regard to the Revenue Department were also vested in him (vide Clause 1). Under Clause 7, the Debottar Officer was to deal with cases regarding lease of Debottar lands on occupancy right and his reports were to be submitted to the Deputy Superintendent for final order.

20. As we find the application of the defendant No. 1 for permanent lease (Ext. 3) was made on 29-12-47. On the next day the Amin made a report recommending the lease. The Debottar Officer submitted his report to the Debottar Superintendent opposing the grant of lease. In the last portion of his note he stated,

"In case these (lands) are given, the niti of the deity will suffer. If the lease in question will be given to the applicant on occupancy right the deity will get a rent of Rupees 19-11-0 per year besides a Nazar of Rupees 99.1.0. In view of the above facts I am of opinion that when, deity will be loser the authority may consider over the matter and pass necessary orders as deemed proper." On the basis of the note, the Deputy Superintendent passed the following order:--

"Inform the applicant to pay the Nazar at once as ordered by the D. S."

There is an endorsement dated 31-12-47 of the Debottar Officer to the following effect:--

"The Nazar of Rupees 99.1.0 is credited into the Treasury vide challan No. 75 dated 31-12-47. Now send the record to the State R.K. for necessary correction of the settlement record and return."

On 5-3-48, the Revenue Kanungo was directed to make the corrections and put up the record by 20-3-48 along with his explanation for cause of delay and on 5-5-48 the Administrator passed the following order:--

"Lands to remain recorded in the name of B. Praharaj (defendant No. 1). Order attached."

21. The lease in this case thus appears to have been granted by an authority competent under the Rules of 6.1.47 made by the Ex-Ruler and after the lease was granted effect was given to the lease subsequent to the merger. The administrator overruled the objection of the villagers and the Additional District Magistrate who was the Chief Administrator also refused to interfere. No allegation of any fraud was made in the plaint, nor was an issue raised to that

effect. Mr. Pal, the learned counsel for the plaintiff, made reference to some other lease cases vide Exts. 6 and 7 to show how leases were being granted of Debottar properties. In the absence of any specific rule laying down the procedure of grant breach whereof might make the impugned lease invalid, it is difficult for us to uphold the challenge to the grant of lease in question because a procedure different from what appears to be in Ext. 6 was followed in this case.

22. Mr. Pal next placed reliance on a note of the Debottar Officer dated 1-6-44 (Ext. 1) wherein the Ex-Ruler accepted the recommendation of the Debottar Officer that no land of the Debottar Department other than real waste lands would be given with occupancy right to any tenant. This decision was required to be promulgated through local newspapers. There is no evidence on record to show that effect was given to this decision and that it was promulgated through local newspapers. For want of proper evidence we are not in a position to uphold the contention of Mr. Pal that the direction in Ext. 1 was given effect to and permanent leasehold rights in respect of Debottar lands which are not really waste could not be created. Mr. R. Mohanty rightly contended that Ext. 1 was more or less an administrative order while Ext. 2 contained a set of statutory rules and as there was no such inhibition in Ext. 2 regarding the nature of land in respect whereof permanent lease could be granted, Ext. 1 should not be given any importance.

We would, therefore, hold that the lease granted in 1947 had been granted by the competent authority and the Courts below were wrong in holding that in the absence of approval of the Ex-Ruler the lease in question was defective.

23. We shall now proceed to examine the remaining contentions, namely, (1) The suit was not maintainable because the grant of lease was an Act of State; (2) Even if the lease is invalid the defendant No. 1 was a temporary tenant and that tenancy has been protected under the Orissa Tenants Protection Act, the Orissa Tenants Relief Act and ultimately the Orissa Land Reforms Act. Therefore, even if the plaintiff succeeds in obtaining a declaration that the lease is not valid he would not be entitled to recover possession; and (3) the question of legal necessity is not material for the present lease.

24. Coming to the contention regarding Act of State it has already been noticed that in Second Appeal the plea has been negatived. Reliance was placed on a decision of their Lordships of the Supreme Court in *The State of Saurashtra Vs. Memon Haji Ismail Haji, and Barman, J.* has held that the grant of lease was an act within the laws prevailing in the State of Nayagarh and as such cannot be labelled as an Act of State. It is convenient to recall here the circumstances in which the lease was granted on 30-12-47. It is the case of both the parties that there were a set of Rules in force in the matter of grant of lease. The application made was processed in terms of the Rules and was disposed of by an authority competent under the rules to pass final orders. We have already found that the lease in this case had been granted by an authority competent under the Rules in force to grant the lease. An act of State is a sovereign act which is neither

grounded on law nor does it pretend to be so. In the recent decision of the Supreme Court, in H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior and Others Vs. Union of India and Another, , His Lordship Hidayatullah, C. J. has stated,

"This Court has ruled on more than one occasion that an "act of State" is not available against a citizen. An act of State is a sovereign act which is neither grounded on law nor does it pretend to be so. It was described by me. quoting from Fletcher-Moulton. L. J. Salaman v. Secy, of State for India (1906) 1 KB 613 at page 640, as "a catastrophic change constituting a new departure" in The State of Saurashtra Vs. Memon Haji Ismail Haji, . I have not been able to better that expression. I further pointed out that in civil commotion, or even in war or peace, the State cannot act "catastro-phically" outside the ordinary law and there is legal remedy for its wrongful acts against its own subjects or even a friendly alien within the State. I may again reaffirm the observations in that case based upon the statement of the law by Lord Kingsdown in Secy, of State in Council for India v. Kamachee Boye Saheba (1859) 13 Moo PC 22. This is what I said :--

"The question thus is always: Did the State or its agents purport to act "catastrophically or subject to the ordinary course of law."

In the instant case the Lease Rules were in force until 31-12-47 and with effect from 1-1-48 the Administration of Orissa State's Order came into force. There was no vacuum and the field was covered by some sort of law applicable to the matter. Thus, action at the time of the grant of the lease even at the time when the Administrator exercised jurisdiction in May 1948 in refusing to dishonour the lease was taken under the law and not in exercise of any sovereign power. Since the essence of an Act of State is the exercise of sovereign power and that is done arbitrarily, on principles either outside or paramount to the Municipal Law the present action either at the stage of the grant of lease or at the stage of reaffirmation of, or refusal to set aside, the lease was not in exercise of any sovereign power, but was under the Municipal Law that governed the subject-matter at the material point of time. We are thus not in a position to accept the contention of Mr. Mohanty that the grant of lease in this case was an Act of State and the suit to set aside the lease was, therefore, not cognizable in the Civil Court

25. The plea of temporary tenancy and protection against eviction was never taken earlier at any stage. There is evidence on record to show that the defendant No. 1 was the Sebas (Sebait) of the deity and he was getting the land cultivated through others. If the defendant No. 1 had taken this plea specifically and raised the bar of statutory protection from, eviction an issue could have been raised and the parties would have been free to lead evidence. To allow the appellant to raise that question at this stage would certainly be prejudicial to the plaintiff. We would accordingly refuse to entertain that contention and would not permit Mr. Mohanty to place his stand on that ground.

26. Now remains the question of legal necessity for examination. On 15-9-41, a notification was published in the Nayagarh State Gazette running to the following effect.:--

"Under orders of the Ruling Chief dated the 11th August, 1941, the Mitakshara School of Hindu Law with Act No. XVIII of 1937 as amended by Act No. XI of 1938 will be applicable to all sorts of properties including agricultural lands in the State and the above said Act and its amendment shall have the retrospective effect from 1st April, 1937."

In the ex-State of Nayagarh the general principles of Hindu Law were applicable. The aforesaid notification only reiterated the position with specific reference to some statutes.

Admittedly the deity Sri Jagannath Jew of Nandighor is the owner of the property and in the ex-State of Nayagarh the management of the deities' properties was looked after by the Darbar Administration. Any alienation of the deities' properties had, therefore, to be made in accordance with the principles of Hindu Law. It is well settled that a permanent lease of temple land at a fixed rent or rent-free for a premium whether the lands are agricultural or building site is valid only if made for the necessity of the institution. It cannot be permitted by local custom or even by practice of the institution to grant lease in the absence of such necessity. See AIR 1917 PC 33, Palaniappa Chetty v. Devasikamony. The trial Court as also the learned Subordinate Judge upon appeal found that there was no legal necessity for this alienation. In Paragraph 6 of the plaint it was alleged that the lease was devoid of any legal necessity. In the written statement the defendant No. 1 did not plead that the lease was for legal necessity. That is why no specific issue on the question of legal necessity was raised, but the learned trial Judge examined the matter under Issue No. 5 and held that there was no such necessity, the learned Subordinate Judge affirmed that finding. No attempt was made in Second Appeal to challenge that finding of the Courts below possibly because the lease was being asked to be upheld as an Act of State and for upholding it as an Act of State the question of legal necessity was not at all material,

Thus the position is that the alienee (defendant No. 1) on whom lay the burden to establish that the lease was for legal necessity did not plead that it was so and has failed to establish that there was legal necessity for the permanent lease of the deity's property. The alienation which is not supported by legal necessity has rightly been set aside in the Courts below.

27. We do not find any justification to interfere with the decree passed in the Second Appeal. The appeal fails and is dismissed. There would, however be no order as to costs.

B.K. Patra, J.

28. I agree.

S. Acharya, J.

29. I agree.