

(1986) 11 OHC CK 0002

In the Orissa High Court

Case No : Original Jurisdiction Case No. 1753 of 1985

Radhakrushna Dutta and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 28-11-1986

Acts Referred:

Limitation Act, 1963 — Section 5

Orissa Estates Abolition Act, 1951 — Section 8A, 8A(2)

Orissa Hindu Religious Endowments Act, 1951 — Section 19, 19(1), 19(4), 25, 27

Orissa Hindu Religious Endowments Rules, 1959 — Rule 36, 37, 38, 39, 4

Citation : (1987) 63 CLT 115

Hon'ble Judges : P.C. Misra, J; B.K. Behera, J

Bench : Division Bench

Advocate : R.K. Mohapatra, K.B. Kar, S.S. Das, S.K. Swain and U.C. Panda, for the Appellant; S. Misra, B. Das and K. Kar, for the Respondent

Final Decision : Allowed

Judgement

P.C. Misra, J.—The prayer in this writ application is to quash the appellate order passed by the Secretary to the Government in Law Department, Bhubaneswar in Endowment Appeal No. 13 of 1984.

2. Petitioner No. 1 and 12 others including opposite parties Nos. 4 to 7 were appointed as non-hereditary trustees of the religious institution, namely Basuli Thakurani, Bhograi u/s 27 of the Orissa Hindu Religious Endowments Act (hereinafter referred to as the "Act") by order dated 31-10-1979 passed by the Additional Assistant Commissioner of Endowments impleaded as opposite party No. 3 in this writ application. On 17-2-1980 all the non-hereditary trustees so appointed elected Petitioner No. 1 as the Managing Trustee and opposite party No. 3 approved the same on 5-3-1980 vide Annexure-2. By the same order, opposite party No. 3 directed the ex-Managing Trustee to hand over the charge of the institution and its properties both moveable and immovable to the newly elected Managing Trustee at an early date, Petitioners Nos. 2 and 3 applied to the Petitioner No. 1, the Managing Trustee to lease out certain lands belonging to

the aforesaid deity for a term of 48 years. It is alleged that all the members of the Board of Trustees including opposite parties Nos. 4 to 7 approved the alienation of the disputed lands considering the pressing necessity of the institution and authorised Petitioner No. 1 to apply for obtaining sanction from the Commissioner of Endowments (opposite party No. 2) u/s 19 of the Act. In pursuance to the aforesaid resolution, Petitioner No. 1 filed an application on 16-4-1982 registered as O.A. Case No. 71 of 1982 praying therein to permit him to lease out the disputed lands to Petitioners Nos. 2 and 3 for a term of 30 years. In the said application it was stated that the lands in question were lying fallow and vacant yielding no income whatsoever and a long term lease would be beneficial in the interest of the institution. On receipt of the application, opposite party No. 2 directed the concerned Inspector of Endowments to make an enquiry as regards the location, nature and character of the lands as also the justification for the alienation applied for. The Inspector of Endowments submitted a report on 9-12-1982 stating that the lands in question are sandy and unfit for cultivation and have been lying fallow yielding no income. It is alleged that the Commissioner of Endowments made an enquiry in the Camp Court held at Balasore wherein Petitioner No. 1 and the Inspector of Endowments were called for the purpose of necessary enquiry. Petitioner No. 1 in his application u/s 19 of the Act had given the valuation of the land at Rs. 250/- per decimal and stated that the lands would fetch more if the same are sold in public auction after giving due publicity. Opposite party No. 2 thereafter directed the Inspector of Endowments to submit a report regarding the valuation of the aforesaid lands, who in his report dated 5-10-1983 indicated that the rate of the disputed lands would be Rs. 20, 000/- per acre. Opposite Party No. 2 by his order dated 23-12-1983 (vide Annexure-3) allowed the petition filed by the Petitioner No. 1 permitting him to alienate the lands subject to the conditions that the upset price of the lands in question should be fixed at the rate of Rs. 250/- per decimal, which means that the lands shall not be sold at a price less than the above and that it should be sold in a public auction in presence of the Inspector of Endowments; Balasore after due publicity thereof is given. It was also directed that the auction so held shall be finalised only after the bid-sheets are approved by the Commissioner of Endowments, who may, in his discretion, order for fresh auction. The auction was directed to be held within six months after the period of appeal and revision was over and, in case any appeal or revision is instituted, then six months after the disposal of such appeal or revision. It was further directed that the sale proceeds shall be kept in fixed deposit in any nationalised bank or in the post-office whichever is found convenient and beneficial to the institution and the interest accruing on the said deposit shall be spent for the institution subject to the approval thereof in the budget. Petitioner No. 1 was prohibited not to raise any loan against the fixed deposit to be made out of the sale proceeds. According to the Petitioners, the said order of the Commissioner of Endowments was duly published in accordance with law and the Inspector of Endowments submitted a report dated 18-5-1984 to opposite party No. 2 in that behalf. Petitioner No. 1 thereafter issued notice intimating the general public that

public auction of the lands in question would be held on 1-7-1984. In the public auction Petitioner No. 2 was the highest bidder in respect of 35 decimals and Petitioner No. 3 was the highest bidder for the balance 30 decimals of land. Their bid was Rs. 9,4000/- and Rs. 7,625/- respectively and they had deposited Rs. 10,000/- (Rs. 5,000/- each) and agreed to deposit the balance amount after approval of the bid-sheet by the Commissioner of Endowments. The Inspector of Endowments submitted a report on 28-7-1984 to the Commissioner of Endowments intimating the details of the public auction and recommended for approval of the bid-sheets. Before the Commissioner of Endowments approved the bid-sheets, on 14-9-1984 Petitioners Nos. 1 and 4 others were again appointed as interim nonhereditary trustee for a period of six months. By order dated 14-9-1984 the Commissioner while approving the highest bids directed the Managing Trustee (Petitioner No. 1) to execute the necessary documents of conveyance in favour of the highest bidders. On 30-10-1984, opposite parties Nos. 4 to 7 filed Endowment Appeal No. 13 of 1984 before the State Government u/s 19(4) of the Act challenging the order of sanction dated 23-12-1983 along with an application u/s 5 of the Limitation Act in which it was alleged that they came to know of the impugned order dated 22-12-1983 on or about 29-10-1984. The Secretary to the Government in the Department of Law, who heard the appeal, allowed the same by his judgment dated 8-5-1985 (Annexure-11) holding that the appeal was not barred by limitation and that the application filed by the present Petitioner No. 1 u/s 19(1) of the Act was incompetent in law. The other grounds urged in the memo of appeal were not critically examined as the said appellate authority was of the view that the impugned order sanctioning the alienation was based upon an incompetent petition which, therefore, cannot be sustained. The Petitioners in this writ application seek to quash this judgment of the appellate court on various grounds which would be discussed hereafter.

3. Admittedly the institution of the deity Basuli Thakurani is a public religious endowment as defined in the Act. There can be no transfer of the immovable property belonging to a public religious institution either by way of sale, exchange, mortgage or lease (for a term exceeding 5 years) unless it is sanctioned, by the Commissioner as being necessary or beneficial to the institution. The Orissa Hindu Religious Endowments Rules, 1959 requires in Rule 4 thereof that for the purpose of obtaining necessary sanction u/s 19 of the Act from the Commissioner, the trustees shall have to file an application in the mode prescribed under Rules 36 to 41. It has been contended that the term of office of the Petitioner No. 1, who was appointed along with others on 31-10-1979, expired on 30-10-1981 i.e., on expiry of two years as per Section 27(2) of the Act and, therefore, the application which Petitioner No. 1 filed praying for sanction of the Commissioner u/s 19 of the Act on 16-4-1982 could not be taken as a valid application as by that date he was not continuing as a trustee. The Petitioners in this Court meet the aforesaid objection by saying that even though the term of trusteeship expired on 30-10-1981, he (Petitioner No. 1) was continuing to look-after the management and affairs of the institution for which

he shall be deemed to be a trustee and was, therefore, competent to apply u/s 19 of the Act. In order that the application filed by Petitioner No. 1 would be in conformity with the requirement of Rule 4 of the Orissa Hindu Religious Endowments Rules, 1959, it is necessary to determine as to whether the word "trustees" occurring in the said rule would also mean a de facto trustee in the absence of de jure trustee and, if that be so, whether the Petitioner No. 1 was a de facto trustee at the relevant time so as to be eligible to maintain the application u/s 19 of the Act. A Hindu deity is a juridical person capable of holding property, but it is only in an ideal sense that property is so held. The possession and management of the properties of a deity in the normal course vests in the trustee, by whatever designation known, who looks after the same in the interest of the endowment exercising the fullest control over the right of management. A person having a legal right to hold the office of the trustee is a "de jure trustee" whereas a "de facto trustee" is one who is in possession of the endowment and exercises all the functions of a trustee though a legal title is lacking. Orissa Hindu Religious Endowments Act defines the word "trustee" to mean 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. Thus the definition of the aforesaid term "trustee" is in a very wide sense and would include a "de facto trustee" who by his own actions and conduct makes himself liable as a trustee. The Orissa Hindu Religious Endowments Act empowers the Assistant Commissioner u/s 27 of the Act to appoint trustee in respect of public religious institutions other than maths and specific endowments attached thereto, where there are no hereditary trustees. Besides, the Assistant Commissioner of Endowments, the Deputy Commissioner of Endowments and the Commissioner of Endowments have been empowered to appoint interim trustees under various other provisions of the Act. A trustee so appointed as well as the hereditary trustees of a public religious institution are persons who have legal title to hold such office and are therefore "de jure trustees". All others who have no legal title to hold the office of trustees but continue to perform the functions and duties of trustees and make themselves liable as trustees by their own conduct and actions are "de facto trustees." The term "trustees" occurring in Rule 4 of the Orissa Hindu Religious Endowments Rules, 1959 according to the normal rules of construction, would mean those who come under the definition as given in the Act. This would mean that a "de facto trustee" is also entitled to apply u/s 19 of the Act for obtaining the sanction necessary for an alienation of the deity's property.

4. Mr. Misra, learned Counsel appearing for the opp. party No. 4 strenuously contended that the legislature could not have thought of empowering a person having no legal right to hold the office of a trustee to apply for alienation of its endowments, therefore, the word "trustees" occurring in Rule 4 should be confined to "de jure trustees" who have lawful title to the office and who perform their duties under the control and supervision of the endowment authorities. This

argument, in our view, is without any merits. The Orissa Hindu Religious Endowments Act governs all the public religious institutions in the State and the provisions contained therein must govern all such institutions irrespective of whether there are hereditary trustees or appointed trustees managing the institutions or whether no trustees have been appointed therein under any of the provisions of the Act. It can neither be conceived that the Act does not put any restriction for alienation of the properties of the religious institutions where there are no "de jure trustees" nor is it reasonable that in the absence of a legal trustee there can be no alienation of the properties of public deities at all in spite of pressing necessities of the deity. A "de facto trustee", therefore, in the absence of a "de jure trustee" can maintain an application u/s 19 of the Act so long as the said action is in the interest of the deity or for the benefit of the endowment.

5. On filing of an application u/s 19 of the Act, the Commissioner of Endowments is required to make an enquiry and will sanction the transfer only if it is found to be necessary or beneficial to the institution. The purpose for enacting a rule that a trustee of the religious institution shall file the application is evidently to avoid frivolous and unnecessary applications by the intending transferees. The trustee being vested with the powers of management of the institution is the best person to feel and appreciate the necessity for transfer of any property belonging to the deity, and therefore, it would be more convenient for the Commissioner to entertain those applications where the trustee is satisfied that the proposed transfer is necessary in the interest of the institution. It is for the Commissioner to make enquiries and be satisfied as to whether the intended transfer is necessary or beneficial to the institution before according sanction for the same. It is the satisfaction of the Commissioner as to the necessity and interest of the deity in justification of a transfer and not that of the trustee, who merely files the application. Thus the interpretation that a "de facto trustee" is also a trustee within the meaning of the term as used in Rule 4 of the Orissa Hindu Religious Endowments Rules does not lead to a situation by which the "de facto trustee" acquires an uncontrolled power which may be utilised against the interest of the deity in the matter of alienation of its properties.

6. It has next to be examined as to whether after the expiry of the term, the Petitioner No. 1 was the "de facto trustee" exercising the powers and performing the duties of a trustee. Admittedly from 30-10-1981 when the term of the office of the appointed trustees expired, till 25-8-1984 when Petitioner No. 1 and four others were again appointed as interim non-hereditary trustees, there were no legal trustees in the sense that none were appointed nor had any legal authority to hold the said office. During this period Petitioner No. 1 had been representing the deity in a proceeding u/s 25 of the Act (vide Annexure-12) and had been submitting the statutory returns and depositing the contribution payable by the institution. Besides, it has also been brought to our notice that the endowment authorities have been corresponding with Petitioner No. 1 in all matters relating to the management of the institution during this period and it was he, who was

paying the revenue for the lands of the deity. Thus as a matter of fact, the Petitioner No. 1 was actively managing the affairs of the deity even after the expiry of his term of office to the exclusion of the other ex-co-trustees. In the absence of legal trustees appointed for the institution he must be taken as a person liable to be a trustee within the meaning of the definition of the term. It has been argued by Mr. Misra, learned Counsel for opposite party No. 4 that if Petitioner No. 1 can be said to be a "de facto trustee" after the expiry of the term of his office, the other co-trustees of whom opposite party No. 4 is one, would also qualify themselves as "de facto trustee" for the very same reasons. Nothing has been placed before us in support of the argument that the other co-trustees including opposite party No. 4 were, in fact, looking after the management of the affairs of the deity after the expiry of their term. There was no legal right to hold the said office as Section 27(2) of the Act provides that a non-hereditary trustee shall hold the office for a period of two years from the date of his appointment unless he is sooner removed or dismissed or otherwise ceases to be a trustee. The other co-trustees, who were in management of the deity and its properties by virtue of their appointment, do not continue to hold the office after expiry of their term as an incident of their previous appointment. It is only the actual act of management which would bring them under the conception of a "de facto trustee." In the absence of any material, we are unable to hold that the opposite party No. 4 and others were "de facto trustees" of the institution during the aforesaid intervening period, i.e. from 31-10-1981 till 25-8.1984. It has been asserted by the Petitioners that all the members of the Board of Trustees including opposite parties Nos. 4 to 6 passed a resolution approving the alienation of the lands in question as it was necessary and beneficial for the institution and they accordingly authorised Petitioner No. 1 to apply for sanction u/s 19 of the Act. On the basis of the said assertion they further contend that the opposite parties No. 4 to 7 being parties to the said resolution, are estopped from taking a stand that Petitioner No. 1 was not a person competent to apply u/s 19 of the Act. In reply to this, opposite parties have stated in the counter affidavit that they had never been noticed to attend the meeting in which the proposed alienations were to be discussed and in the absence of further particulars of the alleged resolution, the aforesaid point raised by the Petitioners merits no consideration. No copy of the resolution said to have been passed in this behalf has been annexed to the writ application. During the course of argument, learned Counsel for the Petitioners sought the leave of the Court to produce copies of the resolution which evidently cannot be entertained at the stage without giving an opportunity to the opposite parties to assail the same. But in view of our conclusion that Petitioner No. 1 was entitled under law to file an application u/s 19 of the Act, this point does not require any further discussion.

7. It was next contended that the appeal u/s 19(4) of the Act filed by opposite parties 4 to 7 before the State Government was seriously barred by limitation on which ground alone, the appeal was liable to be dismissed. It was urged that the

finding of the appellate authority that the appeal is not barred by limitation is contrary to law. As already stated, the Commissioner of Endowments (opp. party No. 2) by his order dated 23-12-83 sanctioned the sale of the land by public auction. This order of the Commissioner of Endowments is required to be communicated to the State Government and to the trustee and it is also required to be published in the prescribed manner. Appeal lies to the State Government against an order passed by the Commissioner of Endowments u/s 19(1) of the Act.

The period of limitation as provided u/s 19(4) of the Act is three months, from the date of receipt of a copy of the order in the case of a trustee and from the date of publication of the order in the case of any person having interest in the institution. The opposite parties Nos. 4 to 7, who were Appellants in the appeal filed before the State Government, were not trustees on the date of passing of the order as their term had expired since 30-10-81. Therefore, the limitation of three months shall be computed from the date of publication of the order, so far as opposite parties Nos. 4 to 7 are concerned. The appeal before the State Government was filed on 30-10-84 against the order of the Commissioner of Endowments dated 23-12-1983 along with a petition u/s 5 of the Limitation Act. The said Appellants allege that there has been no due publication of the impugned order and that they had derived knowledge of the impugned order on or about 29-10-1984. In this view of the matter they contend that the appeal cannot be held to be barred by limitation and, even if it is so held, the delay is liable to be condoned. It has been argued by the learned Counsel for the Petitioners that there was due publication of the order of the Commissioner as prescribed in the rules and computing the period of limitation from the date of publication the appeal was seriously barred by time. They also contend that assuming that there was some irregularity in the matter of publication of the order, the Appellants before the lower appellate court could not take advantage thereof as they had otherwise the knowledge of the order as two out of the four Appellants had filed a petition before the Commissioner of Endowments which would show that they were fully aware of the alienation made pursuant to the order of the Commissioner. The said petition was not dated, but it was received in the office of the Commissioners on 17-6-1984 as noted in the impugned order of the appellate court.

8. The manner of publication of the order of sanction passed by the Commissioner of Endowments has been prescribed under Rule 4(2) of the Orissa Hindu Religious Endowments Rules, 1959 according to which the publication has to be on the notice board or the front door of the religious institution concerned and in a conspicuous place of the village where the property in question is situated. It requires to be examined whether there has been due publication of the sanction order as provided in the aforesaid Rules. Before we examine the said position it is necessary to deal with the alternative argument that the present opposite parties Nos. 4 to 7, who were Appellants in the court below, were otherwise aware of the order of the Commissioner of Endowments for which the

limitation will run from the date of their knowledge. This argument according to us, is devoid of any merit. The language of Section 19(4) of the Act warrants the limitation to run from the date of publication of the order in case of an appeal by any person having interest other than a trustee. Taking a comprehensive view of the matter, the Statute requires that the limitation will begin to run from the date of communication of the order so far as the trustee is concerned and the date of publication thereof so far as others are concerned. If the date of knowledge would be substituted for the purpose of computation of the period of limitation, it would be so in the case of both, namely, the trustee and persons other than the trustee. In such event, communication of the order to the trustee would not be at all required if the trustee was present in court at the time of delivery of the order or he had otherwise knowledge of the order which, according to us, could never be conceived by the legislature. In case of a person other than a trustee, similar ambiguous position would arise as there will be different period of limitation for different persons intending to file an appeal against the order of the Commissioner. Those who were present at the time when the order was passed or had otherwise acquired knowledge of the order would have a different period of limitation from others who have a right of appeal computing the period from the date of publication giving rise to a situation, which could never be conceived by the legislature. That apart knowledge of the order cannot be a substitute for publication as required under the Act and the Rules. In our opinion, therefore, the limitation for filing an appeal against an order of the Commissioner of Endowments which is required to be published under the Act in the manner prescribed in the Rules would run not from the date of the knowledge which may be different in the case of a different person, but from the date of publication of the order.

9. It, therefore, follows that irrespective of the date of knowledge of the order, the Appellants were entitled to file the appeal before the State Government from the date of publication of the order of the Commissioner of Endowments. In the event it is found that there was no publication at all or the publication was not in accordance with law which would amount to non-publication, the limitation would not begin to run, in which event the appeal must be taken to be within the period of limitation. On the contrary, if it is found that there was due publication of the order of the Commissioner of Endowments, the appellate court was obliged to consider the grounds taken in the application u/s 5 of the Limitation Act in order to see as to whether the delay in filing the appeal has been sufficiently explained.

10. The order-sheet of the record of the Commissioner of Endowments would show that there was no due publication of the order. From the order of the Commissioner of Endowments annexed to the writ application as Annexure-2 it appears that the copy of the order was forward to the inspector of Endowments, Balasore for publication thereof as per Rule 4(2) of the Orissa Hindu Religious Endowments Rules, 1959 within seven days from the date of receipt of the order and for submitting a report within 15 days of the publication. Thereafter the order of the Commissioner No. 19 dated 6-9-1984 reads as follows:

Publication Report of the I.E. is received vide No. 118 dated 21-5-84. The copy of the order has not been affixed on the front door of the institution. Direct the I.E. to report as to why a copy of the sanction order has not been affixed and submit bid sheet for further order by 1-11-84.

The next order is dated 14-9-1984 which deals about the bid-sheet and not about the report of publication. No order has been passed after 1-11-1984 in the matter touching the publication of the order of sanction. The lower appellate court has extracted the relevant portion of the report of publication dated 21-5-1984 which merely says that the Inspector of Endowments, who submitted the report, the published the order at the spot through the peon maintaining all formalities. The endorsement of the peon shows that in presence of some of the members of the public of the locality, he proclaimed the order of the Commissioner u/s 19 of the Act by beat of drum and obtained the signature of some persons and affixed a copy thereof at the village crossing meaning that it was a conspicuous place of the village. Accepting the report on its face value, it cannot be said that there was due publication under Rule 4(2) of the Orissa Hindu Religious Endowments Rules. The rule requires that the publication should be made by affixtures of the Commissioner of Endowments on the notice board as on the front door of the religious institution concerned and also in a conspicuous place of the village where the property in question is situated. Admittedly publication by one of the two modes which are not alternative of each other, has not been done at all for which the conclusion is inevitable that there was no due publication of the order as prescribed under the Rules. Some arguments were advanced relying upon the principle decided in a Full Bench Decision of this Court reported in *Krupasindhu Misra (and after him) Krupasindhu Misra and Another Vs. Gobinda Chandra Misra and Others*, that what was necessary under the frame of the Act and the Rules was wide publicity of the order of the Commissioner and the non-affixure of the same of the notice board or the front door of the institution would not lead to a conclusion that there was no due publication, as by affixing the order in a conspicuous place of the village there has been substantial compliance of the requirements of law. The consideration of the point before the Full Bench was under a different set of facts and in different premises which are distinguishable from those of the present case. Their Lordships were dealing with the proviso to Section 8-A(2) of the Orissa Estates Abolition Act, 1951 provisions of which are intended to ensure adequate publicity in the locality so as to make it practicable for every interested person to have notice thereof. Their Lordships observed that there can be no guarantee of notice to every person interested of the claim made u/s 8-A of that Act even if the provision is complied with, to the letter and, therefore, the legislative intention being wide publication of the claim, the substantial compliance of the provision is enough unless there has been failure in complying with the requirements of law and the consequent prejudices. In the present case the rule requires that the order of the Commissioner passed u/s 19 of the Act should be published by affixture (a) on the notice board or on the front door of

the religious institution concerned, (b) in a conspicuous place of the village where the property in question is situated. The question of substantial compliance of the provision may arise when the publication has been made both ways and not in a case where admittedly one of the modes has not been complied with at all. We would, therefore, conclude that there was no due publication of the order of the Commissioner of Endowments as required under the Act and the Rules for which reason limitation could not be said to have begun to run. Consequently the appeal cannot be held to have run out of time.

11. Learned Counsel for the opposite parties urged that the lower appellate court did not enter into the merits of the grounds taken in the appeal for the reason that it was of the view that the order of the Commissioner passed u/s 19 of the Act at the instance of Petitioner No. 1 was incompetent vitiating the order of sanction. It has been urged by the opposite parties that they shall be greatly prejudiced if the grounds taken by them before the lower appellate court are not considered on merits in the event this Court reverses the aforesaid finding on the basis of which the appeal was allowed. We find that the said point is substantial as the lower appellate court having noticed some of the points urged before him observed that these grounds need no examination in view of the clear finding that the impugned order was passed open an incompetent petition that cannot be sustained. In the circumstances, it is necessary in the ends of justice that the appeal before the lower appellate court should be remanded to be re-examined on merits.

12. In the result, we quash the order of the appellate authority in Annexure-11 and remand the matter to the State Government to be decided afresh in accordance with law keeping in view the observations made above.

In the circumstances of the case, parties shall bear their respective costs.

B.K. Behera, J.

13. I agree.