

(1972) 01 OHC CK 0001
In the Orissa High Court
Case No : Misc. Appeal No. 81 of 1970

Rama Chandra Palo

APPELLANT

Vs

Kala Palo and Others

RESPONDENT

Date of Decision : 14-01-1972

Acts Referred:

Orissa Hindu Religious Endowments Act, 1951 — Section 42(6), 5, 79A

Citation : AIR 1972 Ori 261 : (1972) 38 CLT 331

Hon'ble Judges : A. Misra, Acting C.J.

Bench : Single Bench

Advocate : N.V. Ramdas and P.V. Ramdas, for the Appellant; S. Mohanti, S.K. Mohanty and K.N. Sinha, for the Respondent

Final Decision : Allowed

Judgement

A. Misra, A.C.J.

1. This appeal has been preferred u/s 44 (2) of the Orissa Hindu Religious Endowments Act, 1951 (hereinafter to be referred to as the Act) against an order of the Endowment Commissioner u/s 42 (6) of the Act.

2. The facts, in brief, giving rise to this appeal are as follows: The appellant and respondents are the hereditary trustees of the institution known as Sri Radhakanta Swamy temple. On 15-10-1928, a scheme was framed for the management of the said institution by the Board of Commissioners under the Madras Hindu Religious Endowments Act of 1927. As the hereditary trustees were excluded from the scheme, a suit was filed in the Court of the District Judge. Ganjam by the representatives of the three branches Madan Palo, Kalu Palo and Brundaban Palo. The District Judge disposed of the suit agreeing with the findings of the Board of Commissioners by his judgment dated 4-8-1931. The plaintiffs therein preferred as Appeal Case to the Madras High Court which was registered as Appeal Case No. 61 of 1932.

The Madras High Court held that the first appellant Madan Palo, was entitled to

be the trustee and that the family possessed the hereditary right of appointment and directed that the scheme should provide for the same. Accordingly, the case was remanded to the District Judge for re-settlement of the scheme in the light of their observation. After remand, the District Judge. Ganjam by the decree dated 14-3-1938 modified the scheme framed by the Board of Commissioners directing constitution of a Board of three trustees, two of whom, were to be appointed by the Ganjam Temple Committee and the third being Madan Palo, the first plaintiff as hereditary trustee. The actual management should be done by the first plaintiff in his capacity as managing trustee. The two other hereditary trustees Brundaban Palo and Kalu Palo thus being excluded from the Board of trustees preferred an appeal before the Patna High Court which was registered as F. A. No. 38 of 1938. The First Appeal was disposed of by modifying the decree passed by the District Judge, so far as Brundaban Palo and Kalu Palo are concerned. The Court directed that the management should vest in five trustees instead of three, out of whom, three were to be outsiders appointed by the Ganjam Temple Committee, the fourth will be the first appellant Madan Palo, the fifth was to be filled up by appellant Nos. 2 and 3 Brundaban and Kalu by rotation of three years for each. Thus, the Patna High Court decree was confined to the claim of Brundaban and Kalu and the orders of the District Judge that the actual management of the institution was to be done by Madan Palo were not interfered with.

Thereafter, the then Endowment Commissioner framed a scheme in accordance with the decree of the Patna High Court by order No. C-50 dated 25-6-1942. Subsequently, however, with consent of parties, the scheme was modified by his order dated 23-6-1943 to this extent that the three hereditary trustees were given the right of management by rotation of three years each. The appellant, who is a descendant of Madan Palo, was a minor at that time. This latter scheme as framed by Mr. Nair, the then Endowment Commissioner by Order No. 5 dated 23-6-1943 was subsequently adhered to by successive Endowment Commissioners like P. C. Das, Mr. B. K. Patra and Mr. L. Panda. Stating that this scheme was in substantial variance with the decree of the Patna High Court, the appellant filed an application on 29-1-1954 on attaining majority before the Endowment Commissioner to modify the scheme and bring it in accord with the decree of the Patna High Court. This application was disposed of on 10-3-1965 by the Endowment Commissioner who held that the application was incompetent and the appellant was directed to make a proper application u/s 42 (6) of the Act.

This order was challenged in O. J. C. No. 217 of 1965 alleging that the Commissioner was bound to implement the decree of the Patna High Court but was subsequently withdrawn on 14-11-1969 as the matter could be agitated before the Commissioner. Accordingly the appellant filed a petition u/s 42 (6) of the Act before the Commissioner which was registered as O. P. No. 40 of 1969. The Commissioner of Endowments by the impugned order modified the scheme by providing seven trustees instead of five and the management was taken from the appellant and given to the Executive Officer to be appointed by the

Commissioner. The order of the Commissioner is challenged on the ground that he had no jurisdiction to modify the scheme in the manner it has been done and that it has been passed in clear contravention of the provisions contained in Section 42 of the Act.

3. The following contentions are urged by learned Counsel for appellant: (1) Under the scheme settled by the Decree in O. S. No. 10 of 1929 after remand by the Madras High Court, the management of the institution was vested in Madan Palo alone. The decision of the Patna High Court in F. A. No. 38 of 1938 was confined to the claim of Brundaban and Kalu, the other two branches who were allowed to serve in the Board of trustees by rotation of three years. The scheme thus settled could not have been modified in any manner by the Endowment Commissioner. Therefore, the order Of Mr. Nair dated 23-6-1943 by vesting the actual management by rotation of three years in each of the three hereditary trustees was without jurisdiction and consequently the said unauthorised modification should be rectified and the same brought in accord with the one settled by the Court and (2) by the impugned order, the Commissioner purports to modify the scheme in material particulars In clear contravention of the requirements of the Provisions of the Act. Mr. Mohanti, learned Counsel appearing for the Endowment Commissioner on the other hand, contends that the order of Mr, Nair dated 23-6-43 does not amount to a modification of the scheme but is an arrangement in working out the scheme as settled by the Court. Even if it amounts to a modification in any manner, as the said modification was with consent of the parties and has been in operation since 1943 and it is not open to the appellant to question it

4. So far as the second contention is concerned. Mr. Mohanti concedes that the impugned order is not in conformity with the provisions contained in Section 42 (6) of the Act, and therefore, liable to be set aside.

5. There is no dispute that the original scheme was framed under the Madras Act of 1927 and it became final as amended by the Patna High Court decree in F. A. No. 38 of 1938. Under that scheme, as it appears, the management was vested in Madan Palo alone and there is nothing to suggest that Brundaban and Kalu were to get management by rotation. The Orissa Hindu Religious Endowments Act. 1939 came into force on 8-9-1939. Section 5 of the said Act runs as follows:

"5 (i) All actions taken and all things done, the notifications issued and orders made under and in pursuance of the said Acts (Acts referred to in Section 4) shall be deemed to have been validly taken, done, issued or made."

Of course, the words "as if issued, made or framed under this Act" do not occur, but obviously the meaning is that orders, notifications, etc. which were existing by the date of coming into force of the Orissa Act were to be deemed as orders, notifications, etc. issued under the provisions of this Act. Sections 38 and 39 of the 1939 Act provide for framing of schemes for Muths and expected temples. Therefore, prima facie, the scheme which was settled under the Madras Act will

be deemed to be one under Sections 38 and 39 of the 1939 Orissa Act. Of course, these two sections have been subsequently struck down as invalid, but that is not very material, in view of the provisions contained in Section 79-A of the 1951 Act. Under this provision notwithstanding anything contained in any judgment, decree or order, schemes under Sections 38 and 39 of the 1939 Act are to be deemed to be settled under the provisions of the new Act and a period of sixty days was provided for preferring an appeal to the High Court. In this case, no appeal was preferred. That is how the scheme which was settled under the Madras Act continues in force.

6. The next question is how far Mr. Nair's order dated 23-6-1943 making alteration in working out the scheme by allotting the actual management by rotation to the three different branches is valid. Admittedly, the scheme, as altered in respect of the actual management by Mr. Nair's order has been in force since 1943 and this was never challenged by filing any appeal or other appropriate proceeding. Further, as appears from the order itself which is at pages 61-64 of the paper-book, this alteration was made on the basis of consent between the parties and the terms were reduced to writing and filed before Mr. Nair. This being an agreed order. It is not open to the appellant now to say that Mr. Nair had no jurisdiction to make any alteration in respect of the actual management as provided in the scheme settled by the Court. If this does not amount to an amendment of the scheme, no appeal lies under 3. 44 (2). If it amounts to an amendment of the scheme, the order against which an appeal would lie is the order of 1943 and an appeal will be barred. Therefore, the Endowment Commissioner by his order dated 10-3-1965 rightly held that the petition for bringing the order passed by Mr. Nair in 1943 in accord with the scheme settled by the Patna High Court was not maintainable and the appropriate course for the appellant was to apply for amendment of the scheme as implemented by Mr. Nair with consent of parties by a proper application u/s 42.

7. The next contention relates to the validity of the impugned order. The appellant filed an application u/s 42 (6) of the Act for modification of the existing scheme, i.e. the scheme as was being worked out under the consent order passed by Mr. Nair. In substance, the scheme provides for a Board of trustees consisting of five members, three of whom were to be outsiders, one was to be from the branch of Madan Palo and one more by rotation of three years from the branches of Brundaban and Kalu, the actual management being entrusted to each of these three branches by rotation. Section 42 (6) of the Act runs as follows:--

"42 (6) The authority framing a scheme may at any time, after consulting the trustee and the persons having interest, by order, modify or cancel any scheme settled under Sub-section (1) or under the Orissa Hindu Religious Endowments Act, IV of 1939."

The Endowment Commissioner by the impugned order has purported to modify the scheme by increasing the number of members of the Board from 5 to 7 in

which 4 will be outsiders. In addition he directed appointment of a paid Executive Officer by the Commissioner and also directed preparation of a scheme on a line of a schemed temple of that nature. It was observed that no consultation is necessary. Sub-section (6) quoted above provides for modifying or cancelling any scheme after consulting the trustee and the persons having interest. In the present case, the Endowment Commissioner's order amounts to cancellation or substantial modification of the existing scheme without observing the mandatory requirements of Section 42 (6). Thus, the order being in clear violation of law is invalid and must be set aside and the matter remitted back to the Endowment Commissioner for fresh disposal according to law.

8. In the result, the appeal is allowed, the order of the Endowment Commissioner is set aside and the matter remitted back to him for fresh disposal according to law. He is to dispose of the matter after observing the requirement contained in Section 42 (6). In the circumstances, there will be no order as to costs.