

(1980) 02 OHC CK 0009

In the Orissa High Court

Case No : Miscellaneous Appeal No. 181 of 1979

Shankar Gopal Tirtha

APPELLANT

Vs

Commissioner, Hindu Religious Endowments and Another

RESPONDENT

Date of Decision : 12-02-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27

Constitution of India, 1950 — Article 226

Orissa Hindu Religious Endowments Act, 1951 — Section 19, 35, 35(2), 35(3), 42(6)

Citation : (1980) 49 CLT 433

Hon'ble Judges : R.N. Misra, J

Bench : Single Bench

Advocate : N.K. Das, for the Appellant; S. Mohanty, A.S. Naidu and Addl. Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

R.N. Misra, J.—This is an appeal u/s 35(3) of the Orissa Hindu Religious Endowments Act, 1951 (hereinafter referred to as the "Act") challenging the order of the Commissioner of Endowments disqualifying the Appellant the Mahant of the Gopal Tirtha Math at Puri, for life.

2. The Appellant succeeded to the office of Mahant on 30th of June, 1955 and on the basis of an offer made to the Commissioner of a proposal for the management of the Math and its properties to be placed in the hands of a Committee to be selected by the Commissioner a scheme was framed. The Appellant challenged the scheme in this Court in Miscellaneous Appeal No. 156 of 1957, but failed to obtain any relief. In 1972 the Appellant applied to this Court by way of an application under Article 226 of the Constitution in O.J.C. No. 294 of 1972 for cancellation of the scheme and for a direction that the administration may be restored to him. This Court by its judgment reported in Sankar Gopaltirtha Swami Vs. Commissioner of Orissa Hindu Religious Endowments, issued a writ of mandamus requiring the Commissioner to conclude the enquiry

pending u/s 35 of the Act against the Appellant and in case the Appellant was found disqualified to hold the office of Mahant, no further action was necessary, but if the charges were not found to have been established, the Commissioner was required to apply his mind and examine the justifiability of cancelling the scheme. The Commissioner found the charges not to have been established and dropped the proceeding but directed action to be taken u/s 42(6) of the Act for considering cancellation and/or amendment to the scheme. On 28-9-1973, the Commissioner came to the conclusion that the scheme need not be cancelled but made certain modifications. Appellant carried an appeal to this Court being Miscellaneous Appeal No. 10 of 1974 and after hearing parties, this Court by judgment dated 31-7-1975, allowed the appeal and cancelled the scheme by holding:

Since the Appellant has the right of management, I see no justification as to why he should be indefinitely kept out of his office. On the other hand, it is appropriate that he is put back to his office and management is vested in him. A lot of immovable assets of the Math have now vested in the State Government and appropriate steps have not been taken as is complained by Mr. Mohanty at the Bar to make proper applications for settlement of lands with the Math. This is the crucial time when steps have to be taken to protect the properties; otherwise the Math will suffer Irreparable. The Appellant must be given an opportunity of managing his Math and showing his capacity. Keeping all aspects in view and in particular the interests of the Math and the right of the Appellant in the focus. I consider that it is a fit case where the scheme in its entirety should be cancelled and the Appellant should be restored management of the Math. It is open to the Commissioner in exercise of his statutory powers to impose reasonable restrictions on the right of management by the Appellant with a view to protecting the interests of the Math in case for good reasons he is satisfied that such fetters should be imposed.

The appellate judgment was challenged in a Letters Patent appeal before this Court and the matter was also taken to the Supreme Court, but ultimately the appellate decision was upheld. The Appellant was put into management some time thereafter.

On the basis of information and reports received on 8-3-1978, the Commissioner directed a suo motu proceeding u/s 35 of the Act to be initiated against the Appellant for disqualifying him to hold office as Hereditary. Trustee and Appellant was called upon to show cause as to why such an order of disqualification may not be made. The Appellant filed his objection on the very first day he was directed to show cause. On 4-5-1978 to which date the enquiry had been posted, Appellant had asked for an adjournment. The application for adjournment was rejected and the enquiry proceeded. Therefore, the Appellant without the assistance of his lawyer had put certain questions to the witnesses. On 18th of May, 1978 to which date the case had been adjourned for further enquiry, Appellant engaged new counsel and made two applications to the Commissioner

one for recalling P.Ws. 1 and 2 for cross-examination and the other for adjourning the enquiry to a future date as the new lawyers had not yet been instructed. Both the applications were rejected and the examination proceeded. On 5-6-1978 to which date the case was further posted, an application was made to recall some of the witnesses for confronting them with some documents, but on 16-6-1978, the Commissioner rejected the application. The Appellant moved this Court in O.J.C. No. 872 of 1978 against that order of the Commissioner and a Bench of this Court on 13-7-1978, directed:

Heard the learned Counsel for the parties. It is open to the Petitioner to move afresh the Commissioner to give him an opportunity to recall P.Ws. 1 and 6. There is no bar if the Commissioner is satisfied to recall these witnesses. With these observations the writ petition is permitted to be withdrawn.

The Commissioner did not recall P.W. 1, but directed P.W. 6 to be recalled. When Appellant wanted a further adjournment saying that he would move against the order, that was rejected. On 20th of September, 1978, the Appellant moved the Commissioner to expunge the evidence of P.W. 1 as he did not submit himself for cross-examination after being recalled. The Commissioner took the view that the witness had been cross-examined on the first day by the Appellant himself and entered into recording defence evidence. Ultimately on 7-10-1978, the Commissioner came to hold that the Appellant should be disqualified for lite and asked for Government approval, as required u/s 35(2) of the Act. After obtaining approval, Appellant has been disqualified. This decision is under challenge.

3. Five charges were framed against the Appellant namely:

(i) Mismanagement by way of alienation of properties in contravention of Section 19 of the Act and misappropriation of sale proceeds thereof.

(ii) Felling and selling away the green trees and misappropriating the sale proceeds thereof.

(iii) Keeping of a concubine by name Ujalamani and begetting children through her.

(iv) Not maintaining regular accounts of the income and expenditure of the institution and looking after the improvement of the institution.

(v) Non-payment of contribution.

The Commissioner has recorded a finding that the second and the fifth charges have not been established, but on the basis of the three other charges having been proved, the impugned conclusion has been reached.

4. As already stated, the Math was not in the management of the Appellant for about two decades. Appellant's counsel contends that the Math was in a very bad shape when possession was handed over to the Appellant and though the permanent assets are quite substantial, the Math had been robbed of all its liquid assets in the hands of the Commissioner's nominees and therefore, when

Appellant took charge, the cash position was very poor. There were several pressing necessities and with a view to raising funds to meet the same, the Appellant had intended to lease out some of the properties of the Math on temporary basis. The scribe of the lease deeds, however, inserted the term of permanency in the lease deeds. If the lease deeds were intended to be permanent they admittedly required registration, but all the documents executed by the Appellant for raising funds are unregistered ones. Appellant has taken the stand that when he knew of the mistake, he took steps to cancel the same or convert them into temporary leases. The action of the Appellant, however, seems to be after the proceeding started. While it is true that the leases in question may not be capable in-law to grant permanent rights, Appellant certainly intended to execute permanent lease. It is difficult to accept the explanation of the Appellant that the scribe had executed documents contrary to instructions and the Appellant without examining the aspect of alienation without sanction, the Commissioner has stated:

...He (the scribe) was conscious of the illegality in the lease deed but was swayed a way by the persuasion of one Bhikari Misra to write permanent lease deeds pleading his inconvenience to him as the land was close to his house and some body might take that. This O.P.W. 1 has admitted in his cross-examination that the lands of the Math about to the houses and lands of others. Is it for that, all the lands should be permanently disposed of in favour of those persons? Even after knowing the fact no step has been taken to cancel the permanent lease deeds. So there is no hesitation in my mind to believe that the O.P. granted permanent lease deeds in Exts. 5 to 9 to different persons without sanction of the Commissioner as contemplated u/s 19 of the Act....

There is no dear mention in the lease deeds (Exts. 5 to 9) that they were meant for agricultural purpose in which case mere receipt of rent would have been enough to convey the right and any document registered or otherwise would have been relevant. These documents possibly required registration in order to be effective as permanent leases. But the explanation given by the Appellant that the scribe had stepped out of his instructions and had scribed permanent lease deeds cannot be believed. The Commissioner has nowhere discussed whether execution of invalid documents purporting to convey right, title and interest for a period of more than five years required Commissioner's previous sanction and if no such sanction had been taken whether the documents would fail to convey title. In order to hold that the charge has been established, this IS a relevant aspect for consideration.

5. The other charge is that Appellant has maintained a woman with whom he has illicit relationship and out of such relationship two issues have been born. Ext. 10 is the certified copy of the voters' list on which reliance has been placed. Therein Appellant has been shown to be the husband of Ujalamani. The Commissioner has relied on this entry as corroboration to the oral evidence. It is stated that one of the issues born through Ujalamani has taken admission in some school

and in the register Appellant has been shown as the student's father. The admission register has, however, not been proved. Admittedly by custom this is a celebrate Math and a married man is not eligible to be Mahant and the Mahant also is not entitled to marry. This being the tenant at the Math, I accept the contention advanced for the Respondents that if as a fact the Appellant is found to have maintained Ujalamani for purposes of illicit relationship, it would certainly go a long way to prove the charge and entail disqualification. On the earlier occasion, there was a similar charge, but the Commissioner had come to record a finding that the fact had not been established. There has been no categorical finding in any earlier proceeding that the fact that Appellant was maintaining Ujalamani as a concubine has been negated. There is no force in the submission of Mr. Das for the Appellant that this charge is barred by res judicata. Though the Appellant fails on the plea of res judicata, I have a feeling that the Commissioner should have taken steps to prove the entry in the admission register and oral evidence about the entry should not have been accepted. Under the Evidence Act, Secondary evidence is not admissible of facts available to be proved by primary evidence, namely written documents until the procedure provided in the Evidence Act is satisfied. The Commissioner has also utilised the oral evidence as to the contents of the entry which in law would not be appropriate. A set of documents have been presented in this Court along with an application under Order 41, Rule 27 of the CPC and one of them shows that Ujalamani's husband's name has been described as one Niranjana Misra. Since the present enquiry u/s 35 was initiated Suo motu and the Commissioner was anxious to find out the truth, it was really appropriate that adequate care was taken to examine all materials which were found to be relevant and were expected to throw light on the matter so as to help the Commissioner to come to a correct conclusion.

6. As I have already indicated, the Commissioner was anxious to complete the enquiry quickly and merely for that no fault can be found with him. But I am inclined also to take the view that since the penalty proposed and ultimately imposed took away the Appellant's right for life it was very appropriate that he was given a full and proper hearing. This Court observed in the writ application referred to above that the two witnesses may be recalled. Appellant had really not cross-examined P.W. 1 inasmuch as he was not ready on the first day of enquiry and no lawyer was representing him. Later he engaged a couple of lawyers and wanted recall. When the Commissioner refused, the Appellant moved this Court in a writ application and a Bench of this Court had observed that the Commissioner would do well if moved to apply his mind afresh and pass appropriate orders. Since the proceeding had already been delayed, recalling P.W. 1 would have caused no prejudice to anybody. Subsequently when P.W. 1's evidence in chief was asked to be expunged the learned Commissioner readily pointed out that since there has been some cross-examination non-examination of P.W. 1 would not bring about the liability of expunction of his evidence in examination-in-chief. In the setting indicated. I am inclined to agree with Mr. Das

for the Appellant that the Appellant should have been given opportunity to cross-examine the witnesses and for that purpose P.W. 1 should have been recalled. The Hereditary Trustee has substantial rights and the common law Court's jurisdiction has been ousted and Commissioner's jurisdiction in the matter of disqualifying the trustee has been made final. In the circumstances, if such a right has to be taken out for life, the law should be followed scrupulously and adequate opportunity should be given to the aggrieved party before he is debarred. Taking an overall picture of the matter, I am inclined to agree with Mr. Das for the Appellant that the final order should be vacated and the proceeding should be remitted to the Commissioner with a direction that he should give full opportunity to the Appellant to meet the charges. Such of the witnesses who have not been cross-examined by counsel for the Appellant should be recalled and cross-examined and after giving the Appellant a full opportunity of meeting the charges against him the Commissioner would dispose of the matter afresh in accordance with law. Since I am directing the matter to be placed again before the Commissioner, I do not propose to deal with the application for additional evidence. The documents may be returned to the Appellant to be presented again before the Commissioner. Costs shall abide the event.