
(1990) 12 OHC CK 0009
In the Orissa High Court
Case No : Misc. Appeal No. 298 of 1983

Shyama Charan Pradhan and Others	Vs	APPELLANT
Naikhani Thakurani and Others		RESPONDENT

Date of Decision : 17-12-1990

Acts Referred:

Orissa Hindu Religious Endowments Act, 1951 — Section 3, 41

Citation : AIR 1991 Ori 221 : (1991) 71 CLT 339 : (1991) 1 OLR 181

Hon'ble Judges : A.K. Padhi, J

Bench : Single Bench

Advocate : S. Misra, B. Das and K. Kar, for the Appellant; U.N. Misra, B.N. Tripathy and Nityananda Mohanty, for the Respondent

Final Decision : Partly Allowed

Judgement

A.K. Padhi, J.—Villagers of Fullabani are the appellants. Respondent No. 1 is the deity Naikhani Thakurani and respondents 2 to 5 claimed to be hereditary trustees of the deity. Respondents 2 to 5 filed an application u/s 41 of the Orissa Hindu Religious Endowment Act, 1951 (hereinafter referred to as "the Act") for declaration that they are the hereditary trustees of the deity. The public character of the deity is not disputed. In the claim petition it is averred that the deity was an ancient one and had self-revealed. One Sukadeb Panda, common ancestor of the applicants was appointed as hereditary Marfatdar-cum-Archak of the deity and after him his successors had been hereditary trustees in management of properties of the deity and also are rendering Sevapuja. Neither the villagers nor anybody else were ever in management of the affairs of the deity and thus constitution of a board of non-hereditary trustees was unwarranted.

2. The appellants, residents of the village in which the deity has been installed, got themselves impleaded in the proceeding and disputed the assertions made by the applicants. According to them one of the zamindars had endowed certain properties to the deity. The villagers were in management of the institution and

its properties. The family of the applicants are only Archaks who were appointed by the villagers and therefore the applicants have no right as hereditary trustees.

3. The learned Additional Assistant Commissioner of Endowments rejected the application of the claimants u/s 41 of the Act. The appeal, filed before the appellate authority was also dismissed. Miscellaneous Appeal No. 213 of 1977 was carried to this Court. This Court remanded the matter for fresh disposal in accordance with law. The learned appellate court after remand has given the following findings : --

(a) Applicants are in possession of the properties and performing Sevapuja as Marfatdar of the deity;

(b) The management of the affairs of the deity from 1918, performance of Sevapuja and enjoyment of land have been blended together. As the applicants family from 1918 are managing the affairs of the deity they are hereditary trustees and with the above findings allowed the appeal. These findings of the appellate court are challenged in this Miscellaneous Appeal.

4. The learned advocate for the appellants submits that the findings of the appellate court are based on errors of record and without considering the pleadings of the parties. The evidence on record and the pleadings do not satisfy the ingredients as required under the definition of "hereditary trustee". The learned advocate for the respondents, on the other hand, submits that appellate court has correctly arrived at the conclusion that respondents are hereditary trustees and Archaks. Both the sides do not dispute that the temple is a public temple. From rival contentions, the points which arise for consideration are:--

(a) Whether the respondents-claimants are the hereditary trustees of the deity Naikhani Thakurani;

(b) Whether the respondents are the hereditary Archaks; and

(c) Whether the respondents are in possession of the properties and it so, whether as hereditary Archaks or as hereditary trustees.

5. Section 3 (vi) of the Act defines hereditary trustee. According to this definition the term "hereditary trustee" means the trustee of a religious institution succession to whose office devolves by hereditary right since the time of the founder or is regulated by custom or is specifically provided for by the founder, so long as such scheme is in force. Section 8(xvi) defines trustee. This definition of "trustee" includes any person by whatever designation known in whom the administration of a religious institution is vested. A Sebak or Archak is one who has been entrusted to render religious duties of the deity. Function of a trustee i.e. administration of the institution and that of a Sebak/Archak who has been entrusted to render religious duties of the deity may or may not be united in the same person.

6. As to under what circumstances a person or persons can be declared as

hereditary trustee has been the subject matter of several judgments of this Court. The relevant principles of law that can be deduced from the catena of decisions are the person claiming to be a hereditary trustee must have to prove that the management of the affairs of the institution has devolved by hereditary right since the time of the founder or is regulated by customs or is specifically provided by the founder.

7. In a case where by passage of time it is not possible to trace back to the time of the founder, the principles of Lost grant and backward presumption is available for the courts to be drawn. In a decision reported in 26 (1960) CLT 293 (Dhruba Charan Swain v. Jagannath Panda, his Lordship has held that where an office of a trustee has been held by head of a family for four successive generations and there is no suggestion that the trusteeship had ever been held outside the family the trusteeship would be regarded as hereditary. Same view has been taken in 34 (1968) CLT 1111 (Chintamani Pati v. Krishna Chandra Panda). A Division Bench of this Court in the decision reported in ILR (1971) Cut 578 (Raja Bahadur A.N.M.H. Mohapatra v. Bidyadhar Nayak) has approved the aforesaid view and same has been followed in 43 (1977) CLT 108 (Bhagirathi Mohapatra v. The Deity Sukarmala Thakurani 46 (1978) CLT 471 (Puma Ch. Acharya v. Kakhareswar Baidyanath) and 51 (1981) CLT 169: AIR 1981 NOC 178, (Balukeswar Dev v. Kulamani Panda). In a recent decision of this Court in Lingaraj Samantaray and Others Vs. Sri Sidhabaladevjew, , his Lordship has opined that the essence of the principle upon which a "Lost Grant" is presumed is that the present state of affairs which is found to be continuing for a sufficient length of time, is otherwise, not explainable. Where there has been long continued possession in assertion of a right, courts of law have come to conclusion that the said right should be presumed to have had a lawful origin, and the further presumption may be available that the facts necessary for creation of such right were done. In that case his Lordship came to the conclusion:

".....It has been proved on evidence that trusteeship is being enjoyed by the petitioner-appellants and their ancestors from the year 1942 i.e. for more than a century, and as such it shall be presumed that they have been functioning as trustees from the time of its founder which satisfies definition of "hereditary trustee" in the Act."

In another decision reported in 1989 (31) OJD 412 (Maheswar Das v. Nilakantheswar Mahadeb his Lordship has observed :

"There is, however, paucity of materials to draw the presumption either forwards or backwards....."

Before their Lordships the record of rights of 1930 had been filed.

8. Coming to the facts of this case, para 3 of the application u/s 41 of the Orissa Hindu Religious Endowment Act, 1951 reads as follows:

"That the history of the origin of the institution of applicant No. 1 having been

lost in antiquity nobody can say about the foundation of the said institution, but so far the legendary goes one Sukadeb Panda as per the genealogy given below this plaint was entrusted with the management and administration of the affairs of the suit institution and to render personal services to the deity by the founder after establishment of the suit institution."

Para 7 of the plaint reads as follows :

"That since the time of their common ancestor the said Sukadeb Panda who was first engaged as a Marfatdar and Archak of the deity, the applicant and pro forma opposite parties 3 to 8, the present heirs having exercised their right as Marfatdar and Archak of the deity, in question they acquired a hereditary right of trusteeship. Never the applicant and pro forma opposite parties 3 to 8 or their ancestors were ever removed from their position as such as their right as hereditary Archak and Marfatdar of the suit institution has been recognised by the Hindu Public in general and all Public authorities from time to time."

Para 9 of the plaint reads as follows :

"That the founder of the institution had not set apart any property to be enjoyed by the said common ancestor Sukadeb Panda in lieu of his services for rendering sevapuja to the deity. But it was so arranged that besides meeting other expenses in maintaining the suit institution the said Sukadeb Panda will enjoy the rest of the usufructs received from the landed properties after offering the same as "Bhog" to the deity. This practice being in vogue since the date of foundation till to the time of the present applicant it has become a custom in the suit institution."

Para 11 of the plaint reads thus:

"That in the absence of a finding in a properly constituted proceeding about the nature of the suit institution a non-hereditary trustee board having been formed, cause of action arose for such a declaration and so this proceeding is started for a declaration about the hereditary trusteeship of the applicant and pro forma opposite parties 3 to 8 in respect of the suit institution."

The plaint allegations have been denied in the written statement and it has been asserted in the written statement that Brajendra Mohan Mohapatra had endowed some landed properties for the deity for daily sevapuja. One Bhumi Jani was performing the Sevapuja. The villagers appointed one Akhaya Panda in whose absence his cousins who are the ancestors of respondents-applicants were doing the sevapuja. The management of the deity vest to in villagers and applicants are not the hereditary trustees.

9. Now coming to the oral evidence on record. P. W. 1 is one of the claimants u/s 41 of the Act. He has nowhere asserted that their family are hereditary trustees though he has specifically averred that his family members from time of their forefathers are performing sevapuja. P.W. 1 has deposed that one Damodar Panda had constructed the thatched house and the present house was

constructed oil donation of one Krushna Pradhan. P.W. 2 refers to one Shyama Sundar Panda whose name does not find place in the genealogy. P.W. 3 has stated that ancestors of the claimants were managing the affairs of the deity. O.P.W. 1 in his evidence has admitted that Brahmins were doing the seba puja of the deity. O.P.W. 2 has been examined to prove the documents. In para 3 he has stated :

"There is a Trust Board of the deity for last 10 to 12 years."

In para 4 he has stated :

"Ext. C is the C.S. Khatian. Ext. D is the Trust appointment order dt. 1-12-67. Ext. 6 is another appointment order dt. 18-6-73."

The claimants have filed Exts. 1, 1/a, Khatians of the year 1918 in which the name of the grandfather of the applicants has been recorded as Marfatdar. Exts. 2 and 2/a are the rent receipts. The two rent receipts which have been exhibited as Exts. 2 and 2/a are of the year 1974, after the dispute arose between appellants and they are of no avail to the claimants. The appoints opp. parties on the other hand have filed the documents Exts. A to B. Ext. A is an application to the Endowment Commissioner to which one of the witnesses of the claimants Rama Chandra Samal, is a signatory. In the said application it has been averred that trust board has been formed without the consent of the villagers. It should be formed with consent of the villagers. Ext. 8 is missing from the file. Hence it is available for consideration. Ext. C is the Khatian of the year 1918. Sambhunath Panda, son of Damodar Panda has been described as Marfatdar. Ext. D is also not available in the lower court records as the same had been taken back by one advocate Anirudha Swain and has not been re-filed. On direction from this Court to produce the document the Endowment Commissioner has sent a document with the forwarding letter. The letter reads as follows:--

"In inviting a reference cited above, I am to inform you that Ext. D Trustee appointment order dated 1-12-67 marked in O.A.Mo. II-15/1973 is not available, in this office as the L.C.R. (F.A. 1/75 and O.A. No. 13/73) has already been sent to the Hon"ble Court vide this office L. No. 14531 dated 6-12-83.

In this connection, further I am to inform that on perusal of the management file maintained in the office of the Addl. Asst. Commissioner of Endowments. Cuttack that no trust board has been constituted on 1-12-67, but a trust board has been made on 1-12-66 communicated in Order W.916 dated 21-3-67 for a period ending on 31-3-68.

The said trustee appointment order in original is sent herewith for perusal of the Hon"ble Court in M.A. 298/83."

Obviously the copy of the appointment of the trust Board which has now been sent by the Commissioner of Endowment is not Ext. D, There is no evidence on record also to come to any finding that another trust board which was formed on 1-12-1966 took charge of the office or not. In absence of any connecting record

the document which has now been sent by the Commissioner cannot be taken to be same as Ext. D. which was filed by the appellants and was taken return of. For this reasons Ext. D. is also taken out of consideration. Ext. E is the order of appointment of non-hereditary trustees dated 16-6-1973 confirming the appointment of the trust board on 10-3-1973. This order has been challenged in the application u/s 41 of the Act. Ext. G is the order of attachment of moveable properties and Ext. H is the list of properties.

10. Analysing the aforesaid facts it is seen that though in the claim petition it was claimed that the ancestors of the claimants-respondents were entrusted with the management of the deity from the time of Sukadeb Panda, at the evidence stage P.W. 1 claims that the ancestors of the claimants were managing the affairs of the deity from the time of Damodar Panda. P. W. 2 has deposed to the effect that the family of the claimants were managing the affairs of the deity from the time of one Shyama Sunder Panda. There is no Shyama Sunder Panda indicated in the gnealogy which is appended to the claim petition by the claimant. Exts. 1, 1/a and C are all records of rights of the year 1918. From these documents alone backward presumption of Lost Grant theory cannot be drawn. There is paucity of materials to draw such presumption. In my opinion the claimants-respondents have failed to prove that they were entrusted with the affairs of the deity from the time of the founder. No custom has been proved to come to such a finding nor there is any document to show that the claimants' forefathers were appoinned by the founder of the institution of hereditary trustees. Therefore the irresistible conclusion is claimants-respodents are not the hereditary trustees of the institution.

11. Evidence adduced on the side of the claimants prove that from time of forefathers claimants' family were doing seba puja of the deity as Archaks. The evidence of the O.P. also prove that the families of the claimants have been hereditary archaks. The villagers have failed to prove that they had appointed Akhaya Panda as Archaks. Therefore, I come to the conclusion from Exts. 1, 1/a and C and the oral evidence adduced by both the sides that the respondents-claimants are hereditary archaks of the deity and are enjoying the disputed properties in lieu of their seba puja. The evidence adduced by the claimants satisfy the requirements u/s 41(e) of the Act.

12. In the conclusion, I hold that:--

(a) Deity Naikhani Thakurani is a public deity; to prove that they are the hereditary trustees of the deity;

(c) Claimants-respondents are the hereditary Archaks-Sebacks of the deity Naikhani Thakurani; and

(d) The claimants are in possession of the disputed properties in lieu of seba puja rendered by them.

13. In the result, the appeal is allowed in part, the finding of the learned apellate

court that the respondents were the hereditary trustees is set aside and the other findings are hereby confirmed. In the circumstances of the case, there shall be no order as to costs.