

(1969) 07 OHC CK 0010
In the Orissa High Court
Case No : First Appeal No. 78 of 1958

The Commissioner of Endowments

APPELLANT

Vs

Sri Radhakanta Deb and Another

RESPONDENT

Date of Decision : 31-07-1969

Acts Referred:

Orissa Hindu Religious Endowments Act, 1939 — Section 64, 64(2)

Citation : (1969) 35 CLT 992

Hon'ble Judges : S. Acharya, J;A. Misra, J

Bench : Division Bench

Advocate : S. Mohanty, for the Appellant; B. Mohapatra, for the Respondent

Final Decision : Dismissed

Judgement

A. Misra, J.—This is an appeal by Defendant against the judgment of the learned Subordinate Judge, Puri decreeing the Plaintiffs' suit. Plaintiff-Respondents instituted the suit u/s 64(2) of Act IV of 1939 to set aside the order of the Defendant-Appellant dated 4-8-1950 declaring that the temple of the deity Radhakanta Deb installed in village Depur is an excepted temple on the ground that Plaintiff No. 1 is a private" deity of Plaintiff No. 2 and the endowment is a private one.

2. According to Plaintiffs, the deity Radhakanta Deb was the family deity of the Pani family of village Depur their ancestors having installed it in a temple within the compound of their house and endowed certain properties for the seba-puja. Sometime later, the members of the family finding that they could not carry on the seba-puja of the deity and manage the endowed properties properly sold the lands to Plaintiff No. 2 by a kobala dated 17-11-1932, though it was styled as Samarpanpatra and received a consideration of Rs. 1000/. from him. Since that date, Plaintiff No. 2 is performing the seba-puja of Plaintiff No. 1 as marfatdar and the members of the Pani family left the temple compound and lived in another house of their own. It is alleged that Plaintiff No. 1 being a private deity of the Pani family and the endowments being private debottar, there having been

never any dedication in favour of the public, the public have no manner of right or interest in the deity, its worship or its endowments. Being served with a notice to pay contribution by the Defendant, Plaintiffs filed a petition before him u/s 64 of the Orissa Hindu Religious Endowments Act claiming the institution as a private one, but the Defendant by his order dated 4-8-1950 declared the institution to be an excepted temple with Plaintiff No. 2 as the hereditary trustee. On these allegations the suit was filed for the aforementioned reliefs. The Defendant resisted the suit mainly on two grounds that : (1) the suit was not maintainable without impleading any member of the public interested to deny the claim of Plaintiffs and (2) the deity, its temple and the endowments are public in nature and it was not a private deity of the Pani family.

3. The learned Subordinate Judge negated the contention of non-maintainability of the suit on the ground of defect of parties and held the deity and its endowments to be private, and accordingly, decreed the suit as stated above.

4. So far as the non-maintainability of the suit on the ground of defect of parties is concerned, it has been concluded by the pronouncement of the Supreme Court. Therefore, the only other point that remains for determination in this appeal is whether the deity (Plaintiff No. 1) and its endowments are private or public.

5. Learned Counsel for Appellant contends that the Court below has failed to take into consideration the contents of various paragraphs in the two documents (En. A and 1) which clearly indicate dedication in favour of the public. So also construction of the temple away from the residence, structure of the temple, observance of various festivals, provision for Abhyagats and Brahmins, provision for the seba-puja of the deity in perpetuity, conferring rights on the members of the public to supervise the work of the trustee, so on and so forth are characteristics consistent with the institution being a public one and the Court below has failed to take these facts into consideration in coming to its finding. For the Respondent, on the other hand, it is contended that neither in Ex. A nor in Ex. 1 there is anything which indicates an intention of dedication in favour of the public nor is there any evidence to show that members of a public have been conferred with any right of worship or are exercising any such right. It is also contended that the different clauses contained in the two documents (Exs. A and 1) are only consistent with the nature of the institution being a private one and when the documents show that the endowments were created in favour of the family deity or "Ista-debata", it cannot be construed as a dedication in favour of the public.

6. The question whether an endowment is a public or private one has been a matter for consideration in innumerable cases before the various High Courts, the Privy Council and the Supreme Court. It will suffice to refer to the observations of the Supreme Court in some recent decisions where the main distinction between private and public endowments has been clearly explained.

In *Deoki Nandan Vs. Murlidhar*, the Supreme Court explained the principles of law applicable for determination of the question whether an endowment is public or private as follow:

The distinction between a private and a public trust is that whereas in the former the beneficiaries are specified individuals, in the latter they are the general public or a class thereof. While in the former the beneficiaries are persons who are ascertained or capable of being ascertained, in the latter they constitute a body which is incapable of ascertainment.

This principle has been re-affirmed in the decisions of the Supreme Court reported in *Ram Saroop Dasji Vs. S.P. Sahi*, Special Officer-in-charge of The Hindu Religious Trusts and Others, and *The State of Bihar and Others Vs. Charusila Dasi*, . In the former decision, it was observed:

To put it briefly, the essential distinction is that in a public trust the beneficial interest is vested in an uncertain and fluctuating body of persons, either the public at large or some considerable portion of it answering a particular description; in a private trust, the beneficiaries are definite and ascertained individuals or who within a definite time can be definitely ascertained. The fact that the uncertain and fluctuating body of the persons is a section of the public following a particular religious faith or is only a sect of persons of a certain religious persuasion would not make any difference in the matter and would not make the trust a private one.

In the latter decision it was observed:

In order to determine the question whether an endowment is public or private, the cardinal point to be decided is whether it was the intention of the founder that specified individuals are to have the right of worship at the shrine, or the general public or any specified portion thereof.

7. While enunciating the aforesaid principles, it has further been explained that the true beneficiaries of the religious endowment are not the idols, but the worshippers and the purpose of the endowment is maintenance of the worship for the benefit of the worshippers. Therefore, where properties are endowed to a family idol, the beneficiaries are specified, ascertained or ascertainable individuals; whereas, where the beneficiaries are not members of the family or specified individuals but are members of the general public or a section thereof, the endowment can only be regarded as public.

8. Where there exists a document creating an endowment and the intention of the founder is unambiguous or clearly ascertainable from the terms of the document, the question whether the founder intended to create a dedication in favour of the public or for the benefit of ascertained or ascertainable individuals becomes somewhat easy as the other evidence, both oral and documentary necessarily assumes lesser significance. On the other hand, where the origin or foundation of the institution is lost in antiquity or where there is no documentary

evidence indicating the intention of the founder in creating the endowment clearly or the documentary evidence, if any, is not unambiguous in indicating the clear intention of the founder, a decision as to the character of the endowment whether it is public or private often presents considerable difficulty and one has to depend very much on inferences to be drawn from evidence regarding established usages and other characteristics which have been adopted as tests in determining the character of the institution and the endowment. In other words, in such cases, the intention of the founder is to be gathered from a consideration of the material clauses of the document, if any, available together with other circumstances and characteristics which are usually adopted as tests in arriving at a decision.

9. According to the learned Subordinate Judge, who tried the suit, the present case cannot be considered as one where the foundation of the institution and the creation of the endowment can be said to be unknown or lost in antiquity. He has emphasised on the fact that Ex. A, which according to him, is the only document relating to the foundation or creation of the endowment, recites the fact that the executants and their ancestors installed the deity Radhakanta Deb as their Ista-debata or family idol and that after constructing the temple for the abode of the deity endowed certain properties. He refers to the first part of preamble of Ex. A wherein it is stated that the settlers had installed the deity Radhakanta Deb, their Ista-debata and had been regularly worshipping the said deity. This recital has been relied upon for holding that the origin of the endowment was private created for the worship of the family idol in which the public were not interested, and as such, there was no dedication to the public. Therefore, the learned Subordinate Judge has observed that by any subsequent conduct or act, the nature of the institution could not have been altered and it must be deemed to be continuing as a private one. The Court below, however, has failed to give due consideration to the recitals in certain material clauses of the document (Ex. A) as well as the subsequent document (Ex. 1) under which the present Plaintiff No. 2 claims to have obtained the right to manage the affairs of the deity which have an important bearing on the question for determination. The Court below also seems to have failed to consider certain circumstances, characteristics and features which are relevant and material for ascertaining the intention of the founders as to whether the temple was constructed and the deity installed for the benefit of the public or the intention was to confine it for the benefit of ascertained or ascertainable individuals, i.e. the members of the Pani family. In the decision reported in "State of Bihar v. Charusila Dasi", it was held that the question is to be determined by taking into consideration several material clauses of the deed executed by the settlers as well as other circumstances.

10. Bearing in mind the aforesaid principles, we now proceed to consider and construe the "recitals in the two important documents (Ex. A and 1) as well as the oral evidence and other characteristics of the institution, usages followed and circumstances proved with a view to ascertain firstly as to who were intended to be the true beneficiaries and secondly, whether they are definite and ascertained

individuals or a fluctuating body answering a particular description."

11. The oral evidence in this case consists of the testimony of p.w.s. 1 to 5 on the side of Plaintiffs and of d.w. 1 on the side of Defendant. The documentary evidence is primarily confined to two documents marked Exs. A and 1. There is no dispute that the founders of the disputed temple and the endowments were the ancestors of the Pani family of Depur. The genuineness and authenticity of the two documents, Ex. A dated 18-2-1895 and Ex. 1 executed on 17-11-1932 are beyond dispute. P.w. 1 is Plaintiff No. 2 and p.w.s. 2 to 5 are residents of that locality, while d.w. 1 is a descendant of the Pani family who founded the institution. The p.w.s. have generally deposed that the deity Radhakanta Deb is the private deity of the founders family and members of the public have no rights of worship of the deity or in the management of the institution and its properties. On the other hand, d.w. 1 has deposed that the founders dedicated the temple to the public and the public worship there as a matter of right and it is not a private institution belonging to the founders' family. The learned Subordinate Judge had declined to rely on the testimony of d.w. 1 on the ground that he is adversely disposed towards p.w. 1. Admittedly, d.w. 1 was on litigating terms with p.w. 1 and the Court below has therefore rightly declined to place reliance on his testimony.

12. P.w. 1 admits that prior to the date of execution of Ex. 1 in 1932, he was living at Puri and had never visited Depur Sasan. He had no personal knowledge about the foundation of the institution, installation of the deity or how the affairs of the deity were being managed prior to his coming into the picture. Thus, his evidence of Radhakanta Deb having been installed as a private deity of the Pani family is not based on his personal knowledge. The other p.w.s., no doubt, say that they have no right of darshan or worship of the deity, but admit that whenever they visited the temple for darshan, they never took permission of anybody nor were they at any time prevented from entering the temple. It also transpires from their evidence that the temple is situated at the western extremity of the Pani Sahi away from the residential quarters of the founders' family. It is also admitted that the temple is of massive structure, constructed with stone, the height being more than 50 and less than 100 cubits as stated by one of the p.w.s., though p.w. 1 puts the height at 25 cubits. It is also admitted by the p.w.s. that the institution is divided into three separate temples or parts, the first being called Jagmohan, i.e., the entrance temple; the second, the Mukhasala and the third is the main temple. So also, it is admitted that there are stone images of Garuda, Brahma, etc., besides stone engravings of Naba-graha and Jai-bijoy in the entrance temple, the image of Mahabir in the middle temple, while the principal deity Radhakanta Deb with the image of Kishori is installed in the main temple, the height of the deities being 27 and cubits respectively. Admittedly, the festival of Dolpurnima is observed and a Dol-mandap exists on the front side of the temple according to p.w. 1, while inside the temple according to some other p.w.s., It is also not disputed that the cities and daily bhoga ranging from morning to midnight have been fixed in perpetuity and are

strictly observed.

13. It is contended by learned Counsel for Appellant that the aforementioned features are only consistent with the deity being a public one and not a private or family deity of the founders, while learned Counsel for Respondents contends that the aforementioned features do not necessarily indicate the institution being a public one. Dealing with such aspects, the Supreme Court in the decision reported in *Deoki Nandan Vs. Murlidhar*, already referred to above observed:

There is the fact that the idol was installed not within the precincts of the residential quarters but in a separate building constructed for that very purpose on a vacant site and as pointed out in *Delroos Banoo Begum v. Nawab Syud Ashgur Ally Khan* 15 B.L.R. 186 it is a factor to be taken into account in deciding whether an endowment is private or public, whether the place of worship is located inside a private house or a public building.

Similarly, installation of idols permanently on pedestals within the precincts is also taken as a factor consistent with the deity being public rather than private. In the decision reported in *The State of Bihar and Others Vs. Charusila Dasi*, already referred to above, the existence of the temple outside the dwelling house was also considered as a relevant circumstance in determining the character of the institution.

14. The structure of the temple has also been treated as a relevant factor in deciding the character of the institution. Referring to the structure of the temple, rituals observed, etc. in the decision reported in *Balkrushna Kar v. Ganesh Prasad Bhagat and Ors.* 1952 C.L.T. 126, it was observed:

That the general structure of the construction of the temple, the presence of several deities, the observance of usual rituals and ceremonies connected with the worship of the deities and erection of the Dolmandap are strong indications of the public character of a temple.

The Supreme Court in the decision reported in *Narayan v. Gopals*, referred with approval to the following dictum of Varadachariar, J. in the decision reported in AIR 1938 Mad 2097.

The question of intention to dedicate the buildings for the use of the public or of the user by the public being as of right, is necessarily a matter for inference from the nature of the institution and the nature of the user and the way the institution has been administered....once a long course of user by the public for the purpose of worship is established, and the fact of a separate endowment in trust for the deity is also proved, it is fair to infer that the institution must have been dedicated for user by the public (unless the contrary is established)-particularly when the character of the temple, its construction, the arrangement of the various parts of the temple and the nature of the deities installed there are similar to what obtains in admittedly public temples.

15. Though by themselves they may not be conclusive proof about the character

of an institution, features like the construction of the temple, existence of various other subsidiary deities, observance of rituals and bhogs as are followed in public temples have been adopted as tests in determining the character of the institution. In the present case, as stated above, the evidence on the side of Plaintiffs itself discloses that the temple is of massive structure with three distinct parts known as Jagmohan, Mukhasala and main temple with a number of subsidiary deities as well as observance of various rituals and bhogs throughout the day which are usually and normally associated with public temples. No doubt, the p.w.s. have come and deposed that they have no right of worship in the temple, but their evidence shows that whenever they visited the temple, no permission was required or sought nor were they at any time refused or obstructed.

16. Apart from the above features disclosed by the oral evidence which are indicative of the institution having been treated as a public one, the recitals in some of the clauses of the two documents (Ex. A and 1) also unequivocally indicate an intention of dedication in favour of the public and not to confine it for the benefit of the family members and that the successors of the original founders have treated it as such. Ex. A was executed by Basudeb Pani, Gopinath Pani and Dinabandhu Pani for self and as guardian of Balbhadra Pani on 18-2-1995. The recitals in the preamble of Ex. A show that prior to the date of its execution members representing different branches of the Pani family having made an image of their Ista-debata of Radhakanta Deb installed it in the temple built for that purpose in Depur Sasan and also endowed certain properties, from the usufructs of which, the seba-puja and jani-jatra of the deity were being managed by them as Sebait and marfatdars. From the preamble, it is evident that the properties were not endowed in favour of the existing family deity, but in favour of an image of that family deity which was installed in the newly constructed temple. By execution of Ex. A, they appointed Adwait Charan Das, a complete stranger to the family as "tatwabadharaka" and Sebait of the institution in whose favour all the sebaits and management rights were transferred. The future line of succession of the "tatuabadharaka" is indicated in Clause 9 which provides that the seba-puja and management are to be performed according to the injunctions contained in the document by Babaji Adwait Charan Das, and after him, by his chelas and grand-chelas appointed by him. Thus, the right to appoint sebaits and managers of the institution was not retained in the family which militates against its being a private one. In Clause 12, the detailed menu and the bhog to be offered to the deity at different times of the day, such as, hallva early in the morning; khechudi in the morning dhupa; rice and curry at the evening dhupa and dahi-pakhala (rice with curd) in the. "Bada-singhar" (mid-night) have been prescribed to be observed in perpetuity. The number of bhogs offered during the day and the description of the particular bhogs are more in consonance with the rituals observed in public temples than before family deities. Clause 13 makes provision as to the manner in which the daily bhogs are to be utilised, i.e. by serving the Brahmins and Baishnabs present and the remnants, if

any, only being available to the sebaks, thus expressly excluding the family members being entitled to any portion of them. Learned Counsel for Appellant referring to this provision argues that Brahmins and Baishnabs having been given a right to the daily bhog, the dedication must be construed as one in favour of the public. We do not agree that by itself such a provision can be regarded as an independent charity in which any class of the public can claim to have a direct and independent interest. As has been held in the decision reported in *Prasaddas Pal Vs. Jagannath Pal and Others*, , provision about feeding of the poor being a part and parcel of deba-seba is incidental to the puja and it cannot be regarded by itself as conferring any independent right or interest in the public or a section thereof.

17. Clause 15, however, contains a very significant provision which construed independent by or together with some of the other clauses of Ex. A from a long way in proving that the intention of the founders was dedication in favour of the public. Under this clause, in certain contingencies, any member of the Baishnab sect, any important Hindu resident of the village or locality or the sovereign power (Pradhana Raja) has been authorised to exercise the powers and perform the functions envisaged in Clause 7. Clause 7 contains a prohibition against alienation or encumbering of any of the moveable or immoveable properties of the deity by the marfatdar or his successors or by the settlers or their successors. Thus, this clause in no uncertain terms confers rights in the members of the Hindu public to question the improper acts in relation to the temple or its endowments of either by the marfatdar or members of the settlers family.

18. The next document is Ex. 1 which was executed on 17-11-1932 by the successors of the founders' family. Apart from the reasons which necessitated execution of Ex. 1, the preamble makes a reference to the construction of the temple, installation of the deity and creation of the endowments as a great achievement of their ancestors founded for perpetuation of the family prestige. By Clause 2, they acknowledge extinguishment of all their rights and powers of managing the seba-puja and properties of the deity in all respects and Clause 5 is to the effect:

We or our successors cannot interfere with the management in any manner till you or your succeeding chela and grand-chela manage the seba-puja properly according to law.

These two clauses show that not only the family members did not retain any right in themselves, but also conferred the right to regulate the successors of the trustee for the management of the institution and seba-puja of the deity to p.w. 1, a complete stranger. Clause 6 describes the endowments as absolute debottar in which the founders, their successors, the trustee or his successors can have no manner of right to alienate or encumber. It also provides that in case of any alienation, the alienor will be liable for criminal prosecution by any person. In this clause "any person" necessarily refers to members of the general Hindu

public and not confined to the members of the founders" family.

19. Learned Counsel for Respondents contends that conferring of power on members outside the founders" family does not necessarily indicate the dedication in favour of the public. In support of this contention, he refers to the following passage in the treatise Hindu Law of Religious anti Charitable Trust by Shri B.K. Mukherjee (Second Edition) at page 439:

When the sebaite himself is, the misconducting party, whose removal is Bought for or where the property has been improperly, alienated by the sebaite and he is unwilling or incapable of bringing a suit himself any other person interested in the family debottar can sue or the deity itself as a, juristic person can institute a suit through somebody as next friend.

He also refers to certain observations at page 442 to the effect that if a sebaite has improperly alienated a trust property, a suit can be brought by any person interested for a declaration that such alienation is not binding on the deity. It is contended by him that merely because from the recitals any person can initiate legal proceedings to question improper alienations cannot mean that a right has been conferred on the public. The passages relied upon by him only refer to improper alienations by as sebaite. In the present case, however, the recitals show that any person is entitled to criminally prosecute either the sebaite-marfatdar if he makes improper alienations or any member of the founders" family if he commits such acts. It" the deity was a family deity and the endowment a private one, such a power would" not accrue to or would not have been conferred on members of the public.

20. In clauses 14 and 16, provision is made for giving shelter or help to guests of the temple, pilgrims, students and also make donation for any public welfare work. Clause 21 runs as follows:

If after you, in future, for illegal acts of any of your successors or marfatdars appointed by "you," the seba-puja of the deity is not done regularly or any irregularity in the management of the property or loss of property and its income occurs. Italic is ours we or any of our heirs and successors like a member of the public who must be a pious man or any member of the general Hindu public will be entitled to remove the person guilty of committing neglect in the seba-puja of the deity or in the destruction of its property, according to law by giving proper proof and appoint any other suitable and pious Baishnab as marfatdar and to perform the seba-puja of the deity, but he cannot keep the management of the deity or its endowment in his possession or under his management.

The recital clearly equates members of the founders" family to pious members of the Hindu public in exercising rights of taking action against the marfatdar guilty of misconduct. In other words, the intention is clear that members of the founders" family have not retained any rights qua members of the family, but equated their rights to those exercisable by members of the public.

21. It is argued by learned Counsel for Respondents that none of these recitals is necessarily inconsistent with the institution being a private one. On the other band, he emphasises on the fact that nothing in Ex. A or Ex. 1 confers any right of ownership over the institution or right of worship of the deity and in view of the consistent evidence of p.w.s. 2 to 5 who are residents of that locality that they never exercise any such rights, it will not be proper to draw an inference regarding the intention of the founders of having dedicated in favour of the public. As stated earlier, the temple was founded and the deity installed prior to the date of Ex. A which is clear from the preamble of that document. In such circumstances, the question whether the founders intended to create a dedication in favour of the public or to confine the benefit to the family members or ascertained individuals is to depend on inference to be drawn from various factors, such as, the characteristics of the institution, usages and rituals followed and the treatment the institution has received as reflected from documents, if any, which have come into being in relation to the institution and other circumstances. The two documents which have admittedly been executed at different times by members of the founders family in successive generations contain recitals which are in compatible with the institution being a private one. Undoubtedly, the institution is now in charge of a complete stranger to the family and has been so since years. Members of the family are not at all associated in the management of the institution, its properties or seba-puja. Powers have been conferred on a stranger to appoint his successors and public have been given the right to remove the "tatwabadharaka" and also take legal action against members of the founders' family or the manager for the time being if he is found indulging in any acts of misconduct in relation to the institution or its endowments. The appearance of the temple, its structure, engravings, the rituals observed are quite consistent with the institution being a public one.

22. Taking all these facts into consideration, in our opinion, the dedication was in favour of the public and not intended for the benefit of the family members and it has all along been treated as such. Therefore, we hold that the temple of the deity Radhakanta Deb is a public religious institution and that Plaintiff No. 1 is not a private deity of either the Pani family or of p. w. 2. Accordingly, we allow the appeal, set aside the judgment and decree of the trial Court and order that the suit be dismissed with costs throughout.

S. Acharya, J.

23. I agree.