BRAJA KISHORE JAGDEV

v.

LINGRAJ SAMANTARAY AND ORS.

JULY 28, 2000

[S. RAJENDRA BABU AND SHIVARAJ V. PATIL, JJ.]

Hindu Law :

Orissa Hindu Religious Endowments Act, 1951 : Sections 3(6) and 42.

Public Religious Institution—Hereditary Trustees of—Conditions to be fulfilled—Certain persons claimed to be hereditary trustees of public religious institution on the basis that they were functioning as marfatdars—However, no evidence was adduced to this effect—But High Court held that there was sufficient material to show that they were marfatdars and that on the principle of 'lost grant' they should be deemed hereditary trustees—Correctness of—Held : In order to become hereditary trustees the claimants have to establish by cogent evidence that (i) members of their family have been in charge of the management of the affairs of the deity as trustees; (ii) succession to their office devolved on them by hereditary right since the time of the founder; and (iii) the succession scheme was in force at the time of filing of application under S.42—Merely because a person is in charge of the administration of the institution even as a trustee will not make him a hereditary trustee—Hence, High Court erred in holding the said persons as hereditary trustees.

Grant—Lost Grant—Presumption of—Public Religious Institution—Hereditary Trustees of—Marfatdars—Claim of—Held : Lost grant may be inferred when use is open, as of right and without interruption but not when user can be explained otherwise—There can be no presumption of the fiction of a lost grant in favour of persons who constitute trustees in succession—There is no material on record to draw an inference that the marfatdars are hereditary trustees.

Words and Phrases :

"Hereditary Trustees" and "otherwise"—Meaning of—In the context of S.3(6) of the Orissa Hindu Religious Endowments Act, 1951.

"Marfatdars"—Meaning of.

A *Doctrines :*

Doctrine of Lost Grant—Presumption of.

The respondent claimed that they have been functioning as marfatdars of a public religious institution since the time of its founder. The respond-
B **ents also claimed that they were recognized as hereditary trustees of the said institution by the Revenue and other authorities from time to time.**

The respondents filed an application under Section 42 of the Orissa Hindu Religious Endowments Act, 1951 seeking to have a scheme framed
C **for the administration of the institution. However, the application was dismissed in default.**

Thereafter, the respondents filed an application to adjudicate their claims as hereditary trustees under the Act. The appellant contended that by custom or otherwise the respondents were never treated as hereditary
D **trustees of the institution. The Assistant Commissioner rejected the claim. However, the High Court allowed the appeal on the grounds that there was material to show that the respondents were marfatdars and if they were marfatdars, they should be taken to be trustees; and that on the principle of 'lost grant', the respondents should be deemed to be hereditary trustees.**
E **Hence this appeal.**

Allowing the appeal, this Court

HELD : 1. In order to lay a claim that the respondents are Hereditary Trustees under the Orissa Hindu Religious Endowments Act, 1951 it
F **has to be established that the members of their family have been in charge of the management of the affairs of the deity as trustees and succession to their office devolve on them by hereditary right since the time of the founder and the scheme was in force until filing of the application under Section 42 of the Act. Assuming that every single member of the family of the respondents were acting as marfatdars of the deity for some time may**
G **not by itself be sufficient to establish their case that they are hereditary trustees as provided in Section 3(6) of the Act. The other criteria like succession to office of the trustee devolving by hereditary right since the time of the founder or being regulated by custom and such scheme is in force till the time of application under Section 42 of the Act has to be**
H **established by adducing cogent evidence. [9-F-G]**

2. The High Court proceeded to analyse the matter on the basis that there was no impediment to the person who was in charge of rendering religious duty of the deity to be a trustee of the institution inasmuch as the definition of a trustee includes any person in whom the administration of the religious institution is assigned. This approach of the High Court results in examining the matter from the wrong end. What is to be seen is whether respondents, though hereditary trustees, were engaged as "marfatdars" and not the other way. Merely because a person is in charge of the administration of the deity though as a trustee will not make him a "*hereditary trustee*" unless the conditions thereto are fulfilled. In the present case, the claim of the respondents is not that they are trustees but that they are hereditary trustees under the relevant provision. Therefore, the view of the High Court in this respect is not well founded particularly when the view set up by the authorities below could not be termed as unreasonable or improper. [10-A-C]

3. It is open to the Court to infer grant from immemorial use when such user is open, as of right and without interruption but grant will not be inferred if the user can be explained otherwise. The fiction of a 'lost grant' is a mere presumption from long possession and exercise of user by easement with acquiescence of the owner, that there must have been originally a grant to the claimant, which had been 'lost'. There can be no such presumption of a 'lost grant' in favour of persons who constitute trustees in succession. [10-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2378 of 1984.

From the Judgment and Order dated 25.1.84 of the Orissa High Court in M.A. No. 101 of 1979.

Prashant Bhushan, Sanjeev K. Kapoor and Narendra K. Verma for the Appellant.

Janaranjan Das, K.K. Mahalik and D.P. Mohanty for the Respondents.

The Judgment of the Court was delivered by

RAJENDRA BABU, J. The respondents made a claim in respect of an institution Sri SidhaBaladev Jew, Bie-Sodharpur, P.O. Baku in the district of Puri; that the said institution had been established by some unknown founder

A the origin of which had been lost in antiquity and the institution has all along been treated as a public religious institution; that the respondents' ancestors were entrusted with the management of all the affairs of the said institution including seva-puja of the deity and possessing all the lands of the deity and such right of maintaining the institution was inherited by their heirs; that they have been rendering seva-puja to the deity as marfatdars without any intervention at any time whatsoever and therefore are in possession of all the properties of the deity, paying rents to the authorities in respect of the landed properties and from out of the usufruct received from the landed properties by their ancestors; that no property has been separately set apart and given to the marfatdars to be enjoyed by them in lieu of their service; that such right of inheriting the office of marfatdarship has been in practice since the time of the founder and is regulated by custom; that they have been functioning as marfatdars since the time of the founder till today and they have also been recognized as Hereditary Trustees by the Revenue and other authorities from time to time.

In the year 1955, the respondents claimed by filing an application under Section 64 of the Orissa Hindu Religious Endowments Act, 1939, that the institution of the endowments thereof to be their private property made by the respondents and contested by the appellant and others and the same was dismissed. Thereafter the matter went to the High Court in appeal and ultimately the decision of the lower Court was upheld and the appeal was disallowed. Another application under Section 42 of the Orissa Hindu Religious Endowments Act, 1951 [hereinafter referred to as 'the Act'] was filed in the year 1959-60 which was also dismissed but for default. Thereafter a non-hereditary trust board was appointed under Section 68 of the Act and under whose control sevas are performed to the said deity. Another application was filed to adjudicate their claims as hereditary trustees under the Act on the basis of the pleadings set out earlier in this order. The appellant pleaded that by custom or otherwise the respondents were not ever treated as hereditary trustees of the institution.

Three issues were raised by the Assistant Commissioner as to (i) whether the petition was maintainable; (ii) whether the appellant is barred by the principle of *res judicata*; (iii) whether respondents are hereditary trustees. With regard to issue Nos.1 and 2, he found in favour of the respondents. Thus the only issue remaining to be considered is whether the respondents are the Hereditary Trustees of Sri Sidha Baladev Jew of Village Sodharpur, P.O. Baku,

District Puri. The Assistant Commissioner noticed that heavy burden lies upon respondents to establish that they are Hereditary Trustees of the institution of the deity since the time of the foundation of deity or is regulated by custom or specially provided by founder so long as such scheme is in force. He, in detail, considered the said aspect of the matter and came to the conclusion that respondents could only be marfatdars, that is, only servants of the institution, who are liable for dismissal in the event of non-performance of seva/puja of the deity and not Hereditary Trustees. He also noticed that even the respondents' case is that the institution of the deity and entrusting the management thereof had been lost in antiquity. Therefore some good material should have been produced by the respondents to establish their claim. On discussion of the other material on record the Assistant Commissioner rejected the claim made by the respondents. The matter was carried in appeal to the High Court and the High Court allowed the same. The basis upon which the High Court proceeded to hold the respondents as Hereditary Trustees is that there was material to show that the respondents are marfatdars and if they are marfatdars, they should be taken to be trustees. It was also held that since the origin of the temple was lost in antiquity, on principle of 'lost grant', the respondents should be deemed to be Hereditary Trustees.

The definition of "Hereditary Trustee" is set out in the Act. Under the said provision Hereditary Trustee means the Trustee of the 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 of succession is in force. In order to lay a claim that they are Hereditary Trustees it has to be established that the members of the family have been in charge of the management of the affairs of the deity as trustees and succession to their office devolve on them by hereditary right since the time of the founder and the scheme was in force until filing of the application under Section 41 of the Act. Assuming that every single member of the family of the respondents were acting as marfatdars of the deity for some time may not by itself be sufficient to establish their case that they are Hereditary Trustees as provided in Section 3(6) of the Act. The other criteria like succession to office of the trustee devolving by hereditary right since the time of the founder or being regulated by custom and such scheme is in force till the time of application under Section 41 of the Act has to be established by adducing cogent evidence.

Let us test the material placed before the court in the light of what we have stated. The argument that was advanced in the present case is that being

A marfatdars the respondents are trustees. However, the High Court proceeds to analyse the matter on the basis that there is no impediment to the person who was in charge of rendering religious duty of the deity to be a trustee of the institution in as much as the definition of a trustee includes any person in whom the administration of the religious institution is assigned. This approach of the B High Court results in examining the matter from a wrong end. What is to be seen is whether respondents, though hereditary trustees, were engaged as "marfatdars" and not the other way. Merely because a person is in charge of the administration of the deity though as a trustee will not make him a "*hereditary trustee*" unless the conditions thereto are fulfilled to which we have adverted to earlier. In the present case, the claim of the respondents is C not that they are trustees but that they are hereditary trustees under the relevant provision. Therefore the view of the High Court in this respect is not well founded particularly when the view set up by the authorities below could not be termed as unreasonable or improper.

D The other basis upon which the High Court passed its judgment is that the requirements of law that they are Hereditary Trustees since the time of founder" occurring in the definition of 'Hereditary Trustee' is lost in antiquity and therefore it is not possible to have any direct evidence to establish the line of succession but could be derived in the doctrine of 'lost grant'. It is open to Court to infer grant from immemorial use when such user is open, as of right E and without interruption but grant will not be inferred if the user can be explained otherwise. The fiction of a 'lost grant' is a mere presumption from long possession and exercise of user by easement with acquiescence of the owner, that there must have been originally a grant to the claimant, which had been 'lost'. There can be no such presumption of a 'lost grant' in favour of a F person who constitute trustees in succession. We do not think that, with the material on record, any such interference is possible. Firstly, contention had been advanced before the courts that the deity is a private trust and not covered by the enactment; having failed in that regard now they want to hang on to the fact that they are Hereditary Trustees. In establishing the same they have miserably failed by not producing evidence of any kind. In the circumstances G we have no hesitation in setting aside the order made by the High Court and restore that of the Assistant Commissioner to which we have adverted to earlier. The appeal is allowed accordingly. However, there shall be no order as to costs.

V.S.S. Appeal allowed.