M.M.DAS, J.

W.P.(C) NO.5110 OF 2011 (Dt.27.03.2012)

SUMIT KUMAR BOSE & ORS. ……Petitioners.

.*Vrs.*

STATE OF ORISSA & ORS. …… Opp.Parties.

ORISSA HINDU RELIGIOUS ENDOWMENTS ACT, 1951 (ACT NO. 9 OF 1951) – S.19-A.

For Petitioner - M/s. S.K.Choudhury, S.R.Kanungo, P.S.Acharya & M.R. Nayak.

For Opp.Parties - M/s. Dr. A.K.Rath, P.K.Mohanty, A.K.Mishra (for O.P.2)

M. M. DAS J. This writ application has been filed seeking quashing of the order vide Annexure-5, by which the Commissioner of Hindu Religious Endowments rejected the application filed by the petitioners under section 19-A of the Orissa Hindu Religious Endowments Act, 1951 (hereinafter referred to as 'the Act').

The petitioners claim to be the owners in possession of Ac. 0.919 dec of homestead land appertaining to Hal Plot No.2049 under Hal Khata No.1203/305 situated in Mouza - Unit No.13, Chandinichowk, Cuttack Town, which has been recorded in the name of the deity Sri Sri Gopal Thakur in the Record of Rights. It is further averred in the writ petition that originally the land was recorded in the name of the predecessor-in-interest of the petitioners in the Sabik Settlement Record and after their death the petitioners and others being their successors have partitioned their ancestral properties amongst them. The case land has been allotted to the share of the petitioners, who are in peaceful possession over the same. In the Hal Settlement Record, it has been recorded in the name of the deity nominally, which is their property of the family deity. On account of legal necessity and in order to dismantle their dilapidated residential house and raise a new construction as they required funds, they decided to transfer the case land. On fixing a purchaser, they approached the Office of the Sub-Registrar and they were informed that they are required to produce "No Objection Certificate" to be granted by the Commissioner of Endowments, Orissa in accordance with section 19-A of the Act. Accordingly, they made an application before the Commissioner, which was registered as O.A. Case No.152 of 2008. Thereafter, the Commissioner caused an inquiry/inspection through the Inspector of Endowments, Cuttack as regards the status of the land and the Inspector accordingly conducted the said inquiry and submitted a report to the Commissioner of Endowments stating therein that no deity by the name of Sri Gopal Thakur exists in the locality in Chandinichowk. The report has been annexed as Annexure-4 to the writ petition.]

2. The petitioners have alleged that in spite of such report the Commissioner of Endowments rejected the application made by them for grant of "No Objection Certificate" under section 19-A of the Act. Being aggrieved, they have approached this Court in the present writ petition.

3. Mr. Choudhury, learned counsel for the petitioners submitted that this Court has already decided in the order passed in W.P.(C) No.16978 of 2008 that when there is no deity, a "No Objection Certificate" under section 19-A of the Act could not be insisted for transferring the land. A copy of the said order has been produced before this Court. On perusal of the said order passed in W.P.(C) No.16978 of 2008 (**Smt. Jhari Dei Vrs. Commissioner of Endowments**), it is seen that the learned Single Judge of this Court after taking note of the provisions under section 19-A of the Act concluded on the facts of the said case that as per the report of the Revenue Inspector, there was no deity in the concerned village and on that basis came to the conclusion that no deity was installed. So there is no question of "ceased to exist" of any religious institution and when there was no deity at all, the provision under section 19-A of the Act could not be applicable to the facts of the said case and, therefore, no permission is necessary under the said section for sale of the land involved in the said writ application and registration thereof.

4. On perusal of the aforesaid order relied upon by Mr. Choudhury, I find that the said order was passed in the facts of the said case where the Court came to the conclusion that no deity was installed at all. This Court is of the view that the said order was rendered on the peculiar facts of the said case, where this Court concluded that no deity was installed at all. In the present case, however, the report of the Inspector of Endowments does not indicate that no such deity in the name of Sri Gopal Thakur was ever installed in the locality. But the Inspector of Endowments has reported as follows:

> "The Khasmahal Lease deed has been granted in favour of Sri Gopal Thakur be swagrugh a marfat Salil Kumar Bose, Sumit Kumar Bose and Miss Subhra Bose (the present petitioners). Subsequently, the Khasmahal lands have been recorded in the name of the deity Sri Gopal Thakur Bije swagruha with the petitioners as marfatdars with patadar satwa paying rent to the Government after going through the papers. I on the spot found the residential house of the petitioners in a dilapidated condition and in fact nobody is residing in the house at present.
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> I examined few inhabitants of the locality and found that no deity by the name of Sri Gopal Thakur in the locality, i.e., in Chandinichowk near Bandha Baseli. That it would be clear from the statements of the inhabitants that at present no deity by the name of Sri Gopal Thakur exists in the locality in Chandinchowk.
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> I here with enclose the statements of Sri Duruyodhan Behera, Sri Gati Krushan Maharan and Damodar Behera."

6. Hence, this Court is of the view that the said order passed in the case of Smt. Jhari Dei (supra) has no application to the facts of the present case.

5. Mr. Choudhury, learned counsel for the petitioners further contended that the deity being a private deity, the Act, itself has no application to the properties of the said deity, even if, it is assumed that the deity existed and the deity's name has been recorded in the settlement record. Hence, he contended that section 19-A of the Act could not be made applicable to the case land.

6. Dr. A.K. Rath, learned counsel for the Commissioner of Endowments, on the contrary, submitted that since the deity, in question, has not been declared as a private

deity in a proceeding under section 41 of the Act, presumption always arises that the deity is a public deity. He further, placing reliance on section 8-B (2) of the Act contended that where any person disputes the power of the Commissioner to take action under any of the provisions of the Act in respect of any institution on the ground that the institution is not a religious institution within the meaning of the Act, he is required to raise a dispute as provided under section 41 of the Act. He, therefore, urged that the Commissioner in the impugned order has taken a holistic view of the matter and rightly rejected the application made by the petitioners, which is legal and valid and, therefore, the said order is immuned from being interfered with by this Court under Articvle-226 of the Constitution.

7. After hearing the learned counsel for the parties, this Court feels it appropriate that in order to examine the applicability of section 19-A of the Act for transfer of the land in question by a registered document, it would be apt to trace out the history of law relating to Hindu Religious Endowments and also gather the intention of the Legislature in introducing section 19-A into the Act by way of amendment in 1989 under the Orissa Hindu Religious Endowments (Amendment) Act (Act, 22 of 1989), which came into operation with effect from 15th November, 1989. The first legislation in India with regard to Religious and Charitable Trust was the Bengal Regulations of 1810, which was followed by the Madras and Bombay Regulation of 1817 and 1827 respectively. The statutes having been found inadequate for meeting the fast increasing problems of religious institutions, the Madras Hindu Religious and Charitable Endowments Act, 1927 was legislated as a comprehensive local legislation. The Orissa Hindu Religious Endowments Act, 1939 followed the Madras legislation, which operated with effect from 4th day of November, 1939. For assuming more effective control over the religious institutions, the State of Madras consolidated and amended its Act into the Madras Hindu Religious and Charitable Endowments Act, 1951. In the same manner, the State of Orissa also consolidated the 1939 Act. But as certain provisions of Madras Act and sections 38 and 39 of the Orissa Act were declared ultra vires the Constitution of India, both Acts needed further amendments. Consequently the Orissa Hindu Religious Endowments Act, 1951 was brought into force with its amending Act in 1954 on the 1st day of January, 1955. Till date, though there are many other pieces of such State legislations in other States, which are in force, there is no requirement to refer to such legislations for deciding the present lis. Apart from the legislative enactment, there is huge contribution on the part of the Judiciary by pronouncing various judgments by different High Courts and the Hon'ble Supreme Court, on management and control over of Religious and Charitable Endowments. The Orissa Act, in section 1(2), provides that the Act shall have the application to the whole of the State and shall apply to all Hindu Public Religious Institutions and Endowments. The scheme of the Act itself shows that it intends to regulate not all religious institutions, but religious institutions impressed with the character of public trust. The existence of a public trust is the *sine-qua-non* for its applicability in respect of Temples and Maths. If the basic condition is missing, the Act is not applicable. To attract the provisions of the Act, benefits of the Endowments must be confined exclusively to Hindus. The prefix "Hindu" indicates exclusiveness.

8. A bare reading of the definition of "Religious Endowments" or "Endowment' in section 3(XII) clearly shows that all properties belonging to or given or endowed for the support of a Math or a Temple or given or endowed for the performance of any service or charity connected with such Math or Temple or of any other religious charity including the institution concerned and the premises thereof and also all properties used for the purposes or benefit of the institution including the properties acquired from the income of

the endowed property will come under the definition of such 'Religious Endowment' or 'Endowment' except the exception provided under the proviso to the said definition.

It is, therefore, clear that from the scheme of the Act, as already stated, the Act has application only to Public Religious Endowments including the Temples and Maths.

9. The Act provides 'control' with regard to dealing with properties of such Religious Endowments including the institution, under section 19 thereof.

10. From the aforesaid provision of the Act, it is clear that any form of transfer of immovable property belonging to a Religious Trust is barred, except, a lease for a term less than five years and such transfer can be made only if sanctioned. Any transfer made without a sanction granted under section 19 shall be an invalid and inoperative transfer. While such a provision as section 19 is in existence in the Act, the Legislature in its wisdom felt necessary to introduce a further provision with regard to restriction on transfer of immovable property belonging to or given or endowed for the purpose of any public religious institution by amending the Act and introducing section 19-A into the Act under the amending Act, 1989. The statement of objects and reasons for brining the amendments into the Act by the Legislature is as follows:

"STATEMENT OF OBJECTS AND REASONS

In course of implementation of the O.H.R.E. Act, 1951, certain difficulties and deficiencies have come to the notice of Government. In order to remove them and provide for more effective administration of the endowments, amendments to the following effect are felt necessary.

1. For preventing renewal of the lease of debottar lands beyond a term of five years.

2. Before registration of documents relating to alienation of any property of a public religious institutions permission from the Commissioner of Hindu Religious Endowments, Orissa is required for the purpose of preventing unauthorized alienation of properties of such institution.

3. To put restriction on the power of borrowing and lending of the Trustees of institutions by subjecting it to the prior sanction of the Commissioner of Hindu Religious Endowments.

4. To make penal provisions in section 70 applicable to the cases of failure of Trustee or Executive Officer to handover charge of the religious institution along with records, accounts and properties to a succeeding Trustee.

The prior concurrence of the Government of India has been obtained for introduction of the Bill in the State Legislature

The Bill seek to achieve the above objectives."
(emphasis supplied)

The new section 19-A is as follows:

"[19-A. Regulation of registration of documents – Notwithstanding anything contained in any other law for the time being in force, where any

document required to be registered under Section 17 of the Registration Act, 16 of 1908, purports to evidence transfer, by exchange, sale, mortgage or by lease for a term exceeding five years, of any immovable property belonging to or given or endowed for the purpose of any public religious institution, no Registering Officer, appointed under that Act, shall register any such document unless the transfer or produces before such Registering Officer, the sanction order passed by the Commissioner under Section 19, or, as the case may be, no objection certificate in the prescribed form granted by the Commissioner or any Officer authorized by him in that behalf:

Provided that a no objection certificate granted under this sub-section shall not be a bar to a dispute or abate any dispute, if pending under section 41 :

Provided further that a no objection certificate shall be deemed to have been granted, if the Registering Officer is satisfied that the transfer or having applied for grant of no objection certificate to the Commissioner or the authorized officer, as the case may be, has not received the same within three months from the date of the application under section 19 is moved before the Commissioner and that the application has not been rejected before expiry of that period." ***(emphasis supplied)***

11. From the statement of objects and reasons as well as the aforesaid new section introduced by way of amendment to the Act, it is clear that the said section imposes restriction on the Registering Officer on registering a document when such document requires to be registered under the Registration Act, evidencing transfer of immovable property by exchange/sale/mortgage or by lease for a term exceeding five years, belonging to or endowed for the purpose of any public religious institution if a sanction under section 19 or a "No Objection Certificate" in the prescribed form granted by the Commissioner or any Authorized Officer is not produced. The rules under the Act, however, have not been amended providing the prescribed format for "No Objection Certificate" as per section 19-A, which makes the said section redundant as a transferee of immovable property of the nature mentioned in the said section cannot produce a "No Objection Certificate" in the prescribed form since no such prescribed form has been provided in the rules under the Act. **(emphasis supplied)**

12. It is, therefore, inevitable that till the rules are amended and a form is prescribed for grant of "No Objection Certificate" under section 19-A, the said section cannot be operated. In addition to the above, it is clear from the aforesaid section 19-A that such "No Objection Certificate" is required when transfer is proposed to be made by a deed compulsorily registerable in relation to any property belonging to a public religious institution. Though specific rules have been made under the Orissa Hindu Religious Endowments Rules, 1959 with regard to the procedure for obtaining sanction under section 19, there is absence of rules with regard to the procedure to be followed for making an application for grant of "No Objection Certificate" under section 19-A of the Act and the manner in which application is to be dealt with. As such in present form of Section 19-A, no uniform procedure can be followed for either making an application for grant of "No Objection Certificate" or for disposal of the same under Section 19 – A of the Act.

13. Without any procedure prescribed under the Rules with regard to disposal of an application made under section 19-A of the Act for grant of no objection certificate, in the

event an application is made to the Commissioner for grant of such "No Objection Certificate" in the form of a petition, the Commissioner is bound to be prima facie satisfied that the property sought to be transferred on the basis of "No Objection Certificate" to be granted does not belong to a public religious institution or has not been given or endowed for the purpose of a public religious institution. It is only then the Commissioner is empowered to grant a 'No Objection Certificate'. As an illustration, it can be stated that a religious institution if has already been controlled and managed as per the provision of the Act by constitution of a Trust Board either hereditary or nonhereditary or as per the scheme framed or constituted, as an interim major, during pendency of a proceeding under the Act, property of such institution, if sought to be transferred, mandates a sanction under section 19 of the Act, for which specific procedure has been provided in the Rules. In the event, no such sanction has been obtained by such an institution, the Commissioner is bound to reject the prayer for grant of "No Objection Certificate" under section 19-A. However, if a religious institution is neither indexed nor is being managed by a Trust Board as stated above, nor has been declared to be a public religious endowment, it would be incumbent upon the Commissioner to be prima facie satisfied as to whether such an institution is a public religious institution or a private institution. For being prima facie satisfied, it is open for the Commissioner to cause an inquiry. The variety of factors, which may have to be considered for coming into conclusion as to whether an endowment is a private or of a public nature was considered by the Supreme Court in the case of ***Radhakanta Deb and Another Vrs. The Commissioner of Hindu Religious Endowments, Orissa***, A.I.R. 1981 SC 798. The Supreme Court laid down that there can be religious trust of a private character under the Hindu Law which is not possible in English law. It is well settled that under the Hindu law, it is not only permissible but also very common to have private endowments which though are meant for charitable purposes, yet the dominant intention of the founder is to install a family deity in the temple and worship the same in order to effectuate the spiritual benefit to the family of the founder and his descendants and to perpetuate the memory of the founder. In such cases, the property does not vest in God but in the beneficiaries who have installed the deity. In other words, the beneficiaries in a public trust are the general public or a section of the same and not a determinate body of individuals as a result of which the remedies for enforcement of charitable trust are some-what different from those which can be availed of by the beneficiaries in a private trust. The members of the public may not be debarred from entering the temple and worshipping the deity but their entry into the temple is not as of right. This is one of the cardinal tests of a private endowment. The question as to whether the religious endowment is of a private nature or of a public nature has to be decided with reference to the facts proved in each case and it is difficult to lay down any test or tests which may be of universal application. The Supreme Court further provided certain tests, which were held to be sufficient guidelines to determine on the facts of each case whether an endowment is of a private or of a public nature. Such guidelines prescribed by the Supreme Court are as follows:

(1) Where the origin of the endowment cannot be ascertained, the question whether the user of the temple by members of the public is as of right;

(2) The fact that the control and management vests either in a large body of person or in the members of the public and the founder does not retain any control over the management. Allied to this may be a circumstance where the evidence shows that there is provision for a scheme to be framed by associating the members of the public at large;

(3) Where, however, a document is available to prove the nature and origin of the endowment and the recitals of the document show that the control and management of the temple is retained with the founder or his descendants, and that extensive properties are dedicated for the purpose of the maintenance of the temple belonging to the founder himself, this will be a conclusive proof to show that the endowment was of a private nature;

(4) Where the evidence shows that the founder of the endowment did not make any stipulation for offerings or contributions to be made by members of the public to the temple, this would be an important intrinsic circumstance to indicate the private nature of the endowment.

14. However, these guidelines are applicable when evidence is led both oral and documentary in a proceeding under section 41 of the Act. But for the purpose of section 19-A , as already stated, the Commissioner is required to be prima facie satisfied that the religious institution is of public character. Without being satisfied in that regard and without assigning any reason, it is not open for the Commissioner to reject the application under section 19-A of the Act.

15 However, in the instant case, this Court is called upon to interpret the new Section – 19 – A introduced into the Act by way of amendment in 1989, in its present form. It is a foregone conclusion and a settled position of law that the Court should not depart from the ordinary canons of construction and give the enacting words some other construction. The Court is bound to take the Act of legislature, as they have made it ; a *casus*, *omissus* can in no case be supplied by the Court of law, for, that would be to make law. In ***Crawford vs. Spooner*** (1846) 6 Moore P.C. 1, 8, 9 the Judicial Committee said "we cannot aid the legislature's defective phrasing of an act, we cannot add and mend and by construction, make up deficiency, which are left there". In 1951, in ***Magor and St. Mellons R.D.C. vs. New Port Corpn.*** (1952) appeal cases 189 it was held by the House of Lords that a Court has no power to fill any gap disclosed in an Act. To do so, would be to usurp the function of the legislature. ***Lord Halsbury in Mersey Docks v. Henderson*** (1888) 13 appeal cases 595, 602 held that "no case can be found to authorize any Court to alter a word so as to produce a *casus omissus*."

16. Thus it is seen that meaning, which 'words' ought to be understood to bear, is not to be ascertained by new process akin to speculation. The primary duty of a Court of law is to find the natural meaning of the words used in the context in which, they occur, that context including any other phrases, which may so like on the sense in which, the maker's of the Act used the words in dispute.

17. However, it is common knowledge that the increasing complexity of modern administration and increasing difficulty of passing complicated measures through the ordeal of Parliamentary discussion, have laid to an increase in the practice of delegating legislative power to executive authorities. Long ago in 1878, it was stated "legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the legislature to persons in whom it places confidence is no uncommon thing and in many circumstances it may be highly convenience. (See R. v. Burah) (1878) 3 appeal cases 889, 906. It is well founded that "Statutory rules are in themselves of great public advantage because the details can thus be regulated after a Bill passes into an Act with greater care and minuteness and with better adaptation to

local or other special circumstances than they can possibly be in the passage of a Bill through Parliament. Besides, they mitigate the inelasticity which would otherwise make an act unworkable and are susceptible of modifications … as circumstances arise." This was written in the official minute in 1893 by Sir Henry Jenkyns. Thus, the method of delegated legislation permits rapid utilization by the operation of new Acts to be translated into practice and affords an opportunity, which is otherwise difficult to ensure, of utilizing/operating a provision of an enactment.

18. Keeping the above guidelines of interpretation of statute, it would be seen that the Act provides in Section – 76, the power of the State Government to make rules, which is delegated power for making statutory provision in the Act capable of being operated. The relevant portions of the said Section – 76 are quoted hereunder :-

> "76. Power to make rules – (1) The State Government may make rules to carry out all or any of the purposes of this Act not inconsistent therewith.
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> (2) In particular and without prejudice to the generality of the foregoing power, they shall have power to make rules with reference to the following matters.
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> (a) all matters expressly required or allowed by this Act to be prescribed ;
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> (b) the effectual exercise of the powers of superintendence vested the State Government ;
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> (c) the form and manner in which applications and appeals should be submitted to the State Government, [the Commissioner], [the Deputy Commissioner] or an Assistant Commissioner ;
>
> (d) the powers of the State Government, [the Commissioner], [the Deputy Commissioner] or an Assistant Commissioner to hold enquiries, to summon and examine witnesses and to compel the production of documents ;
>
> Xxx xxx xxx
>
> (m) the preservation, maintenance, management and improvement of the properties and buildings of religious institutions ;
>
> Xxx xxx xxx
>
> (v) all matters which under the provisions of this Act are required to be or may be prescribed."

19. In view of the above, this Court interpreting the new Section 19 – A, finds that no rules having been framed by exercise of the power of delegated legislation available under Section - 76 of the Act, prescribing the procedure and guidelines with regard to disposal of an application made by any person for grant of a "No Objection Certificate" under section 19-A of the Act, the Commissioner, if, does not enquire into the matter, to be prima facie satisfied as to whether the religious institution is of public character or private, an anomalous situation will arise. In this regard taking an instance that if the property sought to be transferred, is recorded in the name of a private deity of a family and on an application made for grant

of “No Objection Certificate” to transfer such property, if the Commissioner rejects such application due to want of any declaration in a proceeding under section 41 of the Act and compels the applicant to file a dispute under section 41 of the Act, even though the applicant is a bona fide owner of the property, such action will be amounting to compelling the applicant to enter into an unnecessary litigation by filing an application under section 41 of the Act, which inevitably would also consume a lot of time to be finally decided and till such period a bona fide owner of the property will be deprived from exercising its right over immovable property, which he is entitled to do under the provisions of The Transfer of the Property Act , Contract Act and other enactments relating to exercise of right over immovable property by a bona fide owner.

20. Hence, this Court is of the view that in the event the Rules are amended, providing the procedure for disposal of an application under section 19-A of the Act, this aspect is required to be taken care of, to prevent unnecessary litigations from being initiated under section 41 of the Act and such Rules should provide enough guidelines for the Commissioner to follow for granting or rejecting an application for grant of “No Objection Certificate” under section 19-A of the Act.

21. A complex situation arises when the Commissioner on causing an inquiry finds that there is no existence of religious institution like a Temple and material shows that no such religious institution of public nature existed at the spot. In such a situation, the Commissioner has no other option but to grant a no objection certificate.

22. All the above observations of this Court are subject to the Legislature introducing specific procedure in the Rules, to be followed in case, an application is made under section 19-A of the act.

23. As this Court has already found that the Rules are silent with regard to the procedure to be followed by the Commissioner in case an application is made under section 19-A of the Act, and no specific form is prescribed as mentioned in the section for granting a “No Objection Certificate, this Court is of the affirmative view that until such procedure is laid down in the Rules by way of amendment and the form is prescribed for grant of “No Objection Certificate”, the Registering Authority cannot insist upon production of a “No Objection Certificate” from the Commissioner under section 19-A of the Act and, therefore, the said section 19-A cannot be operated in its present form.

24. In view of the above, this Court finds that in the instant case the Commissioner could not have gone into the application made under section 19-A of the Act by the petitioners and as a consequence could not have rejected the said application. It is further found that in the instant case also it is evident that there is no existence of a religious institution/temple at the spot as per the report of the Inspector of Endowments and, therefore, also the Commissioner could not have rejected the application under section 19-A of the Act. Aneuxre-5, which is the order of rejection, is bound to be quashed, which is accordingly done. This Court makes it clear that till appropriate procedure is prescribed in the Rules for dealing with an application under section 19-A of the Act and a form for grant of such “No Objection Certificate” as contemplated in the said section is prescribed in the Rules, Section 19-A of the Act shall remain inoperative. In the event, such procedure is laid down in the Rules by way of amendment and a form for grant of “No Objection Certificate” is prescribed only thereafter the Registering Authority will be entitled to seek for such a “No Objection Certificate” when a deed

executed to transfer property recorded in the name of a deity/religious institution is presented for registration, as a precondition for registering the same.

25. Accordingly, the writ application is allowed with a direction to the Registering Authority to register the document if already presented by the petitioners or to be presented by the petitioners for transfer of the land, in question, or any portion thereof, without insisting upon a “No Objection Certificate” under section 19-A of the Act.

Application allowed.