

**ORISSA HIGH COURT: CUTTACK**

**M.S.A. NO. 4 OF 2007**

From a judgment dated 29.3.2007 passed by Shri A.K. Das, learned Deputy Commissioner of Endowments, Orissa, Bhubaneswar in F.A. No. 4 of 2003 reversing the judgment dated 7.3.2003 passed by Shri S.P. Nayak, learned Addl. Asst. Commissioner of Endowments, Sambalpur in O.A. Case No. 5 of 2000.

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Danardan Mohapatra & others ..... Appellants

***-versus-***

Pitambar Jena and others ..... Respondents

For Appellants : M/s. S.K.Choudhury &  
L.Mohanty.

For Respondents: M/s. Bharti Dash,  
R.Singh & M.Panda.  
(for Respondents 1,3 & 4)

M/s. S.R. Kanungo & B.M.Nayak.  
(For respondent 2)

Dr. A.K. Rath.  
(For respondent 5)

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***Decided on 27.06.2012***  
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**P R E S E N T:**

**THE HONOURABLE MR. JUSTICE M. M. DAS**

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***M.M. DAS, J.***

This appeal has been filed under Section 44 (2) of the Orissa Hindu Religious Endowments Act, 1951 (in short 'the Act') against the judgment and order dated 29.03.2007 passed by the

Deputy Commissioner of Endowments, Orissa, Bhubaneswar in F.A. No.4 of 2003 under Section 44 of the Act.

2. The appellants 1 to 3 and the mother of the appellant No. 4(a) filed an application under Section 41 of the Act to declare the temple of Shree Shree Bireswar Mahadev Bijje Jhintipal, P.S.-Chhendipada in the district of Angul as their private deity and in the alternative for a declaration to the effect that they are the hereditary trustees of the said deity. It was the case of the appellants that their paternal ancestors installed the deity at Jhintipal. To meet the expenditure towards the management and seva puja of the deity, the fore-fathers of the appellants settled about Ac.1.18 decimals of land as described in Schedule – 'A' of the application under Section 41 of the Act, in favour of the deity. Since the time of installation, they, from generation to generation, have been performing seva puja of the deity and managing its affairs, which includes appropriation of the usufructs of the landed properties recorded in the name of the deity and managing the periodical festivals, such as, Shivaratri etc. The lands recorded in the name of the deity, was under the Marfatdarship of the family of the appellants. As per the genealogy, one Ghana Mohapatra was the first sevayat-cum-person in management of the deity. He was succeeded by his only son Ananta Mohapatra. After death of Ananta Mohapatra, his son Baidyanath Mohapatra stepped into his shoes. Baidyanath Mohapatra died

leaving his widow Kuntala and five daughters. His widow Kuntala was in management of the suit deity after the death of Baidyanath and her name has been recorded in the ROR of 1962 as Marfatdar. When due to the old age, she was unable to manage the affairs of the deity, in the interest of the institution, she inducted appellant No.1 – Danardan Mohapatra, who was her son-in-law, being the husband of the appellant No.2 for managing the institution as well as performing Seva puja. On 28.09.1961, Kuntala executed and registered a Will in favour of Danardan to look after the management of the deity after her. When the application under Section 41 of the Act was filed, it was stated in the application that at that time Danardan along with his wife Pakei Mohapatra have been looking after the management and seva puja as mentioned above for the last four generations. The ROR was also published in favour of the applicant's family from time to time. At a subsequent stage, basing on the report of the local Inspector of Endowments, a non-hereditary trust board was formed and the latest land record was prepared in the name of the deity Marfat the non-hereditary trust board, to wipe out the name of the family members of the applicants as Marfatdars. Being aggrieved, the applicants filed the application under Section 41 of the Act.

3. The respondents before the learned Additional Assistant Commissioner filed their written statements in the proceeding under Section 41 stating that Shree Bireswar Mahadev

was existing since time immemorial in different forms of idol in the Western side of village Jhintipal under a temporary thatched house and later on, one late Bharat Behera donated some lands to the deity and the deity was kept in a thatched house constructed by the villagers of Jhintipal along with the neighbouring villagers and he continued to perform the seva puja of the deity. Since there was no suitable Pujak at that point of time, the villagers brought Ananta Mohapatra from village Nadhara of Dhenkanal and appointed him as Pujak of the deity on cash remuneration basis. When later on, the suit land was donated by the devotees, the said Ananta Mohapatra was asked to cultivate the land and to appropriate usufructs of the land for daily bhog of the deity and to take the rest towards his remuneration. The management of the temple was all along in the hands of the village committee from the time of its establishment and the applicants had no right in management except performing seva puja under the village committee. Late Ananta Mohapatra, taking advantage of the simplicity and ignorance of the villagers, got the land recorded in the name of the deity under his Marfatdarship. After the death of Ananta Mohapatra, his son Baidyanath Mohapatra followed the same practice. Baidyanath had no son, but five daughters, who were residing at different places with their husbands. In the meantime, the widow of Baidyanath Mohapatra got the suit land recorded in her name and brought the appellant No.1 – Danardan

Mohapatara to her house as an illatom son-in-law to perform the seva puja of the deity without any sanction of the village committee. The villagers approached the Endowment authority, upon which the interim trust board was formed from time to time. The rights of the applicants/appellants were denied by the respondents. The learned Additional Assistant Commissioner, on the above pleadings, framed issues and upon recording the evidence from the side of both parties, in his judgment dated 07.03.2002, came to the following conclusion:-

- (i) The dispute is maintainable and the applicants have cause of action to file the application under Section 41 of the Act;
- (ii) The temple is a public religious institution;
- (iii) The applicants 1 and 2, i.e., Danardan Mohapatra and Pakei Mohapatra have been performing seva puja of the suit deity and managing the said institution for over 100 years through last four generations uninterruptedly. The landed properties under Khata No.39 having area of Ac1.18 decimals in Mouza – Jhintipal are endowed properties of Sri Bireswar Mahadev under occupation and management of the applicant-petitioners 1 and 2. The petitioners 1 and 2 are recognized Pujaks of the deity with their hereditary right to manage the suit institution.

4. On coming to the above finding, the learned Additional Assistant Commissioner in the said proceeding under Section 41 of the Act, passed the following orders :-

“The suit institution, i.e., Sri Sri Bireswar Mahadev bije Jhintipal, P.S. Chhendipada, Dist. Angul is declared to be a Hindu public religious institution having Danardan Mohapatra and Pakei Mohapatra as hereditary trustees with right to perform seva puja. The schedule lands are declared to be the endowments of the suit deity to be managed by the hereditary

trustees. Send extract copy of the order to appropriate quarters for suitable action at their end.”

5. Being aggrieved by the above order/judgment, one of the opposite parties in the proceeding under Section 41 of the Act, preferred an appeal under Section 44 of the Act registered as F.A. No.4 of 2003, which was heard and decided by the Deputy Commissioner of Endowments, Orissa, Bhubaneswar by his judgment dated 29.03.2007. The appellant, who is opposite party No.1 in the present appeal, challenged the portion of the judgment of the Additional Assistant Commissioner of Endowments, declaring the appellants 1 and 2 in this appeal, who were the applicants in the proceeding under Section 41 as hereditary trustees with right to perform seva puja and declaring that the endowment of the suit deity is to be managed by the said hereditary trustees. Written objection by way of cross-appeal was filed by the present appellants 1 and 2 against the finding of the Additional Assistant Commissioner of Endowments that the suit deity is a public deity. The learned appellate court, on considering the submissions made before it relying upon the evidence of P.W.1, who has stated that good number of villagers come to the temple for Darshan of the deity and for worshipping, which was corroborated by the evidence of P.W.2, who also stated that the temple of the suit deity was built out of the funds collected from the Hindu public of the locality and the people of the locality offer bhog to the suit deity as well as referring to various case

laws and on analyzing the evidence of O.P.W.-1, came to a categorical finding that it has been well proved that the suit institution is a public temple.

6. With regard to the question as to whether the suit institution has hereditary trustees, the learned lower appellate court, referring to the definition of “hereditary trustee” given in Section 3 of the Act and analyzing the facts of the case as well as the material on record, referring to the judgment of this Court on the point, concluded that it has not been established by any credible evidence that the present appellants are hereditary trustees of the suit institution and in that view of the matter, the suit institution has no hereditary trustees. Thus concluding, the learned lower appellate court allowed the appeal, while dismissing the cross-objection filed by the present appellants and held that the suit institution is a public institution having no hereditary trustees.

7. In the present appeal, the learned counsel for the appellants contended that the learned lower appellate court has misconstrued the meaning of hereditary trustee as defined under the Act. It has also gone wrong in not taking into consideration that although a non-hereditary trust board has been formed in respect of the institution in question, such trust board has never taken charge from the present appellants, who are continuing in the management till date. It was further contended that the predecessors of the appellants having been

recorded as Marfatdar of the deity, it cannot be stated that they are not the trustees upon whom, the management of the case institution is vested. It is also argued that appointment of a non-hereditary trust board under Section 27 of the Act is subject to determination under Section 41 of the Act of the question as to whether a public endowment has hereditary trustees and the learned court below has failed to consider the fact that there is neither any interruption in the management nor any interference in the management so as to declare the case institution to be an institution without any hereditary trustee. According to the appellants, in absence of any documentary evidence to show that the villagers/village committee have constructed the temple and that the villagers appointed the appellants' predecessor as Pujak/Sevak of the case deity and that the villagers were in management by ousting the appellants from the management, the learned court below could not have held that the appellants are not the hereditary trustees. It was contended in the alternative that the lands belonging to the deity, having been given to the appellants in lieu of performing the seva puja, a declaration to that effect should have been made by the learned court below.

8. Learned counsel for the private respondents, however, submitted that there is ample evidence in the record to show that the deity in question was being managed by the village committee and



thereafter, by the interim trust board constituted by the endowment authorities.

9. From the materials on record, which has already been discussed by both the courts below, it is clearly established that the institution is a public religious institution. The only question, therefore, which remains to be answered, is as to whether the appellants are the hereditary trustees of the said institution/temple.

10. Danardan Mohapatra – appellant No.1, who gave his deposition as P.W.3, in his evidence, categorically stated that as per his knowledge, the suit deity was installed by one Katu Pradhan. As he was “CHASA” by caste, he did not perform the seva puja. He brought Ghana Mohapatra from village Nadhara in the district of Dhenkanal and entrusted him with seva puja of the deity along with its management. Ghana Mohapatra performed such seva puja along with the management, till his death. After him, his son Ananta stepped into his shoes. Ananta was succeeded by his son Baidyanath, who also continued performance of such seva puja and management of the deity. Baidyanath had no sons and had only five daughters, out of whom, one was the wife of Danardan Mohapatra. Baidyanath, before his death, entrusted his wife – Kuntala, daughter - Pakei and Danardan (son-in-law) to perform seva puja and manage the deity. Since then, they are performing such seva puja and managing the deity. During the cross-examination, he admitted that the lands

recorded in the name of the deity, were never private lands of his ancestors. His father-in-law died about 50 years back in 1979. He was also in-charge of the seva puja of the suit deity. He has expressed his ignorance with regard to the formation of the trust board for management of the suit deity, which he came to know during filing of the application under Section 41 of the Act, when he found that the lands in question have been recorded in the name of the deity Marfat the non-hereditary trust board.

11. With regard to the hereditary trusteeship, it would be appropriate to refer to the definition of “hereditary trustee” given in Section 3 (vi) of the Act. “Hereditary trustee” has been defined to mean that the trustee of a religious institution, succession to whose office (i) devolves by hereditary right since the time of the founder, or (ii) is regulated by custom or specifically provided for by the founder so long as such a scheme of succession is in force.
12. It is well settled that in order to be the hereditary trustee of a religious institution, a person must prove that the office of the trusteeship has devolved upon by the hereditary right since the time of the founder. The trustee as defined in the Act means a person in whom the administration of a religious institution and its endowment are vested. If the deity is an ancestral one and the time of foundation is not known and the name of the founder is also not known and the existing state of affairs is found to be continuing for a sufficient length

of time without interruption, the theory of “lost grant” has been applied by the courts.

13. In ***Dhruba Charan Swain and others v. J. Jagannath Panda and another***, 26 (1960) CLT 293, this Court held that where an office of the trustee has been held by the head of a family for four successive generations and there is no suggestion that the trusteeship had ever been held outside the family, such trusteeship would be regarded as hereditary. This view was reiterated in a series of following decisions of this Court.
14. It was cautioned in the case of ***Mitrabhanu Nayak and others v. Jaleswar Panigrahi and seven others***, 68(1989) CLT 333 as well as in the case of ***Uchhaba Mohapatra and others v. Sri Amruteswar Dev and others***, 68(1989) CLT 380 not to draw presumption with regard to the hereditary trusteeship in every case.
15. Taking into consideration the law as has been developed with regard to adjudicating a claim of hereditary trusteeship under the Act, it is clear that the decision as to whether a person is a hereditary trustee of a public religious endowment, which includes Math and Temple, will depend upon the facts of each case and there cannot be a straight jacket formula applicable to all cases. In the case of *Mitrabhanu Nayak and others* (supra), it was held, as per the definition of “hereditary trustee” that the claim of the hereditary trusteeship can be proved in three distinct ways, (i) when succession

to such office devolves by hereditary right since the time of founder, (ii) when succession is regulated by custom or (iii) when it is specifically provided by the founder according to the scheme of succession, so long as such scheme is in force.

16. This Court further held that the fact that it appears that one was a trustee for a long period would not be sufficient for a declaration that he was a hereditary trustee. However, the presumption would arise when a party proves long continued possession in assertion of a right, that such right has a lawful origin and the further presumption, which may be available, is that the Acts necessary for creation of such rights were done. However, such presumption cannot be availed of in every case of claim of hereditary trusteeship in view of the definition of “hereditary trustee” in the Act, where the expression “since the time of the founder” has been inserted. Relying upon earlier judgments, this Court, in the case of Uchhab Mohapatra and others (supra) held that the applicants, in order to succeed with regard to their claim of hereditary trusteeship of a religious institution must establish that the members of their family had been in charge of the management of the affairs of the deity as trustees and succession to their office devolved on them by hereditary right since the time of the founder and the said scheme was in force till the filing of the application under section 41 of the Act.

17. On analyzing the facts involved in the present case and the evidence as adduced by the parties, as earlier stated, it is clear that the appellant No.1, who was one of the applicants in the proceeding under Section 41 of the Act and examined himself as P.W.3, has categorically admitted that the suit deity was installed by one Katu Pradhan. Hence, it is found that the appellants' families were not in-charge of the management of the affairs of the deity as trustees since the time of the founder so as to succeed to such office by way of inheritance having hereditary right over the same. P.W.3 has also admitted that as the founder was a farmer by caste, he brought the predecessor-in-interest of his wife (appellant No.2) to perform seva puja of the deity. It is, therefore, an admitted case of the appellants that they have neither succeeded to the trusteeship of the institution nor the office of the trustee of the institution/deity devolved on them by hereditary right since the time of the founder. Therefore, even if the predecessors-in-interest of the appellant no. 2 were recorded as Marfatdars and subsequently they were recorded as Marfatdars in the Record of Rights prepared under the Orissa Survey and Settlement Act, they cannot be construed to be coming within the definition of hereditary trustee as given in the Act. It is also disclosed from the materials on record that an interim non-hereditary trust board for the suit deity was constituted as early as in 1979, which has never been challenged by the appellants and such non- hereditary trust board

was also constituted under Section 27 of the Act again in 2001 during the pendency of the proceeding under Section 41 of the Act. Hence, it cannot be stated that the appellants have succeeded to such office by hereditary right since the time of the founder. However, considering the admitted case of the parties, this Court finds that the appellants 2, 3 and 4(a) are performing seva puja of the deity from generation to generation. This sevayat right is also heritable and, therefore, the appellants 2, 3 and 4(a) along with the other successors of Ananta Mohapatra are the hereditary sevayats of the deity Shree Shree Bireswar Mahadev.

18. This Court finding that the learned lower appellate court has rightly reversed the findings of the learned Additional Assistant Commissioner of Endowments in the proceeding under Section 41 of the Act, confirms the same with the above observation with regard to the hereditary sevayat right of the successors of late Ananta Mohapatra, who was originally inducted by the founder to perform the seva puja of the deity.

19. In the result, the appeal is dismissed, but without any order as to costs.

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**M. M. DAS, J.**

***Orissa High Court, Cuttack.***  
***June 27th ,2012/Biswal.***

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