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January 20

SRI SADASIB PRAKASH BRAHMACHARI
v.
THE STATE OF ORISSA
(with connected petitions)

[VIVIAN BOSE, JAGANNADHADAS, B. P. SINHA, JAFER IMAM and CHANDRASEKHARA AIYAR, JJ.]

Constitution of India, Art. 19(1)(f)—Orissa Hindu Religious Endowments Act, 1951 as amended by Orissa Act XVIII of 1954—Ss. 42(1)(b), 42(7), 44(2) and s. 79(A)—Whether ultra vires *the Constitution.*

Sections 38 and 39 of the Orissa Hindu Religious Endowments Act, 1939 (Orissa Act IV of 1939) as amended by Orissa Act XVIII of 1953 were declared unconstitutional and void by the Supreme Court in *Mahant Sri Jagannath Ramanuj Das* v. *The State of Orissa* ([1954] S.C.R. 1046) on the ground that legislation in so far as it authorised the framing of a scheme by the Commissioner along with his associates and declared such determination as final without any scope for correction thereof by judicial intervention was an unreasonable restriction on the right of the head of the Math as respects his interest in the Math which is a right to hold property within the meaning of Art. 19(1)(f) of the Constitution.

After the judgment dated 16th March 1954 delivered by the Supreme Court in the case of *Mahant Sri Jagannath Ramanuj Das* v. *The State of Orissa*, ([1954] S.C.R. 1046) the Orissa Legislature passed the Orissa Act XVIII of 1954 purporting to amend *not the* 1939 Act which was then in operation but the Orissa Act II of 1952 which had not then come into force.

The Orissa Act XVIII of 1954 received the assent of the President on the 2nd December 1954 and came into force at once and thus the Orissa Act II of 1952 became *pro tanto* amended and modified. The 1952 Act so amended came into force from the 1st January 1955 by virtue of a notification dated 22nd December 1954 issued under the provisions of s. 1(3) thereof which provided that the Act was to come into force on such date as the State Government may by notification provide.

The five petitions under Art. 32 of the Constitution in the present case challenged the validity of various sections of the Orissa Act II of 1952 as amended by Act XVIII of 1954 on the principles laid down in the case of *Mahant Sri Jagannath Ramanuj Das* v. *The State of Orissa*, ([1954] S.C.R. 1046).

Held, that ss. 42(1)(b), 42(7), 44(2) as well as s. 79(A) of Orissa Hindu Religious Endowments Act, 1951 (Orissa Act II of 1952) as amended by Orissa Act XVIII of 1954 are not unconstitutional and

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ultra vires and the contention that the provisions of ss. 42 and 44 of the present Act to the effect (1) that a scheme can be framed by the Commissioner alone on a report of the Assistant Commissioner on such inquiry as he thinks fit and not by the Commissioner in association with one or more Government Officers to be appointed for the purpose by the Government (2) that there is no right of suit for challenging the validity or the correctness of the scheme framed by the Commissioner but there is only an appeal to the High Court, still continue to be unreasonable restrictions on the right of Mathadipathi as in the case of *Mahant Sri Jagannath Ramanuj Das* v. *The State of Orissa* [(1954) S.C.R. 1046] is without substance.

In the initial stage of the framing of the scheme under the provisions of the present Act there is first of all something in the nature of a preliminary enquiry by a judicial officer of the rank of a Munsif and this is followed by a regular and full enquiry before the Commissioner who is of the rank of a Subordinate Judge. The enquiry before the Commissioner is assimilated to and is governed by the provisions relating to the trial of suits by enjoining that, as far as may be, it is to be in accordance with the provisions of the Code of Civil Procedure relating to trial of suits. While, therefore, under the prior Act the enquiry before the Commissioner might well have been of the nature of an executive enquiry by an executive officer, the enquiry under the present Act is by itself in the nature of a judicial enquiry by judicial officers followed up by a right of regular appeal to the High Court. A scheme framed with reference to such a procedure cannot *ipso facto* be pronounced to be in the nature of an unreasonable restriction on the rights of the Mahant. The legislature might well have thought that instead of making the enquiry before the Commissioner more or less in the nature of a preliminary executive enquiry to be followed up by the affected Mahant by a regular suit in the Civil Court, it is much more satisfactory and in the public interests, to vest the enquiry before the Commissioner himself with the stamp of greater seriousness and effectiveness and to assimilate the same to a regular enquiry by the judicial officer according to judicial procedure and then to provide a right of direct appeal to the High Court.

The right of appeal to the High Court is given in very wide and general terms because the appeal can be both on facts and on law.

Mahant Sri Gadadhar Ramanuj Das v. *The Province of Orissa*, (I.L.R [1949] Cuttack 656), *Mahant Sri Jagannath Ramanuj Das* v. *The State of Orissa* ([1954] S.C.R. 1046) and *Commissioner; Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Matth*, ([1954) S.C.R. 1005], referred to.

ORIGINAL JURISDICTION: Petitions Nos. 651 of 1954 and 39, 46, 51 and 176 of 1955.

Under Article 32 of the Constitution of India for the enforcement of fundamental rights.

S. P. Sinha (*S. D. Sekhari*, with him), for the petitioner in Petition No. 651 of 1954.

S. P. Sinha (*B. K. Saran* and *M. M. Sinha*, with him), for the petitioner in Petition No. 39 of 1955.

B. K. Saran and *M. M. Sinha*, for the petitioner in Petition No. 46 of 1955.

S. D. Sekhari, for the petitioner in Petition No. 51 of 1955.

R. Patnaik, for the petitioner in Petition No. 176 of 1955.

M. C. Setalvad, Attorney-General of India (*R. Ganapathy Iyer* and *P. G. Gokhale*, with him) for respondents in all the Petitions.

1956. January 20. The Judgment of the Court was delivered by

JAGANNADHADAS J.—These are five petitions under article 32 of the Constitution by the heads of five Maths in the State of Orissa of which four known as Mahiparakash Math, Uttaraparswa Math, Dakshinaparswa Math and Radhakant Math are situated in Puri and the fifth known as Manapur Math is near Tirtol in Cuttack district. In all these petitions certain provisions of the Orissa Hindu Religious Endowments Act, 1951 (Orissa Act II of 1952) as amended by Orissa Act XVIII of 1954 are challenged as being unconstitutional and *ultra vires*. Since the questions raised are mostly common, all the petitions are dealt with by this single judgment.

These petitions have a background of previous history of legislation and litigation which it is necessary to set out in order that the questions raised may be properly appreciated. The first statutory interference by the Provincial Legislature with the management of Hindu religious endowments in Orissa was by the Orissa Hindu Religious Endowments Act, 1939 (Orissa Act IV of 1939) which came into operation

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on the 31st August, 1939. This was modelled on a similar Act operating in the Province of Madras at the time. The validity of the Act as a whole as also of certain provisions thereof were challenged by the Mahants of the various Maths in Orissa, about 30 in number, by instituting a suit in the year 1940. The suit was on behalf of the individual Maths who figured as plaintiffs (including three of the present petitioners, viz. Mahants of Mahiparakash Math, Dakshinaparswa Math and Radhakanta Math) and also in a representative capacity under Order I, rule 8 of the Civil Procedure Code. (Vide printed record of this Court in Case No. 1 of 1950). That suit was dismissed by the District Judge of Cuttack and came up in appeal to the High Court of Orissa. The High Court upheld the validity of the Act and of the various sections thereof by its judgment dated the 13th September, 1949, which is reported in *Mahant Sri Gadadhar Ramanuj Das* v. *The Province of Orissa*(1). An appeal was filed therefrom to the Supreme Court in January, 1950, which was numbered as Case No. 1 of 1950. This appeal remained pending for over four years and came up for final hearing in February, 1954. During the period of pendency of the appeal the Orissa Legislature passed two further Acts relating to Hindu religious endowments. The first of them was Orissa Act II of 1952 which was an Act to "amend and consolidate the law relating to the administration and governance of Hindu religious institutions and endowments in the State of Orissa" and which on its coming into force was intended to repeal the pre-existing Orissa Act IV of 1939. This Act became law on the 16th February, 1952, by the assent of the President. It did not however come into force at once on account of sub-section (3) of section 1 therein which provided that the Act is to "come into force on such date as the State Government may, by notification, direct". No such notification was issued during the pendency of the appeal in the Supreme Court. This Act was, in fact, brought into force much later, i.e., only as from the 1st Janu-

(1) I.L.R. [1949] Cuttack 656.

ary, 1955, by a notification of the Government of Orissa dated the 22nd December, 1954, published in the Orissa Gazette dated the 31st December, 1954. While thus the 1952 Act remained on the statute book without its coming into force, other independent statutory provisions amending the Act of 1939 were passed and brought into operation. The first of them was Orissa Ordinance No. II of 1953 which was promulgated by the Governor of Orissa on the 16th May, 1953. This was later superseded and substituted by Orissa Act XVIII of 1953 which came into operation on the 28th October, 1953. By these two successive legislative measures, the Act of 1939 was amended in certain respects and it is the Act so amended that was in operation during the period from May, 1953 to March, 1954, falling within the later portion of the pendency of Case No. 1 of 1950 in the Supreme Court. Some time in 1953, subsequent to the month of May, the Commissioner of Hindu Religious Endowments, Orissa, appears to have initiated proceedings for the framing of schemes in respect of a number of Maths, and schemes were actually framed during this period as regards the four Maths, Mahiparakash, Uttaraparswa, Dakshinaparswa and Radhakanta comprised in Petitions Nos. 651 of 1954, 49, 46 and 51 of 1955, respectively. These schemes were brought into operation and the administration of some of these Maths was taken over by the Trustees under the schemes. Thereafter Mahants of three of the affected Maths, Mahiparakash, Uttaraparswa and Radhakanta, who are also petitioners before us, filed applications under article 226 before the High Court of Orissa challenging the validity of the schemes. Those applications were dismissed by the High Court on the 17th February, 1954. Meanwhile the Mahant of Dakshinaparswa Math who was a petitioner in the High Court and also before us, filed along with another Mahant, a petition under article 32 of the Constitution to this Court on the 23rd December, 1953, challenging the Act then in force as being in violation of their fundamental rights. This was Petition No. 405 of 1953. This petition as

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well as Case No. 1 of 1950, referred to above, came up for hearing, together, in this Court on the 9th, 10th and 11th February, 1954. Judgment of this Court therein was delivered on the 16th March, 1954, and is reported in *Mahant Sri Jagannath Ramanuj Das* v. *The State of Orissa*(2). As a result thereof, sections 38 and 39 of Orissa Act IV of 1939 as amended in 1953, under which the schemes were framed were declared unconstitutional. Accordingly, the schemes became invalid and therefore the possession of such of the Maths which had been taken over under the schemes was restored to the Mahants. (It may be mentioned in passing, in this context, that the judgment of this Court refers to Orissa Act II of 1952 as being the one in force at the time and whose provisions were under consideration by the Court. This is a slip. The Act then in force was, as already stated, the Act of 1939 as amended in 1953. That this is a slip in the judgment is admitted before us. That does not however in any way detract from the reasoning and the binding character of the judgment, since as a fact what were really referred to were the sections of the 1939 Act as amended in 1953). Now, after the judgment of this Court was delivered in March, 1954, the Orissa Legislature again intervened and passed another Act, Orissa Act XVIII of 1954. This Act purported to amend *not* the 1939 Act which was by then in operation but the 1952 Act which had not by then come into force. Orissa Act XVIII of 1954 received the assent of the President on the 2nd December, 1954; and came into force at once and therefore Orissa Act II of 1952 became *pro tanto* amended and modified. By that date the 1952 Act so amended was awaiting the issue of notification under section 1(3) thereof for being brought into force. This notification, as already stated, was ultimately issued on the 22nd December, 1954, bringing Orissa Act II of 1952 as amended by Act XVIII of 1954 into force from the 1st January, 1955, and thereby repealing Orissa Act IV of 1939 as amended in 1953. The first of the petitions before us relating to Mahiparakash Math was filed in this

(1) [1954] S.C R. 1046

Court, anticipating this notification, while the other four were filed after the notification was issued. As already stated, all these petitions challenge the validity of various sections of Act II of 1952 as amended in 1954 (hereinafter referred to as the present Act). The challenge is entirely based upon the principles laid down by this Court in *Mahant Sri Jagannath Ramanuj Das* v. *The State of Orissa*(1). The above is the history of the relevant legislation and the connected parallel litigation.

The main attack is in respect of sections 42 and 79-A of the present Act relating to the schemes for religious institutions of the kind with which we are concerned in these petitions. There can be no doubt that the two sections apply to these Maths. The phrase "religious institution" occurring in section 42 has been defined as meaning (also) "a math and endowments attached thereto". A Math is "an institution .... succession to the headship of which devolves in accordance with the directions of the founder or is regulated by custom" and a hereditary trustee is "a trustee of an institution succession to whose office devolves .... by custom or is specifically provided for by the founder". A Math is therefore a religious institution presided over or managed by a hereditary trustee so as to render section 42(1)(b) applicable. To appreciate the ground of attack it is necessary to trace the changes in the provisions relating to the framing of schemes for such institutions in the successive legislative measures. In the Act as it stood in 1939 the provisions in this behalf are sections 38, 39 and 40. Since the attack is mainly as regards the procedure for the framing of the scheme, it is sufficient to notice what the gist of these three provisions is in so far as it relates to the procedure for an enquiry to frame a scheme. Under these three sections the enquiry is to be held by the Commissioner for Endowments appointed under the Act. For this purpose he is to function jointly with one or more persons in the service of the Crown appointed by the Provincial Government in

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this behalf. The enquiry has to be conducted "in such manner as may be prescribed". In making the enquiry the Commissioner and the person or persons associated with him therein are to consult the trustee and the persons having interest. After the scheme is settled and the order determining the scheme is published in the prescribed manner the trustee or any person having interest may, within six months of the date of such publication, institute a suit in the court to modify or set aside such order. The order settling a scheme is final and binding on the trustee and all persons having interest, subject to the result of the suit, if any, as above mentioned. Of course, the result of the suit itself would, under the general law, be subject to further appeal under the Civil Procedure Code in the ordinary way.

Changes were made in these provisions in 1953 first by Orissa Ordinance II of 1953 and then by Orissa Act XVIII of 1953 as already stated. The modification is that sub-section (4) of section 39 which provided for a right of suit, by the trustee or the person interested, in the regular civil court (with the concomitant further appeals to higher courts) was deleted and the following was substituted as sub-section (4) of section 39:

"Every order under this section shall be published in the prescribed manner and the order so passed shall be final and binding on the trustee and all persons having interest".

As a consequence thereof section 40 of the 1939 Act, which stated that "subject to the result of the suit the order settling a scheme is final", was omitted. The result of these two changes was that once the Commissioner with the assistance of one or more Government officers who were to be specially nominated, settled a scheme after making the prescribed enquiry, that order was not open to any further question or correction in the ordinary courts. It was at this stage that the validity of the provisions relating to the framing of a scheme came up for consideration before this Court in March, 1954. This Court held that the legislation in so far as it authorised the

framing of a scheme by the Commissioner along with his associates and declared such determination as final without any scope for correction thereof by judicial intervention, was an unreasonable restriction on the right of the head of the Math with reference to his interest in the Math. Accordingly sections 38 and 39 of the Act then in force were struck down as unconstitutional and invalid. The present provisions which are the result of a later amendment are contained in sections 42 and 44 of the present Act and are substantially different. The relevant portions thereof are as follows:

"42. (1) Whenever there is reason to believe that in the interest of the proper administration of religious institution a scheme may be settled for it, or when not less than five persons having interest make an application in writing stating that in the interests of the proper administration of a religious institution a scheme should be settled for it, the Assistant Commissioner or the Commissioner, as the case may be, shall proceed to frame a scheme in the manners hereinafter provided—

(a).....

(b) in the case of a religious institution presided over or managed by a hereditary trustee, the Assistant Commissioner shall make such enquiry as he thinks fit and submit his report to the Commissioner who shall hold an enquiry in the manner prescribed and so far as may be, in accordance with the provisions of the Code of Civil Procedure, 1908, relating to the trial of suits and if he is satisfied that in the interests of the proper administration of such institution a scheme of administration should be settled, he shall consult in the prescribed manner the trustee and the persons having interest and by order settle a scheme of administration for the institution.

.....

(7) Every order of.....the Commissioner settling a scheme under this section shall, subject to the provisions of section 44, be binding on the trustee, the Executive Officer and all persons having interest.

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(2) Any party aggrieved by the order of the Commissioner under sub-section (1) of section 42 may appeal to the High Court within thirty days from the date of the order or publication thereof as the case may be".

The effect of these provisions of the present Act is (1) that a scheme can be framed by the Commissioner alone on a report of the Assistant Commissioner on such enquiry as he thinks fit and not by the Commissioner in association with one or more Government officers to be appointed for the purpose by the Government, (2) that there is no right of suit for challenging the validity or the correctness of the scheme framed by the Commissioner but there is only an appeal to the High Court direct. It is urged that these provisions still continue to be unreasonable restrictions on the rights of the Mathadipathi and are accordingly *ultra vires* and unconstitutional. In the case reported in the *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutth*(1) the interest of Mathadipathi in the Math has been recognised as property falling within the scope of article 19(1)(f) of the Constitution. It was recognised that the ingredients, of office and property, of duties and personal interest, are blended together in the rights of a Mahant and that the Mahant has the right to enjoy the property or the beneficial interest so long as he is entitled to hold his office. It was recognised that the beneficial interest which the Mahant enjoys is appurtenant to his duties and that as he is in charge of a public institution, reasonable restrictions can always be placed upon his rights in the interests of the public. It was however held therein that provisions for the framing of a scheme which by its terms operate by way of unreasonable restriction would be unconstitutional and invalid. It is this principle that was applied in the next decision of this Court relating to Orissa Maths in *Mahant Sri Jagannath Ramanuj Das* v. *The State of Orissa*(2). There, the validity of the then provisions of the Act, i.e., of sections 38 and 39 of

(1) [1954] S.C.R. 1005. (2) [1954] S.C.R. 1046.

Orissa Act IV of 1939 as amended in 1953 was adjudged in the following terms:

"Sections 38 and 39 relate to the framing of a scheme. The scheme can certainly be settled to ensure due administration of the endowed property but the objection seems to be that the Act provides for the framing of a scheme not by a civil court or under its supervision but by the Commissioner, who is a mere administrative or executive officer. There is also no provision for appeal against his order to the court.....We think that the settling of a scheme in regard to a religious institution by an executive officer without the intervention of any judicial tribunal amounts to an unreasonable restriction upon the right of property of the superior of the religious institution which is blended with his office. Sections 38 and 39 of the Act must, therefore, be held to be invalid".

It is urged that though the obvious purpose of the amending Act of 1954 passed after this decision by the Supreme Court, was to remedy the defect above pointed out by providing for a right of appeal direct to the High Court from the determination of the Commissioner settling the scheme, the present provisions still continue to be unreasonable restrictions on the right of property of the Mahant. It is further urged that the initial decision in a scheme-proceeding is still on the basis of an executive enquiry by an executive officer and that in any case a direct appeal to the High Court as against the Commissioner's order cannot be as adequate a safeguard regarding the rights of the Mahants, as a suit and a right of appeal therefrom in the ordinary course to the higher courts would be. It is undoubtedly true that from a litigant's point of view an appeal to the High Court from the Commissioner's order is not the same as, an independent right of suit and an appeal to the higher courts from the result of that suit. But in order to judge whether the provisions in the present Act operate by way of unreasonable restriction for constitutional purposes what is to be seen is whether the person affected gets a reasonable chance of presenting his entire case before the original tribunal which has to

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determine judicially the questions raised and whether he has a regular appeal to the ordinarily constituted court or courts to correct the errors, if any, of the tribunal of first instance. For that purpose it is relevant to notice that in the present Act, the Commissioner of Endowments has, by virtue of section 4 thereof, to be a member of the Judicial Service (of the State) not being below the rank of a Subordinate Judge, while under section 7 of Act IV of 1939 a Commissioner of Endowments could be a person of either the judicial or the executive service and that even where a member of the judicial service is appointed he may be a person below the rank of a Subordinate Judge. Another important difference has also to be noticed, viz., that while under section 38 of the previous Act the enquiry has to be conducted "in such manner as may be prescribed" which means as prescribed by the Provincial Government by rules made under the Act and hence changeable by the Government, under the present Act, section 42(1)(b) specifically enjoins that "the Commissioner shall hold an enquiry in the manner prescribed *and* so far as may be in accordance with the provisions of the Code of Civil Procedure relating to the trial of suits". It may also be noticed that before the Commissioner starts his enquiry it is expected that the Assistant Commissioner, who, by virtue of section 5(2), is to be a person holding a judicial office not lower in rank than that of a Munsif, is to make such enquiry as he thinks fit and submit his report. Thus in the initial stage of the framing of the scheme under the provisions of the present Act there is first of all something in the nature of a preliminary enquiry by a judicial officer of the rank of a Munsif and this is followed by a regular and full enquiry before the Commissioner who is of the rank of a Subordinate Judge. The enquiry before the Commissioner is assimilated to and is governed by the provisions relating to the trial of suits by enjoining that, as far as may be, it is to be in accordance with the provisions of the Code of Civil Procedure relating to trial of suits. While, therefore, under the prior Act the enquiry before the Commissioner might well

have been of the nature of an executive enquiry by an executive officer, the enquiry under the present Act is by itself in the nature of a judicial enquiry by judicial officers followed up by a right of regular appeal to the High Court. A scheme framed with reference to such a procedure cannot *ipso facto* be pronounced to be in the nature of unreasonable restriction on the rights of the Mahant. The legislature might well have thought that, instead of making the enquiry before the Commissioner more or less in the nature of a preliminary executive enquiry to be followed up by the affected Mahant by way of a regular suit in the Civil Court, it is much more satisfactory and in the public interests, to impress the enquiry before the Commissioner himself with the stamp of greater seriousness and effectiveness and to assimilate the same to a regular enquiry by the judicial officer according to judicial procedure and then to provide a right of direct appeal to the High Court.

It has been strongly urged that a mere right to appeal to the High Court would virtually be in the nature of a limited appeal confined to challenge only on certain basic matters and probably limited to questions of law. We can find no warrant for any such apprehension. The right of appeal is given in very wide and general terms. Obviously the appeal can be both on facts and on law and would relate not merely to the merits of the scheme but also to all basic matters whose determination is implicit in the very framing of a scheme. In our opinion the present provisions cannot be struck down as being in the nature of unreasonable restriction on the rights of the Mahant.

Two other minor provisions in this connection have been brought to our notice and relied upon as indicating unreasonable restriction on the rights. One is that while under the 1939 Act the period of limitation for a right of suit was six months, the period allowed for an appeal under the present Act is only 30 days. Another is that under section 74(3) the operation of the order of the Commissioner is not to be stayed pending the disposal of the appeal. It

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has been urged that these provisions operate very harshly against the Mahant affected by a scheme when framed. It is pointed out that as the result of a scheme being put into operation immediately, the Mahant may be deprived of the effective possession of the Math and hence of the wherewithal to file an appeal within the very short time that is allowed, as also of the resources to conduct the appeal in the High Court or to maintain himself during its pendency which may take years. There is not much force in this contention. In so far as the question of filing of an appeal is concerned, there should be no difficulty since the provisions relating to appeals *in forma pauperis* would be applicable and can be availed of if the circumstances call for it. In so far as any situation may arise which may call for financial facilities for the conducting of the appeal or for interim maintenance, the learned Attorney-General suggests that the appellate Court would have inherent power and discretion to give appropriate directions for supply of funds out of the trust estate and that, in any view, such power and discretion have to be implied in the provision for an appeal so that the said right of appeal may not become illusory. Having regard to the suggestion thus put forward, which we accept, we cannot hold that the provision in section 74(3) that the operation of the order of the Commissioner framing a scheme is not to be stayed pending the disposal of the appeal, brings about an unreasonable restriction. In this view we think that the incidental provisions above referred to do not in any way detract from the reasonableness of the main provisions. In our opinion, therefore, the provisions in the present Act of 1952 as amended in 1954, relating to the framing of schemes are not open to any of the constitutional objections raised, and are valid.

The next point that has been urged, depends on the fact that in four of the petitions before us relating to the Maths of Mahiparakash, Uttaraparswa, Dakshinaparswa and Radhakanta, schemes were in fact framed in the year 1953 under the provisions of

Orissa Act IV of 1939 as amended in 1953. It may be recalled that these provisions were held invalid by the decision of this Court in March, 1954, above referred to. It must therefore be taken that these schemes were void as the law then stood. It is with reference to that situation that the Orissa Legislature by an amendment in 1954 of the 1952 Act introduced section 79-A into this Act which runs as follows:

"Notwithstanding anything contained in any of the other provisions of this Act or in any judgment, decree or order of any court all schemes purporting to have been settled in pursuance of sections 38 and 39 of the Orissa Hindu Religious Endowments Act, 1939, after the commencement of the Orissa Hindu Religious Endowments (Amendment) Ordinance, 1953, and before the commencement of this Act shall be deemed to have been settled under the provisions of this Act and any person aggrieved by any such scheme may within sixty days from the date of commencement of this Act prefer an appeal to the High Court and such appeal shall be dealt with and disposed of in the same manner as appeals provided for under sub-section (2) of section 44".

This purports to revive the schemes which were pronounced to be invalid by the judgment of this Court and attempts to remove the defect noticed in the judgment of this Court by providing for a regular appeal to the High Court against that very scheme within 60 days from the date of the commencement of the Act. It may be noticed that the schemes so revived are only those which were settled after the commencement of Orissa Hindu Religious Endowments (Amendment) Ordinance, 1953, and before the commencement of the 1952 Act, i.e., between 16th May, 1953 to 31st December, 1954, (hereinafter referred to as the specified period). This was exactly the period within which the amendment of 1939 Act made in 1953 was in force, abolishing the right of suit and making the scheme as determined by the Commissioner final and conclusive. Section 79-A in terms purports to revive the invalid scheme notwith-

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standing any judgment, decree or order of any court, which means that though a court may have pronounced the scheme as void still that is deemed to be alive. It has been suggested that this is directly flouting the decision of this Court and that the legislature has no power to declare as valid and constitutional what was decided by this Court as invalid and unconstitutional. But it is to be observed that the legislature does not purport to do anything of the kind. What it does is not to deem the schemes previously settled as having been validly settled on those very dates, under the then existing law. This of course is beyond legislative competence since the legislature has not the power to override unconstitutionality as such. But what the legislature has purported to do is to take up those very schemes and deem them to have been settled *under the provisions of the present Act* and thereby to lay them open to any attack available under the present law. Such a provision is not uncommon in legislative practice, and is enacted in order to avoid the public inconvenience of having to re-do what has previously been done. The result of section 79-A is to treat the schemes framed within the specified period as schemes framed immediately after the commencement of the present Act and to impute thereto, by a fiction, compliance with the various procedural and other steps which are requisite under section 42. We can see no reason for thinking that such a provision is not within the competence of the Legislature. It has been suggested that this is really interfering with the jurisdiction of this Court under article 32. But there is no substance in that suggestion. The right of any person to seek remedy under article 32 in respect of any violation of his fundamental rights is in no way curtailed or affected by the fact that an actual decision of this Court on an application under article 32 is, in effect, nullified by appropriate and competent legislative measures. Indeed, the right has been, in fact, successfully invoked on the prior occasion and has again been invoked on the present occasion. If it fails this time it is not because the right and the remedy under

article 32 have been taken away or affected but because the unconstitutionality has been removed. Section 79-A, therefore, is not open to any objection on the ground of legislative incompetence.

It has further been urged that to treat the scheme prepared with reference to the Act of 1939 as amended in 1953 as a scheme prepared under the present Act by means of a fiction is really in the nature of deprivation of certain advantages which an aggrieved person would have had if in fact the scheme was settled under the present Act, and that therefore such a scheme would still operate by way of unreasonable restriction. This contention is also without substance. It is true that in the present Act the procedure relating to the scheme has four steps which are as follows:

(1) The scheme is to be framed by a Commissioner, who is, by appointment, a judicial officer.

(2) The procedure is, as far as may be, the same as that in the trial of suits.

(3) There is a preliminary enquiry by the Assistant Commissioner.

(4) There is an appeal to the High Court.

Out of these four, the substantial item is the last one and that has been specifically provided for under section 79-A and a period of sixty days from the date of the commencement of the Act has been provided for the right of appeal. There can be no complaint on this score.

It is true that the schemes under the Act then in operation, i.e., during the specified period, might possibly have been framed by (a) an executive officer, as also (b) in pursuance of procedure under the rules framed by the Executive Government which may not approximate to that of a trial of a suit. But this was merely a theoretical possibility. In fact, as appears from the record and, as has been stated to us by the learned Attorney-General on behalf of the State and not disputed on the other side, the Endowment Commissioner during the specified period was a Subordinate Judge of the Orissa Judicial Service. The actual procedure which was in force at the time under the rules as then prescribed was also in fact in

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consonance with the trial of suits under the Civil Procedure Code. This appears clearly from rules 51 to 109 of the Rules framed by the Government of Orissa, an official copy of which has been supplied to us in court by the learned Attorney-General on behalf of the State. As regards the provision that the enquiry by the Commissioner under the present Act has to be preceded by a preliminary enquiry by an Assistant Commissioner who is of the rank of a Munsif, the argument that the deprivation of this feature by the deeming provision in section 79-A operates to the disadvantage of the Mahants is not by any means a serious point. It is to be noticed that this is set-off by the fact that schemes under the 1939 Act are framed not by the Commissioner alone but along with one or more Government officers appointed by the Government. We are, therefore, unable to uphold the contention that the deeming provision under section 79-A which treats the previous schemes as schemes framed under the present Act results in bringing about any substantial disadvantages to the detriment of the Mahants. We accordingly hold that section 79-A of the present Act is not open to any constitutional objection.

We are, therefore, clearly of the opinion that sections 42(1)(b), 42(7) and 44(2) as well as section 79-A of the present Act are not open to the constitutional objections raised before us.

It may be mentioned that in the petitions before us some other provisions of the present Act have also been challenged as being unconstitutional. But no arguments have been advanced before us in respect thereof. It may also be mentioned that the petitions before us have not raised any questions relating to the merits of the scheme in so far as any specific provisions thereof may have operated by way of unreasonable restrictions, in the light of the considerations pointed out by this Court in its judgment in the *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutth*(1). Nor does it appear that any appeal as

(1) [1954] S C.R. 1005.

provided in section 79-A has been filed to the High Court in respect of these cases challenging the validity or the propriety of the various provisions in the scheme or correctness of the decision, express or implied, on the basic facts which are the foundation of the scheme proceedings. We express no opinion on any of these matters.

In the last of the petitions relating to Manapur Math, the facts appear to be slightly dissimilar but this makes no substantial or material difference. In that case the original scheme was one framed under sections 38 and 39 of the 1939 Act as they stood before their amendment in 1953 which provided for a right of suit. The scheme itself was dated the 22nd May, 1948. Previous to the framing of the scheme there appears to have been a claim by the Mahant that the institution was a private one and not a public one and that it did not fulfil the definition of the word "Math" under the Act. There appears to have been a compromise between the then Mahant and the public of the village in which the Math is situated, who were interested in the Math. The compromise was to the effect that the institution was to be declared a Math but that the then Mahant was to be recognised as the hereditary trustee thereof. This compromise was recognised by the Commissioner by his order dated the 12th May, 1947, formally making the above declarations. It was on the basis of this that, later on, a scheme was framed on the 22nd May, 1948. It does not appear that the Mahant filed any suit which was then available to him. But it is stated to us by the learned Advocate appearing for the petitioner that an application was filed in the High Court for a writ to quash the scheme, and that it was dismissed by the High Court on the 16th November, 1954. The scheme became final under the original Act of 1939 as it stood before the 1953 amendment. Obviously, with reference to the facts of such a case, no argument of the kind that has been addressed to us in the other four petitions was available.

In the result, therefore, all the five petitions must be dismissed with costs.