Commissioner of Hindu Religious Endowments Vs. Batsa Patra and ors.

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Court : Orissa

Decided On : Nov-15-1950

Reported in : AIR1952Ori152

Judge : Ray, C.J. and ;Narasimham, J.

Acts : Orissa Hindu Religious Endowments Act, 1939 - Sections 6(5), 6(14), 17(1) and 64(2); Madras Hindu Religious Endowments Act, 1927 - Sections 69(2); Evidence Act, 1872 - Sections 115; Muhamadan Law; Hindu Law

Appeal No. : Second Appeal No. 164 of 1947

Appellant : Commissioner of Hindu Religious Endowments

Respondent : Batsa Patra and ors.

Advocate for Def. : H. Mohapatra, Adv.

Advocate for Pet/Ap. : B.K. Pal and ;P.V.B. Rao, Advs.

Disposition : Appeal dismissed

Judgement :

Narasimham, J.

1. This appeal is by defendant No. 1 the Commissioner of Hindu Religious Endowments, Orissa, against the concurrent decisions of the two lower Courts

declaring the plaintiff and defendants 2 and 3 to be hereditary trustees of the temple of Sri Dahibaban Mohaprabhu located at village Kulada in Ghumsur taluq. On 20-10-44 the Commissioner, H.B.E., Orissa passed an order (Ex. 1) declaring the temple to be a non-excepted temple and thereupon the plaintiff instituted the present suit under Section 64(2) of the Orissa Hindu Religious Endowments Act, 1939.

2. It is an admitted fact that the said temple was constructed by the Raja of Ghumsur sometime before Fasli 1247(1837 AD) and some lands were also endowed for the worship and bhog of the deity Sri Dadhibaban Mohaprabhu installed in that temple. The plaintiff's case was that soon after the installation of the deity and the creation of the endowment the then Raja of Ghumsur appointed the ancestor of the plaintiff as the hereditary trustee and archaka and thus vested the trusteeship in his family. In proof of this he has relied mainly on the oral evidence of three witnesses, two of whom Erukula Kasi Subudhi (P.W. 2) and Raghunath Das (P.W. 3) are old persons aged about 80 years and 63 years respectively. Both the Courts have believed their evidence. Doubtless, if the claim of the plaintiff were to depend on the bare oral evidence of these witnesses there may be some room for argument. But I find that as early as 1862 the plaintiff's ancestor Naran Patra filed a statement (Ex. A-1) before the Inam Commissioner stating that his family were the worshippers of the deity and that they were performing the Puja and Bhog of the deity. Apparently his right was not recognised by the Inam Commissioner who in the Inam register (Ex. A) completely omitted his name and entered the name of Ratnapati as worshipper. That Ratnapati was one of the members of a Committee appointed under the Religious Endowments Act of 1863 (Act XX of 1863) and it appears that the said Committee removed Naran Patra from his office as manager of the institution. But Naran Patra immediately filed a suit in the Court of the Civil Judge, Beharmpur (O.S. No. 19 of 1866) and the judgment and decree in that suit (Exs. 2 and 2a) show that the Court recognised that the said Naran Patra had the right to the office of the manager of the endowment. The Court therefore directed that Naran Patra should be restored to the office of manager. Thus there is a decree of a competent Court given as early as 1866 recognising the right of the plaintiff's ancestor Naran Patra to the office of the manager. This decree has the effect of removing any adverse

inference that may be drawn against the plaintiff's claim from the absence of any mention of the name of his ancestor in the Inam register. Since then the management of the endowment and the worship of the deity have been performed by the descendants of Naran Patra,

3. Mr. P.V.B. Rao on behalf of the appellant urged that even if it be recognised that the plaintiff's family were hereditary archakas of the temple and also managers it does not necessarily follow that the temple is an excepted one or else that they were hereditary trustees. He has emphasised the fundamental distinction between a'trustee' on the one hand and an 'archaka' on the other and urged that the plaintiff can succeed in the suit only if he can show that from the date of the founding of the endowment the trusteeship was hereditarily vested in his family.

4. IT is true that there is a fundamental distinction between an 'archaka' and a 'trustee'. Anarchaka is a mere Pujari who is one of the servants of the temple and his status is that, of anoffice-holder as contemplated in Section 17(1) of the O. H. R. E. Act. But in small temples it is notunusual to find the function of a trustee and anarchaka combined in the same individual.

'An archaka of a temple or Pujari or a Sevakamay be the manager but is not necessarily so.When the archaka or the officiating priest ofa temple has been managing its affairs with theknowledge and privity of the worshippers, thepresumption is that he is the manager as wellas the archaka.' (Iyer's Hindu and MahomedanEndowments. 2nd Edition, p. 452 relying on'RAMASAMI v. RAMASAMI', 2 Mad L J 251 and NARASIMHA CHABYULU v. SUBBAYYA', 31MLJ 202.)

In the present case, in the absence of any evidence to show that any other person ever managed the endowment at any time there seems to be absolutely no reason for disbelieving the plaintiff's testimony to the effect that the management was also vested in the plaintiff's family and that such right was given to them by the original founder and was recognised by the Civil Court in 1866.

5. The expression 'trustee' has been defined in Section 6(14) of the O. H. R. E. Act as follows:

'A 'trustee' means a person, by whatever designation known, in whom the administration of a religious endowment is vested and includes any person 'who is liable as if he were a trustee''.

The words underlined (here in single inverted commas) indicate that the definition is wide enough to include not only a person who has a vested right to administer the temple but also a 'de facto' trustee. But the definition of an 'excepted temple' in Clause (5) of Section 6 is as follows:

'excepted temple' means and includes a temple,the right of succession to the office of trusteeor the offices of all the trustees (where thereare more trustees than one) whereof has beenhereditary, or the succession to the trusteeshipwhereof has been specially provided for by thefounder.'

Mr. Rao rightly contended that though the definition of the expression 'trustee' as given in Section 6(14) is very wide, such a wide definition would not apply in construing the same expression occurring in Section 6(5) because such a construction would be repugnant to the subject or context. That is to say, 'a person who is liable as if he were a trustee' will not be a trustee for the purpose of Section 6(5) because in his case there can be no question of right of succession to the office of trustee hereditarily or else of the succession, to the trusteeship having been specially provided for by the founder. Mr. Rao further urged that so far as the plaintiff's ancestor Naran was concerned the Inam statement and the Civil Court decrees only indicate that sometime in 1862 or so he became a manager and his position as such manager was recognised by the Civil Court. If therefore at that time he was a mere 'de facto' manager the mere fact that subsequently his descendants have been hereditarily holding that post would not confer on them the right of a hereditary trustee unless there is clear evidence to show that even at the time of the founding of the institution the trusteeship vested in their ancestor. But this argument overlooks the clear case as put forward by the plaintiff's witnesses to the effect that when the endowment was founded by the Raja of Ghumsur the founder himself vested, the management with the fore-fathers of the plaintiff. There is doubtless no documentary evidence to support this piece of evidence. But the fact that as early as 1866 the right of the plaintiff's family to manage the temple

had been recognised by a competent Court and the fact that since then at any rate the plaintiff's family have been continuously holding the office of Manager are sufficient to show that the office of manager is hereditary in that family. The fine distinction between a 'trustee' and a 'manager' disappears in the present case because the definition of the expression 'trustee' in Clause (14) of Section 6 includes a person in whom 'the administration of a religious endowment is vested'. If the right of management (which must necessarily include the right of administration) is vested in the plaintiff's family, that family are trustees even though the ancestor of the plaintiff might have been described as manager in the decree of 1866.

6. Mr. Rao next contended that when the said temple was under the management of a Committee under the Madras H. R. E. Act, 1929 the plaintiff used to pay his contribution to the Committee under Sub-section (2) of Section 69 of that Act and thereby the plaintiff admitted that the temple was not an 'excepted temple'. Under Sub-section (2) of Section 69 of the Madras H.R.E. Act every temple other than an 'expected temple' was liable to pay annually a contribution towards the expenses of the Committee constituted under that Act. Demand notices for contributions from the plaintiff were issued by the Committee from 1927 to 1939 (Exs. 4-F, 4-N, 4-O, 4-P, 4-Q and 4-U) and these further Indicate that the plaintiff made payments in pursuance of those notices. If the plaintiff thought that the temple was not an 'excepted temple' he could then have challenged the right of the Committee to realise contributions from the endowment. But for some reason or other he did not challenge this until the passing of the O. H. R. E. Act in 1939. Mr. Rao therefore contended that the plaintiff's conduct in paying the contribution to the Committee would amount to an estoppel and it is not now open to him to say that the temple is not an 'excepted temple'. This conduct of his may amount to an admission and may be taken as a piece of evidence against his present contention that this temple Is an excepted temple. But his conduct then will not be a bar to his bringing the present suit under Section 64(2) of the O. H. R. E. Act inasmuch as, the actual decision of the Endowment Commissioner declaring the temple to be not an excepted temple was given only on 20-10-44 and his right to bring a suit under Section 64(2) arises only after that date. His previous conduct cannot therefore either bar the present suit nor can it operate as a complete estoppel in his

pleading that the temple is still an excepted one. Like all admissions it is only a piece of evidence. But in the present case any inference that may be drawn against the plaintiff from his previous conduct has been amply rebutted by the decree of the Civil Court as early as 1868, recognising the right of management in the plaintiff's family. Moreover, there is the unrebutted testimony of two respectable old persons of the village in support of the plaintiff's case regarding the right being vested in his family from the time of the founding of the institution. I would therefore hold that the payment of contribution to the Committee under Section 69(2) of the Madras H.R.E. Act from 1927 till 1939 is not fatal to the plaintiff's claim in the present suit.

7. I would therefore dismiss the appeal. As regards costs, however, in view of the decision of the lower appellate Court to the effect that theEndowment Commissioner was not personally liable for costs and that costs should be recovered from the endowment (which decision has not been challenged by any cross-objection in this appeal) I do not- think it advisable to pass any order for costs. Both parties will bear their own costs. In the operative portion of the judgment, however, the trial Court omitted to give a declaration to the effect that the temple is an excepted temple though this was one of the reliefs asked for. While therefore dismissing the appeal I would slightly modify the decree of the lower Court and declare that the temple is an excepted temple and the plaintiff and defendants 2 and 3 are hereditary trustees of the same.

8. BAY, C. J.: I agree. In view of the importance of the point involved I wish to add a few words.

9. The facts, so far as they are relevant and material for the purpose of this case, may be summarised in the following words with a view to bring into relief the question involved in its proper setting. Though without any direct proof, it has been assumed by the parties to this litigation that the Raja of Ghumsur was the founder of the endowment. It was registered in the permanent settlement in Fasli 1247(1837 A.D.). Documentarily it is not known if there was any deed of foundation. The custom of the country always was that the founder had always the vested right of sebaitship in him and his heirs unless he had disposed it of

otherwise. In this case, in the matter of disposition, there would be a complete vaccum either way in the evidence except for a few witnesses examined by the plaintiff. The Inam Register does not throw any light on the point. As a matter of history of Indian legislation on endowments, it is known the British Government, by virtue of their sovereign powers, asserted, as the former Rulers of the country had done, the light to visit endowments and to prevent and redress abuses in their management. This was by virtue of the sovereign powers' visitatorial capacity of control over the public endowments of till kinds. The earliest legislation that was effected consisted of Regulations XIX of 1810 in Bengal, VII of 1817 and XVII of 1827 in the Presidencies of Madras and Bombay respectively. They provided for the general superintendence of religious and charitable endowments by the Board of Revenue through their local agents. How this endowment was dealt with in this regime is not known. However, this improvised superintendence for the time being was relaxed since 1042. Then followed Act XX of 1S63. The effect of this legislation was, in substance, to repeal such provisions of the Regulations as related to religious endowments and to transfer them 'in certain cases to trustees and in others to Committees'. Here it is at this period that one of the most significant incidents relating to this document endowment occurred. The Religious Endowment Committee of the district or hte division dismissed the predecessor of the defendants, Naran Patro, manager for the time being, by virtue of the authority derived under the Act. The dismissed trustee or Manager, as he was then called, brought a civil suit against the Committee. In the suit it was decided that the dismissed man had the right to act as manager or the temple.

10. Before the Act, however, in the year 13S2 or thereabout, Inam Commissioner's enquiry into validity of inams for fiscal purposes of the state had taken place. The aforesaid Naran Patro and others tiled a statement relating to the particulars of the inam They therein stated that Sri Dahibaban Swamy 'was enjoying the inam throughthem'. In the Inam Register that followed there was no mention of the names of Naran Patro and others, but one Ratna Pati was shown as worshipper. The Register is dated 24th November 1862. The title deed, however, does not appear to have been granted to Ratna Pati, but it is granted to 'the manager for the time being of the Pagoda of Sri Dadhibaban Swamy' with the declaration:

'This Inam is confirmed to you and your successors tax-free; to be held without interference so long as the conditions of grant are duly fulfilled.'

11. Ratna Pati, as it appears from the judgment and decree in the Original Suit No. 19 of 1866, already referred to, happens to be one of the members of the Committee that dismissed Naran Patro. It is somewhat difficult to reconcile mention of Ratna Pati's name in the Inam Register of 1862 while his appointment as a member must hove been subsequent to the coming into operation of Act, 20 of 1883 unless it be held, that Ratna Pati's name found place in the Inam Register as worshipper as distinct from manager. He is in fact described as worshipper, probably during this period there was some dispute as to the right if Naran Patro and others as managers. In the suit that followed Naran Patro's dismissal, the dispute, if any, was set as rest. The suit was referred for arbitration under Section 10 of the said Act. The section reads:

'In any suit or proceeding instituted under this Act it shall be lawful for the Court before which such suit or proceeding is pending to order any matter in difference in such suit to be referred for decision to one or more arbitrators.'

The arbitrators decided:

'that the defendants (the members of the Committee) did remove the plaintiff from the office of the manager 'to which he had a right' and that they were not justified in so doing.....'

Evidently, after the disposal of the suit, in themanner aforesaid, there never was any interference with the administration of the endowmentby Naran Patro and others as managers and thensuccessors till the order of the Hindu Religious Endowments Commissioner of Orissa which, is thesubject-matter of invasion in this suit. BetweenAct 20 of 1S63 and Orissa Hindu Religious Endowments Act, there came into force the HinduReligious Endowments Act of Madras (Act II (2)of 1927). This Act gave power of superintendenceover Hindu Religious Endowments Board. TheBoard also established certain Committees in orderto assist them in their work. The saidBoard and the Committees uniformly recognisedthe plaintiff or his predecessors-in-interest as trustees or Dharmakartas of the temple. They

were,however, realising for a length of time annual contributions leviable both under Section 69, Sub-section (1) andSub-section (2). It is to be noted that the contributions under Sub-section (2) were not leviable from excepted temples. Relying upon realisation of thesecontributions and the conduct of the plaintiff orhis predecessors in acquiescing in payment thereof,the Hindu Religious Endowments Commissionerof Orissa came to his conclusion that the temple,in question, is a non-excepted temple, in otherwords, that the plaintiff is not a hereditary trusteethereof.

12. In the background aforesaid, arises the question whether the order of the Hindu Religious Endowments Commissioner of Orissa is correct. In the ultimate analysis, the question involved is one of fact, namely, whether the plaintiff has established that the temple, in question is an excepted one. The same proposition may be stated in a different way, namely, whether the plaintiff is the hereditary trustee of the temple. Thereis a serious dispute it the plaintiff is a trustee. This dispute takes its source in the light of the arguments advanced, at the Bar, from the fact, that he is also an Archaka. There is nothing fundamentally wrong in the conception that an Archaka can also be a trustee or manager. As pointed out in my learned brother's judgment, in cases of small endowments, the fact that the same man holds offices in dual capacities very often occurs. It has also been contended that in the title deed the word used is 'manager' but not 'a trustee'. This controversy, if it ever existed taking its root more in terminology than in essence, shall be taken to have been finally set at rest by the legislature. In the Act, 'trustee' means

'a person, 'by whatever designation known,' in whom the administration of a religious endowment is vested and includes any person who is liable as if he were a trustee'.

For the purpose of this case, we shall exclude from consideration 'any person who is liable as if he were a trustee' as we are not here concerned with any question of liability but with the right of succession to the office. Such a 'trustee' is 'a trustee de son tort' or 'a trustee de facto'. The heir or 'a trustee de son tort' cannot claim right of succession to the office, held by his ancestor, as an usurper. In the definition,

emphasis is on 'vesting of the administration'. According to the title deed, the grant is vested in the manager subject to fulfilment of the conditions thereof. The manager, referred to, is, therefore, a trustee within the meaning of the Act. Our task is to find out who has been the manager at through. Roughly speaking, from sometime before the year 1862 uptodate, the administration of the endowment has been carried on by the members of the plaintiff's family and the office has gone down from father to son. This, however, may not be enough to make them hereditary trustees. In this connexion, I shall advert to the definition of the words 'excepted temple' and 'hereditary trustee'.

'Excepted temple' means and includes' a temple the right of succession to the office of the trustee or the offices of all the trustees (which there are more trustees than one) whereof has been hereditary, or, the succession to the trusteeship whereof has been specially provided for by the founder.'

In the instant case, succession to the trusteeship has not been proved to have been specially provided for by the founder. We are, therefore, only concerned to find out if in the case of this temple 'the right to succession to the office of trustee has been hereditary'. It has been contended by Mr. P. V. B. Rao, rather seriously, that unless one is appointed as trustee by the founder either contemporaneously with the dedication, or later absolutely with a right of succession from father to son, there would be no hereditary trustee. This contention, I should show presently, is not consistent with the definition of 'an excepted temple'. The words 'hereditary trustee' have also been defined in the following words;

'Hereditary trustee means the trustee of a religious endowment, succession to whose office devolves by hereditary right or by nomination by the trustee for the time being, or is otherwise regulated by usage, or is specially provided for by the founder so long as such scheme of succession is in force.'

Apparently, though not really, there appears some conflict or anomaly between the two definitions. At the first sight, it appears as if where the trustee of a temple is a hereditary trustee on account of succession to his office devolving by nomination by the trustee for the time being, the temple should not be an excepted temple. De-volution by succession by hereditary right, and its devolution by nomination .by

the trustee for the time being have been mentioned as two mutually exclusive alternatives in the definition of 'hereditary trustee'. This should ordinarily lead to the conclusion that one who succeeds by nomination does not succeed by hereditary right. If the difference is kept up on the assumption that the two modes of devolution are capable of two distinct and divergent conceptions in the matter of succession, the position on which we should land will be that those of the temples whose trustees are 'nominated hereditary trustees would not be excepted temples within the meaning of the Act. Excepted temples, in the matter of their treatment in the Act, are more or less privileged. It would amount to denying this privilege to such temples as are administered by trustees nominated by their immediately preceding trustees from generation to generation. If the Legislature, in treating excepted temples and their trustees preferentially, did so out of respect for their permanently vested right, there would be no logic, far less, any reason, in excluding such of the temples and their trustees as enjoy by and derive their right of succession from a mode of devolution based on nomination which mode probably has more merit to recommend itself for preferential treatment than others. This nomination, as a mode of devolution of office, must have merit rather than consanguinity or natural relationship for the purpose of succession where the right is burdened with responsibilities.

13. This consideration, however weighty, should not, according to the accepted rules of construction of statutes, compel us to ignore the plain grammatical meaning of the words in which the words 'excepted temple' have been defined. That definition clearly requires that the right of succession to the office must have been hereditary. The word 'right' precludes succession either casual or by chance, and this right, howsoever acquired, must have been associated with heredity. For a time, during the course of argument, I was inclined to take the view that the mere circumstance that the succession to the office of a -trustee of a temple has, as a matter of fact as distinct from as a matter of right, been hereditary would be enough to make the temple an excepted one; but on second thought, I have come to the conclusion that with such an intention, in view the legislature should not have used the words 'right of succession.' The factual position conceived as a determining factor would have been adequately well expressed without fear of any ambiguity by merely expressing to say 'succession to the office &c.; has been

hereditary'. The trustee in the very case must be a rightful trustee. It is clear to my mind that the trusteeship of an excepted temple must be one whose succession is governed by right of heredity. The question that then falls to be considered is whether succession devolving by nomination by trustee for the time being, or, in other words, whether the mode of fixation of the next successor of the trustee by his selection, would be hereditary succession. The dictionary meaning of the word 'hereditary' is 'descending by inheritance'. 'Inherit' means 'receive by legal descents or succession'. One getting another's property by testamentary succession also succeeds to it. Such succession is known as testamentary succession. The rule of inheritance is not of necessity a rule based upon either consanguinity or relationship between inheritor and the inherited, or, the successor or succeeded. My conclusion, therefore, is that in the definition of 'hereditary trustee', the two alternative clauses, referred to, have been used as abundant cautela; succession by nomination adopted as a rule of inheritance amounts to'hereditary succession' within the meaning of the definition, of 'excepted temples' in Section 6(5) of the Act.

14. Necessarily, the next step therefore is to find out whether the members of the plaintiff's family from the times of their ancestors uptodate have been occupying the office by right of hereditary succession and whether they had acquired any right to the office. That the right to trusteeship until disposed of remains in the founder is a fundamental rule. This rule being one of necessity, has prevailed from by-gone days both in the English and Hindu Jurisprudence, in the case of 'ST. JOHN'S COLLEGE V. TODINGTON', (1757) I Burr 158 at p. 200', Lord Mansfield held:

'A Charitable corporation, in so far as it is charitable is the creature of the founder.'

Based upon this view, Lord Hardwicks had ruled in 'GREEN v. RUTHERFORD', (1750) 1 Ves Sen 462 at p. 472, '

'that the founder may provide for the government and administration of his creature and the application in perpetuity of the revenue, which was ultimately decided by the Rouse of Lords in the case of 'PHILLIPS v. BURY', (1694) Shower P.C. 35, and contains an elaborate review of the rights of founders of charitable

and religious trusts. This is subject to the reservation that a founder may not, unless special power has been reserved in this behalf, after the constitution of the corporation, vary the trusts or modify the application of the endowment or its revenues. These principles have been applied in the case of religious endowments created in accordance with Hindu Law. According to that law, when the worship of an idol has been founded, the sebaitship is vested in the founder and his heirs unless he has disposed it of otherwise 'or there has been some usage or course of dealing which points to a different mode of devolution'.'

The erudite scholar Mandlik on Public Charities says:

'The repair and control of the things thus dedicated and the ownership of which has been renounced generally vested with the renouncer according to the usage of the country.'

Mitra Misra in the Viramitrodaya Vyavahardhayay remarks as follows:

'But ownership, so far as protection is concerned, does exist in the donor even when ownership, consisting of the power of disposition at pleasure, has been withdrawn (by renunciation) until the final accomplishment of the purpose of the donor who seeks certain merit according to precepts (on gifts); for the act imported by the word 'gift' will not be complete until the ownership of another has arisen.'

The above supports the usage of the country as to the dedicator's right in regard to a sort of guardianship over a thing dedicated. The usage that the founder's guardianship for the purpose of the protection of the things dedicated with the object of completion of the gift, that is to say, the reaching the grantee by the latter's enjoyment, for the purpose of earning merit by grantor, is consistent with usage of equal validity of the guardianship vesting in a merited trustee other than the founder so long as the trustee consumates the gift by its appropriation for the benefit of the grantee and secures the intended merit for the grantor. Such an usage received the approbation of the highest judicial authorities of India (See 'GOSSAMT v. ROMANLALJI'. 16 Ind App 137 and 'JAGAHINDRA v. HEMANT KUMARI', 31 Ind App 203.

15. Coming to the facts of the present case, it can be predicated that the mere fact that thefounder has not disposed of the right of sebaitship in the foundation deed or otherwise will not preclude the right of sebaitship growing in strangers (by which I mean strangers to the founder's family). If there is a long course of dealing regarding the sebaitship and the management, and the founder or his heirs acquiesced in it, prevailing for a length of time ripens into an usage prevailing in the institution, and persons who carry on the administration of the office of trustee and in that capacity, management of the trust property for the benefit of the trust, are as rightful sebaits as one could be by grant or disposition. , This would meet the cases cited by Mr. P.V. B.Rao in which it has been said that the trustee must be one to whom' the right must have been granted by founder. Those decisions are authorities on their own facts. They do not purport to lay down the whole law on the subject of acquisition or disposition of sebaitship by or to persons other than founders.' A case may arise in which a founder might say expressly that he retains the trusteeship in himself and in his heirs to come. That would present a different case. Any stranger claiming a sebaits right should then have to establish that he acquired trusteeship either by disposition or by adverse possession. Any usage contrary to the express reservation may in certain circumstance turn out invalid. Such a case does not arise. Any course! of dealing for a long time as in the present easel shall be considered to have a lawful origin. Presumption of lost grant should apply.

16. The decision in the case of 'RAMALTNGAM PILLAI v. VYTHILINGAM PILLAI, 20 Ind App. 150, lays down that on the question, of the right of succession to the office of Dharmakarta of a Devasthanam or temple, the only law applicable is the custom and practice which are to be proved by evidence. This rule, however, is subject to the condition that the particular mode of devolution is not inconsistent with or opposed to the purpose the founder has in view in establishing the worship. In accordance with this principle, it was held by Leach, C.J., and Madhavan Nair, J., in the case of 'Madana Palo v. Hindu Religious Endowments Board, AIR (25) 1938 Mad 98, relying on 'GANAPATHI v. SITHARAMA', 10 Mad 292; and 'RAMDAS V. HANUMATHA BAG', 36 Mad 364:

'There is no contradictory evidence that the management of this temple has been in the hands of the appellants' family for four generations. The trustee in 1862, that is, at the time of inam settlement, was their great grandfather and the office has been held by their paternal grandfather and by their father in succession. It has not been suggested that any one outside the appellants' family has ever been partaken in the management of the temple. That this justifies the conclusion that appellant No. 1 is the hereditary trustee is to be gathered from the decisions in 10 Mad 292 and 36 Mad 364.'

Their Lordships referred to '38 Mad 364' in the following passage quoted from their judgment:

'The case in '36 Mad 364', related to temple lands and a question was raised whether the trusteeship was hereditary in the family of the plaintiff. The members of the family had held the office of trustee continuously for over 100 years and there was no evidence that it was ever held by any other family. White, C. J., and Phillips, J., considered that this was sufficient to prove the hereditary rights which had been set up.'

They also relied on the dictum of their Lordships of the Privy Council in 'BABU GOPAL LALA v. TELUCK CHUNDER RAP, 10 Moo T A 183, that the absence in the deed of words importing thehereditary character of the tenure was supplied by evidence of long and uninterrupted enjoyment and by the descent of the tenure from father to son and that from this 'hereditary character' could be legally presumed.

Their Lordships summarised in the following words:

'We have in the case before us proof that the office has been held by the head of the appellants' family for four successive generations and that it is at present held by appellant No, 1 as the son of his father. Further, there is no suggestion that the trusteeship has ever been held outside the appellants' family. For these reasons we consider that the learned trial Judge was wrong in refusing to regard this as an excepted temple.'

With these reasons and the conclusion of this judgment I am in entire agreement with very great respect. Reasons applied in that apply 'mutatis mutandis' to the present case.

17. Besides, the unrebutted legal position of the hereditary tenure of the trusteeship of the plaintiff can be said to have been judicially determined in the decision of the District Judge based upon an arbitration award of the year 1868. In order to appreciate the significance of the said judgment, it is necessary to consider it in the light of the history of legislation relating to religious endowments in British India. As I have said, the earliest legislation on the subject was Beg. VII of 1817. This Regulation like Reg. XIX of 1810 had application only to endowments for public purposes. Those Regulations bestowed upon the Board of Revenue the general power of superintendence of the public religious endowments irrespective of the trustees 'thereof being hereditary or not. There were two classes of endowments, if not more, then in existence. In the case of one class, no trustee could be appointed without confirmation by the Board of Revenue or any other public authorities specified in that behalf. With regard to the other, the trustees had there hereditary rights. With regard to the latter class, the Board of Revenue had no power to ignore the rights of a person lawfully in office as trustee and to appoint another person in his place without dismissing him 'VENKATACHALA PILLAI v. TALUK BOARD, SAIDAPET', 34 Mad 375. When the Regulations were replaced by Act 20 of 1863, the said two classes of temples or endowments were dealt with differently in Sections 3 and 4 of the Act. This will be clear on reading the sections which are quoted hereinbelow:

3. 'Government to make special provisions respecting mosques, etc.' -- In the case of every mosque, temple or other religious establishment to which the provisions of either of the Regulations specified in the preamble to this Act are applicable, and nomination of the trustee, manager or superintendent thereof at the time of the passing of this Act, is vested in, or may be exercised by, the Government or any public officer, or in which the nomination of such trustee, manager or superintendent shall be subject to the confirmation of the Government or any public officer, the Local Government shall, as soon as possible after the passing of this Act, make special provision as hereinafter provided.

4. 'Transfer to trustee, & c., of trust property, in charge of Revenue Board.'--In the case of every such mosque, temple or other religious establishment which, at the time of passing of this Act, shall be under the management of any trustee, manager or superintendent , whose nomination shall not vest in, nor be exercised by, nor be subject to the confirmation of the Government or any publicofficer, the Local Government shall, as soon as possible after the passing of this Act, transfer to such trustee, manager or superintendent, all the landed or other property which, at the time of the passing of this Act, shall be under the superintendence or in the possession of the Board of Revenue, or any local agent, and belonging to such mosque, temple or other religious establishment, except such property as is hereinafter provided:'Cessation of Board's power as to such property--and the powers and responsibilities of the Board of Revenue, and the local agents, in respect to such mosque, temple or other religious establishment, and to all land and other property so transferred, except as regards acts done and liabilities incurred by the said Board of Revenue or any local agent, previous to such transfer, shall cease and determine.

18. Recalling the facts of this case, it appears that the members of the Committee were appointed in accordance with the special provisions referred to in Section 3 and enacted in Sections 7, 8, 9, 10, 11 and 12. The properties of such endowments were transferred to the Committee under Section 12. While on the other hand, in the case of temple in relation to the appointment of the trustee whereof the public authority had no concern, the property was transferred under Section 4 of the Act, to the trustee or manager for the time being, as the case may be. This is corroborated by the title deed of the inam settlement. It appears that the members of the Committee appointed for the division or the district wanted to take over or interfere with the management of the properties of the temple of Dadhibana Swamy on ignoring the title of and removing the then managers Naran Patro and others. The latter instituted the suit to establish that theirs was the status' contemplated within the meaning of Section 4 and they could not be removed by the Committee. Accordingly, the decision was to the effect that the trustee or the manager was in possession of the endowment as a matter of right and not on a temporary tenure so as to be removable at will by the members of the Committee. This judgment, therefore, finally determined the question now at issue,

that is, whether the ancestors of the plaintiff's family had a hereditary right to the trusteeship. That no body ever claimed the trusteeship of the temple is clear from the narrative given above. As I have already said after the passing of the Madras Hindu Religious Endowments Act, the members of the plaintiff's family were all along recognised as Dharmakartas. Under the circumstances, I have no hesitation in agreeing with my learned brother's conclusion that the plaintiff has established that he is the hereditary trustee of the temple. The only other question that was argued with amount of seriousness was that during the intervening period the plaintiff or his ancestors acquiesced in levy of such annual contributions from them under Sub-s. (2) of Section 69 of Madras. Hindu Religious Endowments Act were not payable by excepted temples. The question that has been mooted at the Bar is that this acquiescence either affords proof that the temple was not an excepted temple or bars the plaintiff's present claim. The acquiescence as a presumptive proof of the fact of hereditary tenure of the trustees is sufficiently rebutted by recognition as Dharamakartas from generation to generation and by the conclusive proof furnished by the decision of the Civil Court already referred to combined with the fact that there is no evidence to show that at any time after the founding of the temple any stranger to his family has ever administered thetrust. Acquiescence, In the circumstances of this particular case, cannot operate as estoppel. There can be no estoppel against law and there is no estoppel when the truth is known to both parties.

19. My learned brother has pointed out that notwithstanding the acquiescence, the plaintiff is entitled to litigate on the matter as the cause of action for it arose for the first time when the Hindu Religious Endowments Commissioner of Orissa give a decision that the temple concerned was a non-excepted temple. The Madras Endowments Board did not give such a decision and they did not question succession to the office being governed by a right of heredity.

20. Mr. P.V.B. Rao very strongly relied on three decisions of the Madras High Court, namely, 'PHATMABI v. MUSA SAHIB', 38 Mad 491; 'APPASAMI v. NAGAPPA', 7 Mad 499. '38 Mad 491' is very easily distinguishable. It was a case under the Muhammedan law. The fundamental difference between that law and the Hindu Law as to the rule of succession of trusteeship is that the former does

not recognise custom, usage or prevailing practice of an institution as a rule of law governing succession. According to Hedaya, trusteeship with right of heredity in matter of succession to office cannot be created except by the founder or Kazi (Court). It was, therefore, laid down in that case that the mere fact that several mutwallis successfully succeeded one another is no proof of hereditary character of mutwalliship. '7 Mad 500' was a case in which till 1842, the Collector used to appoint trustees. This shows that it was an endowment governed by Section 3 of Act. 20 of 1863. In such a case, it was held, mere chance of succession in a few instances is not proof enough of hereditary trusteeship. In 'BOIDYO GAURANGA SAHU V. SUDEVI MATA', 40 Mad 612, the majority view of the Full Bench does fully accord with the view that I have taken. Sir John Wallis, C. J., observed:

'The Institution of the hereditary office of trustee of religious or charitable endowment is in accordance with the custom of the country and recognised in Mad Reg, VII of 1817 and Act 20 of 1863 and is too firmly established to be altered , without legislation.'

I have already shown that the modern legislations, either the Madras Hindu Religious Endowments Act or Orissa Hindu Religious Endowments Act, have not effected any alteration so as to affect the usages of the country sanctioning the institution of hereditary trusteeship. The definitions, already dealt with, do not run counter to it. His Lordship lays down in the following passage:

'The institution of hereditary trusteeship is held to rest on the intention of the donor either expressed in the instrument of trust or 'to be presumed from usage and the doctrine of reveiter to the heirs if the donor on failure of the line of devolution prescribed by him must also, in seems to me, rest on his presumed intention.'

Similarly the presumed lawful origin of long course of dealing is the founder's intention. In '8 Cal 3 (sic.), also validity of usage relating to succession of sebaitship has been recognised and acted upon. By a long course of decisions, this proposition can now be regarded as unassailable. In the Mohammedan Jurisprudence, self-imposed or self-assumed guardianship does confer no legal status as a trustee compared to that of the de facto guardian or an intermeddler of a Hindu estate under the Hindu Law. Hence the fundamental distinction between

succession of mutwalliship of a Mohammedan institution and that of a sebait of a Hindu institution. That explains the decision of Tybji J. in '38 Mad' 491', already quoted.

21. In the premises aforesaid I should entirely agree with my learned brother that the plaintiff's suit shall be decreed with costs in the Courts below. In the result, the appeal fails and is dismissed with costs.