

(1966) 04 PAT CK 0016
In the Patna High Court
Case No : A.F.O.D. No. 445 of 1963

Mahanth Girjanand Bhagat and Another	APPELLANT
Vs	
Bhagwan Bhagat and Others	RESPONDENT

Date of Decision : 12-04-1966

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : AIR 1967 Patna 101

Hon'ble Judges : S.N.P. Singh, J;H. Mahapatra, J

Bench : Division Bench

Advocate : Lal Narain Sinha, Umesh Chandra Prasad Sinha, K.K. Sinha, Din Dayal Singh and Girish Nandan Sinha, for the Appellant; Kanhayalal Mishra, J.C. Sinha, J.K. Prasad, Ranjit Prasad and Rajendra Kishore Prasad, for the Respondent

Final Decision : Allowed

Judgement

Mahapatra, J.—Defendants 1 and 2 are the appellants Respondent 1, Bhagwan Bhagal brought a suit in the Court of the Subordinate Judge, Chapra, for declaration that he was the duly installed Mahant of Saddar Asthal of Turki and its subordinate asthals: and that neither of defendants 1 and 2 had any right or claim to the Mahanthship; and that the transfers made in favour of the defendants third and fourth party by defendants 1 and 2 in respect of the property belonging to that Asthal were fraudulent, without consideration and without any legal necessity, and therefore not binding on the plaintiff or the Asthal. He asked for recovery of possession of the lands and properties of the Asthal and for a permanent injunction against defendants 1 and 2 restraining them from withdrawing the amount of compensation money of Rs. 59,471.86 P. on account of acquisition of land and Rs. 2,235 as the price of sugarcane. He wanted to be held entitled to receive those two amounts, which had been deposited in suspense account by the Collector. Muzaffarpur. He also prayed for a decree for mesne profits from the date of the institution of the suit till the delivery of possession of properties. The transferees from defendants 1 and 2

were made the defendants third and fourth party to the suit.

2. The plaintiff's case, in brief, was that an Asthal of Kabirpanthi Bhaggataha Vairagi seet was situate in village Turki, thana Kurahni in the district of Muzaffarpur. There were several asthals at different places subordinate to that main asthal, which was established more than 300 years back. A long line of Mahanths had presided over that and were successively in possession of all properties belonging to the Sadar and the subordinate asthals. The devolution of office of Mahanthship had always been from Guru to the seniormost celebrate chela. Defendant 2, Narsingh Bhagat, was the last reigning Mahanth. He had succeeded to the Mahantship after the death of his Guru Mahanth Mahadeo Bhagat. The plaintiff was the seniormost celebrate chela and had been entrusted with the management of the properties and affairs of three subordinate maths (asthals) in the district of Saran, while defendant 1, who was a junior chela, was put in management of the subordinate maths at Siswa in the district of Muzaffarpur and Bhusawar in the district of Darbhanga. Mahanth Narsingh Bhagat fell in bad company and habits and began to waste the properties of the math- He, in collusion with defendant 1, executed a deed of nomination in his (defendant 1's) favour on the 17th December, 1951, whereby he nominated defendant 1 to succeed him after his death as Mahanth. Subsequently, he also executed a deed of surrender on the 15th September, 1952, in favour of defendant 1, Girjanand Bhagat, whereby he (defendant 2) gave up his Mahanth ship to him. The plaintiff filed a suit--title suit No 87 of 1953 against both the defendants in the Court of the Subordinate Judge. Muzaffarpur, for declaration that he being the seniormost chela of defendant 2, was entitled to succeed to the office of Mahantship of the asthal at Turki according to the custom on the retirement of defendant 2 from that office by execution of the deed of surrender dated the 15th September, 1952, and that defendant 1 had acquired no right to that office by virtue of the nomination made by defendant 2. There was a compromise between the parties in that suit to the effect that the plaintiff should assume the Mahanthship: and a compromise petition was to be filed to that effect in the suit. The plaintiff signed on a blank paper and gave it to the defendants to write the compromise petition on that and file it in Court. According to that compromise, the plaintiff assumed the office of Mahanthship and took possession of all the properties of the math. His installation ceremony took place on the 16th February, 1956, according to the custom and usage of the math. Later on the plaintiff came to know that the petition of compromise, that was filed in his suit by defendants 1 and 2, was not in accordance with the terms of agreement and the defendants had practised fraud on him in that respect. When defendant 1 asked for mutation of his name in the Hathwa Revenue office in respect of properties of Chanwa subordinate asthal, the plaintiff objected to that; but without success. Later, a proceeding u/s 145. Criminal Procedure Code, arose between the parties in respect of Chanawe properties and was decided against defendant 1 by the order passed by the Magistrate on the 4th June, 1947; but that order was revised by the High Court at the instance of defendant

1 on the 25th February, 1959. Following that, defendants 1 and 2 dispossessed the plaintiff from all the properties of the math and the subordinate asthals, details of which were given in schedule 1 of the plaint. In the plaint, the transfers made by defendants 1 and 2 of some of the math properties in favour of the defendants third and fourth party were also stated and challenged. The plaintiff asserted that the custom about succession to the office of Mahantship as prevalent in the asthal in this case is that, after the death or retirement of the reigning Mahanth, his seniormost chela succeeds to the Mahanthship and he is installed to the Gaddi after the performance of Bhandara when, in an assemblage of Mahanths and sadhus of the sect of Kabirpanthi and respectable persons of the locality, the Chhadar is bestowed on him by the Mahanth of Achharya Math, Dhanauti in the district of Saran; and after those ceremonies are duly performed the seniormost chela gets the recognition. Since defendant 1, Girjanand was a junior chela, the plaintiff attacked the validity of his nomination by defendant 2, and further pleaded that without the chhadar ceremony and the installation, he (defendant 1) had not become the mahanth. On these allegations, he claimed the reliefs as already stated.

3. One written statement was filed on behalf of both defendants 1 and 2, wherein they referred to the custom and usage of the Turki Math to the effect that a Mahanth in his lifetime nominates a competent chela of his as his successor irrespective of his seniority. As such, the chela becomes the Mahanth on the death or retirement of the reigning Mahanth. Installation or the Chaddar ceremony is not an essential part of conferment of title to the math and its properties. According to the custom, the Mahanth is to lead celebrate life and to maintain high character and lead a life of discipline. They challenged the plaintiff by saying that he was a householder and not a celebrate chela. The nomination by defendant 2 of defendant 1 as his successor was asserted to be valid and not contrary to the prevailing custom and usage. The transfers of properties by the defendants were similarly claimed to be valid. About the compromise in the previous suit filed by the plaintiff, they said that no fraud was practised upon them and the present suit was challenged as barred by res judicata on that account. On these pleadings ten issues were framed of which issues 4 and 5 related to custom and issue 8 was about the compromise in the previous suit, issues 7 and 9 about the plaintiff's possession and dispossession and his acting as Mahanth. Issue 6 was in regard to the nomination of defendant 1 as successor to defendant 2. The question of res judicata was in issue No. 2; and whether the plaintiff was a celebrate chela of defendant 2 was raised in issue 3.

4. The trial Court has decreed the plaintiff's suit holding that the custom that developed at the math was that a ruling Mahanth nominates his successor, but his choice rests upon the seniormost chela unless he (the chela) suffers any disqualification or is found to be unfit for the Mahanthship; installation ceremony is not essential. About the defendant's nomination, the Court held that it was done secretly by defendant 2 ignoring the claim of the plaintiff and could not be upheld by Court. The Court found that the plaintiff had signed a blank paper

without putting a date under it and some fraud had been practised by defendants 1 and 2 in filing the compromise petition in the previous suit between the parties. The plaintiff, therefore, was not bound by that. It was further held that the installation of the plaintiff had been performed; and that he was the actual Mahanth, though he had been out of physical possession of the properties. In that view, the suit was decreed and the plaintiff was held entitled to recover possession of the properties. Against all these, the present appeal is directed.

5. The question of res judicata is linked with the plaintiff's allegation that the disposal of his former suit on compromise was vitiated by fraud. If he succeeds in proving that, there will be no bar of principles of res judicata against him. We shall deal with the alleged fraud separately. Let us now consider, assuming that there was no fraud in respect of the compromise, whether the appellants can invoke the bar of res judicata against the suit. The main questions and the parties involved in the two suits are the same. Section 11 of the CPC provides that no Court shall try any suit or issue in which the matter has been directly and substantially in issue in a former suit between the same parties litigating under the same title. The basic principle of the rule of res judicata is that the cause of action for the second suit does not survive as it was merged in the judgment passed in the former suit. In the present suit, the plaintiff stated his cause of action to have arisen in the middle of April, 1954, when the plaintiff assumed the office of Mahanthship and took possession of all the math properties, on the 16th February, 1956, when the plaintiff was installed to the gaddi, on the 17th January, 1959, when the plaintiff learnt about the transfers of properties made by defendants 1 and 2 in favour of the plaintiffs 3rd and 4th party, on the 1st March, 1959, when the plaintiff was dispossessed from the disputed properties, and finally on the 31st March, 1959, when the plaintiff last demanded from the defendants possession of the properties. In the former suit, that is title suit No. 86 of 1953 he stated that his cause of action had accrued on the 15th September, 1952, when defendant 2 abdicated the Mahanthship and on the 15th January, 1953, when the plaintiff last demanded the possession of the offices of Mahanthship from the defendants (see paragraph 11 of the plaint in the former suit exhibit Y). Though the cause of action had been stated differently in the two plaints, they were virtually the same; and the issues involved directly and substantially in both the suits cannot be said to be different. In that view, it was urged for the appellants that the present suit was barred by res judicata as the former suit being dismissed, the issues involved must have been taken to have been decided against the plaintiff.

Learned counsel pointed that the two cases relied upon by the Court below to conclude against the application of res judicata were irrelevant because one of them *Gainda Mal v. Madan Lal* AIR 1948 EP 30 was a case in which the suit was allowed to be withdrawn under Order 23, Rule 1, Civil Procedure Code; and in the other-- *Mukha Singh and Others Vs. Ramchariter Singh and Others*, the suit was dismissed for default under Order 9, Rule 8 of the Code. In both those cases, there was no decision by the Court. This comment is appropriate.

Learned counsel wanted to draw support in his favour from the case of Chandi Charan Bandopadhyaya Vs. Nabagopal Sarkhel and Others, in which a consent decree was passed. There, it was observed that, as far as the principles of res indicate were concerned, there was no difference between a consent decree and a decree on adjudication by a Court. In that case a person, who was not legally adopted, was recognised in the compromise to be a validly adopted son. On that basis, a compromise decree was passed. Later, when the question of adoption was raised in another suit, the bar of res judicata was pleaded against that; and the Court held that that was so barred. In my view, this case is equally irrelevant for our purpose, because neither the plaintiff nor the trial Court wanted to avoid the Rule of res judicata on the ground that the former case was disposed of on compromise.

Another case relied upon by learned counsel in Ganesh Jha Vs. Baidyanath Jha and Others, , That was a reversioner's suit The plaintiff was the defendant in a previous suit, where the widow's alienation was challenged; and the Court held that the sale by the widow was collusive and left the question of legal necessity undecided. This Court, while dealing with the appeal arising from the second suit on a challenge to the allegation made by the widow, held that, although the Court erroneously in the previous suit had left the question of legal necessity undecided, yet that will be impliedly taken to have been decided against the plaintiff who had challenged that In that view, the same question in the second suit was barred by res judicata When an issue is decided partly, the other part involved in it is to be taken to be impliedly decided so as to attract the Rule of res judicata against his subsequent suit involving the same issue or the allegedly undecided part of the issue.

6. In the present case, no issue involved in the former suit was decided at all. Even no written statement was filed by any of the defendant (see D. Ws. 14 and 19) The plaint was filed on THE 25th August. 1953 The petition of compromise was put in on the 21st April, 1954 (Ext. II); and the final orders were passed on the 3rd May. 1954 (Ext. X). The compromise petition was a short one and said ; "Hence, it is prayed that the suit may be dismissed without adjudication".

The Court passed the following orders on the 21st of April and the 3rd of May. 1954 :

"21-4-1964. Plaintiff and defendants file a petition of compromise. Put up on the dale fixed.

3-5-54. Petition filed by the parties on 21-4-1954 is put up. The suit is dismissed without adjudication as prayed for "

It is thus clear that before any controversy was raised in the suit by filing any written statement by the defendants, both the parties agreed that the plaintiff's suit should be dismissed without adjudication upon any of the questions involved therein. The Court, in its final order, also dismissed the suit, but clearly stated that it was without any adjudication on any of the matters directly and

substantially involved in the suit. In that view, the decision in Ganesh Jha Vs. Baidyanath Jha and Others, relied upon by learned counsel for the appellants is clearly distinguishable and cannot lend any support to the appellants.

7. A second suit on the same cause of action and involving the same issues is barred by provisions of law in some cases, such as, Order 9, Rule 9, Order 23, Rule 1, Code of Civil Procedure. The doctrine of res judicata was in application even before the CPC was codified and Section 11 enacted. One thing important in this connection to be noticed is that when a matter, which is directly and substantially in issue in the suit, has been heard and finally decided by a Court previously, the principles of res judicata will be attracted. The decision on the former suit may be express or implied. Where a question, which could and should have been decided, was left unnoticed or unspoken in the previous judgment, it may, by implication, be taken to have been rejected in that judgment; and in that view, the Rule of res judicata can be attracted. Even in a case like the case of Ganesh Jha Vs. Baidyanath Jha and Others, where the Court decides in a former suit a part of an issue and leaves the other part open, that other part be taken impliedly to have been decided against the party, who raised it; and, in that view, will be attracted the bar of res judicata. But if in a former suit, the Court does not decide any issue even partly and says expressly that it leaves such issue untouched and undecided, a second suit on such issue cannot be barred by the doctrine of res judicata. A person cannot be sued twice for the same cause; and there should be finality of litigation; but if the same cause is not decided at all, it cannot be avoided in a subsequent suit for the same reason that it was stated in the former suit.

8. A leading case in this respect is to be found in 3 CWN 517 (Privy Council) . There, the trial Court in respect of some issue said expressly that it left that question untouched and undecided. When res judicata was pleaded against the trial of that issue in a second suit it was successfully repelled. Their Lordships observed that as there was no decision, there was no ban of principles of res judicata. That case was referred to in the case of Madan Mohan Lal v. B. Borooah and Co. of Delhi AIR 1919 Lah 72; and it was observed [hat what was actually decided in the previous litigation and not what ought to have been decided would determine the applicability of the Rule of res judicata it is true that when a party did not plead a defence which could have been pleaded, it would be taken that he had pleaded that, but that was refused by the Court; but where a Court says that it does not decide a question, it cannot be taken that it had decided it one way.

In the case of Bankey Behary Singh and Others Vs. Emperor, the Court refused to apply the doctrine of res judicata, because the issue involved was not heard and decided in the previous suit. A similar view was taken in the case of Karim Baksha and Others Vs. Abdul Jabbar Miaji, . In a later decision of this Court in Banarsi Prasad Vs. Awadh Bihari Dass and Another, a decree was passed in a former suit for possession of disputed properties by the plaintiff, but it was silent

about the mesne profits for the period between the suit and delivery of possession. When a second suit was instituted for such mesne profits, the plea of res judicata was raised against the plaintiff, but the Court did not allow that to apply. In that case, in the former suit the plaintiff had asked for mesne profits in his plaint and it was raised in issue also; but, perhaps through oversight, the judgment and decree remained silent about it. The relief about mesne profits for the period after the institution of the suit till delivery of possession of the suit properties did not arise on the date of the previous suit; and, in that view, that was not taken to be a relief as claimed in the plaint within Explanation V given to Section 11 of the Code of Civil Procedure. Otherwise, that would have been deemed to have been refused in the former suit for purposes of res judicata.

9. If the Court, on the previous occasion when the plaintiff had filed his suit, would have only dismissed the suit or if the compromise would have only stated that the plaintiff's suit should be dismissed, it would have been taken as if all matters involved directly and substantially in the previous suit were decided against the plaintiff. Both the compromise and the final orders passed in that case should have been taken, by implication as a decision against the plaintiff. But when both the compromise and the final orders by the Court expressly stated that the dismissal was without adjudication of any of the issues or matters involved in the suit, the position is entirely different and keeps out the bar of res judicata.

Reference may be made, in this connection, to *Biram Prakash Chela M. Puran Das and Others Vs. Narendra Das and Others*, . There the suit was dismissed on compromise. Nothing was stated to qualify that, unlike in the present case. Neither the compromise nor the orders said that the Court did not adjudicate upon any point. A disposal of all the contentions raised by the plaintiff in his plaint, by agreement between the parties against the plaintiff was inferred and the dismissal of the suit in accordance therewith was taken as rejecting all the contentions of the plaintiff. That, in my view illustrates the difference between the two classes of cases, where the Court expressly states that the suit is dismissed, but without adjudication, and where merely a dismissal is recorded. In the case before us, since the compromise and the final orders had specifically noted that no question was adjudicated upon either by Court or by agreement between the parties, the appellants cannot raise the bar of res judicata against the plaintiff's suit.

10-12. The compromise in the previous suit was alleged by the plaintiff to be fraudulent, inasmuch as he was made to sign a blank paper on the understanding that a compromise would be recorded thereon to the effect that the plaintiff was the Mahanth of Turki Asthal and would continue in possession. [After discussing the evidence His Lordship continued as under :--

The petition of compromise as it is (Ext. H) cannot be held to have been without the knowledge of the plaintiff or in any way vitiated by any fraud on the part of defendants 1 and 2. Though that may not operate as res judicata against the

present suit, yet that would be a strong piece of evidence against the plaintiff's case.

13-17. The plaintiff asserted that he was the reigning Mahanth according to the custom after defendant 2, surrendered his office. In paragraph 5 of his plaint he stated that :

"According to the tenets and customs of the asthals and Bhagatha seet of Kabirpanthies the devolution of the office of Mahantship has always been from Guru to the senior celebrate chela of the last incumbent and the entire properties of the asthals passes, after the death of the incumbent Mahanth, to the succeeding Mahanth by virtue of his office as reigning Mahanth for the time being and whenever the incumbent has nominated his successor he has always done so by a deed and the nomination has always been of the seniormost chela and the custom of succession of the seniormost chela has never been infringed nor the incumbent Mahanth has any power to alter the line of devolution and the succession of the office of the Mahantship according to his own choice and sweet will".

In paragraph 6 he said that :

"According to the custom prevailing at Turki asthal and also according to tenets of Kabirpanthies Bhagatah seet after the death or retirement of the reigning Mahanth his senior-most chela succeeds to the Mahantship and is duly installed to the gaddi after the performance of Bhandara when in an assemblage of Mahanths and sadhus of the sect and respectable persons of the place and locality the chaddar of Mahanthi is bestowed on him by the Mahanth of Acharya Math Dhanauti, district Saran, and it is only when these ceremonies are duly performed that the senior chela gets his recognition and legal identity irrespective of the fact whether the outgoing Mahanth is alive or dead".

I have quoted those two paragraphs in order to show what exactly was alleged to be the custom of succession to the office of the Mahanth in the suit math, according to the plaintiff. This is necessary, because during argument before us learned counsel appearing for the plaintiff-respondent gave up the installation ceremony, as any essential part of the custom. The trial Court was of the same view. It has now to be seen if the plaintiff proved the other part, namely, that the devolution of the office is in favour of the seniormost celebrate chela of the last incumbent Mahanth. The defendants disputed that in their written statement (paragraphs 8 to 11) and pleaded that the custom was that the reigning Mahanth in his lifetime nominates a competent chela of his as his successor, no matter whether he is the seniormost or not; the person so nominated became the Mahanth on the demise or retirement of the reigning Mahanth; it is not necessary that the person nominated by the Ex-mahanth shall be installed, on the gaddi or chaddar shall be given to him by any one in order to give him the right to the Mahantship or to confer upon him the title to the properties of the Math and subordinate Maths.

[His Lordship then discussed the evidence and held that the plaintiff's case as regards succession of seniormost chela or of his installation could not be believed. The judgment proceeded as under:]

18. Learned counsel for the plaintiff-respondent endeavoured to make out a new case with regard to the rule of succession that should apply to the Asthal at Turki. He advanced that it being a Mourasi Math, the established Rule of succession in such maths should apply here. He contended that spiritual succession from Guru to Chela is recognised in Hindu Law. Mahanth is not an absolute owner of property; and the inherent power of transfer of property or appointment of a successor in that respect cannot be attributed to a Mahanth. He referred to the written statement, where the defendants had also spoken that by custom the right of nomination was with the reigning Mahanth. Thus, he argued, the power to appoint a successor is not attributable to the Mahanth, unless that is confirmed by a long standing custom. To show that the asthal at Turki is a Mourasi Math, he relied upon the three classifications of Maths given in the case of *Ram Parkash Das v. Anand Das* 43L.R. I.A. 73: AIR 1916 PC 256. Referring to the case of *Mahant Rama Nooj Dass v. Mohant Debiraj Doss* (1839) 6 SC S. D A. (Beng) 262 (328), their Lordships of the Judicial Committee observed:

"that the maths are of three descriptions, namely, mouroosi, punchaiti, and hakimi, that in the first the office of the chief mahant was hereditary, and devolved upon the chief disciple of the existing mahant, who, moreover, usually nominated him as his successor; that in the second the office was elective, the presiding mahant being selected by an assembly of mahants; and that in the third the appointment of the presiding mahanth was vested in the ruling power (Presumably the civil power). "or in the party who endowed the temple.""

According to the evidence on either side, learned counsel contended, Turki math cannot come under the latter two classes. Hence, it has to be taken as belonging to the former class, Mourasi Math; and, therefore, the succession should devolve upon the "chief disciple" of the existing Mahanth, which according to learned counsel, means the seniormost chela. This argument assumes that there is a fixed Rule of succession applicable to all Mourasi Maths and that in all such cases the seniormost chela automatically succeeds in his own right to the office of the mahanth and the properties of the math. Both these assumptions are not correct. In the first place in that very decision 43L.R. IndAp 73: AIR 1916 PC 256 their Lordships of the Judicial Committee, immediately before the above quotation, observed as follows:

"The question as to who has the right and office of mahant is one, in their Lordships opinion, which, according to the well-known Rule in India, must depend upon the custom and usage of the particular math or asthal. Such questions in India are not settled by an appeal to general customary law; the usage of the particular math stands as the law therefor."

19. In the case of *Greedharee Doss v. Nundokishore Doss* MI 11 R (1866) (405)

at p. 428 Lord Romilly said:

"that the only law as to these mahants and their offices, functions, and duties is to be found in custom and practice, which is proved by testimony".

Sir Barnes Peacock. Chief Justice of Bengal, observed in that case (which was affirmed by the Judicial Committee in MI 11 R (1866) 405 and which was quoted with approval in the case of (1876) L.R. 4 I.A. 76 (Privy Council)

Numerous, cases have been cited to show what was the usage, but the law to be laid down by this Court must be as to what is the usage of each mahantee. We apprehend that if a person endows a college or religious institution, the endower has a right to lay down the Rule of succession: but when no such Rule has been laid down, it must be proved by evidence what is the usage, in order to carry out the intention of the original endower. Each case must be governed by the usage of the particular mahantee."

20. In the renowned book, the Hindu Law of Religious and Charitable Trust by B.K. Mukherjee (a former Judge of the Supreme Court), in which were compiled the Tagore Law Lectures delivered by him at page 316 of the second edition in 1962, it has been stated:

"Succession to the office of Mohunt is a matter of some importance and complexity, and you would notice a marked distinction between devolution of the rights of a shebait and those of a Mohunt or superior of a Mutt. In all kinds of endowment the primary Rule undoubtedly is that it is for the founder of endower to prescribe the rules according to which the succeeding managers are to be appointed. If these rules do not violate the provisions of any law, they would certainly be given effect to. On this point there is no distinction between a debutter and a Mutt. But questions would arise when the origin of an institution is unknown or the founder has not laid down any rules relating to the devolution of the rights of management. In such cases the rights of a shebait as I have already told you devolve like any other species of heritable property according to the law of inheritance. In a Mutt on the other hand it is the custom or practice of a particular institution which determines as to how a successor is to be appointed."

Referring to some decisions of the judicial committee, the learned author has said:

"By custom or usages are not meant any general customary law by appeal to which these questions have to be decided. They refer to the usage of the particular institution or Mutt in regard to which the question arises The constitution and the rules or religious brotherhood amongst the Hindus are by no means uniform and what the Court should try to ascertain is the special laws and usages, if any, of the particular institution whose affairs have become the subject of litigation It may be taken to be settled law that the controlling Rule with regard to the right to the office of the Mohunt would have to be found in the

usage and customs of the institution provided however that there are no rules relating to the same laid down by the founder. The legal principle seems to be that the wishes of the grantor are to be primarily respected in such matters, but when there is no evidence of any direction given by the founder, the usage or practice that obtains in any particular institution is to be regarded as presumptive evidence of the grantor's intentions.

Three things you would have to bear in mind in connection with the question of succession to the office of a Mohunt. The first is what if the grantor has laid down any particular Rule of succession, that is to be given effect to. Secondly, in the absence of any grant the usage of the particular institution is to be followed; and in the third place, the party who lays claim to the office of a Mohunt on the strength of any such usage must establish it affirmatively by proper legal evidence. The fact that the defendant is a trespasser would not entitle the plaintiff to succeed even though he be a disciple of the last Mohunt, unless he succeeds in proving the particular usage under which succession takes place in the particular institution referring to the case of *Gendapuri v. Chhatarpuri* and (1874) L.R. 1 I.A. 209 (Privy Council) ."

Every Math is an endowment and brought into existence for a particular purpose. The Rule of succession in each case is dependent upon that the original endower may have in his mind. If that is not traced precisely, that is inferred from the way in which succession from Mahanth to Mahanth has followed in a particular Math. It is really succession to the office of the Mahanth; and one, who so succeeds, comes to manage the properties, if any attached, to the Math. It is not succession to property in the sense one succeeds to the estate of a last male-holder. The public character of such endowments and the religious and charitable purposes for which they are created keep the head or the superior or the Mahanth, as may be called, in charge of the management of the properties endowed, to utilise the usufruct therefrom for the specified benevolent purposes. In that context, no general Rule of succession can be applied uniformly to all the maths. Nor can they be classified into any particular groups. If the special custom in regard to succession at Turki Asthal, as pleaded in the plaint, is not established on evidence, the "plaintiff, even if he is the senior chela of defendant 2 cannot succeed to the office. The three divisions quoted in 43 L.R. 73 IndAp 77: AIR 1916 PC 256 at p. 257) from the case of *in (1839) 6 Sel. Cases S. D. A., (Beng) 262 (328)* have no general application in the sense that every Math must be fitted in to one of those three classes. That kind of division was stated as it appeared from the evidence of some of the Mohunts of Purroostum Chhuttur (Puri), when Mr. Money of the Sudder Dewanny Adawlut had asked the Zillah (District) Judge of Cuttack to enquire "as to the usages and customs current among the the different establishments of the Muths at Juggarnath (Puri) in regard to the selection and appointment of a superintendent". The Sudder Dewanny Adawlut did not act upon that evidence and called for the opinion of the pundit of the Adawult as to what was the law in regard to the appointment of a presiding Mohunt of a muth or temple called "Mouroosi"; whether the principal

disciple of the last Mohunt should succeed or whether the existing Mohunt was competent to appoint whom he pleased from among the body of his disciples. The reply of the pundit was:

"Under the circumstances stated in the question, the principal chela or pupil is entitled to succeed on the death of the presiding mohunt of a mouroosi, or hereditary muth. If the principal pupil be personally unfit to succeed, or be disqualified by any of those causes which according to the shastra are sufficient for such disqualification, then in that case, the presiding mohunt should, during his lifetime, select, one properly qualified from among his pupils, to succeed him. The person so selected will succeed".

Acting on this opinion, the plaintiff-appellant in that case was allowed to be the Mohunt of the Muth called Utrparus at Puri. The dispute had arisen between him and one Debraj Doss, both of whom had been appointed at different times by the reigning Mohunt, Jyeram Doss. The defendant's appointment by Jyeram Doss was found to have been departed from by himself on account of bad character and hostile behaviour of the defendant. The deed of gift executed in his favour was equally found not to have been acted upon. The plaintiff was recognised as successor by Jyeram Doss: and he was allowed to function at the Muth under Ins guidance till his death. The practice obtaining in the Muths at Puri is that the reigning Mohunt chooses one as his (Chela) and gives him the collar (necklace of beads) of Adhikari and trains him to be his successor. Others taking Diksha from the reigning Mohunt are known as disciples or Sishya. It is in that sense that the pundit of the Sudder Dewanny Adawlut in his opinion referred to the principal chela or pupil, who is entitled to succeed on the death of a presiding Mohunt of a Mourasi Muth. As a fact it was found in that case that the plaintiff-appellant was such a principal pupil or chela of Jyeram Doss and that he was not afflicted with any disqualification the defendant had alleged against him. Thus, the three divisions of the Muths as mentioned in that decision while referring to the report of the District Judge have not got that binding force as learned counsel wanted to impose upon the case. If that has any significance, that has to be taken as qualified with the opinion given by the pundit in that case to the effect that not the seniormost chela, in the sense it is claimed in the present suit, but the principal pupil or chela would ordinarily succeed to the office of the Mohunt of a Mouroosi Muth and that the reigning Mohunt has got the right or nomination of another in case the principal chela is disqualified. The fact that Jyeram Dass was dissatisfied with the defendant in that case, which was inferred from some of the letters written by him was considered by the learned Judges of the Sudder Dewanny Adawlut as a disqualification on the part of the defendant. Judged by that standard, with reference to the evidence of Narsingh Bhagat (defendant 2 in the present case) and the series of disputes between him and the plaintiff, one can hold the plaintiff to be disqualified; and in that case, his claim can be superseded by nomination of another person by the reigning Mahanth.

21. I may not be taken to ignore that some Maths are called Mourasi. That is a

nomenclature, which is applied in a general sense to the Maths, where succession to the office of the Mahanth is not by election by people other than the reigning mahanth That, however, does not mean that all the maths called Mourasi in that sense have got a uniform custom of succession: and that custom is that the seniormost chela succeeds to the office of the Mahanth. The trial Court referred to a passage of M.B.K. Mukherjee's book on the Hindu Law of Religious and Charitable Trust, to support its conclusion that the custom in regard to succession in a Mourasi math is in favour of the seniormost chela. First of all, whether Turki math is a Mourasi math or not has not been decided by the Court. On evidence, even if it is taken to be so, the custom does not deprive the reigning Mahanth of his right of nomination. The author (Mukherjee) has said at page 318:

"In a Mourashi Mutt the chela or disciple of the last Mohunt succeeds to the office; in default of chela, the office goes to the Gurubhai or co-disciple of the last holder; when there are more chelas than one, the eldest generally succeeds, but a junior chela may succeed if he is found more capable and if he is selected by the last Mohunt as his successor. *Achyutananda Das v. Jagannath Das*, 20 CWN122 . The trial Court did not look to the latter part though it quoted the former part of the above. Capability and not the seniority alone, is the guiding principle of succession and nomination. At the most, it may be contended that if the Mahanth has not made any nomination, the seniormost chela may succeed after his death; but the right of nomination has to be conceded if he so chooses during his lifetime; and that holds good in a case of a Mourasi Math. This is how I understand from the above quotation.

22. Two other cases were referred in support of the plaintiff. The case of *Kartar Rai and Another Vs. Taley Chowdhury and Others*, . That case arose out of a dispute about succession to the Mahanthship of Satlakha Asthan in the district of Muzaffarpur. The plaintiff's claim was dismissed by the trial court. He came in appeal to the High Court and asserted that the custom about succession prevalent in that Math was that if there were more than one chela, the seniormost succeeds to the office after the death of a mahanth. The defendant relied upon a will executed by the deceased mahanth to show that he had been appointed as his successor; but on evidence that will was found not to be genuine; and it was held that that document could not be accepted as an effective appointment of the defendant as the successor of the late Mahanth Dawson-Miller. C.J. considered the evidence specifically in regard to the custom of succession as alleged by the two parties and held that what was given on behalf of the appellant was preferable to that of the other side. Both the parties had agreed in that case that seven mahanth in all had presided over the asthan since the beginning during a period of more than a century and in each instance the evidence showed that the seniormost chela had succeeded to his Guru. The defendant admitted that that Math was "a Mourasi asthan that is to say, one in which the office of the mahanth is hereditary and, apart from custom, devolves upon the chief disciple of the existing mahant". It is on that admission, it was

taken, that the defendant had to prove a deviation from that admitted custom: and he, having failed to do, could not succeed. The learned Chief Justice also referred to the question of devolution of the Mahantship in a Mourasi Math as decided in the above mentioned Sudder Dewanny Adawlut case and quoted the opinion of the pundit as given there. In the concluding paragraph he observed:

"No doubt different customs proved in different Muths, and where such are proved to exist, they must govern the order of succession. But I apprehend that in the absence of proof of any special custom we should follow the general Rule laid down in 1839 with regard to Mourasi or hereditary Muths (referring to the Sudder Dewanny Adawlut case). The respondent (defendant) has in my opinion for the reasons already given failed to prove the custom as to devolution which he alleges and has admitted that the Satlakha Asthan is one of the descriptions known as Mourasi. For this reason also, apart from the fact that I consider the evidence of the appellants' witnesses more reliable as to custom, I think the appeal should be allowed and the decree of the Additional Subordinate Judge set aside".

It is thus clear that the plaintiff's claim was allowed on evidence of custom as alleged by him. The reference to the general Rule as noted by the pundit in the Sudder Dewanny Adawlut case in a Mourasi Math was only by way of an alternative support for the conclusion. The ratio to be taken from the decision is that the Rule of succession in a particular Math will depend upon the custom prevailing therein; and if any such custom is alleged by a party, he has to establish that before he can succeed to the office on that basis.

23. The other case in Gobinda Ramanuj Das Mohanta Vs. Ram Charan Das and Another, does not improve the plaintiff's position any better. There, the deceased Mohant had executed one will in 1908 in which he appointed the plaintiff as his successor. In 1918, he made another will in which he also appointed the defendant to be the Mohant after him but at the same time he divided some of the properties of the Muth to go to the plaintiff and the remainder to remain with the defendant. The two persons were put, one as a gadinashin mahant and another as paricharak mohunt. The Court found the document of 1918 to be invalid as that amounted to a partition in the office of the Mohunt. If that document would have been valid, that would have superseded the older document of 1908 and extinguished the appointment of the plaintiff; but, since the later document was invalid, the first document was treated to be in force and the plaintiff's claim to the office, appointed as the succeeding Mohunt by the deceased was upheld. Page, J. who gave a brief concurring judgment, after mentioning that the plaintiff's claim on the basis of the document of 1908 was to prevail, said alternatively:

"In my opinion, the same result would follow even if the Court were to hold that the will of 1908 had been revoked. The muth at Nayaganj was a Mourasi muth, and although it was not satisfactorily proved at the trial that it was in accordance with the rules of the Muth at Nayaganj that the senior chela should succeed to

the Gaddi on the death of the reigning mahant it is consonant with the principles of Hindu Law relating to a Mourasi Muth that the senior Chela should succeed a fortiori in the absence of a valid nomination by the reigning Mohant: See (1839) 6 Sel. Cases S. D. A. (Beng) 262 and 43 L.R. I.A.78: AIR 1916 PC 256 .

The case was really decided on the first finding on the validity of the earlier document in favour of the plaintiff. Reference to the general Rule was by way of an alternative support. Secondly, if I may say so with great respect, Page. J., mistook what was stated in the Sudder Dewanny Adawlut case as a principal chela or pupil to be the same as the seniormost chela. In any case, the right of appointment of a successor was conceded to the reigning Mahanth, like that of Nayaganj, which was the subject-matter of the appeal in the Calcutta High Court.

24. A decision of the Supreme Court in the case of Sital Das Vs. Sant Ram and Others, , which was referred to by both the parties and was noticed by the trial Court, also lays down that succession to Mahanthship of a math or religious institution is regulated by custom or usage of the particular institution, except where a Rule of succession is laid down by the founder himself who created the endowment. The view to that effect expressed in Gendapuri v. Chhatarpuri was re-affirmed by the Supreme Court. The same view was reiterated in Tulasiram Das v. Ramprasanna Das AIR 1956 Ori 416 relied upon by the parties and the Court below. It is not necessary to multiply references to other cases, because the same principle has all through been adopted in deciding about the disputing claims of aspirants to the office of the Mahanth of a math. It will, therefore, be not sound, to contend for the plaintiff that if he fails to prove the particular custom as he alleged in his plaint, he will still succeed on an application of a general Rule that the seniormost chela must succeed to the office of the mahanth on the demise or retirement of the last Mahanth in a math which can be said to be Mourasi.

25. Learned counsel for the respondent laid great stress on three documents, exhibit B, dated the 18th March. 1899, exhibit B (1), dated the 10th November, 1910, and exhibit B (3), dated the 18th August, 1937, by which Ham Bhagat, Mahadeo Bhagat and Narsingh Bhagat (defendant 2) were appointed as the succeeding mahanth respectively by the then reigning mahanth. No doubt, two of those documents, exhibits B and B (3) mentioned that the appointee was the seniormost chela of the reigning mahanth. The other exhibit, exhibit B (1), does not mention anything; but read with the evidence of D. W. 11, who spoke of three instances of nomination of a junior chela, but did not refer to Mahadeo Bhagat as one such instance, may be taken as an appointment of the seniormost chela. As I have said before, ordinarily the right of appointment will be exercised in favour of the seniormost chela, who is expected to be fit and qualified for the office. In the three instances, exhibit B. B (1) and B (3), the case might have been that way: but that will not establish that in all cases the reigning Mahanth is burdened with the customary obligation of selecting the seniormost chela even though a more capable and deserving junior chela is available and is considered

to be more suitable for the office Since the founder Chaturbhuj. Gossain, six Mahanths occupied the office. Of them three are said to have been junior chelas by some of the witnesses on the defendants' side. They were Doman, Lalbahadur and Mahadeo. The trial Court did not accept that version thinking wrongly that D. W. 11 ,had admitted in his evidence that Doman and Lalbahadur were senior chelas. His evidence was just the opposite. Even in cross-examination he said that it is not a fact that Doman and Lalbahadur were both senior chelas. In order to restrict the choice to the seniormost chela, there must be coercive evidence of a uniform custom or usage to that effect. Neither party said that such a Rule was laid down by the founder, Chalurbhuj Gosain. The plaintiff (P. W. 31) said in his evidence that:

"The custom of this math may be known from the wills of the previous mahanths. Wills and Surat Hall may show the customs. The genealogical table with Acharya may also indicate the custom".

None of those papers showing any custom was produced by him.

26. Even the seniority of the plaintiff was challenged by the defendants. In the written statement in paragraph 11 it was stated that he was not the seniormost celebrate chela. Mukhlal and Hitlal, the two other chelas, were senior to him and they were alive. Evidence was led on both sides as to whether the plaintiff was a Grihasth or celebrate The trial Court found that the plaintiff was a celebrate chela, Learned counsel for the appellants referred to exhibit B (3), the will, by which Mahanth Mahadeo Bhagat appointed defendant 2, Narsingh Bhagat, as the succeeding mahanth, where the plaintiff was an attesting witness and signed his name as Bhagwan Missir and not as Bhagwan Bhagat. That document was dated the 18th August, 1937. If he had become a celebrate chela by that time and had adopted the name of Bhagat, he would not have signed in his original name describing himself as Missir. His initiation as a chela, it was argued, must have been, if at all, after 1937, in which case he could not claim himself as the senior-most chela. As against this for the plaintiff, a reference was made to Ext 15, a previous deposition of defendant 1 in a criminal case on the 7th February, 1958, where he admitted that Bhagwan Das (plaintiff) was senior to him and he had been a chela of Turki Math. Defendant 1 in his deposition in this case said that he was initiated as a chela in 1947. In that view, the plaintiff should be taken as a chela before that. Except in the written statement, it does not appear that either of the two defendants had ever before asserted that the plaintiff was a Grihasth and not a chela, although there were several occasions when both sides contested each other in different proceedings in Court in relation to the math and its properties. The trial Court's finding that the plaintiff is a celebrate chela and senior to defendant 1 cannot be successfully assailed. But whether Mukhlal and Hitlal are two chelas senior to the plaintiff is another relevant question. Neither of them has been examined. On the 14th January, 1958, Narsingh Bhagat (defendant 2) in his deposition in a previous case stated that Bhagwan Das (the present plaintiff) was not his seniormost chela [see exhibit 15 (a)]; but by the

time their had been estrangement between the two and that statement cannot be taken as a conclusive proof. The non-examination of Mukhlal and Hitlal rather makes it difficult to accept that they are senior to the plaintiff. Even then, in absence of proof of a custom in favour of the seniormost chela, and absence of power of nomination in the reigning Mahanth, the plaintiff, though the seniormost chela, cannot claim, as of right, the office.

27. For the plaintiff it was also urged that the appointment of defdt. 1 by defdt. 2 as the succeeding mahanth cannot be upheld as it was done in secrecy and with mala fide intention. The document by which the appointment was made is a registered instrument. It was followed by another registered document by which defendant 2 surrendered his office to defendant 1. No doubt, Narsingh Bhagat admitted in his evidence not to have consulted the trustees or any one else in the matter of his selection and appointment of defendant 2; but there was no obligation cast on him in that respect. For the first time when Mahanth Mahadeo Bhagat appointed Narsingh Bhagat as his successor under exhibit B (3), dated the 11th August, 1937, he appointed several persons, as trustees of the Asthal and movable and Immovable properties attached thereto and directed the appointee to take advice of the said trustees "in the entire management of the estate and expenditure." Learned counsel contended that under the provision Narsingh Bhagat was bound to consult and take the advice of the trustees before he appointed his successor. The management of the estate cannot include a condition of that nature. It was also pointed out that when prior to the appointment of defendant 1, Narsingh Bhagat had executed a document appointing Ganesh Bhagat as his successor, he was prevailed upon by the trustees and others to cancel that document, as Ganesh Bhagat was not a desirable chela. When he was referred to that question in cross examination he said that, because he had not consulted the trustees before the appointment of Ganesh Bhagat, he cancelled that appointment. Something was stated in the deed of cancellation. From this, it was argued that he had realised that it was his duty to take the advice of the trustees in the matter of selection of his successor. It is one thing to say that one has a duty, but a legal obligation is a different thins. Appointment of a successor cannot be invalid for the reason that the advice of the trustees was not taken. When he was convinced that Ganesh Bhagat was not a proper chela, he decided to cancel that appointment, because by that time Ganesh Bhagat had not become the Mahanth as the deed of surrender had not been executed till then. It is difficult to accept that there was any secrecy when the appointment was made and the surrender was effected in favour of the appointee by registered instruments.

28. That the appointment was mala fide was not pleaded in the plaint; nor does any evidence appear to have been given in that respect. It was raised in argument. An objection of that nature has to be specifically pleaded to enable the opponent to meet it. The two documents, exhibit B (4) dated the 16th June, 1947, by which Ganesh Bhagat was appointed to the office of the Mahanth and Exhibit F, dated the 12th April, 1948, by which that appointment was cancelled,

do not indicate any mala fide on the part of defendant 2 in respect of his future action. The will under which defendant 1 was appointed is exhibit B (2), dated the 17th December, 1951, wherein the custom of the asthal is stated and the reasons for selection of Girjanand Bhagat (defendant 1) were given. That document, however, does not show that the executant had consulted either the trustees or the public of the locality or the Sadhus. Learned counsel wanted to stress upon this omission; but, as I have said before, no legal obligation is cast on him to do so, though that might have been a more prudent course.

29. The other incidents from which mala fide can be inferred, according to learned counsel, are the alienations by defendant 2 and defendant 1. As far as the alienations by defendant 1 are concerned, they are after his appointment and cannot be taken into consideration for bona fides or otherwise of his appointment when it was so made or the surrender made in his favour. It was not suggested that defendant 2 appointed defendant 1 with a motive to have the sale proceeds from the transfers to be made by defendant 1 after becoming the Mahanth of the asthal. Nor is there any evidence to support that. No corrupt motive whatsoever was pleaded against defendant 2. Learned counsel referred to exhibit 12, an application u/s 3 of the Charitable and Religious Trust Act made by one Kamli Mahto against defendant 2 in the Court of the District Judge. Muzaffarpur, on the 11th August, 1947 where he had asked the accounts about the income of the properties of the math to be produced by the mahanth in the Court. Exhibit 12 (a) is the compromise that was filed in that case on the 12th April, 1948, where it was stated that irrespective of the statement of the parties, the matter had been settled among them that, after examining the accounts of the Math by the trustees, there was no dispute among the parties and the compromise petition was filed asking for the dismissal of the case without any adjudication. Further, it was stated that except the trustees no other persons had any right to examine the accounts of the asthal. I cannot see how these two documents, taken together, can prove any allegation of waste, mismanagement or improper use of the properties of the Math by defendant 2. Some alienations by him were referred; but they were in respect of pre-existing debts by the previous Mahanth. The proceeding under the Charitable and Religious Trust Ad was in 1947-48 and the nomination of defendant I was in the year 1951. In no way the two incidents can be related. Similarly, the appointment of Ganesh Bhagat and the cancellation of the same in 1948 cannot be used as a basis for any inference of mala fide intention in appointing defendant 1 in 1951. Ganesh's nomination was cancelled because defendant 2 was made to realise that he (Ganesh) was not a desirable or capable person. After cancellation of his appointment, he was, however, given 12 bighas of land by Narsingh Bhagat. That may have been by way of solace; but for that act defendant 1 could not have any responsibility because that was before his appointment. The suggestion that that was by way of machination at the instance of defendant 1 has no evidence to support. Whether that alienation is valid or not is a different matter.

30. About defendant 1's qualifications for being the succeeding mahanth, there

can be little doubt. Compared with the plaintiff, he is decidedly superior in learning and conduct. Defendant 2 said in evidence that the plaintiff was always hostile to him and his conduct was improper. If the right of appointment is with the reigning mahanth, his judgment shall have to be taken to be final in regard to the consideration of the relative qualifications and suitability of the selected chela compared with other chelas. The plaintiff is hardly literate, being able to sign his name. He admitted that he did not know either Sanskrit or English and knew a little of Kaithi and Hindi. Defendant 1 has learnt Sanskrit and has read English, besides Hindi and Kaithi. The main function of the mahanth is to propagate the cult of Kabirpanthi and to maintain a peaceful and harmonious atmosphere in the Math where people are expected to come for religious discussion and discourses and other benevolent functions. If the choice of Narsing Bhagat ultimately fell upon defendant 1 in consideration of all the relevant matters, as he slated in the document, that should be taken to be final unless it is proved that it was a mala fide action on his part. If defendant 1 after his appointment indulged in any improper act, there is a remedy against him under the law; but till then, he holds the title to the office.

31. Learned counsel referred to the case of Nataraja Tambiran v. Kailasam Pillai, 48 Ind App 1 (AIR 1921 PC 84) in support of his contention that an appointment of a succeeding Mahanth will be invalid when it is not in the interests of the Mull. There is no dispute about that proposition. Whether or not a particular appointment is in the interests of the Math is a matter of proof; and the plaintiff has failed in this case to show that the defendant 1's appointment was not in the interests of the Math at the time when he was so made.

32. For all the reasons given above, the plaintiff cannot succeed in his suit. The appeal is allowed with costs, and the judgment and decree of the Court below are reversed. The plaintiffs suit is dismissed on contest by defendants 1 and 2 with costs and pleader's fee at 5 per cent, and ex parte without costs against the rest of the defendants. The suit having been instituted in forma pauperis, the Collector of Saran shall take immediate steps for the realisation of court-fees from the plaintiff.

S.N.P. Singh, J.

33. I agree.