

(1957) 09 OHC CK 0006

In the Orissa High Court

Case No : Second Appeal No. 482 of 1949

Ramakrushna Mohapatra and Others

APPELLANT

Vs

Gangadhar Mohapatra and Others

RESPONDENT

Date of Decision : 02-09-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 13 Rule 3, 100, 9
Evidence Act, 1872 — Section 13, 64, 90

Citation : AIR 1958 Ori 26

Hon'ble Judges : Narasimham, C.J;Das, J

Bench : Division Bench

Advocate : B. Mohapatra, S. Misra and S.K. Ray, for the Appellant; H. Mohapatra and P.C. Chatterji, for the Respondent

Final Decision : Dismissed

Judgement

Das, J.—This is a defendant's appeal (defendants 1 to 4 and 6 to 10) against the reversing judgment of the first additional subordinate Judge, Puri, decreeing the plaintiff's suit for a permanent injunction restraining the defendants from constructing a two-storied building within the inner compound wall of the temple of Lord Jagannath at Puri, any higher than the height of the said wall, and for restraining the defendants from defacing the said compound wall in any manner and to demolish the recent brick structure constructed over the same.

2. The plaintiffs described themselves as the members of an association or "Nijog" commonly known as "Suar Nijog" and filed the suit in a representative character under Order 1, Rule 8, C. P. C. The appellants similarly were sued in the representative character representing the "Pratihari Nijog" under the same provisions of the Code of Civil Procedure. The Raja of Puri is the Superintendent of the temple of Lord Jagannath who it is alleged, had permitted the defendants to put up the disputed structure, and hence he was arrayed as defendant No. 5. Though notice was duly served on him, he never appeared in this proceeding and was set down ex parte by the trial Court.

3. The temple of Lord Jagannath is a very ancient temple the origin of which is lost in antiquity. The greatness of this institution has been in existence since time beyond memory drawing multitudes of pilgrims from all corners of India. From the very inception of the temple, a large number of "Sevaks" were engaged to perform the "sebapuja" of the deities installed therein and these "Sevaks" formed into thirty-six different associations, locally known as "Nijogs", in accordance with the different kinds of services rendered by them.

These "Nijogs" are collectively known as "Chhatisanijog". The plaintiffs as stated above, are the members of a "Nijog" or association known as "Suar Nijog". Their duty was to prepare "Mahaprasad" which is offered to, the three deities, Lord Jagannath, Balabhadra and Suvadra, installed in the said temple. Similarly, the defendants belonging to another association known as "Pratihari Nijog" are the "Sevaks" who were originally engaged to look after the pilgrims, the observance of the "Nitis" and to maintain law and order inside the temple.

4. The plaintiffs' case was that the defendants' association or "Nijog" ever since the establishment of the temple was allotted a site with certain structure at the north eastern corner of the inner compound wall known as "Kurma Prachir". The said structure was a small room, the two walls of the inner compound in the north and in the east forming its two side walls. This room was intended for the "Pratiharis" to take rest while they were on duty, the local name of it being "Pratihari Nijog Bada".

Recently, the defendants wanted to construct a two-storied building on that site. Thus, while proceeding to construct a terraced roof over the room allotted to them, the defendants have broken the ornamented conical portions which adorned the top of the inner compound wall with a view to level it up to facilitate the construction of an upper storey over it by erecting further brick walls on the aforesaid two sides of the compound wall. To the said construction the plaintiffs objected on two grounds:

1. That it is an ancient and long-established usage and custom that within the inner enclosure of the temple no seat of the nature of a platform which is known as "Pitha", a flat, or a levelled-roof can be constructed at a level higher than the height of the inner compound wall, that is, the "Kuram Bedha Prachir" and any violation of this ancient and long-established usage will affect the very foundation and sanctity of the institution and is against all Sastric principles as enunciated in "Silpa Kaumudi" and other authoritative works on the construction of the temples.

2. That from time immemorial the ancient kings of Orissa, who established and were in charge of the management of this temple, have refused similar requests by Mahants, Zamindars and other Rajas and Ruling Chiefs of Orissa; since any such construction higher than the inner compound wall would be derogatory to the usages and custom upon which the temple was built.

5. The affairs of the temple, it was averred, are conducted by the Rajas of Orissa

in consultation with the Pundits and other learned Brahmins of Orissa who form an association known as "Muktimandap Sabha". The opinion of this association, it is said, was always held in high esteem by the said Rajas. On occasions prior to this when permission was sought for constructing flats, or "Pithas" higher in level than the "Kurma Prachir", such permission was not sanctioned by the "Muktimandap Sabha" and consequently was refused by the Rajas.

The simple reason for this being that no seat or "Pitha" for keeping the deities or for use of persons should in any way be higher in level than the "Ratna Singhasan", the raised throne on which the three principal deities are installed inside the inner sanctuary; that height of the inner compound wall being at the same level as that of the "Ratna Singhasan". According to the plaintiffs, the temple was constructed in accordance with the principles of "Kurma Jantra" as laid down in "Silpa Kaumudi" and other ancient Sastras.

The "Ratna Singhasan" is placed on the "Kurmapitha" (on the back of the supposed tortoise). The space inside the inner compound wall is called "Kurma Bedha" and the inner compound wall itself is called "Kurma Prachir". Thus, the height of the "Ratna Singha-san" being on the same level with the height of the "Kurma Prachir" any other construction of any "Pitha" higher than the height of "Kurma Prachir" will be higher in level than the "Ratna Singhasan" and as all other deities inside this inner compound wall are believed to be subordinate to that of the principal deity, the Lord Jagannath, it is scrupulously observed from time immemorial that none of these deities should sit on a higher level than the principal deity.

6. The plaintiffs, therefore, alleged that in accordance with the Sastric injunctions if such a construction is allowed to proceed, the "Bhog" that is the "Mahaprasad" which is offered to the deities will not have the same sanctity, and the "Kurma Prachir" which is one of the essential points of the main temple, will be defaced and spoiled and thereby the sanctity of the temple itself will be affected. Doubtless, the Hindu pilgrims from all over India and other persons including the plaintiffs are interested in the management, sanctity, upkeep and well-being of the temple which will be affected thereby.

Accordingly, the plaintiffs filed the present suit for a permanent injunction restraining the defendants from making any such construction over the said "Kurma Prachir" or any such construction or levelled roof, flat, or "Pitha" higher in level than the "Kurma Prachir" and for replacing the "Kangualas (ornamental constructions) that were broken by the defendants in order to construct the brick walls on the "Prachir" and for demolishing the said brick structures which had already been constructed.

7. The 5th defendant did not file any written statement, and as I have stated above, was set down ex parte. The defence of the other defendants was a complete denial of the custom and usage set up by the plaintiffs. They flatly denied all the allegations in the plaint and particularly the fact that this temple

was constructed either according to the principles of "Kurma Jantra" or any such principle as enunciated in "Silpa Kaumudi".

They further denied the rules and procedure of the construction of the temple as alleged by the plaintiffs and their whole case was that defendant 5 as Superintendent of the temple has got an unlimited power to permit, any construction of any building, flat, or roof and to effect any modification or alteration to the inside and outside compound wall of the temple. The plaintiffs cannot question the said authority of the 5th defendant.

They further averred that the inner compound wall is not known as "Kurma Prachir" and that many outsiders, Mahants, Rajas and Maharajas have constructed various structures for their deities inside the inner compound. There is no custom or usage prohibiting the same and that the alleged "Silpa Kaumudi" is an imaginary piece of document manufactured, by the plaintiff's for the purposes of this suit. Defendant 5 having permitted these defendants to construct a double-storied building, the present plaintiffs cannot object to the same.

The real fact was that there having been long standing disputes between "Suar Nijog" and the "Pratihari Nijog", this suit had been filed by the plaintiff's out of malice. The defendants also had stated in their written statement that a site has been allotted to this "Suar Nijog" near the "Koilee Baikuntha" where the plaintiffs themselves, with the permission of the 5th defendant, have constructed a double storied building in between the inner and the outer compound walls. According to the defendants there is no difference whatsoever between the outer compound and the inner compound.

The kitchen house (Roshaghar) the bathing platform (Snanha Bedi) and the cremation ground (Smashan) are situated in between the inner and the outer compound. The installation of some deities in the outer compound is also contemporary to the deities inside the inner compound. Even in the inner compound many rooms and seats have been constructed for the deities with permission of the fifth defendant having terraced roof and many temples inside the inner compound were constructed long after the construction of the main temple.

The heights of these temples are higher than the height of the inner compound wall. For instance, Bardhaman temple and Naba-graha temple are constructed within the inner compound wall with a higher top in recent times. Laxmi Roshaghar, the main godown of the temple (Godam Ghar) and the Sara Ghara (store room) of Mana Suar and Basudeb Mahapatra stand between the two walls of the inner compound wall, and rafters have been embedded into the inner compound wall itself for the construction of terraced roofs over them.

A terraced roof has also been constructed over the "Pratihari Nijog Bada Bada" and the heights of the inner compound wall have been, raised at those places. At the "Biman Badu Nijog" the terraced roof has been changed by removing a

portion of the inner compound wall. At the Muktimandap Library and the "Saraghara" of Mahiprakash Math many alterations of similar nature have been made in the inner and outer side of the temple.

The Hazari temple was constructed in about 25 years back within recent memory inside the inner compound and the height of this temple is definitely higher than the inner compound wall. The so called Sastric injunctions and customs pleaded by the plaintiffs were never followed and the fifth defendant and his ancestors were all along permitting construction of temples and houses inside the inner compound as well as the outer compound according to the convenience and in the best interest of the management. Thus, there is no custom as alleged and that the suit as framed is not maintainable as it relates to purely religious matters.

8. On these averments, the parties proceeded to trial, and a large number of documents were exhibited on either side, and as many as 41 witnesses were examined. The learned Munsif on a rather elaborate discussion of the evidence, both oral and documentary, came to the finding that there is no such prohibition according to the Sastric principles for erecting any two-storied building inside the temple higher in structure than the "Kurma Prachir".

He further held that defendant 5 has got the unfettered discretion to permit such constructions, and there is no such custom which enjoins on him to consult the Pundits, Sebaites and other learned bodies before granting any such permission of the nature referred to and that the plaintiffs have failed to prove any custom or usage which prohibits any such construction inside the temple and accordingly, he dismissed the suit.

9. The plaintiffs in due course preferred an appeal against this decision of the trial Court, and the learned first additional Subordinate Judge, Puri on a careful consideration of the evidence on record came to a different finding than the trial Judge and set aside the decree passed by him. The learned appellate Judge, thus decreed the plaintiff's suit and restrained the defendants permanently from, making any structure over the wall "Kurma Prachir, and also restrained them from raising any building over the terraced roof of "Pratihari Nijog" higher than the "Kurma Prachir". He also directed the defendants to demolish the brick structure, if any, constructed over the said. "Kurma Prachir". It is against this appellate decree that the present appeal was filed.

10. Since our decision in this case is likely to affect a very ancient institution which has assumed an all India importance, we allowed the parties to argue their respective cases at length with reference to the evidence, both oral and documentary, which were included in the paper book by an order of this Court.

11. Mr. B. Mohapatra, on behalf of the appellants, raised, four contentions before us : (1) The documents (Exts. 1 to 7) are not admissible in evidence, they have not been proved in accordance with law nor have they been produced from proper custody. The execution and the writings in the body of the documents not

having been proved, the Court of appeal should not have drawn the presumption that the signature and every other part of those documents which purport to be in the handwriting of a particular person was in that person's writing. In other words, the whole argument was that they are clearly hit by Section 90 of the Indian Evidence Act (2) From the internal evidence, these documents cannot be held to be genuine. (3) Assuming the documents to be genuine and admissible, they do not prove the custom as alleged by the plaintiffs; and (4) The suit is not maintainable as it is hit by Section 9 of the Code of Civil Procedure.

12. I would, take up the last contention first. Mr. Mohapatra very strenuously urged that Civil Court has no jurisdiction to entertain the suit as the allegations in the plaint merely raise question of religious nature and do not relate to either any right to property or to an office. His argument in substance was that the suit is not "cognizable u/s 9 of the Code of Civil Procedure, since the section bars the civil Courts" to take cognizance of suits for enforcement of a right which depends entirely on the decision of questions as to religious rites or ceremonies. Section 9 of the CPC is as under:

"The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Explanation. A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies." Generally speaking, Courts can try all suits which involve the determination of any civil right. Two things are essentially necessary to give jurisdiction;

1. The suit must be of a civil nature; and
2. Its cognizance must not be expressly or impliedly barred.

According to the explanation added to the section, a suit in which the right to property or to an office is concerned, is cognizable by a civil Court despite the fact that such right may depend entirely on decision of questions as to religious rites or ceremonies. In this case, according to the allegations in the pleadings, it any, "Pitha" or platform is constructed higher than the "Kurma Prachir" it will affect the very character of the institution. The whole principle upon which the temple is constructed will be affected thereby, with the result that the "Bhog" which is offered will be spoiled and the sacred-ness of the deities installed therein will be impaired.

13. Both the Courts below recorded a concurrent finding that a suit of the nature as the present one, is maintainable in civil Court and the plaintiffs have got cause of action. The argument advanced was that the suit is merely of a religious nature of certain actions repugnant to Sastric injunction and as such not of a civil nature. According to the pleadings, the defendants want to make some alterations in the structure of the temple, that is a property attached to the deity.

The plaintiffs allege that such alterations and changes will not only affect the structure of the temple, but will change the very character of it which would ultimately spoil the sanctity of both the institution and of the "Bhog" which is prepared by them. Thus, on the averments of the parties the suit relates to a right to property inasmuch as it affects the structure of the temple and is likely to spoil, the "Bhog", and as such is maintainable in a civil Court.

Mr. B. Mohapatra in support of his contention relied upon a decision of the Calcutta High Court reported in *Lokenath Misra v. Dasa-rathi Tiwari* ILR 32 Cal 1072 (A). The facts of that case were that from time immemorial certain idols were established in a temple at the eastern end of a certain road and on certain, festivals the idols used to be carried in procession from this temple to another at the western end of the road, and that after a stay for a few days there, the idols were carried back to the eastern temple where they used to remain. During these processions, the plaintiffs and other persons by whose doors the procession passed, had the right to make offerings of food to the idols.

On the occasion of one of these festivals in the year 1307, the idols were carried to the western temple, but instead of bringing them back to the eastern temple, the defendants acting in concert, carried the idols in procession for only a short distance towards the east and then carried them back and kept them in the western temple in violation of the old practice, in consequence of which he was prevented from making the offerings of food to the idols and had suffered damage to the extent of rupee one and odd.

Their Lordships held that suits as to religious rites and ceremonies which do not involve any question of right to property or to an office are not suits of a civil nature and as such are not triable by Civil Courts. Thus, the principles decided in this case rather helps the plaintiffs than the defendants. In AIR 1933 193 (Privy Council) , on which reliance is sought to be placed, their Lordships of the Judicial Committee were mainly concerned with a question of limitation as provided u/s 23 of the Indian Limitation Act and they held that:

"The action of the Swetambaris in placing the Charans with the nails in three of the shrines is a wrong of which the Digambaris are entitled to complain, and is a continuing wrong, as to which u/s 23 a fresh period begins to run at every moment of the day on which the wrong continues."

Their Lordships of the Judicial Committee accepted the findings of the Courts in India which held that the action of the Swetambaris in placing Charans of the description in three of the shrines is a wrong of which the Digambaris are entitled to complain in a civil Court. Mr. Mohapatra also referred us to a case reported in *The Advocate-General of Bombay Vs. Yusuf Alli Ebrahim and Others*, , wherein it was held that speaking very generally, a protection of the law in religious matters is confined to the protection of religious property or a religious office.

The Court will not decide mere questions of religious rites or ceremonies, nor will it pronounce on any religious doctrine unless it is necessary to do so in order to

determine rights to property. It is the policy of the State to protect all religions, but to interfere with none. The main question for consideration in that case was whether the Advocate-General is concerned with private trusts or he is only concerned with public charitable trusts; and their Lordships decided that the Advocate-General is not concerned with the private trusts.

On the contrary, in *Krishnasami Iyengar v. Samaram Singarachariar* ILR 30 Mad 158 (D), their Lordships of the Madras High Court held that a removal or alteration of namams or religious marks in a temple amounts to an interference with property and will be a ground for action in the Civil Courts. The trustees of a temple may be restrained by injunction from making unjustifiable changes which would affect the character of the temple as a religious institution.

The facts of that case were that from time immemorial only Tengalai namams were used on the idols, on the temple buildings, on the gates, flagstaves and all prominent places; and the Vadagalais had only one stone stationary idol of their guru at the temple and no processional idol. The defendants recently with a view to convert the institution into a Vadagalai one, removed the Tengalai marks, substituting Vadagalai namams and introduced a copper processional idol of the Vadagalai guru. Accordingly, the plaintiffs prayed for an injunction to restrain the defendants from doing these acts.

It was held that the jurisdiction of the Courts, however, is only to try suits of a civil, as distinct from religious or ecclesiastical nature. The right of a worshipper to worship at a given temple is no doubt recognised by our Courts as a civil right and the Courts will enforce by suit a right of worship to which the plaintiff proves himself entitled. The introduction of idols or other objects which interfere with the form of worship for which the temple is dedicated is a violation of a civil right.

It was further held that any innovation whether by way of commission or omission, if they are sufficiently serious, they may of course give rise to civil suits for the removal of trustees. A similar question cropped up in a case before the Supreme Court in *Bhatia Co-operative Housing Society Ltd. Vs. D.C. Patel*, where their Lordships of the Supreme Court held that a civil Court has inherent power to decide the question of its own jurisdiction although as a result of its enquiry it may turn out that it has no jurisdiction over the suit.

Since the present suit relates to a civil right in the shape of alteration to the very structure of the temple and thereby impairing the sacredness of both the "Bhog" and the deities, I am clearly of opinion that the present suit is maintainable in the Civil Court and the plaintiffs had cause of action."

14. Now, coming to the first two contentions of Mr. B. Mohapatra, they relate to the admissibility of the documents, Exts. 1 to 7. and their genuineness. At the outset it must be stated that admissibility of a particular document is undoubtedly a question of law, but the genuineness of it is a question of fact. The trial Judge had nowhere in his judgment stated anything regarding the admissibility of the documents while suspecting their genuineness.

The Court of appeal below, however, found as a fact that the documents in question were genuine and are admissible in evidence, and as such, the presumption arising u/s 90 of the Indian Evidence Act would apply in all its implications. All these documents (Exts. 1 to 7) were admitted without any objection except the documents, Exts. 3 and 7. The plaintiffs filed these documents to prove the existence of the custom pleaded.

Exhibit I is an "Angyapatra" or "Hukumna-ma" of the Raja of Purl, after obtaining the opinion of all concerned, to one Raghunath Ka-ran to inform all the members of "Chhatisani-jog regarding his refusal of the prayer of one Pararaananda Gountia of Gurulipur in Keon-jhar to open a door in the "Kurma Prachir". Exhibit 2 is the opinion of Muktimandap Ma-hasabha" signed by the President and the Assistant Secretary whereby they advised the Raja that the height of a Titha" could not be higher than the "Kurma Prachir" which is against all established customs.

Exhibit 3 is a letter from the Raja to the "Muktimandap Pandit Sabha" acknowledging Receipt of Ext. 2. Exhibit 4 is "Silpa Kaumudi" a palm-leaf manuscript which describes the construction of the temple. Exhibit 5 is a Hukum-nama by the Raja to the "Chhatisanijog" refusing permission on a previous occasion to Raja Sri Upendra Harichandan Bhupati Mohapatra of Sukinda to construct a Pitha higher than the Kurma Prachir.

Exhibit 6 is similarly a Hukumnama of the Raja refusing permission to a local Mahanta of Trimali Muth for constructing a raised platform near about the disputed site. Exhibit 7 is an order of the Raja to all persons connected with the temple to take particular care of and not to interfere with the "Kurma Bedha" wall in any way during certain military operations.

15. Before advertng to the actual documents, I would like to state what the position in law is. The whole argument of Mr. B. Mohapatra centres round Section 90 of the Indian Evidence Act, which runs as follows:

"Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.-- Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be, but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances, of the particular case are such as to render such an origin probable. This explanation applies also to Section 81."

The principle underlying this section is that if a private document thirty years old

or more, is produced from proper custody and is, on its face free from suspicion, the Court may presume that it has been signed or written by the person whose signature it bears or in whose handwriting it purports to be and that it has been fully attested and executed, if it purports so to be. In other words, documents thirty years old prove themselves.

The age of a document, its unsuspecting character, the production from proper custody and other circumstances are the foundation for the presumption as enunciated in the above section. This rule, it is now well-settled, was founded on necessity and convenience. It is extremely difficult and sometimes impossible to prove the handwriting or signature or execution of ancient documents after the lapse of many many years.

It is therefore presumed that all persons acquainted with execution of documents, if any, are dead, and proof of those facts are dispensed with. Thus, the presumption relates to the execution of the documents, that is, signature, attestation etc., in other words its genuineness, but not to the truth of its contents. Mr. Mohapatra contended that no presumption can be drawn from those documents u/s 90 of the Indian Evidence Act, since the proper custody has not been proved and the documents have not been shown to have been executed or scribed by a particular person. Reading the contents of the documents, it would be clear that they are not genuine documents.

Mr. Mohapatra, however, conceded that Section 90 does not apply to the document, Ext. 2. For his above argument, he relied upon certain decisions reported in *Ramuvien v. Veerappuda-yan* ILR 37 Mad 455 (F); *Mansukh Panachand Shah Vs. Trikambhai Ichhabhai Patel*, ; *Shafi-un-nissa v. Shaban Ali Khan* ILR 26 All 581 (PC) (H); *Harihar Prasad v. Deonarain Prasad* (S) AIR 1956 SC 305 (I). In ILR 37 Mad 455 (F), their Lordships of the Madras High Court held that according to the practice prevailing in that Presidency when prima facie evidence of custody and of the date of a document purporting to be 30 years old is given, the Court generally marks the document on the footing that there is sufficient evidence to justify its being marked as an exhibit at that stage.

It is only subsequently that the opponent exercises his right of adducing evidence of circumstances which entitle him to say that the presumption u/s 90 of the Evidence Act should not be drawn with respect to the document. The Court generally arrives at its conclusion on the matter after the evidence on both sides has been given.

In that case, however, it was not shown that the District Munsif ever recorded a judicial opinion as to whether he would presume, Ext. A to be genuine before he wrote his judgment, in the case nor was it urged by the plaintiff whether the Munsif was prepared to presume the document to be genuine or whether he would require it to be proved. Thus, it was contended that there was no foundation for the argument that in such circumstances, the appellate Court has not got the same power to decide whether the document should be presumed to

be genuine or not as the Court of the first instance had.

Accordingly, their Lordships overruled the contention raised by the appellant and dismissed the appeal. I do not see now this case can be of any help to Mr. Mohapatra. In ILR 26. All 581 (PC) (J), the Judicial Committee held that notwithstanding a document was more than 30 years old and had been produced from proper custody, the Courts below on the grounds that there were circumstances in the case and evidence as to the document itself which threw great doubt on its genuineness, exercised their discretion u/s 90 of the Evidence Act by not admitting the document in evidence without formal proof, and rejected it when no such proof was given.

The Judicial Committee in that case held that the discretion of the Court had been rightly exercised and declined to interfere with it. This case was followed in AIR 1930 Bom 39 (G) and it was observed therein that in the case of documents more than 30 years old, the genuineness of which is disputed, the Courts should consider the evidence both external and internal appearing on the face of document, in order to enable them to decide whether in any particular case they should or should not presume proper signature and execution.

The only other case that remains to be considered is the case reported in (S) AIR 1956 SC 305 (I). That case does not appear to apply to the facts of the present case at all, because their Lordships of the Supreme Court dealt with a case not of the original document, but with copies thereof. What was decided therein was that the presumption enacted in Section 90 can be raised only with reference to original documents and not to copies thereof.

Further, if the document happens to be signed by the agent of the person against whom presumption is sought to be drawn, and there is no proof that he was an agent, Section 90 does not authorise the raising of such a presumption as to the existence of authority on the part of the agent to represent that person. In the instant case, however, the original documents have been produced and the principle applying to copies of documents does not arise in this case.

It was strenuously argued by Mr. Mohapatra that the agency must be proved before any presumption can be drawn u/s 90. However, I will deal with that aspect of the case while dealing with the individual documents. In my opinion that decision does not apply to this case at all. Thus, all the decisions that have been cited by Mr. Mohapatra do not apply, because their Lordships have not gone further than enunciating the principle as laid down in Section 90 of the Indian Evidence Act.

Mr. H. Mohapatra appearing on behalf of the respondents, in this connection, referred us to a decision of the Bombay High Court reported in Sharfuddin v. Govind Bhikaji ILR 27 Bom 452 (K). In that case, the plaintiff purchased the equity of redemption from defendant 1 and sued to redeem, and recover possession of certain Thikars originally mortgaged by the plaintiff's vendors to the ancestors of defendants 2 to 6 who on the 12th of April, 1893, had by Ext.

55 transferred their rights to defendants 7 to 10 for Rs. 1275/-.

The defendants contended that the plaintiffs could not recover possession without redeeming Exts. 57, 58 and 59 as well as the original mortgage of 1837 (Exit. 56). A question thus regarding the admissibility and the presumption u/s 90 of the Indian Evidence Act fell to be considered and their Lordships held:

"Section 90 of the Evidence Act admits a presumption of the genuineness of documents purporting to be thirty years old, if produced from custody proved to have had a legitimate origin or an origin the legitimacy of which the circumstances of the case render probable. It is not necessary that the documents" should be found in the best and most proper place of deposit. The Section read with the explanation seems to insist only on a satisfactory account of the origin of the custody and not on the history of its continuance".

Mr. Mohapatra also drew our attention to a case reported in *Ahir Daya Mulu v. Ahir Deva Karman*, AIR 1955 NUC (Sau) 317 (L) Shall, C. J. in that case held:

"A man's handwriting is liable to change after some years and it is improper to disbelieve the earlier handwriting on the ground of a discrepancy between the two handwritings."

He further held:

"To say that Section 90 presumes the genuineness of document, but it does not prove the authority of the person who purports to have executed it, is applying the rule rather with unnecessary strictness and the rule should be relaxed in appropriate cases, and it should be open to the Court to draw an inference as to the authority from surrounding circumstances. There is a distinction between executing a document on the basis of an authority by another document in the nature of a power of attorney and the physical act of execution carried out under the express authority, an supervision of the executant. In the, latter cases where the signature of the executant purports to have been made by a scribe, the authority of the latter is presumed. To require independent proof of authority to execute, which proof may not be available on account of lapse of time, -- would strike at the usefulness of the rules as to presumption u/s 90 and ignore the object for which it has been introduced."

On a closer examination of these cases, it comes to this that if a document thirty years or more old is produced from proper custody as explained in the explanation appended to Section 90 and on the face of it is free from suspicion, the Court may presume that it had signed or written by the person or persons whose signature it bore or in whose handwriting it purported to be and that it has been duly attested and executed, if it purports so to be. Keeping these principles in view I would now advert to the documents themselves.

16. The defendants, during the argument before the lower appellate Court, conceded that the inner compound is known as "Kurma Bedha" and the compound wall as the "Kurma Prachir". It this were admitted from the beginning,

much of the evidence adduced in his case could well have been eliminated. The defendants were constrained to admit the above fact, since the inner compound and the compound wall had been described as "Kurma Bedha" and "Kurma Prachir" respectively by reputed historians of Orissa, as also in an ancient book known as Jagannatha Charitamuruta" wherein the enclosure inside the inner compound was described as "Kurma Pitha" and the space within the compound as "Kurma Bedha" (vide Utkala Itihas by Late Krupa-sindhu Misra; Prachin Utkal by late Jaganandhu Singh, and the History of Orissa by Dr. H.K. Mahtab). This being the undisputed fact now, it would necessarily follow that the temple had been constructed according to the principles of "Kurma Jantra" or else the "Pitha" could not have been called "Kurma Pitha" and the walls as "Kurma Prachir". The very fact that the "Kurma Pitha" is inside the "Kurma Bedha" presupposes that the temple was constructed in accordance with the principles of "Kurma Jantra" as contended by the plaintiff. The defendants' case was that despite this concession, the plaintiffs must all the same prove that there is a custom or usage according to the recorded rules of the Hindu Sastras. The Plaintiffs, as I had stated above, had relied upon Exts. 1 to 7 for this purpose. Let us now examine the individual documents to find out how far the plaintiffs have been able to prove the alleged custom.

17. Ext. 1 is a Hukumnama from Raja Sri Birakishore Deb to the various Sevakas of the temple in the name of one Raghunath Karan. This document bears the mark of Kelu Karan and is purported to have been executed by Birakishore Deb and is dated as Srinagar (PaJace), 13th day of Makr. But there is no year appended to it. From the report of the special officer appointed under the Puri Sri Jagannath Temple Act (Orissa Act XIV of 1952,), it is evident that this Birakishore Deb reigned between the years 1356 and 1872.

Hence this document relates to a period between those years. By this document, the Raja is purported to have informed all the Sevakas and officials of the temple through Raghunath Karan regarding his decision that he had refused permission to one Paramananda Gountia of village Gurulipur now in the ex-State of Keonjhar to open a door in the inner compound wall which would be against the well-established custom and usage, and would, therefore, act as, an ill-omen to all concerned. Reading the contents of the document, it is apparent that in between 1856 and 1872, Raja Birakishore Deb prohibited any interference with the inner compound wall. It is contended by Mr. B. Mohapatra that this document does not show who wrote the contents thereof and who signed it.

Although it is purported to have been executed by one Kelu Karan, no oral evidence whatsoever has been adduced to connect him with this document. Nobody from the family of Paramananda Gountia has been examined. This document bears a seal which is not easily decipherable. A witness was examined on behalf of the plaintiff (P. W. 15) Syed Abdul Salam who in his cross-examination stated: "The seal in Ext. 1 shown to me does not even appear to be in Urdu. I cannot say in what language the seal is." The fact, however, remains

that there was a seal and it purported to have been executed by Sri Birakishore Deb.

Admittedly this document is more than thirty years old and was admitted into evidence without any objection by the defendants. P. W. 1 who is a member of the "Daitanijog" produced the document and stated that Raghunath Karan handed over this document to his ancestors who were the most important "Daitas" belonging to the "Daitanijog". P. W. 1 had also stated in his evidence that this document is more than thirty years old and the defendants had never cross-examined him on this point.

The trial Judge had not come to any conclusion regarding the admissibility or otherwise of this document, but merely doubted the genuineness of it. The appellate Court, on the contrary, came to the definite conclusion that the document is not only admissible in evidence, but is entitled to the presumption under Section 90. It has been held by the Judicial Committee in AIR 1940 160 (Privy Council) , that where the trial Court exercises its discretion u/s 90 and admits a document, and the first appellate Court finds no reason to interfere with it, the High Court should not overrule the discretion, and reject the document. In this case the discretion once having been exercised by the Court below, this Court ought not to interfere with that discretion without any compelling reason.

The document, as I have stated above, is purported to have been executed by Sri Bira-Kishore Deb and bears the mark three fours in Oriya of Kelu Karan. I would profitably refer here to a decision of the Allahabad High Court reported in *Hoji Sheikh Bodha Vs. Babu Sukhram Singh and Others*, wherein their Lordships held that the presumption permitted by Section 90 in the case of a document purporting to be 30 years old, that it was duly executed by the party by whom it purports to be executed, includes the presumption that when the signature of the executant purports to have been made by the pen of the scribe, the latter was duly authorised to sign for him.

In *Shailendranath Mitra Vs. Girijabhushan Mukherji*, , the question arose whether the lessees held any area in excess of what they were paying rent for; was the rent of the tenure in question a consolidated one for the lands within the specified boundaries, and was the rent fixed in perpetuity as alleged by the lessees or was it only the rate of rent that was fixed as asserted by the lessors. The whole argument in that case was that the lease-deed not having been signed was void and inoperative in law and could not be adduced in evidence for any purpose whatsoever.

At the place meant for signature only the words "Shree Sahi" appeared. Their Lordships held that according to the general policy of the law, "signature" includes a mark; a mark put on the document indicated that the document was signed by the executant by a sort of symbolic writing which is to be taken to be the signature in the absence of proof to the contrary, and held that the document must be taken to have been signed by the executant and it was valid and

operative as such. Thus, in view of the principles decided in the above decisions, and in view of the fact that the document was eventually produced from the custody of a person who is a member of the Chhatissnijog" and proved by him and bore the mark of the executant, it can hardly be contended that the presumption u/s 90 will not apply to this case.

Mr. Mohapatra conceded that if the contents of this document are believed to be true, it will undoubtedly support the plaintiff's case, this being a specific instance of custom. The lower appellate Court found this document to be genuine and believed the contents to be true. There does not appear to be any satisfactory reason for us to disturb that finding.

18-19. As I have stated earlier, Ext. 2 is the opinion given by the "Muktimamdap Mahasabha" to the Raja regarding the construction of a Mandap inside the inner walls. They stated in their afore-mentioned opinion that the temple was constructed on the principles of "Kurma Jantra" and it has been consecrated on "Kurma Bastu". The measurements also have been referred to in the body of the opinion. They also referred to certain stanzas in Silpa Kaumudi (Ex. 4). Ext. K is the English translation of this document.

It is contended by Mr. B. Mohapatra that this document is not genuine, for the simple reason that the internal evidence shows that this document could not have been written by the learned persons by whom it is purported to have been written. He also challenged the genuineness of the signature of both Pandit Sadasiva Misra and Jayakrishna Misra, the President and the Assistant Secretary respectively. Mr. Mohapatra further contended that the document has not been produced from proper custody. (After discussion of evidence on this point the Judgment proceeds:) Therefore, I have no hesitation in holding that Ext. 2 which is a document more than thirty years old has been produced from proper custody and was written in the hand of Jayakrishna and bears the signatures of Sadasiva & Jayakrishna. Mr. Mohapatra rightly concedes that this document is not hit by Section 90 of the Evidence Act. Ext. 2 thus being a genuine document it is a clear proof of the custom and the plaintiffs can well rely upon this document alone to prove the immemorial usage and custom, which is of a prohibitory nature. Even if all other documents are excluded from consideration, Ext. 2 is sufficient to prove the custom pleaded by the plaintiffs.

20. Then coming to Ext. 3 it bears the seal of the temple Superintendent's Office and the signature of the Manager. There is evidence that Sri R.K. Das was the manager in 1905, he having assumed office in 1902. It appears that English dates were introduced from the time of Sri R.K. Das (vide also Ext. G). In Ext. G the date given is 26-5-1928. Similarly in Ext. L the manager signed as Sri R. K. Das dated 28-7-1908. There is internal evidence, as I have stated above, to connect this document with Ext. 2 as the Oriya dates given in the two documents tally with each other the document having borne the seal of the Temple Superintendent's office and having been signed by the Manager of Raja Mukunda Deb subsequent to Ext. 2, the presumption u/s 90 of the Indian Evidence Act

would apply with equal force. The genuineness of this document was not seriously challenged. These two documents were called for from the office of the defendant No. 5, and fee did not produce them.

21. Now, I will take up the document Ext. 5, which is an earlier application by the Raja of Sukinda for a similar permission. This document was in two languages either Persian or Urdu and Oriya. With utmost effort the Persian or Urdu portion could not be deciphered. The Oriya portion refers to an application by Sri Upendra Harichandan Bhupati Mohapatra, Raja of Sukinda for permission to construct a two-storeyed Jagati (Pitha) for his deity Kunjubihari Deb and the said permission was refused. No doubt, Exts. 2 and 3 do not refer to this earlier document, but that itself is not sufficient to prove that the document was a forged one. Mr. Mohapatra contended that this document should not have been admitted into evidence at all, since it does not bear any date nor year nor the signature.

He relied upon a decision reported in *Rajendra Prasad Hose v. Gopal Prasad Sen* AIR 1929 Pat 51 (P), where it was held that it is always at the discretion of the trying judge either to raise or not to raise the presumption arising u/s 90. The Court of appeal cannot overrule his exercise of discretion in that matter without sending the case back for retrial. As I have stated earlier, the trial judge did not apply his mind to this question at all, and merely considered the genuineness of the document. The lower appellate Court exercised his discretion and applied the presumption u/s 90 which, as stated above, according to the Judicial Committee, the High Court should not lightly interfere with.

An appeal was carried to Privy Council against this decision of the Patna High Court AIR 1930 24 (Privy Council) and their Lordships of the Judicial Committee assumed the document to be admissible and did not decide the question at all. In *Mt. Gomti and Others Vs. Meghraj Singh and Others*, this Patna decision was referred and it was held that when the lower court does not exercise a proper judicial discretion in raising the presumption of the genuineness of a document, ordinarily it is not proper for the appellate court to overrule the discretion of the trial Court; but where it is constrained to do so, the party producing the document should, be given an opportunity of supporting the presumption. The question really does not arise because the document bears the seal in Urdu and it was called for from the office of defendant-5 as well as from the Raja of Sukinda.

Neither defendant-5 nor the Raja of Sukinda produced the document. It was contended by Mr. H. Mohapatra, learned counsel on behalf of the respondents that the document having borne the expression "E Pra-mana" amounts to the mark of execution. This document purports to be an order by the Maharaja and the expression "E. Pramana" is his mark which proves the proper and valid execution of the document by him. Ext. B is a document addressed to the Parichha of the temple. This document also bears the same expression "E. Pramana". Ext. 5 is another document which also bears this expression.

Reference was made to Purnachandra Oriya Bhashahosh by late Gopal Chandra Pra-haraj, Vol. IV p. 5114 where it is stated that "E. Pramana" in documents means a mark put on a document by an unlettered person.

The case in Shailendranath Mitra Vs. Girijabhushan Mukherji, where the expression "Shree Sahi" had been considered, and was referred to by me earlier, applies in all fours to this case. Therefore, I have no doubt that the document had been executed by the Maharaja and it bore his mark. Since the document has been properly executed the presumption u/s 90 would also apply.

22. Then coming to Ext. 6, this is a document which is both in Oriya and in Urdu. This document was admitted into evidence without objection.

P. W. 13 is the present Mahant of Trimali Muth to whose ancestors permission to build a Mandap inside the inner temple near about the disputed site was refused. This document also bears the expression "E. Pramana" and the mark (three flours). Tims applying the same analogy this document is clearly admissible and the presumption u/s 90 would also apply with equal force.

23. The only other document that remains to be considered is Ext. 7. This document is admittedly more than thirty years old. This was produced and proved by P. W. 14 who according to his evidence is a Sevaka and holds office of "Dwara Karan" whose duty it is to guard the doors of the kitchen. P. W. 18 supports him in this respect. This document was addressed to the "Beheran Karan" and other officials of the temple by the then Raja of Puri during the 14th year of his reign on the 30th day of Shrabana, 1168 Sakabda, on the eve of an attack by the Marhattas.

He directed that all the doors of the temple should be kept closed except the Lions Gate, which will remain open. Amongst others, a specific direction was given therein not to interfere with the Kurma Bedha walls. It also bears the Mutha of the Maharaja. Similar arguments were advanced by Mr. Moha-patra contending that this document suffers from the same infirmities. The learned court of appeal below on a careful consideration of the evidence came to the conclusion that this is a very old document and has been produced from proper custody and the execution is proved by putting the "Mutha" into the document. Accordingly, he held that the document is as good as any other official record and its genuineness cannot be questioned, and applied the presumptions u/s 90 of the Indian Evidence Act.

24. Ext. 4 a palm-leaf manuscript known as "Silpa Kaurndi". A long argument was advanced at the bar regarding the genuineness of this document. From a loak of the document, it does not Inspire confidence, and hence I would rather discard it from consderation. But the documents, Exts. 1, 2, 3, 5, 6 and 7 being admissible in evidence and being genuine in nature, lead to an unmistakable conclusion that those were instances when permission in the past either to interfere with the inner compound wall or to build a "pitha" or platform or "Man-dap" higher than the inner compound wall had been refused.

25. It was next contended by Mr. Mohapatra that assuming the documents to be genuine and admissible they do not prove the custom as alleged by the plaintiffs. The custom to be valid must not be contrary to justice, equity or good sense. It must not have been declared to be void by any competent authority nor would contravene any express provision of the law. It must also be ancient, certain and invariable. A custom may either be general or special. It may be proved or disproved in any of the following ways:

(1) By the opinions of persons likely to know of its existence or having special means of knowledge thereof.

(2) By statements of persons who are dead or whose attendance cannot be procured without unreasonable delay or expenses, provided they were made before any controversy as to such custom arose, and were made by persons who would have been or likely to have been aware of the existence of such custom if it existed.

(3) By any transaction by which the custom in question was claimed, modified; recognised, asserted, or denied, or which was inconsistent with its existence.

(4) By particular instances by which the custom was claimed, recognised, or exercised, or knowledge of its exercise was disputed, asserted or departed from. It must be remembered in this connection as has been held by the Privy Council in AIR 1941 21 (Privy Council) , and reiterated by the Supreme Court in Gokal Chand v. Parwin Kumari 1952 SC 331: (AIR 1952 SC 231) (T) that, the English rule that "a custom in order that; it may be legal and binding must have been used so long that the memory of man runneth not to contrary" should not be strictly applied to Indian conditions.

Mr. B. Mohapatra's whole argument was that there is no question of any Sastric injunction, but the whole case depended on the proof or otherwise of the existence of the custom. According to his contention, the Raja of Sukinda sought for permission and was refused and that is the only instance, which, by itself would not be sufficient to prove the custom. For this contention, he relied upon a decision reported in Durgacharan Mahto v. Raghunath Mahto. 18 C LJ 559 (U), wherein it was held that if a party relies upon a special custom of a family to take a succession out of the ordinary Hindu law, such custom must be proved to be ancient and continuous. The custom must be very satisfactorily proved by evidence of particular instances so numerous as to justify the Court finding in favour of the custom. One should not forget that in the instant case it deals with a negative custom or a prohibitive one. Mr. Mohapatra also referred us to a decision in Mahantawa v. Gangawa ILR 33 Bom 693 (V).

That was a case relating to a marriage between a man of the Panchal caste and a woman of the Kurba caste. The question arose whether according to the custom prevalent in that part of the country any marriage between the above two subdivisions of the sudra tribe is valid. Their Lordships after going into the evidence in some detail, held that the plaintiff had failed to prove the custom. Section 13

of the Indian Evidence Act also states that where the question is as to the existence of any right or custom the following facts are relevant:

(1) any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence.

(2) Particular instances in which the right or custom was claimed, recognised or exercised, or, in which its exercise was disputed, asserted or departed from. The cases referred to by Mr. Mohapatra are cases of positive custom rather than of negative or prohibitory custom. In this connection, I may refer to a case decided by the Privy Council in *Chandika Bakhsh v. Muna Kunwar* ILR 24 All 2 (PC) (W),. In that case a family custom alleged to exist among the Abhan Thakurs of Oudh in derogation to the ordinary Mitaksbara law in force there, that on the extinction of the line of one of several brothers the descendants of all the other brothers take equally without reference to their nearness to the common ancestor.

It was held by the Judicial Committee not to be proved by four instances of the custom of comparatively modern date which their Lordships found to be the only portions of the evidence adduced which supported it. In the case of a negative or prohibitive custom on the contrary, it depends rather on the obedience of the custom than any disobedience thereof, and therefore, it would be difficult to find out numerous instances of a custom of that nature. However, the plaintiffs in this case have been able to prove successfully several instances of such a custom ranging from a very long time.

26. Mr. Mohapatra then addressed us at great length whether in fact there is in existence any construction higher than the level of Kurma Prachir. In this connection he referred us to the evidence of D. Ws. 1, 2, 3, 4, 5, 6, 7, 9, 11, 12 and 17. (After stating the summary of evidence of these witnesses His Lordship proceeded:)

The plaintiffs in my opinion have successfully proved that during the last eight centuries there has been no construction of a two-storeyed building inside the inner walls, and they have proved by instances that at no point of time permission had been granted and that such a custom does exist. The defendants on the other hand have not been able to prove even one instance to the contrary. History tells us that the present temple was constructed during the reign of Ananga Bhima Deb in the 12th century, who endowed various properties and huge loads of gold for making arrangements for the Seba puja of the Lord Jagannath, though Traverner and Thevernot and Carriri trace its origin to earlier than 318 A. D. When the pirates fled away with the sacred images and left an empty city to Red Arm (Rakta Balm) and his buccaneers.

Subsequent to the reign of Ananga Bhima Deb and till the advent of Marhattas the temple flourished under the royal patronage of the kings of Orissa.

The defendants in their written statement contended that the plaintiffs

themselves have built a two-storeyed house in between the inner and the outer compound walls. There is evidence on record to show that the "Kurma Bastu" ends-with the inner walls and the space between the inner and the outer compound walls do not form a part of the foundation of the temple or of its structure. A little more than 200 years after sometime before 1405, during the reign of Kapilendra Deb the first Emperor of, Orissa, that the outer compound wall which is known as the "Maghnada Prachir" was constructed. History records that from the time of Ramachandra Deb upto the Marhatta occupation of Orissa in or about the year 1756, there were various invasions and attacks by the Moslems and the deities were being removed now and then for their safety; but there has been no damage of any kind to this great institution, much less to the inner compound wall. At no point of time an attempt has been made to deface the inner walls; one fact that stands out prominently in this case is that the constructions referred to by various witnesses on the side of the defendants have no staircase leading to the roof. For instance reference may be made to the deposition of D. W. 6. Now Ext. F is the plan of the proposed two-storeyed building which allows a stair-case to the roof. Evidently the roof is meant for a "Pitha" or sitting place. There is abundant evidence on record that it will be of a higher level than the "Ratnasinghsan". Thus, from my above discussion, the evidence adduced and the instances proved by the plaintiffs, there is no doubt regarding the existence of the custom as pleaded in the plaint.

26-A. The only other point that yet remains to be considered is whether the form in which the injunction has been ordered by the learned Subordinate Judge is the proper form. Mr. Mohapatra contended that there should not have been a general injunction prohibiting the defendants from constructing any building on the disputed site. The order reads as follows:

"As per my above findings, the plaintiffs have got a good cause of action and they have also proved that the new constructions intended by the defendants are against the custom and usage and the plaintiffs have got a right to prevent; and on a consideration of the facts, I allow the appeal, set aside the order of the learned Munsif and decree the plaintiffs suit. The defendants are thus restrained permanently from making any structure over the wall "Kurma Prachir" and are also restrained from raising any building over the terraced roof over the "Pratihari Nijog" higher than the Kurma Prachir. The defendants are further directed to demolish the brick structure if any constructed over the wall." I do not find anything wrong in the form of the order recorded by the learned Subordinate Judge. He, by his order, has restrained the defendants from putting up any structure over the "Kurma Prachir" which would run counter to all established custom and usage, and to demolish the brick structure, if any. Thus, all the contentions raised by Mr. Monapatra fail, and I find no merit whatsoever in this appeal. Accordingly, I do not propose to interfere with the decree as passed by the learned Subordinate Judge by his order dated 31-8-1948. In the result the appeal is dismissed with costs throughout.

Nabasingham, C.J.

27. I agree that the appeal should be dismissed; but in view of the importance of the subject would give my reasons separately.

28. The famous temple of Lord Jagannath at Puri is enclosed by two compound walls-The inner compound wall within which lie the sanctum (Gambhiria), "Jagamohan" and Bhoga-mandap" and other small shrines like those of Bimala and Lakshmi is known as "Kurma Pra-ohir". The outer compound wall is known as "Maghanada Prachir". The space between the inner "compound wall and the outer compound wall is known as "Bahar Bedha" whereas the space enclosed by the Kurma Prachir is known as "Kurma Bedha".

The deities of Lord Jagannath, Balabhadra and Subhadra are placed on a High pedestal inside the sanctum and that pedestal is known as "Ratna Singhasan". The plaintiff's case is that the temple is constructed in accordance with "Kurma Jantra", that is to say, the space inside the Kurma Prachir is of the shape of the back of a tortoise and the "Ratna Singhasan" where the Lord is seated is in the centre of that space and is the highest point in that area.

The idea is that no other deity should be placed on a level higher than Lord Jagannath and no human-being should also be permitted to sit at a place higher in level than the Lord. According to the plaintiffs the height of the "Kurma Prachir" is the same as that of the Ratna Singhasan and within the "Kurma Bedha" no "Pitha", terrace or any other construction has ever been permitted so as to facilitate the placing of a deity on a higher level than the Lord.

The plaintiffs, however, conceded that the several sculptured deities either inside the "Jagamohan" and "Bhogamandap" or outside the "Gambhiria" such as "Nrusingha", "Vaman", etc., may be on a higher level than the "Ratna Singhasan". But according to them these are mere sculptures or decorations of the temple made at the time of the construction of the temple, and even though they may be worshipped by the pious devotees they would not militate against the rule, that no pedestal or terrace should be built higher than the "Ratna Singhasan".

It was also admitted that the "Lahadia" (conical spire) over the shrines of Bimala and Lakshmi may be on a higher level than the Ratna Singhasan" and occasionally during festivals people may be seen sitting on all available space at levels very much higher than the "Ratna Singhasan" while witnessing the ceremonies observed for Lord Jagannath. This also according to the plaintiffs does not militate against the rule mentioned above which applies only to permanent structures including terraces and two-storeyed buildings constructed higher than the Kurma Prachir.

It was also conceded that in the Bahar Bedha there are buildings on a very high level. But according to the plaintiffs the rule applies only to the space enclosed by the Kurma-Prachir known as "Kurma Bedha". It was further alleged that the

wall of the "Kurma Prachir" is considered very sacred and any defacing or alteration of the same with a view to facilitate the construction of a structure resting on it would affect the sanctity of the temple.

29. The plaintiffs and defendants are both "Sevaks-Nijogs" of the temple; the plaintiffs being "Suars" (Cooks) and the defendants being "Pratiharis" (attendants and watchmen of the Lord). The trouble arose when the Pratiharis after obtaining permission of the Raja of Puri began construction of a double storeyed building within the "Kurma Bedha" and actually completed a terrace higher in level than the "Ratna Singhasan. According to the plaintiffs such a construction was against the "Sastric" injunctions and the established usage of the temple and would affect the sanctity of the shrine.

Once sanctity is so affected the sanctity of the "Mohaprasad" (daily offering of food to the Lord) would also be affected and as the plaintiffs depend for their livelihood partly on the sale of the Mohaprasad to the general public their income would also be affected. Moreover, the plaintiffs as Sevaks urged that they have a right to prevent any other person from defacing the "Kurma Prachir" and thereby affecting the sanctity of the temple.

30. The first question for decision is-whether a suit of this type is cognizable by a Civil Court. Mr. B. Mohapatra on behalf of the appellants urged that the principal question relates to religious rites and ceremonies which do not involve any question of right to property or to an office and consequently is not cognizable by a Civil Court u/s 9 of the Civil Procedure Code. He relied mainly on ILR 32 Cal 1072 (A).

In my opinion, however, that decision has no application to the present case. The plaintiffs are vitally interested in the sanctity of the Mohaprasad for their livelihood. If, as alleged by them, such sanctity would be adversely affected by allowing a "Pitha" higher in level than the "Ratna Singhasan", their right to property is affected and a civil suit would necessarily lie.

Again, the mere alteration in the Kurma Prachir which involves pulling down and breaking the ornamental conical portions (Kangula) which adorn the top of the "Kurma Prachir" would furnish a ground for civil action by the other worshippers of the temple if such alteration would affect the sanctity of the shrine. The leading decision on the subject is AIR 1933 193 (Privy Council) , dealing with the well-known dispute between the Setambaris and Digambaris regarding Parasnath Hill.

In that case the Digambaris complained against the action of the Swetarabaris in erecting dwelling for temple servants and other structures on the sacred hill of Parsanath and in placing Charans with nails in three of the shrines on the hill. According to the Digambaris, these acts amounted to sacrilegious pollution and desecration of the sacred hill and amounted to interference with the Digambaris right of worship on the hill.

The maintainability of such a suit was never in doubt though their Lordships held on the facts of that case that the construction of the buildings by the Svetambaries did not interfere with the Digambaris right of worship. But they further pointed out that the action of the Svetambaris in placing charans with nails in three of the shrines was a wrong against which Digambaris had a right to complain in the Civil Court.

The present case is hardly distinguishable from this decision. If the plaintiffs can succeed in establishing the custom as alleged, the action of the defendants in building structures inside the Kurma Bedha and in altering the Kurma Prachir would impair the sanctity of the shrine and affect their right of worship-Again in ILR 30 Mad 158 (D), it was held that where Thengalai Namams were used at various places in a temple for a very long time and the Vadagalais tried to efface these Namams and put Vadagalai Namams, there was interference with property and a ground for civil action.

The present case is on a stronger footing than the aforesaid case because apart from the desecration and sacrilege involved, the plaintiff's main source of livelihood, namely, sale of Mohaprasad, would be adversely affected by the conduct of the defendants and this interest of theirs is undoubtedly an interest in property. I have, therefore, no doubt that the suit is cognizable in the Civil Court.

31. To support their case the plaintiffs relied on (i) the Sastric injunctions as given in an ancient book known as "Silpa Kaumudi" and (ii) Well-established immemorial custom. I agree with my learned brother that they have not been able to cite clear authority to show that the Sastras prohibit the construction of a Pitha inside the Kurma Bedha higher in level than the Ratna Sighasan.

They relied on a palm-leaf manuscript known as "Sila Kaumudi" (Ext. 4) which according to them was written at about the time of the construction of the temple itself several centuries ago. The genuineness of this manuscript is, however, open to grave doubts. There is no reference to it in any other authoritative book. I would entirely agree with the observations of my learned brother on the subject and hold that it would be unsafe to rely on this manuscript.

32. Hence, the success of the plaintiffs' case depends mainly on their ability to prove the long established custom. The very fact that the inner compound wall is known as Kurma Pracnir and the space enclosed by it is known as "Kurma Bedha", to some extent supports the case of the plaintiffs that at the time of the installation of the deities in the shrine the builders of the temple followed the principles of Kurma Jantra and kept the shape of the Kurma Bedha like the back of a tortoise.

Hence, there is nothing unreasonable in the plaintiffs' contention that as the Lord is sitting at the highest point on the back of the tortoise on the Ratna Singhasan there should be no Pitha or platform higher in level than the Ratna Singhasan. He is the Supreme deity in the temple and if it is recognised by

longstanding custom that no deity (excluding of course the sculptures on the roof of the temple) should be installed on a higher level than Him such a custom seems quite reasonable.

To prove such a custom, the plaintiffs have relied on (i) the absence of any terrace or double storeyed building on a level higher than the Ratna Singhasan within the Kurma Bedha and (ii) the specific instances when permission to build such structure was refused on the recognition of existence of such a custom.

33. The defendants' own witnesses (D. Ws. 2 and 5) have admitted that no two-storeyed building has yet been constructed inside the Kurma Bedha though the temple is in existence for several centuries. It is true that some of the defence witnesses have stated that platforms higher in level than the Ratna Singhasan are found on the top of "Jhulan Mandap" and the roofs of "Padhiari Badaveda", "Phulaghara", "Sayanaghara", "Mukhasala". etc.

It may be that the roofs of some of these buildings are on a higher level than the Ratna Singhasan. But as pointed out in the beginning those roofs are not meant for seating deities or for human-beings to be seated on ordinary occasions and their height does not go against the custom as alleged by the plaintiffs. As regards other platforms inside the Kurma Bedha, though no accurate measurement has been taken the evidence is fairly clear to the effect that they are practically of the same height as the Ratna Singhasan and the top of the Kurma Prachir.

A difference of few inches here and there would not go against the custom as alleged. Hence, the plaintiffs can reasonably say that the strongest support of the custom is found in the absence of any double storeyed building or Pitha inside the Kurma Bedha higher than the Ratna Singhasan. There are admittedly innumerable structures inside the Kurma Bedha and if there was no such custom as alleged by the plaintiffs it is not unlikely that such structures would have been raised to a much higher level than they are now.

34. Apart from this circumstance, the plaintiffs have also adduced evidence of specific instances where such custom was recognised. It is true that such instances are not innumerable. But it should be remembered that the custom alleged is a prohibitory custom, that is to say, a prohibition from doing an act which involves sacrilege to the temple itself.

It is very rarely indeed that any Hindu would even attempt to do any sacrilegious act to Lord Jagannath and consequently one cannot get innumerable instances in which such an attempt was made and was frustrated. The general rule that where a customary right is alleged several instances of the assertion of the right and its due recognition should be proved will not therefore apply in view of the peculiar facts and circumstances of this case. Thus, *Chandika Bakhsh v. Muna Kunwar* ILR 24 All 273 (PC) (W), on which Mr. Mohapatra relied becomes easily distinguishable.

35. I now take up the documents (Exts. 1 to 7) on which the plaintiffs mainly relied to prove the alleged custom. The admissibility of these documents was challenged at great length before us. But I find that in the trial Court all of them were admitted without objection except Exts. 3 and 7. Objection to the admissibility of a document should be taken at the earliest stage though doubtless the absence of any such objection does not preclude a party from challenging its genuineness at a later stage.

But once at the time of marking a document as an exhibit no objection is taken it necessarily follows that formal proof of the document is dispensed with and it will not be open to the party to later on say that the document should be formally proved in accordance with law. Most of these documents except Ext. 2 have been marked as exhibits u/s 90 of the Evidence Act as they purport to be more than thirty years old.

That section says that if a document which purports to be thirty years old is produced from any custody which the Court considers to be proper the Court may make some presumptions regarding the signature and every other part of the document. If objection had been taken at the time of the production of the documents the party producing them would have been compelled to lead evidence about the proper custody of the documents to the satisfaction of the Court.

But where the opposite party allowed such documents to be admitted without any objection it necessarily follows that their proper custody was not challenged and it is not open to the appellants-defendants now to contend that the plaintiffs have failed to prove their proper custody. Doubtless, the absence of any objection at the time of the admission of the documents will not preclude the defendants from urging that there are special circumstances under which the presumption u/s 90 of the Evidence Act may not be drawn. But I do not think that it is open to them to say now that the proper custody of these documents has not been proved in view of their failure to object at the proper time.

36. Ext. 1 purports to be a Hukumnama from Raja Sri Birakishore Deb addressed to one Raghunath Karan, a Sevak of the temple, informing him of his decision to refuse permission to one Paramananda Gountia of some village in Keonjhar State to open a door in the Kurma Prachir which act would be against the well-established custom and usage and would also be sacrilegious (Amangala).

It was produced by P. W. 1 who is himself one of the Sevaks being Daita Nijog of the temple, and who stated that it was in the possession of his ancestors who had obtained it from the said Raghunath Karan. As no objection was taken when the document was admitted in evidence its proper custody cannot now be challenged. Moreover, the statement of P. W. 1 to the effect that the document is more than thirty years old was not challenged.

It is true that the year of the execution of the document is not found on it. But it purports to have been executed by the then Raja of Puri and his well-known

palace (Srinaar) is clearly written, therein. Sri Birakishore Deb was the Raja of Puri from 1856 to 1872 as will be clear from the Report of the Special Office? appointed for the Jagannath Temple. Hence there seems no doubt that this document is more than thirty years old.

It is true that the name of the scribe of the document is not mentioned in it and nobody from the family of Paramananda Gountia has been examined. But it purports to have been executed by Sri Birakishore Deb and contains, the marks "X X X" of one Kelu Karan. This must be deemed to be his signature in view of Section 3(52) of the General Clauses Act which says that signature includes "mark" also.

There is no intrinsic circumstance from which the genuineness of this document could be doubted. It also contains a seal which was unfortunately not decipherable. Under these circumstances when the final Court of fact has drawn a presumption u/s 90 of the Evidence Act and held it to be duly executed by the then Raja of Puri and signed on his behalf by one Kelu Karan, I do not think that there are sufficient reasons for this Court in second appeal to reverse its decision.

It was, however, urged that there was no evidence to show that this Kelu Karan was authorised to sign on behalf of the Raja of Puri. It is obvious that no such evidence can ever be forthcoming for such an ancient document. It is for this very reason, as pointed out in a Full Bench decision of the Allahabad High Court in Hoji Sheikh Bodha Vs. Babu Sukhram Singh and Others, , that Section 90 of the Evidence Act permits a presumption to be drawn to the effect that the person who signed the document on behalf of another was duly authorised to sign for him.

Doubtless, if the entire document purports to have been written by Kelu Karan on behalf of the Raja of Puri, no presumption as regards his authority can be drawn u/s 90 and his power to act on behalf of the Raja must be proved. In the Allahabad case the distinction between a document executed by an agent or power of attorney holder on behalf of another person and signed by him on the one hand and another document which purports to have been written out by the principal himself but the mere physical act of signing the document is made by another person, was pointed out.

In the former class of documents there is no presumption that the executant had the necessary authority from the principal and no such presumption can be made u/s 90 of the Evidence Act. In the latter class of documents, however, (as in the present case) once it is clearly established that the document purports to have been written by the principal himself though signed by some other person, the presumption about due execution of that document would involve the necessary inference that the person who signed it had the authority to sign on behalf of the principal. In Ganga Ram Vs. Chunni Lal , it was pointed out:

"Even where an ancient document does not purport to have been signed by the executant it is open to the Court to presume that the party who signed for the

executant signed it with an authority from him."

The Allahabad Full Bench decision cited above was further considered in B. Bhairon Prasad Vs. Ablak Singh and Another , and it was pointed out that the decision applied even to those documents "bearing the name of the alleged executant by the pen of another" and that such a document would, u/s 90 of the Evidence Act, be presumed to have been executed by the executant himself. Following the decisions cited above it must be held that though there is no evidence to show that Kelu Karan had authority to make a mark on behalf of the then Raja of Puri, that document was duly executed by the Raja of Puri.

37. Once the genuineness of this document is taken as established it affords the strongest support to the plaintiffs' allegation about the long-standing custom. There is a clear recognition therein of the well-established custom of making no alteration to the Kurma Prachir even by way of opening a door.

38. Exts. 2 and 3 if taken as genuine will also strongly support the plaintiffs' case about the prohibition of any structure higher than the Ratna Singhasan. Ext. 2 is dated 20th September, 1904. It is an opinion given by the "Muktimandap Sabha" on a reference made to them by the Raja of Puri regarding the construction of a Mandap inside the Kurma Bedha.

It is signed by Pandit Sadasiva Misra and Pandit Jayakrishna Misra who were then President and Assistant Secretary respectively of the Sabha. This document also was allowed to be marked as an exhibit without any objection. It was actually proved by P. W. 2 who is the present Secretary of the said Sabha. He has been believed by the final Court of fact and though some attempt was made to show that the signatures of Pandit Sadasiva Misra and Pandit Jayakrishna Misra were forgeries, I am in entire agreement with the conclusions of my learned brother to the effect that the evidence of the plaintiffs' witnesses is preferable to that of the defendants".

Though the founder-member of the Muktimandap Sabha was examined as a defence witness (D. W. 14) and was a life-long associate of Pandit Sadasiva Misra the defendants discreetly did not place this document before him and invite his opinion as to whether the signature of Pandit Sadasiva Misra therein, was genuine or not. Moreover, my learned brother has compared the signature of Pandit Jayakrishna Misra as found in Ext. O series produced by the defendants with his disputed signature in Ext. 2 and found them to tally.

On a pure question of fact as to whether P. W. 2 should be believed or not regarding the genuineness of the signatures found in Ext. 2 I see absolutely no reason to disturb the finding of the lower appellate Court, especially when no objection was taken to the admissibility of the document at the earliest stage. Much was made of some spelling mistakes in the document for the purpose of showing that such highly educated persons as Pandit Sadasiva Misra and Pandit Jayakrishna Misra could not have made such spelling mistakes. My learned brother has given adequate reasons to show that spelling mistakes are not

uncommon in Oriya writing even by scholars.

Once Ext. 2 is thus taken as a genuine document the plaintiffs' case gets great strength. As early as 1904 on a specific reference made by the Raja of Puri the learned scholars and Pandits of the Muktimandap Sabha definitely held that according to the well-established custom there could be no structure higher than the Ratna Singhasan inside the Kurma Bedha.

39. Ext. 3 was doubtless objected to at the earliest stage. It is merely an order passed by the Raja of Puri on the basis of the decision given by the Muktimandap Sabha in Ext. 2. Once it is held that Ext. 2 is a genuine document there is no reason to doubt the genuineness of Ext. 3 which is signed in English by one R. K. Das who was admittedly the Superintendent of the temple in 1905 and also bears the seal of the Superintendent. The lower appellate Court rightly drew the presumption u/s 90 of the Evidence Act.

40. The next document is Ext. 5 which is said to be an order by the Raja of Puri rejecting the application of the Raja of Sukinda for construction of a two-storeyed Pitha (Jagati) for his deity Kunjabehari Deb installed inside Puri Temple. The document is written in Persian and around the Persian writing there is also writing in Oriya. The Persian writing is not decipherable. The purport of the Oriya writing is as stated above.

This document was proved by P. W. 8. At the top of the document are the words "E. Pramana". In the body of the document there is reference to the decision taken by the Maharaja and at the end of the document the date is referred to as "Dooi Anka". Doubtless, there is no direct evidence to show who wrote the document and when it was written. But as the document was admitted in evidence without objection the evidence of P. W. 8 regarding its proper custody and its age (more than forty years ago) must be taken as unchallenged.

Mr. B. Mohapatra, however, urged that in the absence of any further evidence to show by whom the document purports to have been executed, no presumption u/s 90 of the Evidence Act could be drawn. Mr. Mohapatra, however, contended that the words "E. Pramana" at the top, "Maharajanka Chhamuru Sabha Hoi Sthira Hela Je" in the body of the document and the reference to "Anka" while giving the date, unmistakably show that it is a document emanating from the Raja of Puri. The word "Anka" is generally used to denote the year of the reign of a king (See Oriya Bhasakosh Vol. I by G. C- Praharaj, p. 101) and as the reference is to the temple at Puri it is obvious that the King is none else but the Raja of Puri.

41. The strongest support for this argument of Mr. H. Mohapatra is found in a document Ext. B proved by the defendants themselves- D. W. 7 has proved it and stated that this was an order (Chammu Chithau) granted to his grand-father by the then Raja of Puri. This document also does not bear the signature of any person; nor is there any clear reference to the Raja of Puri in the body of the document. But it begins with the words "E. Pramana" and while giving the date

at the end of the document there is mention of "Dasa Anka". In view of these characteristic signs indicating an order issuing from the Raja of Puri as disclosed from the defendants' own document it is not open to them to challenge Ext. 5 as not emanating from the Raja of Puri.

42. It is not unusual for big personages just to issue orders without expressly mentioning or signing their names. In a very recent decision reported in *Gopal Das v, Gisilal* AIR 1957 Raj 264 (Z), it was held that where the Mahant of temple though literate did not sign a document but merely directed his scribe to write the word "Sahi" on the top of it and then affixed a seal, the document may be held to have been executed by the Mahant himself.

Doubtless, in that case there was direct evidence that the document was scribed under the instructions of the Mahant. But in the case of documents more than thirty years old no such direct evidence is available. But in drawing a presumption u/s 90 of the Evidence Act the practice observed by the Raja of Puri while issuing orders as shown from Exts. B itself may be taken as a good guide.

In the well-known Oriya Bhasakosh of G. C. Praharaj the words "E. Pramana" were explained as referring to a mark put on a document by an unlettered person. Though there is no eviaence to show whether the then Raja of Puri was literate or not a reasonable presumption can be made from mere comparison of Exts. 5 and B that they were both executed by the same person.

As pointed out by my learned brother, in *Shailendranath Mitra Vs. Girijabhushan Mukherji*, , the mere words "Sri Sahi" occurring in a document were held to mean the signature of one Bijaykeshab Rai Bahadur. I would, therefore, in agreement with the lower appellate Court, hold that Ext. 5 is a genuine document and it is an order from the then Raja of Puri.

43. Ext 6 is another document, more than thirty years old, produced by the present Mahant of Trimali Math (P. W. 13) whose ancestors had sought for permission from the Raja of Puri to build a Mandap inside the Kurma Bedha. Their prayer was refused. This document has been produced from proper custody and its admissibility was not challenged at the earliest stage.

It also contains the characteristic words "E Pramana" at the top, "Anka" while giving the date, and reference to the Maharaja in the body of the document. It also contains the mark "X X X" which is found in Ext. 1. For the reasons already discussed, a presumption can be drawn u/s 90 ot the Evidence Act that this is a duly executed order from the Raja of Puri.

44. The only other document is Ext. 7 which purports to be more than a century old. It was produced and proved by P. W. 14. It is true that the admissibility of this document was objected to at the earliest stage. It contains the "Mutha" of the Maharaja of Puri and also bears his "Anka". I agree with my learned brother that there is no reason to disturb the lower Court's finding regarding its genuineness, based on a presumption under S- 90 of the Evidence Act. This

document contains a specific direction not to interfere with the Kurma Bedha wall.

45. Thus, to prove the custom the plaintiffs have relied on :

(i) Exts. 1 and 7 to show that the Kurma Prachir should not be damaged under any circumstance;

(ii) Exts. 2, 5 and 6 to show that there can be no structure within the Kurma Bedha higher in level than the Ratna Singhasan.

The custom as alleged is specially referred to in Exts. 1 and 2. These documents coupled with the absence of any double storeyed building or structure within the Kurma Bedha for such a long time would, I think, suffice to prove the custom as alleged. There is also a large volume of oral evidence of the plaintiffs' witnesses to prove the custom based not only on personal knowledge but on what the witnesses have heard from their ancestors. The defendants have also adduced oral evidence challenging their statement. The aforesaid documents afford the strongest corroboration of the oral evidence of the plaintiffs' witnesses regarding the alleged custom.

In view of the invariable habit of the pious Hindus not to do any sacrilegious act, especially in the temple of Lord Jagannath of Puri, it will be futile to expect innumerable instances in which such an attempt was made and foiled. The plaintiffs must, therefore, be held to have succeeded in establishing their case.

46. I would, therefore, concur in the order of my learned brother dismissing the appeal with costs.