
(1998) 11 PAT CK 0056

In the Patna High Court

Case No : Appeal from Original Decree No. 500 of 1977 and Miscellaneous Appeal No. 146 of 1979

Shri Mahanth Chandramani Das

APPELLANT

Vs

Shri Ram Rajeshwar Das and Another
Rajeshwar Das Vs Chandramani Das

RESPONDENT

Date of Decision : 11-11-1998

Acts Referred:

Evidence Act, 1872 — Section 41, 45, 47, 67, 68

Specific Relief Act, 1963 — Section 41

Succession Act, 1925 — Section 192, 209, 59, 63

Citation : (1999) 1 BLJR 373 : (1999) 1 PLJR 443

Hon'ble Judges : B.P. Sharma, J;B.N. Agrawal, J

Bench : Division Bench

Judgement

B.P. Sharma, J.—The Main appeal i.e. F.A. No. 500 of 1977 is directed against the judgment dated 28th of May, 1977 passed in T.S. No. 22 of 1966 by the 2nd Addl. District Judge, Patna which was registered on the basis of an application filed for grant of Letters of Administration and originally registered as Letters of Administration Case No. 17 of 1963.

2. The appellant Mahanth Chandra Mani Das, claiming himself to be the Chela of Mahanth Sri Ram Krishna Das of Baba Bhikham Das Thakurbari in Mohalla Bakarganj within the P.S. Kadamkuan in Patna Town, filed this application for grant of succession certificate on a Will purported to have been executed by his Guru Late Mahanth Sri Ram Krishna Das on 2nd of August, 1960 in his favour. It appears that prior to the filing of this application the respondent Ram Rajeshwar Das had filed a petition u/s 192 of the Indian Succession Act which was registered as Succession Case No. 188 of 1961. This application was filed by the respondent on 14th March, 1961 on the basis of Wasiyatnama and Mokhtarnama purported to have been executed by the said Mahanth Sri Ram Krishna Das in favour of the respondent Ram Rajeshwar Das on 21st of December, 1952. When in L.A. Case No. 17 of 1963 the opposite party, i.e. the present respondent,

appeared and filed objection petition and contested the matter, this miscellaneous application was registered as Title Suit No. 22 of 1966. At a later stage both the Title Suit No. 22 of 1966 and Miscellaneous Case No. 188 of 1961 were taken up together for hearing and evidence was recorded in both the cases together. Thereafter two separate judgments were passed; one in Succession Case No. 188 of 1961 and another in Title Suit No. 22 of 1966 which was subsequently renumbered as Title Suit No.3 of 1973. On 28th of May, 1977 the Misc. Case No. 188 of 1961 was allowed in favour of the respondent Ram Rajeshwar Das on contest and Title Suit No. 22 of 1966/3 of 1973 was dismissed and grant of Letters of Administration to the appellant was refused. It further appears that a revision petition was filed by the present appellant against the judgment in Succession Case No. 188 of 1961 which was registered as Civil Revision No. 806 of 1977, but subsequently when it transpired that the Civil revision petition was not maintainable against the order in question, this Civil Revision Case No. 806 of 1977 was withdrawn. It further appears that after the judgment was passed in Title Suit No. 22 of 1966/3 of 1977, a Title Suit was filed by the appellant Mahanth Chandra Mani Das which was registered as Title Suit No. 225 of 1978. In this title suit the appellant asserted that he was the senior-most Chela of Late Mahanth Ram Krishna Das and, as such, he was his successor to the Gaddi of the said Baba Bhikham Das Thakurbari and he was also continuing in possession over the properties of the said Thakurbari. The appellant also challenged the legality of the order passed in T.S. No. 22 of 1966 and sought a relief that the plaintiff be declared legal Mahanth and Sevait of Bakarganj Thakurbari popularly known as "Baba Bhikham Das Thakurbari" and it be also declared that the defendant, i.e., the present respondent Ram Rajeshwar Das has no title to the property of the Thakurbari. The appellant also prayed for permanent injunction restraining the respondent from executing the decree of delivery of possession on the basis of the judgment in Succession Case No. 188 of 1961/3 of 1973. He also prayed for the cost of the suit and for any other relief to which he was found entitled. It further appears that during the pendency of the suit, a petition for injunction under Order XXXIX, Rule 1 of the CPC was filed on behalf of the appellant and after hearing on the rejoinder filed on behalf of the respondent, the Court of Addl. Sub-Judge IX, Patna passed an order on 15th of May, 1979 allowing temporary injunction in favour of the appellant whereby the respondent Ram Rajeshwar Das has been restrained from executing the decree of delivery of possession passed in Succession Case No. 188 of 1961/3 of 1973. Against this order of injunction the respondent Ram Rajeshwar Das filed a miscellaneous appeal under Order XLIII, Rule 1 of the CPC which was registered as Misc. Appeal No. 146 of 1979. Earlier, this miscellaneous appeal was ordered to be heard alongwith F.A. No. 500 of 1977 by an order dated 27.2.1997 and accordingly, both the matters have been heard.

3. For the purpose of deciding the points at issue it will be necessary to co-relate the facts of the case in short.

The said Baba Bhikham Das Thakurbari was established long ago by one Baba

Beni Das who was succeeded by his Chela Purushotam Das and Mahanth Purushotam Das was succeeded by his Chela Achraj Das, who was in turn succeeded by his Chela Bhikham Das. This Mahanth Bhikham Das is the person by whose name the Thakurbari is popularly known as Baba Bhikham Das Thakurbari. The Thakurbari owned huge property in the form of land and building in the town and it has some subsidiary branches also at different places including at Ayodhya in Uttar Pradesh. The said Mahanth Bhikham Das was succeeded by his disciple (Chela) Mahanth Badri Das and Mahanth Badri Das was succeeded by his Chela Ram Krishna Das who was the last Mahanth before the present series of litigations started. The appellant claims that he was the Chela initiated in his Panth at a very early age of about 10-12 years in 1933 and as he was not educated and was very immature and young his Guru Mahanth Ram Krishna Das arranged for his early education and he also sent him to a branch Math at Ayodhya where he remained for several years and learnt the scriptures and customs and Puja Path and subsequently when the Mahanth became old and diseased he called the appellant and he started remaining with his Guru Mahanth Ram Krishna Das and he started looking after him. According to the appellant, at some point of time the respondent Ram Rajeshwar Das came to contact with his Guru Mahanth Ram Krishna Das and by his manner and conduct because of his cunningness he impressed Sri Ram Krishna Das who allowed him to remain with him for some time and out of his cunningness and greedy eyes over the properties of the Math this Ram Rajeshwar Das got a Wasiyatnama and Mokhtarnama executed by the said Mahanth Ram Krishna Das in his favour on 21st of December, 1952. However,, the documents continued to remain with the Mahanth Ram Krishna Das. It further appears that in 1953 late Mahanth Ram Krishna Das went away to Vrindaban for some time and in his absence the respondent Ram Rajeshwar Das came to his true colours and after preparing a duplicate key of the room occupied by the Mahanth Ram Krishna Das, which was looked in his absence, got the lock of the room opened and removed some valuables including the ornaments of the deity in the temple of the Math and later this Mahanth Ram Krishna Das slipped away and though a case of theft was registered in Kadamkuan Police Station in this regard, the respondent Ram Rajeshwar Das could not be traced by the police and the case was also dropped. It is stated on behalf of the appellant that in this background the late Mahanth Ram Krishna Das was very much unhappy and annoyed with Ram Rajeshwar Das and accordingly, he got the Wasiyatnama in favour of the respondent Ram Rajeshwar Das cancelled by a deed of cancellation dated 8th of June, 1953. It is further stated on behalf of the appellant that subsequently in the year 1960 Mahanth Ram Krishna Das fell seriously ill and inspite of treatment by the eminent Doctors at Patna he could not improve. So, being conscious of failing health, Mahanth Ram Krishna Das got executed a Wasiyatnama and also a Mokhtarnama in favour of the appellant Chandra Mani Das on 2nd of August, 1960. Thereafter said Mahanth Ram Krishna Das died on 19th of February, 1961. Then his last rights were performed by the appellant who was his senior Chela and successor and his Saradh Ceremony was also performed by the appellant.

Thus he was duly installed as the Mahanth of the said Math by several religious persons entitled to do it and the appellant became full-fledged Mahanth of the Math in question and he continued to be so uninterrupted. However, the respondent Ram Rajeshwar Das arrived after the death of Mahanth Ram Krishna Das and as he was not allowed entry in the Math, with ulterior motive and mischievous intention he filed Succession Case No. 188 of 1961. Thereafter Misc. Case No. 36 of 1961 was filed by the present appellant for grant of Letters of Administration to him but it was subsequently dismissed in default in 1963. Subsequently, in 1963 the miscellaneous case was filed as Misc. Case No. 17 of 1963 which was subsequently converted into Title Suit No. 22 of 1966 and both the Misc. Case No. 188 of 1961 and Title Suit No. 22 of 1966 were heard together. It appears that the evidence was recorded in both the cases together but on 28th of May, 1977 the Court i.e. the Court of 2nd Addl. District Judge, Patna passed two separate judgments.

4. As stated above, Misc. Case No. 188 of 1961 was allowed in favour of the respondent Ram Rajeshwar Das; whereas Title Suit No. 22 of 1966/3 of 1973 was dismissed against the present appellant on contest and accordingly the present Appeal No. 500 of 1977 has been filed.

5. So far as the respondent is concerned, it has been asserted on his behalf that actually Mahanth Ram Krishna Das was the person who was well-bred Sadhu of Ramanandi Sampardaya and he had adopted the respondent Ram Rajeshwar Das as his Chela. It was further stated on behalf of the respondent that as the Math in question was established by a person of Sutradhari Class i.e. Dwij, a custom was being followed that only a Sutradhari will become a Mahanth of the Math and accordingly, all the previous Mahanths of this Math were from Sutradhari Class and no person of a lower caste (Maladhari) could be either adopted as a Chela of the Mahanth or could succeed as Mahanth of this Math. It is further stated on behalf of the respondent that the appellant Chandra Mani Das belonged to a lower caste, Kurmi by caste, and he could not have been adopted as a Chela by Ram Krishna Das and actually he was brought by late Mahanth from Bihar Sharif while he was aged about 10 years only to work as his servant and to look after his work. It is further asserted on behalf of the respondent that the custom of Baba Bhikham Das Thakurbari is that only Sutradhari i.e. the person belonging to Brahmin, Bhumihar or Chhatriya castes could become a Mahanth and since the appellant did not belong to this category he was never supposed to be a Chela of Late Mahanth Ram Krishna Das, but, however, he was a favourite servant of late Mahanth Ram Krishna Das. It is further stated that since the respondent was the senior most Chela of Mahanth Ram Krishna Das he had executed a Wasiyatnama as well as the power of Attorney (Mukhtarnama) in his favour, but during the last days of late Mahanth the respondent had gone away to some other places including to Raipur in Madhya Pradesh to look after the Thakurbari there, in his absence the appellant with the help of other employees of the Math and some other unscrupulous persons of litigant character forged and fabricated some documents in order to oust the respondent and to grab the valuable property of

the Math. But when the respondent learnt about the death of his Guru, he immediately came back to Patna. In the meanwhile, his Chela Ramakant Das performed the last rites of late Mahanth and on his return the respondent performed the Bhandara Ceremony of his Guru and on this occasion several religious persons and Mahanths of other Thakurbaries participated and they bestowed upon the respondent the Mahanthship of this Thakurbari by offering Chadar to him and he also offered them adequate Vidai etc. It is asserted on behalf of the respondent that so far as the appellant is concerned, not only that he belongs to a lower caste, he is also quite illiterate and he does not have any knowledge of scriptures and he does not know even the manner of performing Puja Path and actually he is an usurper of the Math with the help of some musclemen and litigants coming forward to support him for personal ends. Accordingly to the respondent, he was initiated a Chela by Ram Krishna Das in the year 1930 and he belongs to Sutradhari Class and is well educated and a pious celibate person and he is also respected by the Sadhus and Grihastha connected with the Thakurbari in question. It is further asserted on behalf of the respondent that late Mahanth did not cancel his Mukhtarnama and the alleged cancellation of his Wasiyatnama is also a fabrication and it could not have been cancelled and that is the reason why the Court upheld his claim to the succession of the Math in question in Misc. Case No. 188 of 1961. The Wasiyatnama on the basis of which the appellant claims his title to the Gaddi of the Math is a forged and fabricated document and the trial Court has also rightly refused to accept the genuineness of this Wasiyatnama and has refused to grant Letters of Administration to the appellant.

6. The Main point for consideration before the trial Court in this case was whether the Will purported to have been executed in favour of the appellant on 2nd of August, 1960 by the Mahanth Ram Krishna Das (Ext. "E") was genuine, valid and legal. The Will was produced in Court and its execution and attestation was also proved by some witnesses and a number of witnesses were also examined on behalf of the plaintiff- appellant on the point that he was a Chela of Late Mahanth Ram Krishna Das and that he succeeded to throw off the late Mahanth after his death and was recognized as such by a large number of persons including some religious persons and is continuing to be the Mahanth of the Math in question.

7. On the other hand, a large number of witnesses were examined on behalf of the defendant-respondent in order to show that actually the respondent was the senior Chela of Mahanth Ram Krishna Das. He was qualified and competent to succeed the Mahanth and actually the Mahanth had executed Wasiyatnama and Mukhtarnama in his favour, but because the respondent was absent for quite some time from the Math in question, the appellant with the help of unscrupulous employees and some litigant persons manipulated things and got a cancellation deed prepared and thereafter he also got a Wasiyatnama (Will) prepared in his favour. It was stated by the witnesses on behalf of defendant-respondent that at the relevant time when the Will is said to have been executed

by the Mahanth, he was seriously ill and was not in a proper disposition of mind to understand the contents of the forged Will. It is also further asserted that though late Mahanth was a well educated person and he was in the habit of signing the documents executed by him, he did not sign the Will in question and it is claimed that he put his L.T.I. on it, but the L.T.I. was also not put by him on the document and the entire execution of the document is an outcome of fabrication and fraud.

8. The learned Trial Court considered the evidence on record and held that though several experts were examined in the case regarding examination and comparison of the L.T.I. on the document, no definite opinion could be formed regarding the genuineness of the execution of the Will and the circumstances appearing in the evidence were sufficient to indicate that the execution of the Will in favour of the plaintiff-appellant was not done by the late Mahanth Ram Krishna Das in a proper frame of mind with his freewill. Since the Court had serious doubts about the genuineness of the Will, the trial Court did not accept the Will as a valid and legal last Will executed by the Mahanth. It could not be treated as the last Will of the testator and, therefore, the learned trial Judge refused to grant Letters of Administration to the plaintiff-appellant as prayed and the suit was accordingly dismissed.

9. The plaintiff was felt aggrieved against the judgment and order of the trial Court and it has been contended on behalf of the appellant that the learned trial Court misconceived the scope of the suit and based its findings on extraneous and irrelevant considerations. It is further contended that the learned trial Court failed to consider the evidence, oral as well as documentary, regarding the execution of the Will and in spite of the fact that the execution of the Will was supported by the competent attesting witnesses, the learned trial Court guided by some other considerations. It is further submitted on behalf of the appellant that since the Will earlier executed in favour of the defendant respondent was cancelled by a registered document by the late Mahanth, he had no right to challenge the proceeding and the learned trial Court also approached the case with a wrong view point, because the Court was obsessed with a feeling that the defendant respondent was the oldest Chela of the late Mahanth. It is further contended that the learned trial Judge came to erroneous conclusion that at the time of execution of the Will in favour of the plaintiff-appellant the executant Mahanth was not in sound disposing capacity, as, because of his failing health, his mental faculties had deteriorated. It is also further contended that the learned trial Court also erroneously held that the thumb impression on the Will was put at the instance of the plaintiff-appellant and, therefore, the execution of the Will was doubtful. It was further been contended that the learned trial Court also did not take notice of the fact that a large number of witnesses consistently stated in favour of the appellant that he was all along present with late Mahanth as his Chela and after his death he continued to be in possession of the properties of the Math left behind by late Ram Krishna Das and that he is actually continuing as Mahanth of the Math. Therefore, it has been contended that the

entire findings of the learned trial Court and an adverse inference drawn by the trial Court are indicative of the fact that the learned trial Court misconstrued the facts and the evidence on the record and came to erroneous conclusion. Therefore, it has been contended that the judgment and order of the trial Court be set aside and the Letters of Administration, as prayed for by the plaintiff-appellant, be ordered to be granted.

10. It may be noted at this stage that the trial Court was hearing two matters together; one being Succession Case No. 188 of 1961/3 of 1973 and another was Title Suit No. 22 of 1966/3 of 1973. The respondent in this case was the petitioner in Misc. Case No. 188 of 1961, while the appellants was the applicant-plaintiff in T.S. No. 22 of 1966. but the Court treated the respondent as the plaintiff while recording evidence and accordingly, the witnesses examined for the respondent have been numbered as P.Ws., while the witnesses examined for the appellant have been numbered as D.Ws. in the case. It appears that altogether 38 witnesses have been examined on behalf of the respondent in support of his case. In order to contest the claim of the respondent in the title suit under appeal 26 witnesses have been examined on behalf of the respondent numbered as P.Ws. So far as the documentary evidence is concerned, a large number of documents have been admitted into evidence on behalf of both the parties. All the documents are not relevant in the matter in question and only a few documents have significance, so far as the present appeal is concerned, because the appeal is against the judgment in Title Suit No. 22 of 1966. It has already been stated above that this Title Suit No. 22 of 1966 arose out of the original miscellaneous petition filed on behalf of the respondent for grant of Letters of Administration on his Will purported to have been executed by late Mahanth Ram Krishna Das in favour of the appellant Chandra Mani Das. The original Will is Ext. "E". It also appears that alongwith the Will which is claimed by the appellant as the last Will of the testator Mahanth Ram Krishna Das, a Power of Attorney or Mukhtarnama was also executed by late Mahanth in his favour and the Power of Attorney is Ext. "F". On the other hand, the similar two documents were admittedly executed in favour of the respondent by late Mahanth. The Power of Attorney executed in favour of the respondent is Ext. 1 while the Will executed in favour of the respondent-by late Mahanth is Ext. 3. So far as the execution of the Will and the Power of Attorney in favour of respondent is concerned, the same is admitted. However, according to the appellant the Will executed by the late Mahanth. in favour of the respondent is said to have been cancelled by him through a registered deed of cancellation dated 11-6-1953 (Ext. "H"). So far as the genuineness and the validity of the Will and the Power of Attorney (Exts. 3 and 1) is concerned, there is no contest on the point and it is also clear that the Cancellation Deed (Ext. "H") relates to the Will (Ext. 3) and thus, the Power of Attorney (Ext. 1) was never cancelled. However, regarding the matter of the Will (Ext. 3) in favour of the respondent and the Power of Attorney (Ext. 1) in his favour, there is no necessity to consider the validity of these two documents. Actually, as stated above, there is no cancellation so far as the Power

of Attorney (Ext. 1) is concerned, but the Cancellation Deed (Ext. "H") indicates that the Will in favour of the respondent (Ext. 3) was cancelled by Ext. "H". It was also challenged by the respondent in his application before the Court and the matter has been separately decided and that matter is not under appeal presently. So the only question for consideration in the appeal is whether the Court was right and justified in refusing to grant Letters of Administration to the appellant regarding the Will in his favour (Ext. "E"). Thus, the scope of the appeal is also limited.

11. So many matters are raised and the evidence has also been led by both the parties. The parties have led sufficient evidence to indicate whether the appellant was the senior Chela of late Mahanth Ram Krishna Das or the respondent was the only and senior Chela of the late Mahanth, there is no document available on his point and the oral evidence has been led on behalf of both the parties in support of their cases. The evidence is also not so important for the purpose of deciding the matter in issue, because even if it is so that the appellant was not the senior most and the only Chela of late Mahanth and if the Will executed by him (Ext. "2") was the last Will of the Mahanth by which he conferred right to succeed him to the properties of the Math on the respondent, the appellant is certainly entitled to get a Letter of Administration if the Will is found to be genuine and valid. On the other hand, if the appellant is found to be the senior most or the only Chela of late Mahanth testator Ram Krishna Das and if the Will executed by him in favour of the appellant (Ext. "E") is not found to be genuine and valid then the Letters of Administration could not have been granted to the appellant which has been done by the trial Court.

12. So far as the execution of the document is concerned, it appears that altogether four attesting witnesses were there and two of the attesting witnesses could not be examined by the respondent and it has come in evidence that one of them was dead. It is also in the evidence that the scribe of the Will (Ext. "E") i.e., Yamuna Prasad was also dead and, therefore, he could not be examined. The witnesses, who have been examined on the point of execution of the Will, are D.W. 38 Islok Singh, D.W. 12 Ram Briksha Singh and D.W. 39 Ram Narayan. D.Ws. 12 and 39 are the attesting witnesses while D.W. 38 Islok Singh is the person who is said to have made endorsement and who has signed for the testator Ram Krishna Das and it is said that because the testator Mahanth Ram Krishna Das was seriously ill and was not in a position to sign himself he reposed confidence in him and he was related to testator as nephew, D.W. 38 Islok Singh had signed on his behalf. The endorsements are Exts. "D" to "D/5" on the Will Ext. "E". He has stated that the Will was scribed by Yamuna Prasad at the instruction of the testator Mahanth and on being asked by the Mahanth he had made endorsement of execution and had put signatures of Mahanth on the Will. D.Ws. 12 and 39 have supported the execution of the Will as the attesting witnesses. So far as these witnesses are concerned, it has been submitted on behalf of the respondent that the Court has rightly refused to accept their evidence because of certain discrepancies and absurdities appearing in their

evidence. So far as D.W. 38 Islok Singh is concerned, it has been stated that though he claims affinity with the testator and claims that he was looking after the affairs of the Math on behalf of the Mahanth, his cross-examination indicates that he betrays the knowledge of the details of the affairs of the Math and he could not give some other details of the execution. He could not say that who called the scribe and who called the Registrar for the registration of the Will and admission of the execution by the testator and who took steps for depositing the necessary cost for the work. So far as D.W. 12 Ram Briksha Singh is concerned, he appears to be an attesting witness to the Power of Attorney (Ext. "F") and he has given the details of the execution, no doubt, but it has been pointed out that this witness while deposing about the health condition of the Mahanth has admitted that the testator Mahanth was ill and because of his ill health he used to generally remain practically confined to bed. He has also further admitted in paragraph 26 of his cross-examination that the eye sight of the Mahanth testator was also very poor. He also further stated that the Will was scribed and prepared and thereafter it was executed between 7 a.m. to 11 a.m. on the date of execution and according to him, the execution took place at 10.30 a.m. However, he could not say as to who actually presented the Will before the Sub-Registrar, who was called for admission of the execution and registration; though he says that the execution of the Will was admitted before the Registrar and an endorsement to this effect was made by the Registrar. However, in this connection it has been pointed out that the Registrar himself has also not made a mention to the fact as to why the testator Mahanth was himself, a well educated person, did not put his signature and rather put his L.T.I. on the document. This witness also cannot say as to what happened to the original Will after its execution and registration.

13. Another witness D.W. 39 has also supported the attestation, no doubt, but from paragraph 4 of his evidence it appears that he was a tutored witness and from paragraph 6 of his evidence, it appears that the Mahanth was always found lying on his bed. It was because of his illness. However, it appears that his brother Balram had purchased some property from the testator prior to the execution of this Will and that the consideration paid was too low. He has also further stated in paragraph 15 of his evidence that he had signed the Will as an attesting witness at 8 a.m. in the morning and thereafter he had gone away to his office, but it has been pointed out earlier that according to D.W. 12 the Will was executed at about 10.30 a.m. Therefore, there is serious contradiction in the evidence of two witnesses regarding attestation of the Will by this witness, He has also admitted in his cross-examination that one Bimal Prasad was the Tahsildar of the Math. He used to look after the affairs of the Math. It has, therefore, been submitted on behalf of the respondent that so far as the execution of the Will is concerned, it has not been properly proved to the satisfaction of the Court.

14. So far as D.W. 38, Islok Singh, is concerned, it has been pointed out that he has clearly stated in his evidence, paragraph 3, that the testator Mahanth was

lying ill for about 8-9 months prior to his death and it is obvious that the execution of the Will took place on 2.8.1960 while the Mahanth died on 19.2.1961, i.e., within the period of his illness and about five months prior to his death. This witness also claims that during his illness this witness was the only person who was serving the late Mahanth. Thus, he excludes the appellant as the person serving the Mahanth during the last days. He has given a complete picture of the health of the testator but inspite of the fact that he was the close confidant of the testator Mahanth, he could not say as to who had deposited the necessary money for calling the Sub-Registrar and necessary expenses to be met for the execution of the Will. He has also further admitted that the documents after execution were made over to Bimal Prasad, a Tahsildar. It has, therefore, been pointed out that it appears to be peculiar that the Will after execution was neither retained by the Mahanth himself nor it was handed over to the testatee, appellant and there is allegation against this Bimal Prasad that he was the man behind manipulation of all kinds right from so-called cancellation of the Will in favour of the respondent to the execution of the Will in question. It has also been further pointed out that this witness in paragraph 40 of his cross-examination has stated that the testator Mahanth had put his L.T.I. only once on the Will in presence of the Registrar but the other witnesses on his point have stated that the Mahanth had put his T.I. on several pages. This witness has also stated that the accounts of the Math were not being Maintained, though it has been stated by several other witnesses that Bimal Prasad, the Tahsildar, was Maintaining the account. He also signed the document in question as Nawal Kishore Das and his claim is that though he was not a Sadhu he was called Nawal Kishore Das by late Mahanth and he has admitted that he did not sign any other document claiming himself to be Nawal Kishore Das. It has been submitted on this score that the transaction therefore appears to be shady and not free from suspicion. It has also been pointed out that he happens to be the own brother of Balram Singh who had acquired some land of the Math and there is an allegation that he has also grabbed some property not actually transferred to him through a document. In such a circumstance, it has been emphasised on behalf of the respondent that the learned trial Court has rightly viewed the execution of the Will (Ext. "E") with suspicion because the circumstances appearing in the evidence clearly indicate that the Mahanth was at least not in a fit condition of health and there is sufficient indication to show that the testator was not in fit disposition to execute the Will in question.

15. It may be noted that in this case sufficient evidence has been led on two other points though the points do not appear to be so material for the purpose of decision of the matter in issue. On the one hand, it has been stated on behalf of the respondent that the Math of which Mahanth Ram Krishna Das was the Mahanth was a Math established under Ramanandi Sect of Vaisnavites and there was a tradition that only a Sutradhari could hold the post of Mahanth and a Maladhari could not be entitled to be appointed as a Mahanth of the Math in question. Several witnesses came forward to support the case of the respondent

and have made oral statements supporting the case on this point and have stated that no Mahanth of this Math was a Maladhari and all were Sutradhari and the tradition was that a Maladhari could not become a Mahanth of the Math. It transpires from the evidence that the witnesses have used to term Sutradhari for twice borne (Dwij) who had right to wear Yaggopawit and the persons of only three castes are included in this definition of Sutradhari, i.e., Brahamins, Bhumihaar Brahamins and Rajputs. By Maladhari it is meant that a person becoming a Sadhu but not coming from the class of Dwij is known as Maladhari and according to the witnesses for the respondent a Maladhari is not entitled to become a Mahanth of the Math. On the other hand, several witnesses have supported the case of the appellant that actually when the person renounces the world and leaves his family and becomes ascetic, there is no distinction between a Sutradhari or Maladhari and it has been stated that in several of the Maths in and around Patna the persons of other castes than the Dwij, as stated above, are working as Mahanths and it has been stated that in this Math also there was no such custom. However, in this connection it may be noted that it has transpired from the evidence that prior to issue being raised there was no person from the Maladhari Class holding the charge of Mahanth of this Math, but so far as the tradition and custom is concerned, there is no written paper available on this point. However, this point was emphasised by both the parties only in order to assert that he was the real disciple (Chela) of the late Mahanth Rain Krishna Das. The claim of the respondent is that since he belonged to Class of Sutradhari he was rightly adopted by late Mahanth as a Chela after his initiation in the tradition of ascetic.

16. On the other hand, it has been asserted on behalf of the appellant that he was adopted as Chela by the late Mahanth in his very childhood and he got him educated under his patronage and though the late Mahanth had earlier bestowed his affection and reposed confidence in the respondent, because of his misconduct committed in the year 1952 in committing theft in the Math, the Mahanth had driven him away and thereafter he was roaming from one place to another and he was not even present in the Math after 1952 till the death of the Mahanth in February, 1961. It is stated on behalf of the appellant that during this period this respondent was moving from here to there doing work as Pujari at different places including some places in Madhya Pradesh and he was also claiming to be the Mahanth of some small Maths, but when the testator died he came back and was instigated by the enemies of the Math and by some unscrupulous person to lay his claim over the properties of the Math only in order to grab the valuable property of this Math.

17. One thing has come in evidence and is practically admitted that in the year, 1952 when the respondent was in the confidence of the testator he had executed two documents in favour of the respondents: one being the Power of Attorney (Ext. 1) and another being a Deed of Will (Ext. 3). By executing these two documents testator had desired that the respondent should become his successor, but it is also obvious that there was a theft in the Math some time in

the year 1952 when the testator had-gone away to Brindawan after executing the documents (Exts. 1 and 3). It also appears that the Mahanth had retained the key of his personal room with him but when he returned he found that his room was opened in his absence and the key of the box in which the ornaments of the deity of the Math were kept was removed and the ornaments were stolen away. It appears that before arrival of the testator the respondent had left the Math and thereafter he did not return till the death of the testator. In this background, there appears to be some sense in the contention that being annoyed with the conduct of the respondent the Mahanth testator got the Deed of Will (Ext. 3) cancelled through a Deed of Cancellation (Ext. "H") in 1953 and in this background it is asserted on behalf of the appellant that since the Mahanth testator has become disappointed with the conduct and character of the respondent and since the appellant was available and he felt that he could be interested, he, subsequently before his death, decided to execute a Will and the Power of Attorney in his favour. Therefore, it has been contended on behalf of the appellant that the circumstances go to indicate that the execution of the Will in favour of the appellant was made in a very natural way and in a very natural circumstance and therefore, the execution, which has been proved by the competent witnesses, should not be doubted and disputed and therefore, it is submitted that the findings of the trial Court in this regard be set aside and the appeal be allowed.

18. On the other hand, it has been contended on behalf of the respondent that actually the respondent was a competent person to become a Chela of the Mahanth testator and he had become a Chela of the testator as back as in the year 1930 and thereafter he continued to remain in the Math with the testator all along and won the confidence of the Mahanth and accordingly, a Will (Ext. 3) and the Power of Attorney (Ext. 1) were executed by the testator in the year 1952 and the testator had actually decided that the respondent should become his successor. But unfortunately some unscrupulous persons including several employees of the Math went in collusion with the appellant and they conspired together to fabricate some documents and cause prejudice to the deceased Mahanth testator. It is contended that the respondent was absence for some time when the testator returned from Brindawan in the year 1953 and taking advantages of his absence this unscrupulous element poisoned the ears of the testator against the respondent and started blaming him for committed theft in the Math which he had not done. In this regard, it is important to note that though a document has been produced and it has been stated that the Mahanth had gone to the extent of lodging information to the local Police regarding theft blaming the respondent for the theft in question, the matter was subsequently dropped, as the respondent was not available. There is no further evidence on this point as to what happened to the investigation of the case. Even if it was so that the Police found the allegation against the respondent to be true and even if he was not available or could not be apprehended, the Police could have submitted final report saying that the accusation was true but the accused was

absconding. But there was no question of the proceeding being terminated or the case being dropped. Therefore, it appears to be mysterious as to why the case could not proceed. If it was so that the case remained pending only because of the absence of the respondent, it was natural that the Police could catch hold of the respondent on his return after the death of the Mahanth when he started claiming succession to the thrown of the Math and started to reside in Patna. But nothing of this kind was done. It is, therefore, contended on behalf of the respondent that all these things are manipulations by unscrupulous element including the employees of the Math that the respondent was maligned in the estimate of the testator and the manipulations were made resulting in cancellation of the Will and thereafter when the Mahanth was on death bed they manipulated to fabricate two documents (Exts. "E" and "F") and because the respondent was outside, in his absence the appellant with the help of his supporters and the other employees grabbed the Math and ousted the respondent. However, admittedly the appellant is continuing to act as a Mahanth since after the death of testator and his names have also been entered in the Serista of the State and of the Municipal Corporation and in the Religious Trust Board also and he is managing the affairs of the Math all along and the respondent is not being allowed to enter the Math. But according to the respondent merely because some unscrupulous elements succeeded in ousting him by fabricating documents, they cannot be treated as genuine person and the appellant cannot be accepted as the true Mahanth of the Math and it has been submitted that the trial Court after examining all aspects of the matter has rightly refused to grant Letters of Administration to the appellant and therefore, there is no necessity to interfere with the judgment and order of the trial Court.

19. Another point on which much emphasis have been led on behalf of both the parties and the matter has also been highlighted in evidence as well as in argument that on the one hand the appellant claims that after the death of his Guru testator he performed his last right and he also performed his Sharadh and on this occasion many persons including some religious persons assembled and offered Chadar to the appellant indicating his acceptance as Mahanth of the Math in question. On the other hand, respondent claims that as soon as he was informed that his Guru testator has died he rushed to Patna and in the meanwhile because he being the senior most Chela of the deceased Mahanth was not available, the Sadhu Samaj performed the last rites of the Mahanth according to customs and on his arrival he managed to perform the Sharadh and Bhandara of his Guru, which was attended by the important religious persons of the town and the locality and on this occasion Chadar was offered to the respondent bestowing the Mahanthship on him, but because the majority of the employees of the Math were in collusion with the appellant they drove him away and ousted him and the appellant grabbed the Mahanthship of the Math.

20. In this background the respondent has turned the appellant usurper. Both the parties have led sufficient oral evidence on this point and there is no documentary evidence in this regard. Therefore, the evidence from both the

sides are practically balanced. But these points cannot, go to decide the Main issue in this case. On consideration of the entire facts and circumstances appearing in the evidence in this case, it is very difficult to say whether there was a prevalent custom in the Math that only a Sutradhari could become a Mahanth and it is also very difficult to come to a definite conclusion whether Bhandara of the deceased Mahanth testator was performed by the appellant or the respondent because several important religious persons have come forward to support the case of the appellant. A large number of important religious persons of the locality have also supported the case of the respondent on this point. In this circumstance, it is difficult to hold as to who was actually installed as Mahanth after the death of the testator but so far as the point in issue is concerned, all these factors are not so relevant, because, as stated earlier, what is material is as to whether the Will in question (Ext. "E") is the last Will of the Mahanth and is a genuine and valid Will or not. Other matters may be relevant for the purpose of deciding the final title to the Math and its properties and it has already been mentioned above that a suit bearing T.S. No. 225 of 1978 is already pending in the Court of Sub-ordinate Judge, Patna. In the suit an order of injunction has been passed against the present respondent who is defendant in the suit and he has been restrained from taking possession of the properties of the Math on the basis of the judgment and the order passed in Misc. Case No. 188/61/3/73. It is important to note that the order of injunction also stands challenged in the Misc. Appeal No. 146 of 1979 which has to be decided herewith.

21. For the purpose of deciding whether the Will (Ext. "E") should be held to be genuine, legal and valid, certain principles of law have been urged to be taken into consideration by both the parties. So far as the appellant is concerned, certain decisions have been cited. The cited case laws are as follows:

(i) AIR 1947 PC 169, Suryanarayana Murthi v. Suramma and Ors.

The case deals with the onus to prove testamentary capacity.

(ii) The State Vs. Karu Gope and Another, .

In this case the principles involved in considering the report of the finger print expert have been dealt with and it has been observed that the report of the expert should be in detail with reasons for the opinion.

(iii) A.E.G. Carapiet Vs. A.Y. Derderian, .

In this case their Lordships have dealt with the matter of consideration of the principles to decide the question of grant of probate by a Court and it has been held that the test to judge a sound disposing mind is not an absurd test nor is it the test of a perfectly healthy and perfect mind. It has been further held that the test of a sound disposing mind is in law a workable test. Further, it has been held that it means in plain language an appreciation of the fact that the man is making a Will and an appreciation of the contents of that Will and an appreciation of the nature of disposition that he is making having regard to the

claims of affection and family relationship and claims of the society or community to which he belongs. Accordingly, it has been held that it is not a hypothetical nor an impracticable test.

(iv) *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others*, . In this case their Lordships have dealt with the detailed onus of proof in propounder of a Will and the nature of appreciation of evidence as well as duty of the Court in appreciating the evidence.

(v) *Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee* since deceased and after him his legal representatives and Others, . In this case their Lordships have dealt with mode of proof of a Will and the principles to be taken into consideration for grant of probate. The question of evidence of the expert in the matter has also been dealt with by their Lordships in this case.

(vi) *Pushpavathi and Others Vs. Chandraraja Kadamba and Others*, . In this case their Lordships have dealt with the manner of proof of execution and attestation and also question of burden of proof as the propounder of the Will especially when it is alleged to be a forgery.

(vii) *Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others*, .

In this case their Lordships have laid down the principles in detail regarding the manner and the nature of proof of a Will and the principles regarding appreciation of evidence.

On the other hand, some case laws have also been cited on behalf of the respondent:

(i) In the case reported in *Gorantla Thataiah Vs. Thotakura Venkata Subbaiah and Others*, , their Lordships have dealt with the suspicious circumstances attending the execution of the Will and the manner of appreciation of evidence.

(ii) In another case reported in *Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others*, , which is also referred to by the Counsel for the appellant, the manner of proof of a Will and the appreciation of evidence have been considered by their Lordships.

(iii) The third case referred to it also the case on which the Counsel for the appellant has placed reliance. This is a case reported in *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others*, .

(iv) The last case referred to on behalf of the respondent is the case reported in *Sarada Charan Misra Vs. Smt. Prafulla*, .

22. In this context it will be proper to deal with Mainly two cases on which both the parties have placed reliance i.e. *Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others*, and *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others*, .

23. In the case of *H. Venkatachala Iyengar v. B.N. Thimmajamma and Ors.* (supra), the principle to guide the nature and onus of proof and the nature of

appreciation of evidence as well as the duty of the Court have been discussed in detail by their Lordships by taking into consideration some other decisions in the matter. In this case, it has been observed by their Lordships:

18. What is the true legal position in the matter of proof of Will? It is well known that the proof of Wills presents a recurring topic for decision in Courts and there are a large number of judicial pronouncements on the subject. The party propounding a Will or otherwise making a claim under a Will is no doubt seeking to prove a document and, in deciding how it is to be proved we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68, Evidence Act are relevant for this purpose. u/s 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by Will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the Will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a Will. This section also requires that the Will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the Will set up by the propounder is proved to be the last Will of the testator has to be decided in the light of these provisions. Has the testator signed the Will? Did he understand the nature and effect of the dispositions in the Will? Did he put his signature to the Will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of Wills. It would prima facie be true to say that the Will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of Wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

19. However, there is one important feature which distinguishes Wills from other documents. Unlike other documents the Will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his Will or not; and this aspect naturally introduces an element of solemnity in the decision of the

question as to whether the document propounded is proved to be the last Will and testament of the departed testator. Even so, in dealing with the proof of Wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free Will. Ordinarily when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law. Courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the Will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the Will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the Will may otherwise indicate that the said dispositions may not be the result of the testator's free Will and mind. In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last Will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and,, unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last Will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the Will propounded, such pleas may, have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free Will in executing the Will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

21. Apart from the suspicious circumstances to which we have just referred in some cases the Wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the Wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the Will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the Will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with Wills that present such suspicious circumstances that decisions of English Courts often

mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical Courts in England when they exercised jurisdiction with reference to Wills; but any objection to the use of the word "conscience" in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasises that in determining the question as to whether an instrument produced before the Court is the last Will of the testator, the Court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

22. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on Wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the Will has to prove the due and valid execution of the Will and that if there are any suspicious circumstances surrounding the execution of the Will the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Duparcq in 50 CWN 895 (Privy Council), "Where a Will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the Judge even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth." It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect.

24. In another case reported in *Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others*, it has been observed by their Lordships:

In cases where the execution of a Will is shrouded in suspicion, its proof ceases to be a simple issue between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the Court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the Will is such as to satisfy the conscience of the Court that the Will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the Will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the Will.

25. While dealing with the question their Lordships have quoted from the decisions reported in *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others*, in detail and the points dealt with in the aforesaid decision have been enumerated under six heads:

1. Stated generally, a Will has to be proved like any other document, the test to

be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of Wills, one cannot insist on proof with mathematical certainty.

(2) Since Section 63 of the Succession Act requires a Will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution; if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

(3) Unlike other documents, the Will speaks from the death of the testator and therefore, the maker of the Will is never available for deposing as to the circumstances in which the Will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last Will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the Will.

(4) Cases in which the execution of the Will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the Will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the Will. That suspicion cannot be removed by the mere assertion of the propounder that the Will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the Will was made, or that those like the wife and children of the testator who would normally receive their due share in the estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the Will excite the suspicion of the Court, the propounder must remove all legitimate suspicions before the document can be accepted as the last Will of the testator.

(5) It is in connection with Wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the Court is the last Will of the testator, the Court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the Will has been validly executed by the testator.

(6) If a caveator alleges fraud, undue influence, coercion etc., in regard to the execution of the Will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the Will may raise a doubt as to whether the testator was acting of his own free Will. And then it is a part of the initial onus of the propounder to remove all

reasonable doubts in the matter.

26. In the background of the principles laid down by their Lordships in the present case it is necessary to consider the genuineness of the Will. It has already been observed earlier that the Will in question (Ext. "E") was prepared when the testator was lying on bed and was ailing. It has come in evidence that he was ailing for practically a year prior to his death and was under-going treatment by several doctors and it has also come in evidence that the testator during the period of his illness was mostly confined to bed and he had also lost his eyesight and was not in a position to discharge his rituals and duties himself. In such a circumstance the Will is executed in presence of the testatee himself. It is also alleged that the other employees of the Math for their own reasons and Mainly because of the fact that they were also benefited by the transfer of some "properties to them colluded with the testatee in preparation of the Will. In this background the fact that the testator being a literate and educated person puts his L.T.I. on the Will instead of signing the same creates serious doubt about the manner of execution of the Will. In this circumstance, the creation of the Will has been seriously challenged on behalf of the respondent and it has been submitted that taking advantage of the illness of the Mahanth and because of his incapacity to take any decision and do something to decide about his successor, the Will in question (Ext. "E") is brought into existence. It has been pointed out that most of the witnesses coming in support of the execution of the Will have benefited by purchase and acquisition of the part of the property of the Math through sale-deeds executed only recently prior to the execution of the Will. Therefore, it has been contended that the circumstances are indicative of the fact that there was a well hatched conspiracy on behalf of the appellant to create a document to grab the property of the Math after the death of the testator and accordingly, the Will (Ext. "E") is brought into existence and the respondent has been forcibly driven away and kept out of reach of the Math. Therefore, it has been contended that authenticity of the Will (Ext. "E") is so suspicious and doubtful that the learned trial Court has rightly refused to accept the Will as genuine and refused to grant Letters of Administration to the appellant.

27. In the background of the principles laid down by the Supreme Court it has been contended on behalf of the respondent that the point which has got to be decided in this case is whether the Will purported to have been executed by the Mahanth Ram Krishna Das in favour of the appellant (Ext. "E") was genuinely and validly executed out of free Will and in a fit estate of mind by the testator.

28. For the purpose of considering this aspect the following points have to be taken into consideration:

(a) The Will (Ext. "E") does not contain the signature of the testator who was literate and educated person and it bears only L.T.I.

(b) The said thumb print on the Will (Ext. "E") was described as super-imposed by the experts in the Finger Print. Bureau of C.I.D. and in their opinion (Ext. 6/1)

the thumb print was not in position to be scientifically examined and compared for the purpose of opinion.

(c) Several sale-deeds are said to have been executed by the testator in favour of different persons including the nears and dears and relations of the witnesses to the execution of the Will and all these sale deeds were executed just one month prior to the execution of the Will (Ext. "E").

(d) The testator was seriously ill for a pretty long time prior to the execution of the Will.

(e) The legatee is practically illiterate and has no knowledge of Sanskrit language and scriptures and he has also no knowledge of performing Puja etc. and therefore, he was not fit to hold the post of Mahanth.

29. So far as the execution of the Will in favour of the appellant (Ext. "E") is concerned, it has been supported by the appellant himself as D.W. 35 and it has already been stated earlier, the execution has also been supported by D.Ws. 12, 38 and 39. On the other hand, the respondent has denied the genuineness and the validity of the execution of the Will (Ext. E) in his evidence as P.W. 17. Some experts were also examined on behalf of the parties and as it has been stated earlier, the experts of the Finger Print Bureau opined that since the thumb impression on the Will (Ext. E) was superimposed and blurred, no opinion could be given on scientific examination and comparison of the thumb impression which was not possible. The report was signed by several experts and as the practice is, any document or any thumb impression or signature is examined by a team of experts in the Finger Print and Handwriting Bureau of C.I.D., then the opinion is recorded. One of the experts has also been examined as a witness in the case and he has proved the report. He is P.W. 23, P.W. 24 is a private expert and he has also examined the thumb impression on the Will and has stated that it was not possible to give opinion but he has also stated that the thumb impression on the disputed document did not tally with the thumb impressions sent for comparison.

30. On the other hand, an expert (D.W. 32) Dharnidhar has been examined on behalf of the appellant and he has also proved two reports submitted by him (Exts. "Z" and "Z/1"). In his reports as well as in his evidence in Court this witness has stated that he had scientifically examined and compared the thumb impression on the Will with the undisputed thumb impression sent for comparison and in his opinion the thumb impression on the Will was of the said person whose thumb impressions were sent for comparison. In this connection it has been contended and the learned trial Court has also held that the report of this expert is not in detail. He has not given the detailed reasons for arriving at the conclusion and such a report cannot be treated as a report of an expert worth reliance. In this connection it has also been submitted that the report of an expert privately examined by the parties has to be considered with care and cautions and so far as this expert is concerned, he is out and out a private expert

and his qualifications are also doubtful. Therefore, it appears that in view of the fact that the experts of the Finger Print Bureau came to the finding that the thumb impression being superimposed and blurred was not fit for the scientific examination and comparison, the report of this expert (D.W. 32) is not fit to be accepted.

31. So far as the witnesses supporting the execution of the Will are concerned, it has already been discussed earlier while dealing with their evidence that all these witnesses are highly interested witnesses and they have been benefited by the Math which was under the control of the appellant as the testator Mahanth himself was ill and was lying on bed and was not in a position to look after the affairs of the Math. Therefore, it has been contended on behalf of the respondent that all these documents are also created as a result of a conspiracy between the appellant and his witnesses to oust the respondent and to grab the property of the Math and therefore, these witnesses are not reliable and their evidence is not fit to be considered. There is much substance in the submission in view of the fact that a large number of sale-deeds (Ext. I series) were executed only a little while prior to the execution of the Will in question (Ext. "E"). From the evidence of D.W. 35, the appellant himself, it also appears that he claims that he was the eldest Chela of the testator Mahanth Sri Ram Krishna Das and was initiated as such in the year 1936 at the age of ten years only. It also becomes clear that he was quite illiterate at that time and he was given some education under the guidance of the Mahanth and from his evidence he is not properly educated person and he had no knowledge of the scriptures and even of performing Puja Path etc. and certain answers given by him in connection with the documents relevant in this connection and regarding execution create doubt about the correctness of his claim.

32. So far as the superimposition on the thumb impression is concerned, a plea has been taken on behalf of the appellant that since the Will was being filed in several cases some one super-imposed it and blurred it deliberately in order to damage his claim, but it has been rightly Observed by the learned trial Court in this connection that there does not appear to be much substance in this plea because a Will unless authenticated and probated is not fit to be considered as a document of title and Will was not required to be filed in other cases and no such marking is available on the Will to indicate that the Will was ever filed earlier. It has already been observed earlier and it has been held by the learned trial Court that when a Will is filed in Court in a case relating to grant of probate or Letters of Administration, as a rule Will is kept in sealed box under safe custody of a senior clerk of the Court and it is not usually touched or handled by any person. Therefore, there was no question of the respondent or anybody on his behalf causing tampering in the Will and if the Will is superimposed the blurred the appellant cannot take its advantage.

33. So far as fit mental condition of disposition on the part of the testator is concerned, it is admitted that the testator was ill for quite some time. The

appellant himself has admitted as D.W. 35 that Mahanth was ill for about 8-9 months prior to his death and he was mostly confined to bed and he was being treated by several doctors. It has been asserted in this connection on behalf of the respondent that the Mahanth was seriously ill and he was completely paralysed and not in a position to move and he had lost his eye sight. For the purpose of getting support on this point the respondent examined the retired Principal of the local Ayurvedic College, (P.W. 1) Biku Singh, who stated that at some point of time he had examined and treated the Mahanth who was seriously ill. On the other hand, the appellant stated that the Mahanth was being treated by a renowned physician of Patna Dr. Madhusudan Das. Some witnesses on behalf of the respondent have also stated that the testator was examined and treated during his illness by another renowned physician of Patna Dr. T.N. Banerjee but for some reasons it is very difficult to accept that Dr. T.N. Banerjee had treated the testator and so far as the treatment of the testator by Dr. Madhusudan Das is concerned neither any prescription by Dr. Madhusudan Das was filed on behalf of the appellant nor Dr. Madhusudan Das, who was then alive, was examined in this case. In this regard, it has been contended on behalf of the respondent that under similar circumstances it was held by their Lordships of the Orissa High Court in the case of Sarada Charan Misra Vs. Smt. Prafulla, , that if none of the Doctors, who had treated the testator during the period he was in hospital, was examined to prove his mental and physical state, the execution of the Will by such a testator becomes doubtful and in such a circumstance it Will be presumed that the propounder of the Will has failed to perform his duty and discharge his onus.

34. In this case, no evidence has been adduced on behalf of the appellant to show that the testator was in force disposition of mind to make a Will and, therefore, it is very difficult to accept the plea of the appellant that the Will (Ext. "E") was validly executed and is a genuine Will. In this context there does not appear to be any reason to differ with the findings of the learned trial Court that considering the entire circumstances appearing in the case it is not possible to accept the Will (Ext. "E") as a genuine Will and the last Will of the testator and the appellant is not entitled to get the Letters of Administration, as claimed by him.

35. Therefore, there does not appear to be any reason to disagree with the findings of the trial Court and accordingly, it is held that this appeal has no merit.

36. It has already been stated above that after the appellant in this appeal lost in both the proceedings. i.e., in Succession Case No. 188/61 and Title Suit No. 22 of 1963, he filed a Title Suit bearing T.S. No. 225/78 claiming himself to be the senior most Chela of his Guru Mahanth Ram Krishna Das and thereby he claimed that he was the right person to succeed as a Mahanth. He also further claimed that he was installed as a Mahanth according to rites and he came in possession over the property of the Math and he is continuing in possession all along. In course of the pendency of the suit a petition under Order XXXIX, Rules 1 and 2

C.P.C. was also filed and the plaintiff prayed for injunction in order to restrain the appellant from taking possession on the basis of the judgment and order of the Court of Addl. District Judge II, Patna in Succession Case No. 188/61. The learned Addl. Sub-Judge IX, Patna accordingly passed an order on 15.5.1979 allowing the prayer for injunction and restrained the respondent from taking delivery of possession in Succession Case No. 188/61. Being aggrieved and dissatisfied with the order of the Subordinate Judge, the defendant Ram Rajeshwar Das has filed this appeal and it has been submitted that the order of injunction is illegal and improper and no such order could have been passed.

37. It has been submitted in this connection on behalf of the appellant Ram Rajeshwar Das that so far as an order passed u/s 192 of the Indian Succession Act is concerned, a suit can of course be brought, but so far as the possession is concerned, the decision becomes final. It has been pointed out that u/s 209 of the Indian Succession Act the decision is not fit to be challenged. Section 209 of the Indian Succession Act reads like this.

209. Effect of decision of summary proceeding.--The decision of a District Judge in a summary proceeding under this Part shall have no other effect than that of settling the actual possession; but for this purpose it shall be final and shall not be subject to any appeal or review.

38. In this context it has been observed that the civil revision filed against the said order in Succession Case No. 188/61 filed before this Court was withdrawn by Chandramani Das and the order has thus, become final and so far as the possession is concerned, it cannot be challenged.

39. It has also been pointed out that according to Section 41 of the Evidence Act an order or decree is relevant and it cannot be ignored. Section 41 of the Evidence Act reads as follows:

Section 41. Relevancy of certain judgments in probate, etc., jurisdiction.--A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or Insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

It is further laid down in Section 41 that:

Such judgment, order or decree is conclusive proof-

that any legal character which it confers, accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares as any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person; that any legal character which It takes away

from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

40. Therefore, it has been contended on behalf of the appellant Ram Rajeshwar Das in this appeal that the order of injunction passed by the learned Sub-ordinate Judge is illegal and as it has the effect of nullifying the order of a superior Court in the form of a judgment and decree, such an order cannot be Maintained. It is contended that according to Section

41 of the Evidence Act such an order or decree has its finality so far as the determination of right is concerned. By the order of injunction in question the learned Sub-ordinate Judge has taken away the right from the appellant and therefore, it is illegal. It has also further been contended that according to Section 41 of the Specific Relief Act is a bar to passing of any such injunction. Section 41 reads like this:

41. Injunction, when refused.--An injunction cannot be granted-

(a)

(b) to restrain any person from instituting or prosecuting any proceeding in a Court not subordinate to that from which the injunction is sought;

41. It has been contended in this context that since the judgment in Succession Case No. 188/61 was passed by a superior Court, i.e., the Court of the District Judge, the Sub-ordinate Judge had no jurisdiction to pass any order of injunction in order to restrain the decree holder according to that judgment and decree from prosecuting the proceeding in execution of the decree. In this regard. Counsel for the appellant has also cited a case law reported in Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others, . It has been observed and held by their Lordships in this case that "ordinarily a preventive relief by way of prohibitory injunction cannot be granted by a Court with a view of restraining any person from instituting or prosecuting any proceeding and this is subject to one exception enacted in larger public interest, namely, a superior Court can injunct a person from instituting or prosecuting an action in a subordinate Court with a view to regulating the proceeding before the subordinate Courts. At any rate, the Court is precluded by a statutory provision, i.e., Section 41(b) from granting an injunction restraining a person from instituting or prosecuting a proceeding in a Court of co-ordinate jurisdiction of superior jurisdiction.

42. In this view of the matter, it has been submitted that the order of injunction passed by the Sub-ordinate Judge is illegal and without jurisdiction and therefore, the same is fit to be set aside.

43. From perusal of the aforesaid provisions and also on consideration of the decision of their Lordships in the aforesaid case it Will become clear that the learned Sub-ordinate Judge, who passed the injunction order in question, has ignored the provisions of law while passing the order. The order, therefore, must be termed as illegal and without jurisdiction. Such an order cannot be sustained in law. Accordingly, the order of injunction passed by the Sub-ordinate Judge IX, Patna on 15.5.1979 in T.S. No. 225 of 1978 is set aside and Misc. Appeal No. 146 of 1979 is hereby allowed on contest.

44. So far as P.A. No. 500/77 is concerned, as held above, the same is found to be without merit and accordingly it is dismissed on contest with cost. The judgment and order in T.S. No. 22/66 is hereby confirmed.

45. Both the appeals are accordingly disposed of. Consolidated hearing fee of Rs. 250/-.

B.N. Agrawal, J.

I agree.