
(1955) 10 OHC CK 0001
In the Orissa High Court
Case No : First Appeal No. 151 of 1950

Tulasiram Das

APPELLANT

Vs

Ramprasanna Das and Others

RESPONDENT

Date of Decision : 10-10-1955

Acts Referred:

Evidence Act, 1872 — Section 49

Citation : AIR 1956 Ori 41

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

Bench : Division Bench

Advocate : M. Mohanty and A.K. Das, for the Appellant; P. Mohanty, Bifava Kr. Ray, B. Mohapatra and R.K. Mohapatra, for the Respondent

Final Decision : Allowed

Judgement

Panigrahi, C.J.—This is an appeal by defendant 1 against the Judgment of the Subordinate Judge, Cuttack declaring the plaintiff's right to succeed to the Mahantship of the Katarpa Math, situated, in the district of Cuttack, of which the last Mahant was one Ram Narayan Das. The appellant Tulsiram Das is the son of Mahant Ram Narayan Das by his second wife, Tulsi Dibya, the plaintiff being the son of Raja Ram the deceased son of Ram Narayan by his first wife.

2. The plaintiff alleges in his plaint that the Math at Katarpa was founded by one Lalu Das, a Gruhasth Brahmin Vaishnab and that devolution of the succession to the office of Mahant in that Math is governed by the rule of lineal primogeniture. The plaintiff further avers that, in accordance with the direction of the original founder Lalu Das the Mahantship has descended to the eldest male line

23-11-1945 appointing the appellant as his successor and Mahant, but this document was challenged as having been brought about by undue influence exercised by Tulsi Dibya who is described by the plaintiff as the mistress of the late Mahant Ram Narayan Das. The plaintiff accordingly challenges the right of the late Mahant to divert the rule of succession by nominating his illegitimate son. He therefore prays for a declaration, in para 17 of the plaint, that

(a) "he is the rightful successor to the Mahantship and the sebaity marfatdari right of the Katarpa Math as the eldest son, according to the rule of primogeniture prevailing at the institution of the Mourasi Math and defendant 1 is not eligible to be the Mahant of the said Math." He further prays that

(b) "it be declared that the late Mahant, Ram Narayan Das was not competent to change the line of succession by appointing defendant 1 as his successor, (c) it be declared that the deed of appointment executed by the late Mahant on 23-11-1945 in favour of defendant 1 is illegal and invalid as having been brought about under undue influence of defendant 1 and his mother and not binding against the plaintiff and the math, and (d) it be declared that the plaintiff is entitled to recover the Math and all devottar properties appertaining thereto as described below as the sebaity-marfatdar and he be put in possession thereof through Court by evicting defendants 2 to 5."

3. The defendant appellant controverts the claim of the plaintiff, and denies that Mahant Lalu Das the original founder was a married man or that Chaitan Das was his son. According to the defendant's case Mahant Lalu Das was a celibate Vaishnab and Chaitan Das was his chela. The defendant also denied the alleged directions given by the founder Lalu Das that succession to the Mahantship should descend in the eldest male line. He put forward an alternative case that

"it was the direction of the late Mahant Lalu Das and also the custom of the sect to which the parties belong, that he who would be nominated by the last Mahant should succeed to the gadi and become the Mahant and sebaity-marfatdar."

He further contended that the last Mahant could, during his lifetime, nominate his successor and abdicate the gaddi in his favour. He asserted that his mother was the legally married wife of the late Ram Narayan Das and that she was not his mistress.

4. The plaintiff says that he was given "Kanthi" and "Siropa" at an assemblage of Mahants and Adhikaris on 29-11-1947, and that a document was written and signed by the principal Mahants and Adhikaris recording this fact. This took place on the 13th day of the death of Ram Narayan who admittedly died on 16-11-1947.

The defendant, on the other hand, asserts that he assumed charge of the endowment and was installed as Mahant a few days prior to the death of his father, in the presence of the principal Mahants and Adhikaris of the Sri Sampradaya Sect and took charge of the gaddi.

The defendant applied to the Commissioner of Hindu Religious Endowments, Orissa, for being recognised as the Mahant and the Commissioner appointed him, along with defendants 3 to 6, as associate interim-trustees. These associate trustees who are arrayed as defendants 3 to 6 also filed a written statement denying the existence of the custom of primogeniture as alleged by the plaintiff and pleaded that defendant 1 was the legitimate son of the late Ram Narayan Das.

5. Several issues were framed in the suit, but the controversy between the parties centres round three of them, namely, issues 4, 5 and 6. These are as follows :

"4. Is succession to the suit properties governed by the law of primogeniture?

5. Whether defendant 1's mother is a Brahmin by caste, and whether she was the legally wedded wife of the Mahant?

6. Was the late Mahant entitled to nominate his successor and end he nominate defendant 1 to be his successor and is the said nomination valid?"

6. A number of witnesses were examined by the trial Judge and he found in favour of the legitimacy of the appellant on issue No. 5. On issue No. 4 he found in favour of the plaintiff and held that succession to the Mahantship of the math was regulated by the law of primogeniture. On issue No. 6 he found that Mahant Ram Narayan Das was not competent to nominate his successor for the sebaitemarfatdarship and divert the line of succession.

The learned Subordinate Judge further held that the endowment was not a "math" but was an "excepted temple" and that the scope of the suit was to recover the office of sebaitemarfatdarship as distinguished from that of Mahantship; and observed in the concluding paragraph of his judgment:

"I have deliberately refrained myself from discussing the authorities cited before me relating to the evidence of proof of custom of primogeniture as they related to maths and not to temples."

7. It will be convenient at this stage to set out the genealogy as put forward by the parties in order to appreciate the points in controversy.

A. Genealogical Table according to the plaintiff:

LALU		Chaitan		-----			Raghunath	Parasuram	
-----							Balaram	Sriram	Jairam
Narayan		-----					First wife	Second wife (Tulsi)	
-----							Anadiram (Plaintiff)	Tulsiram(deft. 1)	Pruthu decreased)
Ram Prasauna	(Substituted in appeal).								

B. Gene

----- | | 1st wife 2nd wife (Tulsi) | | Raja Ram ----- | | |
Anadiram (Plaintiff (Tulsiram(deft.) Pruthu Das deceased) | Ram Prasauna
(Substituted in appeal).

The defendant says that Raghu Nath was the only son of Chaitan Das and that Parsuram was the youngest son, and not the brother, of Raghu Nath. According to him Raghu Nath had five sons while according to the plaintiff he had only four. Neither side has adduced any evidence to prove whether Parasuram. was the son of Chaitan or of Raghu Nath. The admitted case of both parties, thus, is that after Chaitan Raghu Nath was the Mahant and left a number of sons surviving him. Ram Narayan Das, the last Mahant was the natural born son of Sriram and was adopted by Balaram according to the plaintiff's case, while according to the defendant's case Sriram was the Mahant after Raghu Nath and was succeeded by his son Ram Narayan.

It is admitted that the other sons of Raghu Nath were all celibates. The plaintiff did not prove that Chaitan was the natural born son of Lalu Das or that Lalu Das was married. The result of the evidence is that there were four Mahants before Ram Narayan two of whom were married. It was conceded that marriage did not disqualify a person from assuming the Mahantship and that it is left to the option of the Mahant himself whether he should remain celibate or take a wife.

8. It was contended before us that the learned trial Judge committed a serious error in treating the suit institution as a temple and assuming that the claim of the plaintiff was confined to the sebaiship of the deity, Baldev Jieu. It was the case of both parties in the Court below that the suit endowment was a math and that succession to the office of Mahant in this institution was the only Issue on which the parties went to trial.

It was also common ground that the institution was a "maurasi Math" and that it was governed by the special usages prevailing in such institutions. The parties joined issue only with regard to the nature of the custom namely, whether succession was regulated by the rule of primogeniture or nomination by the Mahant for the time being.

The finding of the learned Subordinate Judge is assailed as untenable not only on account of the meagre evidence relied on by him but also on the ground that he misconceived the nature of the controversy between the parties and failed to take into consideration the several authorities placed before him in support of the appellant's contention.

9. It should be stated here that learned counsel for the respondent did not challenge the finding of the trial Court on the legitimacy of the appellant. It was also conceded that the deed of appointment executed by the late Mahant was not vitiated by undue influence exercised by either the appellant or his mother. The controversy has thus been narrowed down to a single question, namely, whether there is a custom of succession by lineal primogeniture prevailing in the suit endowment, or whether the last Mahant has the right of nominating his successor.

10. Learned counsel for the respondent tried to support the finding of the trial Court that the endowment was a temple and that the plaintiff sought to recover the sebaiship of the temple, but he did not commit himself, though repeatedly called upon, to a definite statement that the plaint was so drafted. Nor did he venture to amend the plaint so as to clearly bring out his right to succeed to the sebaiship.

11. I shall discuss the nature of the endowment later, and would, at present, confine myself to the plaintiff's case on the assumption that the endowment is a math.

12. It may be stated at the outset that no Attempt has been made to prove the intention of the founder relating to the succession to the Mahantship by any documentary evidence. In such cases the rule to be followed for ascertaining his intention was laid down by Sir Barnes Peacock in -- "Greedharee Doss v. Nundkishore Dutt", Marsh 573 at p. 581 (A) as follows :

"But the law to be laid down by this Court must be as to what is the usage of each Mohuntee. We apprehend that if a person endows a college or religious institution the endower has a right to lay down the rule of succession. But when no such rule has been laid down it must be proved by evidence what is the usage, in order to carry out the intention of the original founder. Each case must be governed by the usage of the particular Mohuntee."

This statement of the law received the approval of the Privy Council in -- "Greedharee Doss v. Nundokishore 11 Moo IA 405 (PC) (B), when the case went up in appeal & it was held that it

"was not necessary to consider whether there was an infirmity whatever in the title of the defendant, but whether the plaintiff had made out a satisfactory case to entitle him to recover the office and the lands and properties belonging to the office, of the Mahant".

In a later case the Judicial Committee again observed -- "Genda Puri v. Chhatar Puri 13 IA 100 (PC) (C).

"In determining who is entitled to succeed as Mahant in such a case as the present, the only law to be observed is to be found in custom and practice which must be proved by testimony, and the claimant must show that he is entitled according to the custom to recover the office and the lands and property belonging to it."

The same rule was reiterated by the Judicial Committee once again in -- "Lahar Puri v. Puran Nath AIR 1915 PC 4 (D), and their Lordships observed:

"Consequently, it is for the plaintiff to prove his right to the Mahantship which, if proved, would in the case of this temple carry with it the right to the possession of the temple and of the properties appertaining thereto. If the plaintiff has failed to prove that he is the duly elected Mahant of the Math, his suit must fail and in

that event it would be immaterial to consider whether the defendant Is or is not the Mahant of the math, or whether he has or has not any better title to the temple and to the property which, appertains to it, than a title of mere possession."

That case related to the appointment of a Mahant of a temple belonging to the sect of Nihanggosains and it did not appear from the evidence that the founder of the math prescribed any rules of practice to be followed in the selection and appointment of the future Mahant. Consequently, the selection and appointment of a person to be the Mahant of a math on a vacancy occurring in the Mahantship depended upon the custom and usage and the practices which prevailed in the appointment of Mahants.

The only law therefore as to Mahants and their office, functions and duties is to be found in custom and practice which has to be proved by testimony, and the plaintiff must succeed by the force of his own title and not by the infirmity of the defendant's title. In the light of these principles I have to determine how far the plaintiff has succeeded in the present case in establishing that he is entitled to the office of the Mahant of the suit math by reason of his descent from the eldest line.

13. The customary law governing succession to the maths in Orissa was recognised as early as 1839 in what is known as the -- Uttaraparswa Math case, -- "Ramanuj Das v. Debraj Das 6 S R 329 (E). The report states that the evidence of the Mahants of Purushottam Chhatar (Purl) disclosed that the maths were of three categories, namely, mourasi, punchayeti and Hakimi; that in the first the office of Chief Mahant was hereditary and devolved upon the chief disciple of the existing Mahant who, moreover, was nominated by him as his successor; that in the second the office was elective, the presiding Mahant being selected by an assembly of Mahants; and that in the third the appointment of the presiding Mahants was vested in the ruling power or in the party who endowed the temples, and that the math, the mohantee of which was now under litigation was of the first-mentioned class.

The Pundit attached to the Sadar Dewani Adalat was directed to state what was the vyavastha in regard to the appointment of the presiding Mohant of a math or temple called Mourasi whether the principal disciple of the last Mahant should succeed or whether the existing Mahant shall appoint whom he pleased among the body of his disciples. The reply of the Pundit was as follows:

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

The Vyavastha Darpan compiled by Sarkar states the rule, at page 115, as follows:

"In some countries, especially in Orissa there are three kinds of maths or monasteries, namely, the Mourasi, Punchayeti and Hakimi. In the first the office of Mohant is hereditary and devolves upon the chief disciples of the existing Mohant who moreover usually nominates him as his successor Generally the usage or custom of the Mohants is that the Mohant or principal of every math or monastery selects his principal and most worthy pupil to succeed him at his decease; and that after his death the Mahants of other similar institutions in the vicinage convene an assembly of the order and perform his Bhandara or funeral obsequies at which they generally confirm the nomination made by the deceased and instal the pupil he selected as his authorised successor".

In "Sita Pershad v. Thakur Das 5 CLR 73 (F), the plaintiff, the senior chela, claimed under a deed of gift of 1949 from the old Mahant while the defendant claimed under a will dated 6-5-1873. The deed of gift was however set aside in 1856 in a suit by the Mohant and the plaintiff was dispossessed during the life time of the Mahant. On the death of the Mahant the plaintiff obtained his confirmation as Mahant at a Bhandara ceremony held by the leading Mahants.

The plaintiff's claim was negated on the ground that as succession to the gaddi of the math was not elective the investiture of one who was not entitled to succeed as the appointee of the last Mahant was of no value, and the Court refused to go into the question of the defendant's title. Princep J., was of opinion that the plaintiff could not succeed merely by reason of the investiture by the leading Mahants at the Bhandara ceremony as he could not prove that he was the person actually appointed by the last Mahant, for the Bhandara ceremony by itself conferred no right or title but was only a public confirmation of the appointment already made.

14. By the very nature of the office, a Mahantship must be held to be inalienable and impartible. It is common ground that the office can be held only by a single heir at a time. These features which are common to impartible estates as well as to the office of a Mahant have led to some confused thinking and arguments were addressed to us on the assumption that there is absolutely no difference between the two.

It should be remembered however that impartibility does not always necessarily imply primogeniture though estates which are Impartible are often subject to the rules of primogeniture, due to historical reasons. Nor does a single succession mean succession by the eldest son. The rule of lineal primogeniture should be distinguished from the rule of primogeniture by proximity according to which the person nearest in blood takes.

In the case of maths the real owner of endowed properties is a Juridical person and not an office-bearer. The apparent owner is the manager or the sebit. The nature of the office of Mahant is described by the Judicial Committee in -- "Ram

Prakash Das v. Anand Das" AIR 1916 PC 256 in the following words;

"The Mahant is the head of the institution. He sits upon the gaddi; he initiates candidates into the mysteries of the cult; he superintends the worship of the Idol and the accustomed spiritual rites; he manages the property of the institution; he administers its affairs; and the whole assets are vested in him as the owner thereof in trust for the institution itself. Upon his death or abdication he is succeeded by one of the Bairagi chelas."

The ownership of the property Is an ownership in trust for the math or Institution itself, and succession to the Mahant in such property follows with the succession to the office. There cannot be any right of succession by reason of birth only. The Mahant la entitled to have more than one chela, and he knows best who among I his several chelas is fit to succeed to the office.

In the interest of the endowment itself this should be so, for otherwise the very object of the founder namely, the creation of a line of religious preceptors may be defeated. In -- "Mahanth Ramji Dass v. Lachhu Das 7 C WN 145 (H), the parties were Vaishnavites of the Ramanandi class and it was observed (at page 147 of the report):

"Where there are more chelas than one custom and practice intervene. The guru or the last incumbent may in some cases nominate his successor from amongst his chelas and naturally the eldest chela may succeed."

15. These are the principles applicable to the present case, and the learned Subordinate Judge seems to have lost sight of them in his assessment of the evidence. The plaintiff is one of the heirs left by the previous Mahant and the foundation of his claim is his birth in the eldest line. In giving effect to the plaintiff's claim the learned Subordinate Judge relied on the oral evidence of P. Ws. 5 to 8 and on Ex. 3 dated 14-12-1900 a registered deed of Nadabi executed by Sitarama Das in favour of the last Mahant Ram Narayan Das. He has referred to the evidence at D. Ws. 5 and 21 as supporting the plaintiff's version, as also to that of D. W. 23.

(His Lordship then discussed evidence and proceeded further.)

16. The entire evidence on the side of the plaintiff was placed before us and has been discussed threadbare; and the impression left on my mind is that It is too indefinite find vague to enable me to hold that there was any such custom as would entitle the plaintiff to succeed to the office of Mahant merely by reason of his birth. The documentary evidence filed on his side to equally inconclusive.

The evidence for the defendant-appellant on the other hand shows that so long as there was only one member in the family that member succeeded, but when there was more than one member there had been disputes. The right of Ram Narayan Das to succeed to the office was itself disputed though ultimately he succeeded by reason of the agreement of surrender by the other surviving member of the family in his favour.

17. A custom cannot be created by purchase. It must be such as has obtained the force of law by long usage; it must be ancient, certain and reasonable and must be construed strictly. In --"Rama Lakshmi Ammal v. Sivanatha Perumal 14 Moo IA 570 (PC) (I), the Privy, Council said: (at page 585 of the report)-

"Their Lordships are fully sensible of the Importance and justice of giving effect to long established usages existing in particular districts and families in India. But it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable; and It is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends".

The evidence of custom must not only be clear and unambiguous, but should also establish that those who were following it were compelled to follow it as it was in accordance with law, and the burden of proof as to its existence rests on the person who sets up the custom. Mere assertions, by any number of witnesses -- irrespective of their competency to speak or their connection with the establishment -- that such and such a rule applies, can hardly accord any help or guidance to the Court.

When the Court has to form an opinion as to the existence of an usage, Section 49, Evidence Act makes such evidence admissible if the persons giving their opinion have special means of knowledge regarding the usages and tenets of any body of men or their family. The weight of such evidence would depend upon the position and character of the witness and his evidence must be the expression of an independent opinion formed on what he has known or heard. Repetition of hearsay is still hearsay evidence.

Section 60, Evidence Act says that if the oral evidence refers to an opinion, or to the grounds on which that opinion is held, it must be the evidence of a person who holds that opinion on these grounds. The plaintiff's witnesses are comparatively all young men and are hardly competent to depose about the character of the tenure of the Mahant in this type of institution. They certainly do not disclose the grounds on which they have formed an opinion that a particular custom prevails. Nor is their version otherwise corroborated. I am therefore not inclined to place any reliance upon such evidence.

In AIR 1941 21 (Privy Council) the question was whether a custom in favour of a daughter's succession had been varied by special custom, enabling the plaintiffs to exclude the daughters. The Judicial Committee on a review of all the authorities said:

"What is necessary to be proved is that the usage. has been acted upon in practice for such a long period, and with such invariability, as to show that it has, by common consent, been submitted to as the established governing rule of the particular district".

In "Bhau Nanaji v. Sundrabai 11 Bom 249 (K), it was observed that if what is alleged to be is a family custom then

"the evidence must clearly show that it has been submitted to as legally binding, and not as a mere arrangement by mutual consent for peace or convenience".

18. In "Nil Kisto Burman v. Bir Chandra Thakur 12 SWR 21 (PC) (L), the suit was for succession to a Raj, the right to which was founded on family custom governing succession. The plaintiff stated that he was the oldest living member of the class out of which alone the successor could be appointed. The defendant contended that the choice of the Raja out of a certain class was absolutely free and could not be controlled by the wishes of a previous Raja.

The Privy Council held that where there was evidence of a power of selection the actual observance of seniority in a considerable series of successions could not of itself defeat a custom which established the right to free choice, and that even if the instances had been uniform and without exception that alone would not be sufficient to support the plaintiff's case. Where custom required the union of two things to constitute the legal heir, namely, seniority in age and nearness of Kin, a claimant who has but one of these qualifications (seniority) cannot be entitled to succeed by family custom.

In "Muthu Madhava Naik v. Sevatta Muthu Madhava Naik 7 Mad 160 (M). the learned Judges referred to a previous unreported decision of that Court which would show that the fact of the plaintiff being the eldest son would alone not be sufficient to establish his right to succeed.

In "Vandravan Jekisan v. Manilal Chunilal 16 Bom 470 (N), the question was whether there was a caste custom prohibiting widows from adopting 202 witnesses were examined by the plaintiff to show that it had not been the practice in the caste for widows to adopt. At the same time there was evidence of two adoptions by widows without any caste protest against them. In the circumstances their Lordships held that there was no uniform and persistent usage so as to justify the inference of divergence from the ordinary rule of Hindu law.

I am therefore driven to the conclusion that the evidence in the present case falls far short of the standard of proof required to establish the custom set up by the plaintiff. In such circumstances I must hold that the plaintiff has acquired no right to hold the office merely by reason of birth in the eldest male line.

19. Nor would the plaintiff's father, Rajaram be entitled to succeed by reason of his being the senior member of the family, for it is well established that seniority as such, in the absence of a specific appointment, cannot be the basis of a claim to Mahantship. In the case of Kumbhakol Math situated in the interior of the district of Cuttack which was also a Mourasi Math, the plaintiff, the senior chela claimed succession to the office of Mahant as the Gurubhai of Mahant Sriram Das who had nominated the defendant.

This case is reported in -- "Achyutananda v. Jagannath Das AIR 1915 Cal 341 (O), and Mookerji J., approved of the Subordinate Judge's finding that in a Mourasi Math the chela succeeds and in default of the chela the Gurubhai succeeds, and where there are more chelas than one the eldest generally succeeds. But a junior chela may succeed if he is found more capable and if he is selected as Mahant by the last Mahant.

This is in accord with the decisions of the Judicial Committee in 11 Moo I A 405 (PC) (B)", and in 13 IA 100 (PC) (C)". There is no inflexible rule that a senior chela should invariably succeed in disregard of his qualifications for the office or the wishes of the previous Mahants. The textual authority regarding the rule of succession is that the virtuous pupil inherits the property of an ascetic. Yagnyavalkya says:-

"The heirs of a hermit, of an ascetic and of a student in theology are, in their order, the preceptor, the virtuous pupil and the spiritual brother and associate in holiness..... The student in theology is of two descriptions, perpetual or Naishtika, and temporary or upakurbana. The virtuous pupil or Sat-Sishya is he who is assiduous to his studies of theology, in retaining the Holy Sciences, and in practising its ordinances, for a person whose conduct is bad is unworthy of the inheritance were he even the preceptor or any other venerable relation." Mitakshara, Ch 11, Section 8. Bairagis are considered to be corrupt Yathis. But they, like the Sanyasis, are succeeded by their virtuous pupils or principal chelas.

20. The test therefore is who is the Sat-Sishya? In the majority of cases the senior-most chela by reason of his age, experience and association with the Guru and his co-disciples qualifies himself for the office. But this is not a rule of law. He succeeds because the reigning superior of the monastery considers him fit. to succeed. This is the root of the practice which has grown up and has been recognised by Courts.

21. in a recent decision of the Supreme Court -- Sital Das Vs. Sant Ram and Others, , Mukherjea J., said:

"It cannot also be disputed that the Mahantship is not hereditary in the sense that on the death of the existing Mahant his chela succeeds to the office as a matter of course. He can acquire rights only by appointment".

It was therefore clearly incumbent upon the plaintiff not only to show that a senior chela is entitled to succeed, but also to prove that there was a custom in the particular math that the Mahant had no power to nominate his successor.

22. In the well known case of -- "Vidyapurna Tirtha Swami v. Vidyaniidhi Tirtha Swami" 27 Mad 435 (Q) Sir Subramania Ayyar, discussing the relative position of the trustees of temples and Mahants said (at page 442 of the report):

"In the case of maths however though there are idols, connected therewith, the worship of such is quite a secondary matter, the principal purpose of such an institution being the maintenance, in circumstances likely to command due

respect & estimation of a line of competent religious teachers who, as already shown, are given for the welfare of the foundation itself -- a real and so to speak a beneficial interest in the usufruct."

23. Maintenance of a competent line of religious teachers being the principal purpose of establishing a math, the Mahant knows best how to perpetuate the line and has the inherent power of nominating his successor to the office. Bhashyam Iyengar J., put the same idea in these words:

"As in the case of a Bishopric perpetual succession in a math is secured by a provision for the nomination of the successor (whether by the head of the math or otherwise)".

24. in the "Dakshina Parswa Math case", which went up to the Privy Council, -- "Bhagavan Ramanuj Das v. Roghu Nundun Ramanuj Das 22 I A 94 (PC) (R), their Lordships accepted the report of the Collector who called on the Mahants who claimed the right to nominate their successors to make their selections and report to him and to inform him whether they were of opinion that so doing had not been contrary to the Shastras.

A great number of Mahants reported to the Collector that the Mahant had the power of appointment from among his chelas or disciples, if there were more than one; that in the absence of the appointment, a chela succeeds; if there are more than one the eldest succeeds; and in the absence of a chela a gurubhai succeeds. This statement of the Collector was accepted as being the prevailing custom in Orissa, so far as at least the Sri Vaishnavite Maths were concerned.

25. In a later case of the Madras High Court -- "Thiruvambala Desikar v. Chinna Pandaram AIR 1917 Mad 578 (S) it was similarly held that the head of a math is entitled to nominate and ordinate a junior Pandara Sannadhi. See also 5 CLR 73 (F)", where it was observed that the right to select the successor vested in the Mahant for the time being.

26. It is thus clear on the authorities that the right of nomination of successor is an incident of the office of Mahant in a Mourast Math, and a senior chela acquires no right to the office only by reason of his seniority in the line of succession. In the absence of a special custom to the contrary this rule is of universal application and would apply equally to Celibate and Gruhi Maths. I am accordingly satisfied that the plaintiff has failed to make out the custom alleged in the plaint, and the authorities go to show that the previous Mahant had the right to nominate his own successor.

27. The learned Subordinate Judge has avoided a discussion of this very material question relating to the right to succeed to the Mahantship, and followed the much easier course of assuming that the suit institution is a "Temple". He appears to have been influenced solely by an order of the Hindu Religious Endowment Commissioner Orissa (Ex. 5-(b)) in which that officer held that the suit institution is an "excepted temple". (Exhibit 5-(b)) is cryptic and is-in these

words:

"Not pressed. Petition is dismissed, and the temple is declared an excepted temple by consent of parties".

The petition to which reference has been made in this order has not been exhibited and it is also not clear who the "parties" referred to in the order were. The order is dated 19-2-1945 and in December of that year certain villagers filed a petition alleging that Mahant Ram Narayan Das was mismanaging the endowment. The plaintiff was one of the signatories to that petition.

The petition (Ex. 2) shows that Baldev Jieu Temple was the subject-matter of the enquiry by the Endowment Commissioner. Relying on this document, learned counsel, for the plaintiff wanted to make out that the suit was really one for recovery of the sebaiship of a "temple" and that the references to "Mahant" and "Chela" in the plaint were but honorific and ornamental and made in a loose manner.

The only mention of a "Temple" as such is to be found in para 1 of the plaint where the plaintiff says that Mahant Lalu Das was the first Mahant and sebaiship of the Debottar properties appertaining to Baldev Jieu's "temple" at Katarpa. If this was the genesis of his claim it is unintelligible why the plaintiff makes a further reference to the custom of conferring Kanthi and "Siropa" on the 13th day of the death of the last Mahant. He also alleges in para 13 that the Katarpa math and the Sevapuja of Shri Baldev Jieu Thakur and other temples there are presided over by a Mahant who has to render certain services to the deities.

The prayer is for a declaration that the plaintiff is the original successor to the Mahantship and sebaiship of the Katarpa math which is described as a Mourasi math and for the recovery of the math and its Debottar properties. The pleading is definite and clear that, there is a math at Katarpa presided over by a Mahant, and that in the said Math there is an idol in whom are vested certain properties.

The suit was therefore clearly one for the recovery of the office of Mahant and of the math . to which are annexed certain debottar properties. The entire evidence adduced by the plaintiff leaves no room for doubt that what was sought to be proved was only the right to succeed to the Mahantship. A belated attempt was made in this Court to construe the plaint as one for the recovery of the office of sebaiship, alone. This was presumably due to the fact that the distinction between the Mahant of a Math and the Mahant of a temple has not been properly appreciated.

28. The property of a Math does not descend to the disciples as such. The disciple chosen by the preceptor is installed in the paddi, and he takes by succession the property which has been held by its predecessor. The property is in fact attached to the office and passes by inheritance to no one who does not

fill the office. It is in a sense a trust property and is devoted to the maintenance of the establishment, but the Mahant has large dominion over it. And so long as he applies the proceeds in furtherance of the objects of the institution, he is not accountable for its management.

The head of a Math is called by different names, Mahant, Acharya, Jeer or Swami. The term "math" means a monastery or residential college, or college attached to a temple, or an asylum for the poor and the ascetics, or a shelter for travellers, or a combination of all or some of them. In essence it is an association of Sanyasis or celibates devoted to divine worship, who give instructions to deserving candidates. There are maths of which the head may be allowed to marry. Sometimes the house in which the head of the math lives is itself called a math.

The object of founding a math is explained in 27 Mad 435 (Q)" to which I have referred already. In a math there may be idols, but their worship is quite a secondary matter, the principal purpose being the maintenance of the purpose for which the math was created. The ideal person therefore is the office of Mahant in whom the property is vested. A math, like an idol, has been treated as a juristic persona capable of acquiring, holding and vindicating legal rights though of necessity it can only act in relation to those rights through the medium of some human agency.

So long as he fulfils the purpose of the math such as supporting disciples, performing religious and other Charities in accordance with usages and customs, the surplus income is as he likes in furtherance of the object for which the Institution was brought into existence. It is more or less a moral obligation on his part to devote the surplus income to religious or charitable objects.

The position and powers of a Mahant of a math are different from those of a Mahant of a temple or sebit of an idol, in the latter case property is vested in the idol, and the sebit --call him a Mohant or by any other name -- is bound to utilise the income for the service of the deity. The idol is the person in whom property is vested and any rights connected with the debottar properties could only be enforced by the idol acting through the sebit.

Another point of distinction is that there may be more than one sebit of a temple while there cannot be more than one Mahant of a math. There are a few cases reported in the books where a superior Mahant presides over subordinate maths each with a junior Mahant at its head, but these are due to the peculiar customs that have grown up in those particular cases.

The Mahant of a temple has a dual capacity in the administration of the math and the properties of the idol. As manager of the endowed property he can contract debts but his private property cannot be seized in execution of a decree against him passed in his capacity as manager or trustee. Nor can the offering made to the idol be appropriated by him. But the head of a math has complete power over the offerings made to the math. The right to manage the properties

of an idol in a temple ordinarily descends to the natural heirs of a sebit and is partible property.

In a Mitakshara joint family, the right of managing debottar properties belongs to the family, and a member of it becomes entitled to the sebitship on his birth. And the possession of any one member of the family is neither exclusive of, nor adverse to the other members. Mere succession of son to his father in the trusteeship of a temple does not create any hereditary right See -- "Appasami v. Nagappa", 7 Mad 499 (T).

The right of inheritance to a sebiti follows the same line as the right of inheritance to immovable property in the absence of anything to the contrary, see -- "Purna Chandra Bysack v. Gopal Lal Seth 8 CLJ 369 (U). It has recently been held by the Supreme Court in -- Angurbala Mullick Vs. Debabrata Mullick, , that sebit is not merely an office but is also property which descends according to the ordinary Hindu law. The founder can lay down rules of succession to sebitship.

But if the rules provide for the office to be held by one among the heirs of the founder, to the exclusion of others in a succession differing from the line of heirs according to Hindu law, it is invalid, according to the principles laid down in the Tagore Case see -- "Monohar Mukherjee v. Bhupendranath AIR 1932 Cal 791 (PB) (W), which was approved by the Privy Council in -- AIR 1936 318 (Privy Council) .

In Netai Chandra Jana and Others Vs. Emperor, , the plaintiff claimed the sebitship under the terms of a deed as the eldest male heir of the previous sebit. It was held that such a provision was not in accordance with Hindu law and should not be given effect to. But I have not come across any decision which warrants the assumption that Mahantship also can be regarded as Joint family property descendible to the personal heirs of a Mahant.

Mahantship is regulated by custom and usage prevailing in each institution and is not governed by the ordinary rules of Hindu law. I am not unaware of the dictum of Mukherjea J., in -- The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., , that for the purpose of Article 19 of the Constitution both Mahantship and Sebit are alike regarded as property.

29. But all this discussion regarding the powers and functions of the Mahant of a math and the Mahant or manager of a temple becomes academic in this case as the plaintiff does not disclose anywhere in the plaint that he is suing on behalf of the Deity for recovery of possession of the properties belonging to the idol. Nor is it a suit for recovery of possession of the sebayati right dissociated from the Mahantship of the math.

It may be that the parties are bound by the order of the Endowments Commissioner. But, if the institution in its origin is a math, it cannot be treated

as a "temple" merely) because the trustee consents to its being so treated. "Temple" as denned in the Orissa Hindu Religious Endowments Act means a "place used as a place of public religious worship".

A math includes a place of religious worship other than a temple; it is a place for rendering charitable and religious services in general. The distinction is that there may be idols in a math, but it is not a place of public religious worship. Whatever doubts may have been entertained in the lower Court regarding the status and character of the institution have now been set at rest by the production of the Robkari of the year 1890 granted by the Collector to Mahant Raghu Nath Das confirming the grant of the two suit villages, Katarpa and Barbari.

This document was tendered in evidence before us under Order 41, Rule 27, Civil P. C., and its reception has become necessary in view of the erroneous finding of the learned Subordinate Judge that the institution is a "temple".

30. The robkari records the dispute between the Government and the Mahant at the time and shows that even at the time of the enquiry there was a math at Katarpa where Mahant Raghunath Das was residing. The lands were granted by Januji Bhonsle, Raja of Berar, and the Sannad was registered in the Collectorate in the year 1905.

The object of the grant was Sadavart, namely, for feeding of travellers and for the maintenance of Mahant Lalu Das. The endowment was created for a charitable purpose, and the grant was confirmed in the name of the then Mahant Raghu Nath Das. Learned counsel for the respondent represented that it may be necessary for him to adduce evidence in rebuttal, and suggested that copies of the Provincial Settlement Register may be required to be produced to prove that the lands had been granted in the name of the deity in the Provincial Settlement. But there does not appear to be any substance in this contention.

Exhibit 8 dated 2-2-1891, unmistakably shows that these two villages were recorded in the name of the Mahants and not in the name of any deity. There is no mention of any idol in this document and it is possible that the deity had not been installed by the year 1891, or, if installed, had not been endowed with any properties. The Nadabi deed, Ex. 3 of the year 1900, however, mentions the names of the deities installed in the math and recites that the properties which belonged to those deities had been acquired by the previous Mahants.

The other recitals indicate that the lands were registered in the names of the Mahants and there is nothing to show that the idols had been registered as proprietors. Whatever the subsequent history of these properties may have been, it is clear that by the year 1891 the villages have been recorded in the name of the Mahants alone. In Col. 2 of Ex. 8 the nature and purpose of the grant have been mentioned as "Sadavart" and too as "offerings to the deity". I am therefore satisfied that there is no reason to reject the Robkari, though filed at a late stage, as the plaintiff would not be prejudiced by its reception.

31. The plaintiff also tendered a copy of a petition purporting to have been filed by Shri U. C. Misra, the pleader who appeared for Ram Narayan Das before the Endowments Commissioner, in which the Mahant claimed that the endowment was not a math as defined in the Act, and that it was his private property. He further stated that the properties were recorded in the name of Baldev Jiew with a view to avoid unnecessary and Illegal transfers.

The only contention raised by him was that the Endowments Act was not applicable to this endowment as they were secular properties and not devoted to any religious purposes. The document is not a verified petition and is not signed by the petitioner himself. Even if formal proof of this document were to be waived I do not see why this was not exhibited during the trial if the case of the plaintiff was that it was the private property of the family and not of a public institution.

That question is no longer in issue in the suit as both parties have accepted the position that it is a public endowment -- be it a math or an excepted temple. The rule which governs the reception of additional evidence in this Court is that the party seeking to adduce additional evidence must satisfy the appellate Court that notwithstanding the exercise of due diligence it could not be produced by him at the time when the decree or order under appeal was passed or made. No reason has been given in the affidavit as to why this document was not tendered in evidence in the lower Court, and I fail to see the purpose it would serve if admitted in evidence at this stage. I am not therefore disposed to accept this petition as additional evidence, and would reject it.

32. For the reasons already given, I would admit the Robkari in evidence and it will be marked as Ex. H (for the defendant) in the case 29.

33. One more point remains to be considered and that relates to issue No. 6 questioning the validity of the nomination of the appellant by the last Mahant. I have already held that in a Mourasi math the power to nominate a successor is inherent in the office of Mahant. There is also evidence to show that this nomination was confirmed by the Mahants of the order to which the parties belong.

Defendant 1 has been in possession of the endowment and has also been recognised by the Endowments Commissioner as a trustee acting along with other trustees appointed by him. The witnesses examined on this point are defendants 1 to 11, 14 to 16, 19, 21, 23 (plaintiff's mother) and 24. According to this mass of evidence defendant 1 was installed as Mahant 15 days before the death of Mahant Ram Narayan Das.

Exhibit D, the deed of appointment executed two years before his death, says that Raja Ram Das the father of the plaintiff was a bad character, that there was no prospect of his improving, that on account of his being addicted to intoxicants and as he had been squandering away the properties he was incompetent to look after the management of the endowment. It further says that Raja Ham had

misappropriated properties, of considerable value, belonging to the Thakur and had alienated some of the properties belonging to the Katarpa math and its branches. It says that the defendant was religious minded and was competent to look after the management.

These recitals are amply corroborated by the plaintiff himself who says that his father was addicted to opium and was not in a proper state of mind and was not even present to meet the guests at the "Siropa" ceremony which according to the plaintiff, took place on the 13th day of the Mahant's death. Exhibit 1 itself says that Raja Ram was a man of unsound mind. The plaintiff was examined as P. W. 12 and said in chief examination that his father had abdicated his right. His witnesses deposed that he was an imbecile and was unfit to be placed in charge of the math.

In these circumstances it was inevitable that Mahant Ram Narayan Das should have thought of a suitable person to succeed him and naturally appointed defendant 1, the appellant, who was considered by him to be more competent. All the circumstances in the case point to the conclusion that the appointment of defendant 1 was made bona fide in the interests of the institution and not out of any corrupt motive. The appellant is therefore entitled to a finding on this issue.

34. In the result my findings are as follows: The plaintiff has failed to prove that the rule of lineal primogeniture governs succession to the office of Mahant in the suit institution. The institution is a math presided over by a Mahant and the properties are endowed for charitable purposes. The installation of an idol in the math and the subsequent registration of the properties in the name of the idol are not inconsistent with the existence of a math as such. The defendant has been validly nominated and appointed as his successor by the last Mahant Ram Narayan Das.

35. The appeal succeeds, the judgment of the learned Subordinate Judge is set aside, and the plaintiff's suit is dismissed with costs throughout.

Narasimham, J.

36. I agree that the appeal should be allowed with costs but wish to give my reasons separately.

36a. The material facts and the pedigrees of the rival parties have been given in the main judgment. The plaintiff prayed for a declaration that he was the rightful successor to the Mahantship and Sebait Marfatdari right of the endowment consisting of Katarpa Math and the temple of Sri Baldev Jiew together with the debottar properties of the endowment. The admitted predecessor-in-interest of the parties was Mahant Ramnarayan Das. The original plaintiff Anadiram (since deceased and substituted by his minor son), was Ramnarayan's son's son by his first wife.

The contesting defendant Tulsiram alias Baldhar (defendant 1) is Mahant Ramnarayan's son by his second wife. The plaintiff alleged that succession to the

Mahantship and Sebait Marfatdari right devolved on him according to the rule of lineal primogeniture which was a special custom of the institution and that he was, therefore, the preferential heir. Defendant 1, however, alleged that there was no custom or rule of lineal primogeniture prevailing in the institution but that the reigning Mahant had the right to nominate his successor.

The plaintiff's allegation that the right claimed is the Mahantship of Katarpa Math and Sebait Marfatdari right of the debottar properties was not challenged in the written statement of defendant 1. On the other hand, the dual nature of the right was clearly recognised and reiterated again and again in several paragraphs of the written statement of defendant 1.

Thus, in para 8 it was stated that the person nominated by the last Mahant "should succeed to the Gaddi and become the Mahant and Sebait Marfatdar". In para 9, Mahant Ramnarayan Das, father of Sri Ram Das was said to have succeeded his father Raghunath Das and become Sebait Marfatdar of the deity Baldev Jiew. Again in paragraphs 11 and 17 of the written statement the composite nature of the right, namely, Mahantship of the Math and Sebait Marfatdari right of the deity was reaffirmed.

I should further point out that in the list of the properties attached to the plaint all items except one were recorded in the names of several deities with Mahant Ramnarayan Das as the Marfatdar of the deities. No property was shown as standing in the name of Katarpa Math as such. The only point in controversy between the parties was whether succession to the composite right was according to the rule of lineal primogeniture or else whether it was based on the right of nomination by the preceding Mahant.

37. But, during the life-time of Mahant Ramnarayan Das there was a proceeding u/s 64 (1), Orissa Hindu Religious Endowments Act, 1939, for a decision as to whether the institution was either a Math or an excepted temple and the Endowment Commissioner on 19-2-45 (vide Ex. 5-b) declared the temple to be an excepted temple by consent of the parties.

Under Sub-section (2) of Section 64, Orissa Hindu Religious Endowments Act, 1939 this decision in final subject to the result of a civil suit, if any. It is admitted that no civil suit was subsequently brought challenging this declaration of the Endowment Commissioner.

The learned lower Court therefore thought that this decision of the Endowment Commissioner finally settled the question as to whether the entire institution was a Math or an excepted temple and that the present litigation should be disposed of on the assumption that the Institution was only an excepted temple as defined in the Orissa Hindu Religious Endowments Act. He refused to discuss the case laws that were cited before him dealing with the principles of succession to Maths.

38. Mr. Mohanty on behalf of the appellant rightly urged that without framing a specific issue on the question as to whether the institution was essentially a Math

or a temple the lower Court should not have held it to be an excepted temple and thereby completely ignored the principles of succession to recognised Maths. There is some force in this argument and at first I was somewhat inclined to frame a new issue as to whether the institution was essentially a Math or a temple and to call for a finding from the trial Court after giving both parties an opportunity to lead additional evidence bearing on that Issue.

In fact, the appellant himself filed an application under Order 41, Rule 27, C. P. C., for admitting as additional evidence an ancient Rowakari relating to the institution which would show that the institution was essentially a Math. The plaintiff-respondent also filed an application under Order 41, Rule 27, C. P. C., to show that the Institution was essentially a temple. He wanted to prove the original application of Mahant Ramnarayan Das before the Endowment Commissioner on the basis of which the proceeding u/s 64 (1), O. H. R. E. Act was started in 1945.

A true copy of the petition is in the records of this case and there Mahant Ramnarayan Das had categorically asserted that the institution was not a Math but a private Debottar. The plaintiff also wanted to prove the Provincial Settlement khatians relating to the property.

39. If the decision of this appeal were to depend mainly on a decision of the question as to whether the institution is essentially a Math or a temple I would have been inclined to admit the prayers of both the plaintiff and the defendant for leading additional evidence under Order 41, Rule 27, C. P. C., frame a fresh issue on this question and call for a finding from the trial Court after giving both parties an opportunity to adduce rebutting evidence against the evidence of the other party.

It appears to me that if it is decided to admit the appellant's Rowakari as additional evidence at the second appellate stage, in fairness to the other side the plaintiff's application to adduce rebutting evidence should also be allowed and a finding called for from the Court. But for reasons set out in the succeeding paragraphs I consider that the question as to whether the institution is essentially a Math or a temple does not arise for consideration in view of the pleadings of the parties and that consequently the prayers of both the appellant and the respondent for leading additional evidence under Order 41, Rule 27 should be rejected. Such additional evidence is not required to enable us to pronounce judgment in this appeal.

40. I have already shown that in the pleadings of both the parties the right claimed was of a composite nature, namely, Mahantship of the Math and Sebait Marfatdari right of the debottar. In the written statement dated 16-7-1947 of Mahant Ramnarayan Das (common ancestor of both parties) in a previous Title Suit (O. S, No. 19 of 1949) (Ex. 6) the debottar nature of the property was fully emphasised. I may quote the following passage in para 5 of that document:

"The properties in the possession of the defendant being endowed properties

belonging to Shree Baldev Jiew, this defendant has only the right to manage the same and appropriate the income thereof for the purpose of the trust."

As far as I could gather from the pleadings as well as from the evidence on record, no attempt was made either by the plaintiff to allege that the institution was essentially a temple and that the right claimed was exclusively Sebait Marfatdari right or by the appellant to urge that the institution was essentially a Math and the right claimed was only Mahantship. Mahantship and Sebait Marfatdari rights have been mentioned indiscriminately throughout.

During the hearing of the appeal, however, Mr. Mohapatra on behalf of the respondent wanted time to consider the question of amending the plaint so as to make it clear that the institution was essentially a temple and that the right claimed was that of a Sebait Marfatdar subject to the special rule of lineal primogeniture as a peculiar custom of the institution.

He was given sufficient time to obtain instructions from his client and amend the plaint accordingly; but in the end he declined to file any petition for amendment and submitted that the appeal may be disposed of on the pleadings as they stand. I am therefore of the opinion that on the pleadings of the parties a composite right has been claimed by both parties and the settled rule of law regarding succession to the right of a Sebait Marfatdar or to the right of a Mahant of a Math will not strictly apply.

Succession will be governed according to the special custom of the institution as set up by both parties, namely, either the rule of lineal primogeniture as alleged by the plaintiff or the rule of nomination by the preceding holder as alleged by the defendant.

41. There is yet another reason why the rule of succession of Mahantship of Maths as settled in innumerable decisions which have been referred to in the Judgment of my Lord may not apply. Admittedly, most of the Mahants of the Math were house-holders (Gruhis). The founder was one Lalu Das and there is some controversy between the parties as to whether he was a cell-bate or a house-holder. But as regards his two successors, namely, Chaitanya and Raghunath it is admitted that they were both Gruhi Mahants.

In the petition of defendant 1 before the Endowment Commissioner dated 8-12-1947 (Ex. 5 paras C and D) it was stated that Lalu Das made it a rule that all his successors would be free to marry and that Chaitanya and Raghunath led married lives and begot children. The plaintiff alleged that the person who succeeded Raghunath was his eldest son Balaram who was celibate. But it was the case of the defendant that Balaram was superseded by his" younger brother Sriram, who was a house-holder.

His successor was Ram Narayan who was admittedly a house-holder having married twice. Thus, according to the defendant's own case, excluding the original founder Lalu all other succeeding Mahants, namely, Chaitanya,

Raghunath, Sriram and Ramnarayan were house-holders. The contesting defendant is also a house-holder having married twice. Thus the institution is not a celibate Math but a Gruhi Math as stated by the plaintiff.

It is true that even in a Gruhi Math the presiding Mahant may or may not choose to marry. But in a celibate Math it is the invariable rule that the Mahant should remain celibate. The various decisions dealing with three classes of Maths, namely, Mourasi, Panchaiti and Hakimi existing in Orissa and Northern India all deal with rules of succession in Maths presided over by celibate Mahants.

In my opinion they have no application to the present institution which is a peculiar one in the sense that the presiding Mahant is a householder belonging to Sree Sampradaya of the Vaishnab sect. I think it will be unsafe therefore to take the observations in those decisions as a guide in determining the rule of succession.

The decision of the litigation would depend solely on a critical examination of the evidence dealing with the peculiar custom of the institution as alleged by the parties bearing in mind the burden of proof in cases of this type.

42. That Gruhi Maths stand fundamentally on a different footing from celibate Maths admits of no doubt whatsoever. In the well-known book of Mukherjea on Hindu Law of Religious and Charitable Trust the learned author after fully discussing the law of succession in the three classes of celibate Maths (pp. 350 to 357) observed:

"There are, as indicated above, certain exceptional cases where Mutts are presided over by married persons and where the headship goes to the Mohunt's personal heir. These customs are generally found in Vaishnab and Bairagee Akhras in Western and Southern India and also amongst Sivaite Gossain sects in Northern India."

43. The only decision cited in Mukherjea's book in support of the above observation is --"Gossain Dawlat Geer v. Bissessur Geer 19 SWR 215 (Z1) where Phear J. after discussing the rule of succession of celibate Maths observed-

"There are instances of Math in which Mahantship descends to a personal heir of the deceased."

In my opinion, the institution in dispute comes under this exceptional class. It is a Vaishnab Math following the Sree Sampradaya of the famous South Indian saint Sri Ramanuja. Succession since the death of Chaitanya has devolved on the personal heirs of the Mahants subject to the special rule of either lineal primogeniture as alleged by the plaintiff or nomination from amongst the personal heirs as alleged by the defendant.

44. It is true that in the written statement of defendant 1 it was not expressly stated that according to the custom of the institution the right of nomination of a successor by the present holder was limited to his personal heirs only. The

written statement is somewhat silent on this question.

Moreover, in the application dated 8-12-1947 (Ex. 5) filed before the Endowment Commissioner u/s 16, Orissa Hindu Religious Endowments Act, 1939 in para C it was stated that the rule of succession was for the Mahant to elect his successor "from amongst his sons of Chelas." But I notice that in the written statement of Mahant Ramnarayan Das dated 16-7-47 (Ex. 6) in O. S. No. 19/47, in para 8 the rule of succession of the institution was described as follows :

"In fact any of the sons who is found to have a religious temperament and conforms to the tenets of the Ramauti Vaishnab sect and is otherwise found fit and is so initiated by the Mahant is entitled to succeed. There is no such custom that the eldest son would become Mahant in preference to other sons."

45. This rule of succession as described by defendant 1's father would indicate that the choice of a successor by a Mahant was limited to his sons or personal heirs and not to anyone whom he may choose. Doubtless, this question does not arise for decision in the present litigation because on the defendant's case the right of nomination has always been exercised only in favour of one of the sons of the reigning Mahant.

As the Math is a Gruhi Math where according to the observations of Phear J. in 19 SWR 215 (Z1) Mahantship would ordinarily descend to a personal heir of the deceased it seems reasonable to hold that the right of nomination as claimed by defendant 1 is limited to the personal heirs of the reigning Mahant. For the purpose of this litigation, therefore, it may be assumed without finally deciding, that the right of nomination as alleged by defendant 1 is limited to the personal heirs of the previous Mahant.

46. Hence, the main question for decision is whether the plaintiff has established that succession has devolved according to the special rule of lineal primogeniture. The plaintiff wanted to show that Chaitanya had two sons named Raghunath and Parsuram and that Raghunath succeeded as he was the elder son. According to the defendant however Raghunath was the only son of his father Chaitanya and consequently there was no question of applying any rule of primogeniture for his succession.

There is absolutely no documentary evidence to show that Parsuram was also a son of Chaitanya. Vague oral evidence on this point given by the plaintiff's witnesses can hardly carry any conviction. Hence, the plaintiff has failed to prove that Raghunath succeeded Chaitanya according to the rule of primogeniture.

47. It is admitted that Raghunath had several sons of whom Balaram was the eldest. Balaram was recorded as the Mahant in Register D of the year 1891-92 but his younger brother Sriram was also recorded as Naib Mahant. There is no documentary evidence about any controversy between the two at that time. But after the death of Balaram there was some dispute between Ramnarayan on the one hand and his uncle Sitaram on the other.

That dispute was settled by a compromise and the said Sitaram by his Nadabi deed dated 14-12-1900 (Ex. 3) admitted the prevalence of a special family custom of succession by primogeniture. The contents of this document have been quoted in full in the judgment of my Lord.

With respect, I agree with his observations that the admission of Sitaram of the existence of the custom of primogeniture in that document though an important piece of evidence on the side of the plaintiff is yet not conclusive and in the absence of any other kind of corroborative evidence would not suffice to establish the rule of primogeniture as a special family custom.

There was no trouble during Ramnarayan's life time as he was the only son of his father and all his uncle died celibates. Hence, no occasion for following the rule of primogeniture arose till the present dispute amongst the descendants of Ramnarayan.

48. The plaintiff has also relied on the oral evidence of some of his witnesses and on some admissions made by the defendant's witnesses to establish the special family custom prevailing not only in the institution in dispute but also in Gruhi Vaishnab Maths of this State. This evidence has been fully discussed by my Lord and I entirely agree with the comments on the unsatisfactory nature of the evidence to establish the special family custom.

I would, with respect, agree with his conclusions that the plaintiff has failed to establish the rule of primogeniture as a special custom governing succession in this institution.

49. The next question for consideration is whether defendant 1 (appellant) has succeeded in showing that succession depends on the right of nomination by the preceding Mahant amongst his personal heirs. This right was claimed by Mahant Ramnarayan Das in O. S. 19/47 (Ex. 6). Doubtless, the defendant has not been able to prove that this right was ever exercised on any preceding occasion.

He set up a story that Ramnarayan's father Sriram though a younger son was nominated by his father Raghunath as a Mahant in preference to his elder son Balram. This story was however not established and is moreover not believable in view of the entry in the D Register (Ex. 8) of 1891-92 to the effect that the then Mahant was Balaram Das. Apparently, as Balaram and all his other brothers except Sriram were celibates and as Sriram died leaving an only son named Ramnarayan there was no acute controversy at the time of his succession inasmuch as in any case ultimately the property would devolve on Sriram's son Ramnarayan who was the sole heir of all the brothers.

Hence, the only real occasion when the right of the preceding Mahant came up for consideration was in the present instance when Ramnarayan appointed defendant 1 Tulsiram superseding the claims of his elder son's son. Doubtless, if the defendant's evidence were to stand by itself it would not suffice to prove the special family custom of nomination by the preceding Mahant as set up by the

defendant.

The adverse comments made against the inadequacy of the plaintiff's evidence to establish the rule of lineal primogeniture would apply with equal force against the defendant's evidence on this point also. In this state of the evidence I would ordinarily have been inclined to hold that the property would devolve on all the personal heirs of the late Mahant Ramnarayan Das but for the admitted position of both parties that the property devolves on a single heir to the exclusion of others.

It is on that admission that the parties went to trial. Hence, once it is admitted that succession to the institution devolves on a single heir to the exclusion of all others and when it is further found that the plaintiff has failed to prove the special rule of lineal primogeniture as set up by him I am inclined to accept the defendant's contention that the succession is governed by the right of nomination by the preceding Mahant.

In fact, it is difficult to think of any other alternative mode of succession bearing in mind the fundamental position that (1) as the institution is a Gruhi Math succession must be limited to the personal heirs of the preceding Mahant and (2) the admitted case of both parties that succession devolves on a single heir to the exclusion of others.

50. To sum up, therefore, my findings are as follows: Succession to the institution is based on a special custom set up by both parties and is limited to one of the personal heirs of the last Mahant. The plaintiff has failed to prove the rule of lineal primogeniture as a special custom.

Defendant 1 (appellant) has been validly nominated by his father late Mahant Ramnarayan Das and is entitled to succeed. The Math is a Gruhi Math to which the rules of succession of celibate Maths do not apply. The entire institution is of a composite nature being both a Math and a Debottar and it is unnecessary for the purpose of this litigation to decide whether it is essentially the one or the other.