
(1951) 11 OHC CK 0001

Orissa High Court

Case No: First Appeal No. 39 of 1946

Jaganath

APPELLANT

Vs

Tirthananda Das

RESPONDENT

Date of Decision: Nov. 30, 1951

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10, Order 1 Rule 8, Order 21 Rule 22, Order 22 Rule 4, Order 32 Rule 3

Citation: AIR 1952 Ori 312

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

Bench: Division Bench

Advocate: S. Misra, for the Appellant; S.N. Sen Gupta, for the Respondent

Final Decision: Dismissed

Judgement

Panigrahi, J.

The suit out of which this appeal arises was instituted by the plaintiff-appellant under Order XXI, Rule 103 of the Civil Procedure Code, for a declaration that he is the sebayat of Deity Lord Jaganath to whom the suit properties belong and for recovery of possession of the same from the defendant.

2. The plaintiff Mahanta Ganga Das is a chela of the late Mahanta Dhyan Das, who was the previous Mahanta of Bhaga Akahada Math situated at Puri. Mahanta Dhyan Das died on 20-6-41 and the plaintiff, claiming to have been elected on 13-7-41 by a Punch of Mahantas, to succeed the deceased Dhyan Das as Mahanta of the said Math, asserts his title to the properties which admittedly constitute an endowment of the Deity Lord Jaganath. The defendant, Mahanta Tirthananda Das, is the Mahanta of Pandu Math situated in Cuttack district and he claims to have been put in possession of the suit properties through Court, in pursuance of an execution sale held on 10-3-42. His case is that the late Mahanta Dhyan Das had contracted loans from him, for meeting the necessary expenses of the Deity, of which the deceased Mahanta was the Sebayat, and

that he had executed in his favour a registered bond dated 10-7-20 and a handnote dated 6-7-30.

For recovery of the amounts due to him under these bonds the defendant filed a suit in O. S. No. 40 of 1933 in the Court of the Second Munsif, Cut-tack, and obtained a decree for 3399/- and odd. In execution of that decree, the suit properties were put to sale and purchased by the defendant decree-holder. The defendant subsequently took delivery of possession on the 7th and 18th of June 1942. Meanwhile, the plaintiff Ganga Das filed a suit for declaration of his title to, and for recovery of possession of the Math and its properties in original Suit No. 5 of 1942, from one Dharmananda Das who was then in possession of the same as the duly constituted chela of the deceased Mahanta Dhyan Das on the strength of a will said to have been made by the deceased Mahanta on 17-6-41 three days prior to his death.

That suit ended in the compromise whereby Dharmananda Das gave up his claim and admitted the plaintiff's right to succeed to the Mahantaship of the Bhaga Akhada Math. In execution of the compromise decree, the plaintiff took delivery of the possession of the suit properties through Court on 22-1-43. The defendant having thus been dispossessed filed a petition under Order XXI, Rule 100 of the CPC which was registered as Miscellaneous Case No. 22 of 1944. This petition having been allowed he was restored to possession on 16-9-1944. Thereafter, the plaintiff filed the suit out of which this appeal arises, namely, Title Suit No. 40 of 1944 in the Court of the Subordinate Judge, Puri, for recovery of possession of the properties from the defendant upon declaration of title.

3. The plaintiff's case is that the decree obtained by the defendant in O. S. No. 40 of 1933 against the deceased Mahanta Dhyan Das was collusive, that the money borrowed by him from the defendant was not for purpose binding on the Deity, that the Deity to whom the properties belong was not properly represented either by the deceased in the suit, or by his chela Dharmananda in the subsequent execution proceedings. The court sale in favour of the defendant is, therefore, attacked as having been wrongfully and fraudulently brought about. It is accordingly contended that no title passed to the defendant by reason of the court sale and that the plaintiff is entitled to recover possession of the properties from him.

4. The defendant has traversed these allegations, and avers that the decree obtained by him in the Original Suit No. 40 of 1933 was against the deity as represented by the deceased Mahanta, and that the subsequent execution proceedings were continued, on the death of Mahanta Dhyan Das, against Dharmananda who was then in actual possession of the Math and its properties and who represented the Deity as the duly constituted chela of the deceased Mahanta.

5. The learned Subordinate Judge in a careful and exhaustive judgment, found that the loans contracted by the late Mahanta Dhyan Das were for purposes binding upon the Math and that the decree obtained by the decree-holder in O. S. No. 40 of 1933 was

against the Thakur represented by Mahanta Dhyhan Das and against Mahanta Dhyhan Das in his personal capacity. He also found that there was no fraud or collusion between the decree-holder and the Mahanta and that the execution sale was valid inasmuch as Dharmananda Das, as successor of the deceased Dhyhan Das, represented the Deity and was in possession of the properties of the Math on the day when the sale was held. He accordingly dismissed the plaintiff's suit.

6. In the appeal before us, the only points urged on behalf of the plaintiff-appellant that require consideration are: (1) Whether the debts contracted by the deceased Mahanta were such as would bind the plaintiff-deity; and,

(2) whether the deity was adequately represented in the suit filed by the defendant in O. S. No. 40 of 1933.

A number of other points had not been raised in the Trial Court (sic) but as they have not been pressed before us it is unnecessary to advert to them.

7. The plaint filed by the present defendant in O.S. No. 40 of 1933 is marked Ext. A. It recites that Mahanta Dhyhan Das borrowed 12 bharanas of paddy under a registered bond dated 10-7-20 for the Khatni expenses of the deity and other necessary expenses connected with the Math festivals. By that time the Mahanta had also borrowed, from the Mahanta of Bada Akahda Math and from a cloth-dealer named Gauranga Oatro, some money for meeting the Khatni expenses of the deity and for payment of road cess due to Government. In order to discharge those debts he borrowed a sum of Rs. 750/- on a handnote dated 15-6-24 executed in favour of the defendant. On 21-1-27 he again borrowed Rs. 100/- for the same purpose under a promissory note executed in favour of the defendant.

He had made some payments towards the dues under the handnote but on 5-7-30 he again executed a handnote in favour of the defendant for Rs. 1700/- consolidating the dues under the previous documents. On the basis of these documents, the defendant filed the suit and obtained a decree for Rs. 3399/- and odd as already stated above. Mahanta Dhyhan Das, deft, in the suit, filed a written statement denying the execution of the said documents and the liability of the idol (deity) thereunder, but became ex parte when the suit actually came up for trial, apparently because he found his position to be untenable. The suit was eventually decreed against him on 14-11-33. On 19-11-33 he filed a petition under Order 9, Rule 13 of the Civil Procedure Code, praying for the setting aside of the ex parte decree and that petition was registered as Miscellaneous Case No. 229 of 1933 (Ext. B-1).

The petition was, however, dismissed as the Mahanta Dhyhan Das did not get ready to proceed with the petition when it came up for hearing. There-after, the decree-holder started an Execution case in the Court of the Munsif at Cuttack (numbered as Execution Case No. 108S of 1936) on 20-11-36 praying for the transfer of the decree to the Court of

the Munsif at Puri (where the properties are situated) for execution. Execution Case No. 887 of 1940 was started at Puri on 29-4-40 but on receipt of notice, the judgment-debtor Dhyana Das filed a petition, u/s 47 of the Civil Procedure Code, objecting to the attachment of the properties on the ground that they were "Devotter". The petition was registered as Miscellaneous Case No. 16 of 1941 on 11-2-41, but while it was pending in the court of the Subordinate Judge, Puri, Mahanta Dhyana Das died on 20-6-41 and the decree-holder filed a petition praying that one Dharmananda Das be brought on the record as the legal representative of the deceased Mahanta.

The said Dharmananda Das was a minor and therefore his natural father Uchaab Senapati was proposed as his guardian-ad-litem and notice of substitution was taken out to him, but he did not appear and therefore the decree-holder prayed for the appointment of a Court Guardian, and a Pleader was accordingly appointed on 18-8-41, as Court Guardian to represent the minor as the legal representative of the deceased judgment-debtor. On 19-9-41 Miscellaneous Case No. 16 of 1941 was dismissed for default as the legal heir of the deceased judgment-debtor did not choose to appear on the record in order to prosecute the petition. On 24-11-41, the Court directed a proclamation to issue fixing 15-1-42 for the sale of the properties. It was at that stage that the minor Dharmananda, as the Marfatdar of the Deity Sri Jaganath Mahaprabhu filed a petition under Order XXI, Rule 58 of the CPC claiming the properties on behalf of the deity.

That petition was registered as Miscellaneous Case No. 7 of 1942, but was summarily rejected for the reason that it was filed too late. The judgment-debtor filed another petition for restoration of this miscellaneous case but again without success. The sale was adjourned and was ordered to be held on 16-1-42. On 13-1-42 Dharmananda filed Title Suit No. 3 of 1942 and prayed for an injunction restraining the decree-holder from proceeding with the sale. The sale was adjourned to 30-1-42 on the judgment debtor waiving a fresh proclamation and his undertaking to deposit a sum of Rs. 500/- by 30-1-42 and further a sum of Rs. 500/- by 16-2-42. The judgment-debtor later asked for extension of time for making the promised deposit, but again failed to make the payments, and so the order of stay was vacated and the sale was actually held on 10-3-42 and the property was purchased by the decree-holder (the present defendant) as stated above.

On 24-6-42, Title suit No. 3 of 1942 filed by Dharmananda Das was dismissed for default as neither the plaintiff nor his pleader appeared on that date. Soon after the institution of that suit Mahant Ganga Das, (the present plaintiff) filed original suit No. 5 of 1942 against Dharmananda claiming to have been elected as the validly constituted chela of the deceased Mahanta Dhyana Das. His case was that succession to the Mahantaship of the Bhaga Akahada Math was not regulated by a nomination of the previous Mahanta but by election by a Punch of Mahantas belonging to the same order, and that since he was elected by a Punch he was the rightful heir to the deceased Mahanta Dhyana Das. He disputed the genuineness and validity of the will dated 17-6-11 left by the late Mahanta whereby he is said to have nominated his nephew, the said Dharmananda Das, as his

successor.

The plaintiff claimed that as he had been elected Mahanta by the punch on 13-7-41 he was entitled to be put in possession of the Math and its properties as the Sabayat and Marfatdar of the Deity Sri Jaganath. This suit was, after a few adjournments, compromised on 23-12-42 by a petition of compromise dated 17-12-42 (Ext. JO) filed by the parties. By this compromise the plaintiff's title to succeed to the late Mahanta was admitted by Dharmananda & he acquired the right to take possession of the Math and its properties as the successor of the deceased Mahant.

8. It will appear from the sequence of events narrated above that the decree was obtained by the present defendant during the lifetime of the late Mahant Dhyani Das and that the latter did his best to question the validity and binding character of the loans contracted by him on the plaintiff-deity but could not succeed in establishing it, and allowed the suit ultimately to be decreed against him ex parte. Evidence was adduced in the suit filed against him by the defendant to show that the defendant-creditor had, after enquiry been satisfied that money borrowed was actually required for purposes of the Math. There appears to be no room for thinking that the creditor wanted a personal decree against the Mahant nor was such a personal decree against the Mahant in his personal capacity passed. Later, at the stage of execution the judgment-debtor's chela filed a petition u/s 47 of the CPC objecting to the attachment on the ground that the properties were Devotter but that petition was dismissed for non-prosecution.

There appears to be little room for thinking that the loans were incurred for purposes other than for meeting the expenses of the deity. It is clear from the evidence that in the year 1920 Mahant Dhyani Das who was in charge of the Math was in need of money as there was total failure of crops resulting in the famine. The properties of the Math are such that one would be led to believe that the Math could not have met its usual expenses otherwise than by borrowing. The evidence shows that the Math owns 41 acres of tenanted lands in Cuttack District and 132 acres in Puri. Out of the lands in Puri only 24 acres are Khas-Dakhali lands and the rest of the lands fetch, in all, a cash rental of Rs. 278-8-0 a year. It is further in evidence that these lands are subject to periodic inundation by three rivers and frequent failure of crops.

In these circumstances, it would not be surprising if the Mahanta was hard put to it to find money for the usual expenses of the Math without resorting to borrowing. Moreover, we find that besides the defendant-creditor there were other creditors who had lent money to the late Mahanta Dhyani Das.

One Hariprasad Sen who was once such creditor brought a suit against the Mahanta and obtained a decree against him on a bond executed in his favour by the Mahanta. But as the decree was not satisfied, the properties of the Math were brought to sell by Hariprasad Sen. The plaintiff, Ganga Das, filed Original Suit No. 14 of 1937 challenging the binding character of that decree but that suit was dismissed. Ext. K the Ekarinama

executed by the plaintiff in favour of the Mahanta who elected him as successor to the deceased Mahanta Dhyana Das, shows that Dhyana Das had borrowed a sum of Rs. 2000/- from the Punch for meeting the expense of the Math, and P. W. 7 the Mahanta of Emar Math, Puri, deposed that the said amount was advanced by him, in his capacity as the President of the Punch after due enquiry. This would show that borrowing for purposes of the Math was a necessity. It is not suggested that the late Dhyana Das was a spend-thrift or that he was otherwise guilty of any misconduct in his administration of the Math.

The plaintiff himself deposed in O. S. No. 14 of 1937 (Ex. M-1) that Dhyana Das "is a good man, and I have never found him guilty of dishonesty or misconduct." In the present suit also, the plaintiff as P. W. 6, admits that on festive occasions like Mahotsab, Car Festival, Holi, etc., the Math has to incur abnormal expenditure which cannot be met from the annual income of the Math. I am not inclined to accept his testimony that the Math makes a net saving of 8 to 10 Bharanas of paddy every year in view of his admissions made on different occasions.

In Ext. M-1 (deposition of plaintiff in O. S. No. 14 of 1937) he admitted that "at present the math has no surplus money or paddy. Every year Rs. 50/- to Rs. 100 are saved but spent in Khairat". The defendant has let in evidence to show that his agent, P. W. 2, enquired about the need for the loans from local witnesses & examined the accounts to satisfy himself. The evidence of P. W. 1 and 5, who were called to speak about the income of the Math, has not been believed by the Trial Court as neither of them had any personal knowledge about the financial position of the Math. It is also clear, from the evidence, that the deceased Mahanta had borrowed from the defendant on an earlier occasion on a registered mortgage bond, and that a suit had been filed in connection with the same in the Court of the Subordinate Judge in Suit No. 66 of 1931.

Having regard to all these circumstances, I am satisfied that the finding of the learned subordinate Judge that the loans in question were contracted for purposes binding upon the Math and that the decree had been obtained against the Deity, of which the deceased Mahant was the Sebayat and Marfatdar, is correct and must be upheld.

9. It was next contended that the plaint filed by the defendant in original suit No. 40 of 1933 (Ext. A) does not show that the Deity was properly impleaded as a party defendant. The description of the defendant in that suit is in the following terms:

"Mahanta Dhyana Das, chela of Mahanta Haribandhu Das, Brahmin, Neogi Baishnab, profession Thakur Seva, residence Kundhei Benta Sahi, Town Puri, Math Niralambi Bhaga Akhada, Sebayat-Marfatdar of Sree Jagannath Mohaprabhu, installed at Purushotam Khetra".

It is argued that this description is not adequate to make the Deity a party defendant. It is a recognised principle of law that an idol can sue and be sued only through a sebayat. The idol is a juridical person and is capable of holding property in an ideal sense. But the

possession and management of the dedicated property is vested in the sebayat and this carries with it the right to bring whatever suits are necessary for the protection of the property.

As the Judicial Committee have held in "JAGA-DINDRANATH v. HEMANTA KUMARI DEBI 31 Ind App 203 (PC) every such right of suit is vested in the sebayat and not in the idol. In Ext. A, it appears that the plaintiff, after having described the Mahanta and given his residence as Niralambi Bhaga Akhada Math at Puri, has also further described him as the sebayat marfatdar of Sri Jagannath Mahaprabhu, in order to emphasise the character in which the said Math was being sued, viz., Mahanta Dhyan Das as the sebayat Marfatdar of Sri Jagannath and not as the chela of Mahanta Haribandhu Das in his personal capacity.

The examples given in Appendix A of the Civil Procedure Code, under the heading "Pleadings" show that it would ordinarily be sufficient merely to describe the residence of the defendant in the cause title, and that, in particular cases, the description of the parties has to be given as shown in paragraph 2 of the heading "Pleadings". Where a person is sued in a representative capacity it would be enough to state in the plaint that he is the sebayat of a Thakur. The plaintiff, in Ext. A, has adopted the form in Appendix A of the CPC and has also prayed, in paragraph 10 of his plaint, that the suit amount may be decreed and realised from the properties which have been endowed to the deity. In such cases, it is necessary not only to see how the defendant is described but also refer to the pleadings.

In "RADHA BINODE MANDAL v. GOPAL JIEU THAKUR" 54 I A 238 (PC), a suit was filed by some sebayats against some other Sebayats and both parties were described as the Sebayats of God Gopal Jieu. The Judicial Committee observed that

"if God Gopal Jieu is to be regarded as a plaintiff in such circumstances he must also be regarded as a defendant which would be a *reductio ad absurdum*"

and held that it is necessary to examine not only the heading of the plaint, but also the allegations contained in the plaint.

It is also permissible, for the purpose of impleading the Deity, to describe the defendant deity as Sri Thakurji under the Marfatdari of a particular person, as was the case in "JODHIRAI v. BASDEO PRASHAD", 33 All 735 (PB). In a later case of the Privy Council reported in "PRAMATHA NATH v. PRADHYUMNA KUMAR" 52 I A 245 (PC) it was held that it is open to an idol, acting through his guardian, the sebayat, to conduct its worship, in its own way, at its own place, always on the assumption that the acts of the sebayat expressing its will are not inconsistent with the reverent and proper conduct of its worship, and directed that the idol should appear by a disinterested next friend appointed by the court.

In "MASJID SAHIDGANJ v. SHIROMANI GURDWARA PARBANDHAK COMMITTEE" 67 I A 251 Sir George Kankin delivering the judgment of the Board, referred to the earlier case of Jagadindranath and observed that the procedure of the courts allows a suit in the name of idol or deity though the right of suit is really in the sebayat. In "UPENDRANATH v. KUSUM KUMARI" 42 Cal 440 a sebayat had been sued in his representative capacity and a decree had been obtained against him. In the execution proceedings he filed objections to the attachment and sale of the properties claiming them to be his private secular properties. That objection having been overruled the sebayat preferred an appeal, and the question that came up for decision before the High Court was whether the order of the Executing Court was one u/s 47 C. P. C. and whether an appeal lay.

In holding that it was not one u/s 47, C. P. C. Mookerji J. held that when a decree has been passed against a person in his representative capacity as sebayat, execution can be taken out only against the properties of the endowment in his hands, that the personal properties of the sebayat cannot be taken in execution of a decree made against him in his capacity as the Manager or trustee of the endowment that the two capacities are fundamentally distinct and the individual constitutes two distinct juristic persons from the two different points of view.

In "BIDHU SEKHAR BANERJI v. KULADA PRASAD" 46 Cal 877 the judgment debtor filed a claim petition objecting to the attachment of certain properties in her hands, which she claimed belonged to a Deity named Kalyaneswari Devi, The claim was allowed and the decree-holder filed a suit against her as the sebayat of the Goddess. The trial court dismissed the plaintiffs suit on the ground that the idol had not been impleaded in the suit. In allowing the appeal, the court held that it was not necessary that the idol should be there as a party and observed that the suit can be properly maintained in the name of the sebayat" relying on the Privy Council case in 31 I A 203 (PC). In my judgment therefore, the plaintiff idol was properly represented as a party defendant through the sebayat, the deceased Mahanta Dhyhan Das, in the suit brought against him by the present defendant, Tirthananda Das.

10. There is no evidence of any collusion between the creditor and the deceased Mahanta, nor is any particular act of fraud or collusion alleged in the plaint or proved at the trial. The only allegation, if at all, that has been made is that in paragraph 7 of the plaint in the present suit to the effect that

"the late Dhyhan Das failed to raise proper defence in that suit, and was grossly negligent in not contesting and prosecuting the application under Order 9, Rule 13, C. P. C. which he got fraudulently dismissed".

It is quite clear to my mind that Dhyhan Das did raise all possible defences to the suit which a dishonest debtor could raise, but either because of lack of evidence or because of the hopelessness of the attempt he appears to have given up the fight at the last moment and preferred to remain ex parte. So is the case with the petition under Order 9,

Rule 13 C. P. C. which, even if pursued, would not have been successful. The plaintiff has not brought out any facts which would induce us to hold that there was even the remotest possibility of either the defence in that suit or the petition succeeding. A bald assertion of fraud in the plaint would not be enough to disclose sufficient cause of action unless particulars are stated in the plaint or other circumstances from which an inference of fraud can be drawn, or specifically pleaded in the pleadings.

In "WALLINGFORD v. MUTUAL SOCIETY", (1880) 5 A. C. 685 Lord Selbourne said:

"With regard to fraud, if there be any principle which is perfectly well-settled, it is that general allegations however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice" A general allegation of fraud or collusion is ineffectual to give fraudulent colour to a particular statement of fact in the plaint, unless the statement by itself is such as to imply that fraud has actually been committed".

Bearing these principles in mind, I am satisfied that the plaintiff has failed to establish any fraud on the part of the defendant creditor or any collusion between him and the judgment-debtor.

11. Nor can it be said that the allegation of gross negligence on the part of the deceased Mahanta Dhyani Das is founded on fact. Learned counsel for the appellant wanted us to extend the analogy of the next friend of a minor to the case of an idol. But it is well-settled that an idol cannot be regarded as a perpetual minor and the special protection given to a minor does not apply to an idol. The protection of a minor against the negligent actings of a guardian is a special one and statutory provision has been made for safeguarding a minor's interest.

In AIR 1937 1 (Privy Council) their Lordships of the Privy Council declined to extend the principles applicable to minors to the property of a deity. While, therefore, the gross negligence of the next friend of a minor may constitute a cause of action to displace a judgment obtained against the minor, the same reasoning would not apply to the negligence of the sebayat of an idol. This contention must accordingly fail.

12. The next point that requires to be considered is whether the execution proceedings are vitiated by reason of the fact the plaintiff was not brought on the record as the legal representative of the deceased Mahanta in view of the fact, that, by virtue of the compromise decree obtained on 23-12-42 in O. S. No. 5 of 1942 filed by the plaintiff against the then Mahanta Dharmananda Das, the plaintiff's title to the properties was recognised.

The evidence shows that at the time when the execution proceedings were started in pursuance of the decree obtained by the defendant (in O. S. 49 of 1933) Dharmananda was in actual possession of the Math properties, as the validly constituted chela of the deceased Mahanta under a will left by the latter purporting to nominate the said

Dharmananda as his successor. Ext. O series are the rent receipts filed by the defendant to show that Dharmananda paid the rents due from the suit properties for the year 1942.

It is also undisputed that the plaintiff Ganga Das had to file a suit for recovery of possession of the Math and its properties from Dharmananda who admittedly was in possession. Ext. A the plaint filed by Ganga Das shows that he was then living in Mulak Chaura Math and not in the suit Math. It was open to the plaintiff to apply for substitution of his name, in the execution proceedings started by the decree-holder, in place of Dharmananda, at least after 14-8-41 when he was elected Mahanta by the Punch. In that case, the Court would have gone into the question of his capacity to represent the idol. He did not take any steps to do so, as, obviously, he was not in possession of the properties.

It may be that Dharmananda, as it turned out subsequently, had no real title to represent the estate of the Math but the fact remains that at the time of the execution proceedings he was in actual possession of the properties appertaining to the Math, and was competent to represent the Math in all proceedings against it, till he was dispossessed by the plaintiff in January 1943 in pursuance of the compromise decree. On the date of the sale viz. on 10-3-42 the only person who was in possession of the Math and who was competent to represent it was Dharmananda.

At any rate, the plaintiff was nowhere in the picture at least by 5-7-41 when the petition for substitution of the legal representative of the deceased Mahanta was filed by the decree-holder. It has also to be remembered that in O. S. No. 14 of 1937 filed by the present plaintiff against the creditor, Hari Prasad Sen, Issue No. 1 was framed in the following terms:

"Whether the plaintiff (Ganga Das) is the chela of Mahanta Dhyan Das".

This issue was found against him and it was held that he was a stranger and had no right to maintain a suit on behalf of the deity. Ext. B. the judgment in that suit, shows that the Court held that he was not a chela of Mahanta Dhyan Das. In the face of these incontrovertible facts a reasonable inference that would arise is that Dharmananda was in possession of the Math and its properties as the validly constituted successor of the deceased Mahanta at the time when the sale was held, and that he was properly on the record as the legal representative of the deceased judgment-debtor. The fact that his title was subsequently decided to be defective is not relevant, so far as Dharmananda's capacity to represent the deity as the legal representative of the judgment-debtor is concerned.

13. Nor, as I have said, is there any reason to assume that there was any collusion on the part of the decree-holder. D. W. 2 deposes that he was satisfied, after a personal enquiry, that Dharmananda succeeded to the Mahantaship under the will left by the deceased Mahanta Dhyan Das and that Dharmananda was actually in possession of the properties.

It would appear from Ext. G (Register of Application No. 856 for execution of decree dated 14-9-1940) that the creditor Hari Prasad Sen also impleaded Dharmananda, as the chela of Dhyan Das, in his execution petition dated 5-7-1941. Column 8 of this Register shows the description of the judgment-debtor as "Dharmananda Das, minor, represented by his father Uchhab Senapati amended as per Order No. 25 dated 5-7-41". Column 87 shows that "Judgment Debtor being dead his chela is substituted in his place."

It would therefore be reasonable to infer that so far as the title to the Math was concerned, Dharmananda Das was the only person who represented it after the death of the deceased Mahanta Dhyan Das. It is also clear that he took steps, from time to time, to safeguard the interests of the Math. He first filed a petition under Order 21, Rule 58, C. P. C. on behalf of the deity which was registered as Mis. Case No. 7 of 1942.

He later filed a suit under Order 21, R. 63, C.P.C. which was registered as Original Suit No. 3 of 1942 and obtained a stay of the sale. He took adjournments from time to time to enable him to make a deposit in part-payment, of his decretal dues. He carried the matter to the High Court also as would appear from Ext. B-4 the Order Sheet in Mis. Appeal, 5 of 1942 of the High Court. Having failed in all his attempts to safeguard the Math properties he gave up the fight and allowed the sale to be proceeded with. It cannot be inferred from his conduct that he failed to take adequate steps to protect the properties or that his being impleaded as the legal representative of the deceased Mahanta was other than bona fide.

14. Learned Counsel for the respondent has drawn our attention to the fact that the plaintiff-appellant did not implead the creditor (Tirthananda) in Suit No. 5 of 1942, although the properties had been advertised for sale after having been attached. Admittedly that suit was filed after the properties had been proclaimed for sale and it was open to the plaintiff to have impleaded the present defendant, and since he did not do so, it is argued, it must lead to an inference that his suit against Dharmananda was collusive and was instituted with a view to bring into the field a new claimant to the properties in question.

This argument is based on the fact that the pleader-guardian who had been appointed to represent the minor Dharmananda was suddenly discharged and the natural father of Dharmananda appeared on the scene and the latter entered into a compromise with the plaintiff unconditionally withdrawing his claim to the Mahantaship; Orders Nos. 19 and 20 dated 17-12-42, in Ext. B(6) relating to O. S. No. 5 of 1942 printed at page 70 of the Paper Book (Part III) show that on the date of the compromise namely 23-12-42 the Pleader-guardian was discharged and the natural father of Dharmananda was appointed as the guardian, that the compromise, was accepted on that very date, and the suit decreed in terms of that compromise, as a result of which the Mahantaship of the Math, together with the properties, passed to the present plaintiff.

But this does not affect the validity of the execution sale, because the law on the subject as has been laid down, in several cases is very clear. The principle is that a person who

is impleaded as the legal representative of another which he is not, in execution of decree, sufficiently represents the estate with the result that an order passed against him is held to be binding upon the true representative though the latter was not a party to the same-See "MALKARJAN v. NARHARI" 27 I A 216 (PC). So long as the decree-holder acts bona fide and takes care to ascertain that the person he proposes to implead is the de facto representative of the deceased judgment debtor, the fact that that person subsequently turns out to be the wrong party will not affect the validity of the proceedings.

If, in ignorance of the legal heir the decree-holder impleads a wrong person & the person having the real title does not intervene, the proceedings will be binding on the latter in the absence of any fraud or collusion. In a case where there are rival claimants to the estate of a deceased person, it is open to the decree-holder to choose the person, who appears to have a prima facie title. The authorities on the subject are fully discussed in [Sanna Govappa Vs. Rodda Sanna Govappa and Others](#).

15. It is also well established that a de facto trustee of an endowment can sue for the benefit of the deity and also be sued in his capacity as the representative of the deity. In "MAHADEO PRA-SAD v. KAIRA BHARTHI" 62 IA 47 (PC) the possession of Kaira was held to be sufficient to entitle him to recover the property, for the benefit of the Math, which was wrongly held by the appellants. The Privy Council, in disposing of the appeal, referred to an earlier decision of the Board reported in "RAMCHARAN DAS v. NAURANGI LAL" 60 I A 124 where it was held that a person in actual possession of the Math is entitled to maintain a suit to recover property appertaining to it not for his own benefit, but for the benefit of the Math.

In a recent Full Bench decision of the Madras High Court reported in "SANKARANARAYANAN v. POOVANATHA SWAMI TEMPLE KOILPATTI" AIR 1949 Mad 721 (FB) it was laid down, on a review of the entire case law, that a "de facto" trustee can maintain a suit to recover properties belonging to an idol or institution, provided that such a person is able to prove that he is in exclusive possession of the office of Manager or Head of the institution although he may not be able to establish his legal title to it. Possession of the office or the institution which is the object of the trust and the exercise of the rights appertaining to that office are important indicia of a "de facto" trusteeship.

If, therefore, the finding that Dharmananda was in possession of the Math and its properties on the relevant date be correct, and we see no reason to differ from the Trial Court on this point, then it follows that he was capable of representing the idol both in proceedings taken by him for the benefit of the idol and in those taken against him as the sebayat of the idol. Having regard to all these circumstances, there can be no escape from the conclusion that the plaintiff deity was properly represented by Dharmananda so long as he purported to act as the Mahant of the Math, and the execution proceedings taken against the idol would therefore be binding upon the plaintiff.

16. This appeal must therefore fail and it is dismissed with costs.

Das, C.J.

17. I agree.