the other hand, the powers of enhancing of sentence in revision are given to the High Court alone, and the powers of revision are given to the High Court in the case of any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge.

Their Lordships are clearly of opinion that when the High Court has before it on appeal a record of a criminal proceeding, the condition precedent is performed, and the High Court can then, though the record has only come to its knowledge in the appellate proceeding, proceed to exercise its revision powers if it chooses to do so. In this case the High Court did choose to exercise its revision powers. Mr. Sidney Smith points out that the notice which actually was served was headed in the criminal appeal; but it is quite plain that the subsequent proceedings were in fact in revision, and it was made plain that the Court was exercising its revision power. That being so, it appears that the Court had complete jurisdiction to act as they did, and their Lordships therefore, in the exercise of the ordinary rules which govern criminal appeals, see no reason at all in this particular case why any leave to appeal should be granted.

In those circumstances, they will humbly advise His Majesty that the petition be dismissed.

Solicitors for petitioners: *Hy. S. L. Polak & Co.*

Solicitor for the Crown: *Solicitor, India Office.*

PRIVY COUNCIL

MAHADEO PRASAD SINGH AND OTHERS *v.* KARIA BHARTI

J. C.* 1934 *December*, 18

[On appeal from the High Court at Allahabad]

Limitation Act (IX of 1908), schedule I, article 144—Religious institution—Math property——Alienation—Suit by de facto mahant—Limitation—Adverse possession.

Present: Lord ATKIN, Lord ALNESS, and Sir SHADI LAL.

1934

MAHADEO PRASAD SINGH v. KARIA BHARTI

On the death in 1894 of the mahant of a math the office was claimed by *R* and by *K*, who was a minor. Under a compromise *R* was installed as mahant but agreed to appoint *K* as his successor. *K* upon attaining majority sued repudiating the compromise and claiming the office. The suit was dismissed by the High Court upon appeal. An appeal by *K* to the Privy Council was abandoned under a compromise deed of 1904, which provided that *K* should have possession of two of the math villages, including the math building, and *R* possession of the other math villages; either party was to be competent to alienate the villages allotted to him. *R* did not relinquish the office of mahant by the deed, but thereafter *K* (and not *R*) lived in the math building and managed its affairs, and upon the death of *R* in 1916, *K* was treated as mahant though he was not installed. In 1914 *R*, purporting to act as mahant and for necessity, sold one of the villages allotted to him in 1904. In 1926 *K* sued the purchasers to recover possession of it as math property. Both courts found that the sale was not for necessity of the math:

Held, (1) that as *K* was in actual possession of the math he could maintain the suit for its benefit; (2) that the possession of *R* under the compromise of 1904 was not adverse to the math, and that the suit was not barred by the Indian Limitation Act, 1908, schedule I, article 144, as it was commenced within twelve years of *R's* death.

[*Damodar Das* v. *Lakhan Das*, I. L.R., 37 Cal., 885, distinguished. *Mahanth Ram Charan Das* v. *Naurangi Lal*, I. L. R., 12 Pat., 251, followed.

Decree of the High Court affirmed.

APPEAL (No. 8 of 1933) from a decree of the High Court (April 20, 1931) reversing a decree of the Subordinate Judge of Gorakhpur (March 31, 1927).

In 1926 the respondent, Karia Bharti, brought a suit against the appellants claiming possession of the village Saktni. By his plaint he alleged that the village appertained to a math at Kanchanpur; that he had been installed as mahant of the math upon the death in 1916 of Rajbans Bharti; and that Rajbans had sold the village to the appellants in 1914 without necessity. The appellants by their written statement denied that the respondent had been installed as mahant, and the other facts alleged; they pleaded (*inter alia*) that the suit was

barred by limitation. Rajbans had been installed as mahant in 1894 and had died in 1916. In 1904 a deed of compromise had been entered into by Karia and Rajbans with reference to the math properties; the effect of the deed was one of the matters in dispute upon the appeal.

The facts appear fully from the judgment of the Judicial Committee.

Both Courts in India found that the village appertained to the math and had been sold without necessity.

The Subordinate Judge dismissed the suit on the ground that the plaintiff could not maintain it, as it was proved that he had not been installed as mahant as he alleged in his plaint.

An appeal to the High Court was allowed and a decree made for possession and mesne profits. The learned Judges (PULLAN and NIAMAT-ULLAH, JJ.) held that although the plaintiff had not been installed he had been *de facto* mahant since the compromise of 1904, and that as such he could maintain the suit, and that the suit was not barred by limitation, as it was commenced within twelve years of Rajbans' death.

1934. November 16, 19. *De Gruyther, K. C.*, and *Parikh*, for the appellants.

Wallach for the respondent

The contentions appear from the judgment. Reference was made to: *Damodar Das* v. *Lakhan Das* (1), *Khunni Lal* v. *Gobind Krishna Narain* (2), *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (3), *Ramcharan Ramanuj Das* v. *Gobinda Ramanuj Das* (4), *Mahanth Ram Charan Das* v. *Naurangi Lal* (5), and *Naurangi Lal* v. *Mahanth Ram Charan Das* (6).

The judgment of their Lordships was delivered by Sir SHADI LAL:

This appeal relates to a village known as Saktni, which is situated in the district of Gorakhpur in the Province

(1) (1910) I.L.R., 37 Cal., 885.
(2) (1911) I.L.R., 33 All., 356.
(3) (1921) I.L.R., 44 Mad., 831.
(4) (1928) I.L.R., 56 Cal., 894.
(5) (1933) I.L.R., 12 Pat., 251.
(6) (1930) I.L.R., 9 Pat., 885 (895).

1934

MAHADEO PRASAD SINGH v. KARIA BHARTI

of Agra. The village formed part of the estate annexed to the math of Kanchanpur in that district and was sold to the defendants, hereinafter called the appellants, on the 1st March, 1914, by one Rajbans Bharthi alleged to be the mahant of the math at that time. Rajbans died on the 21st March, 1916, and the present action was brought on the 23rd February, 1926, by Karia Bharthi, who claimed to be his successor as the mahant of the shrine.

A large number of pleas were raised to defeat the suit, but there are only two questions which have been argued on this appeal; first, that the plaintiff was not entitled to maintain the suit; second, that the claim was barred by limitation.

The facts of the case bearing on these questions do not admit of any real dispute. In April, 1894, one Bachchu Bharthi, who was admittedly the mahant of the math, died, and two persons, namely Rajbans Bharthi and Karia Bharthi came forward to claim the office of the mahant. Karia was, at that time, a boy of only about thirteen years of age; and his father, acting as his guardian, settled the dispute with the rival claimant by a compromise. In accordance with this compromise Rajbans executed on the 2nd May, 1894, a deed by which he promised to adopt the boy as his chela and declared him to be his successor to the office of mahant. As a result of this settlement, Rajbans was recognised and installed as the mahant of the math.

On attaining majority Karia repudiated the compromise and instituted in 1899 a suit to establish his claim to the office of mahant on the death of his guru Bachchu Bharthi. This claim was allowed by the trial court but dismissed on appeal by the High Court. Against the judgment of the High Court Karia preferred an appeal to His Majesty in Council, but, while the appeal was pending, he entered into a compromise with Rajbans. In compliance with the compromise Rajbans executed, on the 25th April, 1904, a document by which he

assigned to Karia two villages Kanchanpur and Pathkauli, and also the building of the math situated at Kanchanpur; while he retained for himself the rest of the property appertaining to the institution including the village of Saktni. The deed also provided that each of the claimants would be competent to alienate the property allotted to him without any objection by his rival. In the result, Karia did not prosecute his appeal to the Privy Council and that appeal was apparently dismissed without any decision on the question of his title to the mahantship.

After this compromise Karia lived in the building of the math at Kanchanpur, and Rajbans took his abode at Pakri, one of the five villages which continued to be in his possession. Karia has admittedly alienated both the villages which were assigned to him by the compromise, and Rajbans also has transferred some properties annexed to the institution including the village of Saktni. In the plaint filed by Karia in the present case he laid claim to the village in question on the ground that he was the chela of Rajbans, and was, after his death, installed as the mahant of the math. The trial court and the High Court have, however, held that he was neither the chela of Rajbans, nor appointed to be the head of the institution. Both the Courts have also found that Karia, though not duly installed, was, in fact, the mahant of the math; but they differed on the question of whether he could, in that capacity, recover the property. The learned Judges of the High Court have answered the question in the affirmative, and their Lordships are of opinion that the conclusion reached by them is correct.

There can be little doubt that Karia has been managing the affairs of the institution since 1904, and has since the death of Rajbans been treated as its mahant by all the persons interested therein. The property entered in the revenue records in the name of Rajbans was, on his death, mutated to Karia, and it is not suggested that there is any person who disputes his title to the office of

1934

MAHADEO PRASAD SINGH v. KARIA BHARTI

the mahant. In these circumstances their Lordships agree with the High Court that Karia was entitled to recover for the benefit of the math the property which belonged to the math and is now wrongly held by the appellants. They are in no better position than trespassers. As observed by this Board in *Mahanth Ram Charan Das* v. *Naurangi Lal* (1), 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.

On behalf of the appellants it is contended that the action brought by Karia should have been dismissed, when it was found that he could not substantiate his allegation that he was installed as the mahant after the death of Rajbans. But this defect in the statement of claim, if any, could have been remedied by an amendment of the plaint, if the objection had been taken in the courts below. It is clear that all the relevant facts were before the High Court, and the learned Judges were, upon the facts found by them, justified in determining the real dispute on the merits.

The only other question raised on behalf of the appellants is that the claim was barred by limitation. This question must be answered with reference to the law which obtained prior to its amendment by the Indian Limitation (Amendment) Act I of 1929. It is common ground that the article of the Indian Limitation Act of 1908 applicable to the claim is article 144, which prescribes a period of 12 years from the date when the possession of the appellants became adverse to the math. Their case is that in 1904, when Rajbans settled his dispute with the plaintiff, he ceased to be the mahant of Kanchanpur and repudiated the title of the math to the village of Saktni as well as to the other villages which he got in pursuance of the compromise. On that date, it is contended, he began to hold the property adversely to the institution, and the action, which was brought

(1) (1933) I.L.R., 12 Pat., 251.

after the expiry of 12 years from that date, was barred by time.

It is, however, obvious that Rajbans had entered into the possession of the property in 1894 as the mahant of the math, and that his status as mahant was confirmed by the judgment delivered by the High Court in 1903. He admittedly held the village in question on behalf of the math until the compromise in 1904, and the mere fact that the parties to the compromise purported to confer upon each other an unrestricted power of alienation in respect of the endowed property did not change the character of Rajbans' possession. The deed of compromise makes no mention of the transfer of the office of mahant, and it is to be noted that Rajbans, though he migrated thereafter to Pakri, did not relinquish his position as the mahant of the institution. In the sale deed in question, as well as in the other documents executed by him after 1904, he took care to describe himself as mahant, and even justified the sale in dispute on the ground that he required money to discharge the debts which he had contracted for protecting the other property appertaining to the math. This recital of legal necessity would have been wholly unnecessary, if he had repudiated the title of the math and was holding the property on his own behalf. The learned counsel for the appellants has cited the case of *Damodar Das* v. *Lakhan Das* (1) in support of his argument that the possession of Rajbans became adverse from the date of the compromise, but that case is clearly distinguishable. The document dealt with therein was an assignment of the math as well as its properties, and as observed by this Board in the case of *Mahanth Ram Charan Das* (2), such an assignment was void, and would in law pass no title, with the result that the possession of the assignee was adverse from the moment of the attempted assignment. In the present case there is no assignment of the religious institution itself to Rajbans, nor any

(1) (1910) L.L.R., 37 Cal., 885. (2) (1933) I.L.R., 12 Pat., 251 (258).

1934

MAHADEO PRASAD SINGH v. KARIA BHARTI

other transfer which was a void transaction and rendered his possession adverse. He was undoubtedly the mahant of the math in 1904, and, while transferring certain items of property to Karia, he kept the rest of the estate for himself. It is one of the villages retained by him that he sold in 1914, and that sale was a voidable transaction. The period of limitation for the recovery of the village did not begin to run until the death of Rajbans in 1916. The action, which was commenced in 1926, was, therefore, within the limitation prescribed by article 144.

The result is that this appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed with costs.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondent: *Hy. S. L. Polak & Co.*

APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Justice Sir Lal Gopal Mukerji

1934 *March*, 12

SHEO RAJ CHAMAR AND ANOTHER (PLAINTIFFS) *v.* MUDEER KHAN AND OTHERS (DEFENDANTS)*

Easement—Prescription—Customary right—Right of burial—Muhammadan family claiming a right to bury their dead in another man's land—Presumption from long user—License coupled with a grant—Graveyard—Easements Act (V of 1882), sections 4, 17, 18.

Where it was established that a certain Muhammadan family had, for more than thirty years, been using a plot of land, belonging to another person, as a graveyard by burying their dead in it, but the origin or source of this right or practice was not known, it was *held* that, apart from the question whether the right to bury dead bodies amounted to an easement or not, the long user gave rise to a presumption of a dedication as a graveyard, or of a license coupled with a grant and irrevocable, in the past on the part of the then owners of the land.

*Second Appeal No. 936 of 1930, from a decree of Muhammad Zia-ul-Hasan, Second Additional District Judge of Gorakhpur, dated the 18th of March, 1930, reversing a decree of S. Zillur Rahman, Munsif of Gorakhpur, dated the 28th of June, 1929.