GANGULWITIGAMA PANNALOKA THERO

v.

COLOMBO SARANANKARA THERO AND OTHERS

SUPREME COURT,
SHARVANANDA, J., RATWATTE, J.,
AND COLIN-THOME, J.,
S.C.NO. 17/81, C.A. NO. 353/72(F)
D.C. COLOMBO NO. 11150/26
SEPTEMBER 9TH 1982,
OCTOBER 14TH & 15TH, 1982.

Succession to the Viharadhipathiship of a Temple - Section 4(1) and (2) of the Buddhist Temporalities Ordinance - The plea of "resjudicata" from both parties - Section 24, 33, 34, 207, 406(2), of the Civil Procedure Code -

The plaintiff-Appellant claimed on two grounds to the Viharadhipathiship of the temple called "Wijewardana Aramaya" situated at Skinner's Road, Kotahena after the death of its former Viharadhipathi (Gangulwitigama Saranatissa Thero). He claimed that according to a deed No. 1125 of 27.9.1958 (P6) which created a line of succession to the Viharadhipathiship and that he being the senior pupil of the said Saranatissa Thero, he was the lawful Viharadhipathi of the said temple.

The defendant-respondent denied the plaintiff's claims and in turn claimed that he is entitled to the incumbency of the said temple on a different writing dated 14.9.1959 (D2) and that he

is a senior pupil of the said Saranatissa Thero.

The trial judge held against the plaintiff's claim, on deed (P6) , which was affirmed by the Court of Appeal. On the issue of seniority the trial judge concluded that the plaintiff was the senior pupil of the said Saranatissa Thero. Though the Court of Appeal affirmed this, it however, held against the trial Judge's decision that the writing D2 is not the act and deed of Saranatissa Thero and that it conveyed no right to the incumbency of the temple to the defendant. The claim in reconvention of the defendant was upheld and the defendant was declared the Viharadhipathi of the said temple.

The main issue was res judicata. Both parties contended that the other party was precluded by the earlier judgment and decree in case D.C. Colombo 9357/L from maintaining his claim to the incumbency of the temple. The trial judge upheld the argument of res judicata set up by both parties. Both parties appealed on this and the Court of Appeal set aside the trial judges decisions.

Held -

(1) That though the plaintiff's claim to the Viharadhipathiship of the temple based on deed P6 cannot be sustained, on the basis of the dates and names of the robing and ordaining tutors, he is the senior pupil of Rev. Saranatissa Maha Thero.

(2) That the trial judges' observation that "all the circumstances confirm the suspicious and questionable character of the writing D 2" is, in the perspective of the case, apt and well-founded. The Court of Appeal was not justified in reversing the finding respecting the validity and genuiness of the document D 2 by the trial judge.

(3) That the District Judge misdirected himself in law in holding that the judgment and decree in case No. 9357/L operated as res judicata against the plaintiff and precluded him from maintaining this action. The facta probanda to establish the ingredients of the cause of action in each case are different and the rights claimed in the two actions are not the same. The Court of Appeal is in error in holding that what the defendant had pleaded in his answer in case No. 9357/L was by way of defence and not by way of counter claim. Since there had been no adjudication no rule of res judicata estops the defendant from setting up the plea as a defence. The defendant is barred from maintaining his present claim in reconvention to have himself declared Viharadhipathi of the temple, but he is not precluded or estopped from resisting or defending plaintiff's claim on the grounds which support his claim to Viharadhipathiship.

(4) That the plaintiff-appellant is the lawful Viharadhipathi of the said "Wijayawardena Aramaya" entitled as controlling Viharadhipathi of the said temple and its temporalities, to control, administer and manage the same.

Cases referred to :

1. *Somaratna vs. Jinaratne (1941) 42 N.L.R. 361*
2. *Chand Koer vs. Pratab Singh, 16 Cal. 98 (P.C.)*
3. *Samichi vs. Pieris (1913) 16 N.L.R. 257 at 261*
4. *Ranhoti vs. Singho (1935) 14 C.L. Rec. 91*
5. *Krishna vs. Thevarajah (1959) 62 N.L.R. 511*
6. *Punnirulapillai vs. Western India Oil Distribution Co.Ltd., A.I.R. 1948 Madras 270*
7. *Jayawardena vs. Aranolishamy, 69 N.L.R. 49*
8. *Fernando vs. Perera (1923) 25 N.L.R. 197*
9. *Radheyshiam vs. Nazir Khan A.I.R. 1937 Oudh 394*
10. *Dhammajoti vs. Sobita (1913) 16 N.L.R. 408*

11. Piyatissa Terunnanse vs. Saranapala Terunnanse (1938) 40 N.L.R. 262

APPEAL from an order of the Court of Appeal.

E. Amerasinghe, S.A., with *L.C. Seneviratne*, *Lakshman Peiris* and *Miss D. Guniyangoda* for plaintiff- appellant.

H. L. de Silva, S.A. with *S. Mahenthiran* for defendant respondent.

March 24, 1983. *Cur.adv.vult.*

SHARVANANDA, J.,

The Plaintiff-Appellant instituted this action on 23rd August 1963 against the Defendant-Respondent praying inter alia for a declaration that the Plaintiff-Appellant is the lawful Viharahipathi of the temple called 'Wijayawardana Aramaya' situated at Skinner's Road North, Kotahena and that as the controlling Viharadhipathi of the said temple and its temporalities he is entitled to control and administer the same.

It is admitted that the founder and the first Viharadhipathi of this temple was Gangulwitigama Saranatissa Thero and that the temple is exempted from the operation of section 4(1) of the Buddhist Temporalities Ordinance, but is governed by section 4(2). The said Gangulwitigama Saranatissa Maha Thero died on the 27th August 1960. This dispute that has arisen in this case is in respect of the succession to the Viharadhipathiship of the said temple with the death of the said Saranatissa Thero.

The Plaintiff-Appellant based his claim to the Viharadhipathiship on two grounds. He stated that according to deed No. 1125 dated 27.9.1958 (P6) the said Saranatissa Maha Thero created a line of succession to the Viharadhipathiship of the said temple, according to the rule known as 'Gnathisisya Paramparawa' and appointed the Plaintiff-Appellant,

who is a blood relative of the said Saranatissa Maha Thero to succeed him as Viharadhipathi. The Plaintiff claimed that the said deed P6 constitutes a valid nomination and appointment of the Plaintiff to the office of Viharadhipathi of the said temple in succession to the said Saranatissa Maha Thero and that he was therefore a lawful Viharadhipathi of the said Wijewardena Aramaya. The Plaintiff further claimed that, in any event, he being the senior pupil of Saranatissa Maha Thero he had succeeded the latter priest as Viharadhipathi of the said temple.

The Defendant-Respondent denied the plaintiff's claim to the Viharadhipathiship of the said temple and in turn claimed a declaration that he is entitled to the incumbency of the said temple on the following grounds :-

a) That he is a senior pupil of Saranatissa Maha Thero and is thus the lawful Viharahdipathi of this temple.

b) That the said Saranatissa Maha Thero had by writing dated 14.9.1959 (D2) nominated and appointed him to succeed to the incumbency of this temple on his death; the defendant had by virtue of the said document D2 , succeeded as the lawful Viharadhipathi of this temple.

c) That, on the day following the nomination of Saranatissa Maha Thero, the Sanga Sabha together with the Plaintiff-Appellant and other pupils of the deceased priest elected and nominated the Defendant as the Viharadhipathi of this temple.

d) The Plaintiff-Appellant has by his conduct and consent to the said election and/or nomination renounced and/or abandoned any right of the plaintiff to the incumbency and that the

plaintiff was thereby estopped from making the present claim and cannot have and maintain this action.

The Plaintiff-Appellant by his replication denied that the defendant was a senior pupil of Saranatissa Maha Thero or that the writing dated 14.9.1959 - D2 was the act and deed of the deceased Saranatissa Maha Thero. He also denied (a) that the Sanga Sabha nominated or elected the Defendant - Resopndent as the Viharadhipathi or (b) that the Plaintiff or other pupils of the said Saranatissa Maha Thero at any time acquiesced in or consented to the appointment of the Defendant as an incumbent or (c) that he renounced or abandoned any of his rights to the incumbency of this temple as alleged by the Defendant.

The trial Judge has held against Plaintiff's claim based on deed No. 1125 dated 27.9.1958 to the Viharadhipathiship of the temple. This finding has been affirmed by the Court of Appeal. I am in agreement with the conclusion of the Courts below that the Plaintiff's claim to Viharadhipathiship of the temple based on deed P6 cannot be sustained.

On the issue of seniority, the trial Judge has accepted the evidence of the Plaintiff which was supported by the 'Upasampada" Register (P2) and documents P6 and P21, that he is the senior pupil of Rev. Saranatissa Maha Thero by robing and ordination. The Defendant was a pupil of Saranatissa Maha Thero only by ordination. Under the Buddhist Ecclesiastical law pupilage is conferred by robing or by ordination and a robed pupil is entitled to succeed to the incumbency of the tutor, whether he has been ordained or not. Robing precedes ordination and the pupil who is the first to be robed is the senior pupil, who is entitled to succeed his predecessor. (*Senaratne vs. Jinaratne*)(1) . On the basis of the dates and

the names of the robing and ordaining tutors given in the declarations P1, P2 and P3, the District Judge concluded that the Plaintiff was the senior pupil of Saranatissa Maha Thero. The Court of Appeal has affirmed this finding. No valid reason to differ from this conclusion has been advanced and I hold that the Plaintiff is the senior pupil of Rev. Saranatissa Maha Thero.

The evidence and contention of the Defendant that he was appointed as Viharadhipathi of the temple by the Sanga Saba at a meeting held on the day after the cremation of Saranatissa Maha Thero and that the Plaintiff had consented to and acquiesced in his election has been rejected by the trial Judge. On the evidence on record the findings of the trial Judge on this issue cannot be faulted. The main argument in this appeal related to the issue of res judicata. Both Plaintiff and Defendant contended that the other party was precluded by the earlier Judgment and Decree in case D.C. Colombo 9357/L from maintaining his claim to the incumbency of the temple. In the earlier action 9357/L instituted on 14th of December 1960, the Plaintiff-Appellant, along with seven other Plaintiffs had sued this Defendant for a declaration of title to the said land on which the temple was built, the buildings, the furniture and other articles within the buildings on the land and for ejectment of the Defendant priest and for damages, on the basis that the subject matter was 'pudgalika property' of Rev. Saranatissa Maha Thero and that he had gifted the property to the Plaintiffs by Deed No. 1125 dated 27th September 1958 (P1) subject to the terms thereof. In that action the Defendant had filed answer stating that the said land and premises constituted 'sangika' property and that the deed P6 was invalid and had no effect in law. The Defendant has further stated that he was the senior pupil of Rev. Saranatissa Maha Thero and had as such succeeded to the

Viharadhipathiship of the temple on the death of Saranatissa Maha Thero and further prayed for a declaration that he was the lawful Viharadhipathi of the said temple and entitled to the premises. The said case No.9357/L went to trial on eleven issues all touching on Plaintiff's claim. The Defendant-Respondent raised the decisive issue whether the said temple property was Sangika property and if so whether the plaintiff could maintain his action. The defendant respondent, though in his answer, had by way of a claim in reconvention prayed for a declaration that he was the lawful Viharadhipathi of the temple, did not raise or put in issue his claim whether he was the senior pupil and if so he had succeeded the said Saranatissa Maha Thero as Viharadhipathi of the temple. By its judgment dated 3rd June 1963 the trial Court held that the property was Sangika property and dismissed the plaintiffs' action in case No.9357/L. This judgment was affirmed in appeal on 20th July 1966 by the Supreme Court.

On the basis of the judgment and decree in case No. 9357/L the Defendant-Respondent contends that due to the failure of the Plaintiff to claim in case No. 9357/L that he was the senior pupil of Saranatissa Thero and was the lawful Viharadhipathi of the temple, the judgment and decree in the said case operated as res judicata against the plaintiff and that sections 33, 24 and 207 of the Civil Procedure Code taken together barred him from making the present claim. On the other hand the Plaintiff-Appellant contends, on the basis of the pleadings judgments and decree in case No. 9357/L, that though the defendant had pleaded in case No. 9357/L that he was the senior pupil of Rev. Saranatissa Maha Thero and had become the lawful Viharadhipathi of the temple on the death of Saranatissa Maha Thero and had prayed for a declaration that he was the lawful Viharadhipathi of this temple, he had failed to put these matters

in issue in case No. 9357/L and had thereby abandoned his claim, and was barred by the provisions of section 406 (2) of the Civil Procedure Code from agitating the said issues in this case and make a claim that he was the senior pupil of Saranatissa Maha Thero and is the lawful Viharadhipathi of the said temple.

The trial Judge upheld the argument of res judicata set up by both parties and dismissed the plaintiff's action and the claim in reconvention of the defendant. Both parties appealed from the judgment of the District Judge dismissing their claims to the Court of Appeal. The Court of Appeal by its judgment dated 22.11.1979 set aside the District Judge's determination on the pleas of res judicata raised by both parties to the case and held that the judgment and decree in case No. 9357/L did not operate as res judicata or as an estoppel against the claims of the Plaintiff and Defendant in this case.

Though the Court of Appeal affirmed the findings of the District Judge that the Plaintiff was a senior pupil of Rev. Saranatissa Maha Thero and that he had not abandoned the claim for incumbency, it however held that Rev. Saranatissa Maha Thero had by writing dated 14.9.1959 (D2) nominated and appointed the Defendant Respondent to the incumbency of the temple and temporalities and it set aside the findings of the trial judge that the said writing D2 was not the act and deed of Saranatissa Maha Thero. In the result the plaintiff's action has been dismissed with costs and the claim in reconvention of the defendant has been upheld and the defendant respondent declared the Viharadhipathi of the temple and its temporalities by the Court of Appeal. The Plaintiff has preferred this appeal against the judgment of the Court of Appeal.

In my view the District Judge misdirected himself in law in holding that the judgment and decree in case No. 9357/L operated as res judicata against the Plaintiff and precluded him from maintaining this action. The Plaintiff-Appellant had along with seven others claimed in action No. 9357/L title to the land on which the temple is built and the buildings thereon on the footing that they constituted 'pudgalika property' of Saranatissa Maha Thero which were actually disposed of by him by Deed No. 1125 - P6 in their favour and that the entirety of the said property had devolved on them according to P6. On the other hand the claim of the Plaintiff - Appellant in this action is founded on the premise that the temple and its temporalities constitute 'sangika property' and that as senior pupil of the last incumbent he has succeeded as the Viharadhipathi. In this action the Plaintiff prays for a declaration that he is the lawful Viharadhipathi of the temple and entitled as controlling Viharadhipathi of the said temple and temporalities, to control and administer the same. The District Judge has fallen into the error of assuming that the cause of action in the present case is identical with the cause of action in case No. 9357/L. The cause of action pleaded in the earlier case No. 9357/L was defendant's denial of the plaintiff's title to the land and premises described in the schedule to the plaint in the case, namely the land on which the temple is built with the buildings standing thereon together with the furniture and other articles on the said building. The cause of action pleaded by plaintiff in the present action is defendant's denial of plaintiff's status and office of Viharadhipathi of the temple. The facta probanda to establish the ingredients of the cause of action in each case are different and the rights claimed in the two actions are not the same. The earlier action is based on ownership of the property on which the temple is built, while the present action seeks to establish

entitlement to the office of the Viharadhipathi which carries with it the right to the possession and control of the temple and its temporalities. The rights claimed are different in nature and context, the grounds of title to the respective rights are different and the causes of action are distinct. True that the defendant had in the earlier action resisted the plaintiff's claim on the ground that the land and temple are 'sangika property' and that he was the lawful Viharadhipathi of the temple and entitled, as such to be in possession of the said premises and temple. But, as observed by Lord Watson in *Chand Koer vs. Pratab Singh*, (2) "the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action or in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour." This principle has been accepted and adopted by our Courts (Vide *Samichi vs. Peiris* (3), *Ranhoti vs. Singhe*(4), *Krishna vs. Thevarajah* (5). The plaintiff, though he could have set up, was not bound to have set up, in the earlier action No. 9357/L, his rights to the incumbency of the temple on the ground that he was the senior pupil of Rev. Saranatissa Maha Thero; a person is not bound to sue on an alternative cause of action; his failure to do so in the former action does not bar the present action for declaration that as the senior pupil of Saranatissa Maha Thero, he is the lawful Vihahradhipathi of the temple in suit. The bar does not operate when the cause of action in the subsequent suit is not the same as in the previous action. The defendant's plea of res judicata based on sections 34 and 207 of the Civil Procedure Code is misconceived for, what would be res judicata in terms of those sections are rights and reliefs which could have been claimed or put in issue between the parties

upon the cause of action for which action No. 9357/L was brought. Further the Plaintiff in the present case could not have joined in action No. 9357/L his personal claim to the Viharadhipathiship of the temple with the claims of other plaintiffs in that action, to the land on which the temple was built which was the subject matter of that action - there would have been misjoinder of parties and causes of action.

I shall now deal with the plaintiff's contention that since the defendant had failed to put in issue in case No. 9357/L his claim to be declared the senior pupil of Rev. Saranatissa, the present Viharadhipathi of the temple, the judgment and decree in the said case No. 9357/L operate as res judicata in respect of the said claim (issues 7 and 8 raised by the plaintiff).

In my view no question of res judicata is involved in respect of the defendant's claims; for there has been no adjudication on the said claims in the earlier action; the claims were not put in issue. Counsel for the plaintiff however contended that what precludes the defendant from maintaining his claim in this action is not any rule of res judicata but the statutory bar created by section 406(2) of the Civl Procedure Code. He urged that the defendant had in his answer in case No. 9357/L not only denied and resisted the plaintiff's claim but in fact had made a claim in reconvention that he be declared the lawful Viharadhipathi of the temple in suit and entitled to the premises. He submitted that since the defendant had however refrained from framing any issue with respect to his claim in case No. 9357/L, the defendant is consequently precluded by the said provisions of section 406(2) from reagitating that claim in the present action.

Counsel submitted that where a defendant makes a claim in reconvention, he is presumed to be in the position of plaintiff in so far as the said claim for reconvention is concerned. He based his submission on section 75(E) of the Civil Procedure Code. The Defendant having put forward his claim in reconvention was bound to put in issue and have decided all matters on which he founded his claim in reconvention. The section provides that a claim in reconvention duly set up in the answer has the same effect as a plaint in a cross action. Counsel cited in support of his submission the case of *Punnirulapillai vs. Western India Oil Distribution Co. Ltd.* (6) where it was held that since a defendant who prefers a counter claim is in the position of a plaintiff in respect of his claim in reconvention, Order 23 Rule 1(3) of the Indian Civil Procedure Code which corresponds to section 406(2) of our Civil Procedure Code would operate to preclude him from bringing a fresh action for the same matter, the subject of his claim in reconvention if he withdraws or abandons his claim in reconvention without the permission of Court.

The Court of Appeal has said that the defendant had in case No. 9357/L only pleaded a defence and not set up a claim in reconvention and has reasoned that sections 34, 207 and 406 of the Civil Procedure Code apply in the case of a defendant only when a claim in reconvention is made by the defendant and not where the defendant has only pleaded to the Plaint. In my view the Court of Appeal is in error in holding that what the defendant had pleaded in his answer in case No. 9357/L was by way of defence and not by way of counter claim. In his answer in that case the defendant had in paragraph 8 not only pleaded by way of defence that he was the senior pupil of Rev. Saranatissa Maha Thero and the lawful Viharadhipathi of the said temple and entitled to the premises and place of worship, but had in his

prayer asked not only that the plaintiff's action be dismissed but that he (the defendant) be declared the lawful Viharadhipathi of the temple and entitled to the said premises. The defendant had thus sought not only to justify his possession of the temple and the premises on the ground that he is the lawful Viharadhipathi of the temple, but had proceeded to pray for a declaration that he is the lawful Viharadhipathi and entitled to the premises in suit, on the grounds set out in the body of the answer. The plaintiff, in fact had filed his replication dated 4th May 1961, denying defendant's claim in reconvention and prayed for its dismissal.

In my view the failure of the defendant in case No. 9357/L to put in issue his claim to the incumbency amounts to an abandonment of his claim by the defendant. The Court had not granted him permission for such abandonment. Section 406(2) provides that if the plaintiff withdraws from the action or abandons part of his claim without the permission of Court, he shall be precluded from bringing a fresh action for the same matter or in respect of the same part. The 'matter' referred to in section 406(2) does not mean the property in respect of which an action is brought. It means the cause of action in respect of which the action is brought. It includes the facts and circumstances upon which the right to relief claimed by the party who withdraws or abandons his claim depends. (*Jayawardena vs. Aranolishamy*), (7). As stated earlier, this bar to a fresh suit in respect of the subject matter of the former action which had been withdrawn without the permission of Court is not based on the principle of res judicata but is attributable to the provision enacted in section 406(2). The stringency of this section is such, that the fact that an action was withdrawn before the service of summons does not take the case out of the provisions of section 406; an action is

instituted when a plaint is presented. *Fernando vs. Perera* (8).

On the above view of the matter I agree with the contention of Counsel for the plaintiff that the defendant in the present action is precluded by the statutory bar created by section 406(2) of the Civil Procedure Code from resurrecting his claim in reconvention viz. that he be declared entitled to the incumbency of the temple on the grounds which could have been put in issue in the earlier action 9357/L by way of fresh action or fresh claim in reconvention against the plaintiff.

But the defendant's claim is not irrelevant or purposeless in plaintiff's present action. Since there had been no adjudication, no rule of res judicata estops the defendant from setting up a plea as the defence. Section 406(2) does not extinguish a party's right; it only bars his remedy; it does not operate to preclude the party from resisting the plaintiff's claim on the basis of the right in which he founded his claim in reconvention. The prohibition enacted by section 406(2) of the Civil Procedure Code applies to actions and not to defences. Where a defendant raises a plea of set off but withdraws it without the permission of the Court, he will not be precluded from raising the same plea by way of a defence in a subsequent suit against him. *Radheyshiam vs. Nazir Khan* (9).

On the above analysis of the question of res judicata or estoppel by statutory bar, raised by the parties, I am of the view that the defendant is barred from maintaining his present claim in reconvention to have himself declared Viharadhipathi of the temple, but he is not precluded or estopped from resisting or defending plaintiff's claim on the grounds which support his claim to Viharadhipathiship. For the purpose of his defence

the defendant can reagitate the issue of Viharadhipathiship which he abandoned in action No. 9357/L. Hence if the defendant establishes in this case either that he is the senior pupil of Saranatissa Maha Thero or that he had been appointed and nominated by writing dated 14.9.1953 - D2 by Saranatissa Maha Thero to succeed him as incumbent of the temple, though the defendant will not be entitled to any declaration that he is the lawful incumbent of the temple he can negate the plaintiff's claim and have the plaintiff's action dismissed.

Finally there is the defence of the defendant that Saranatissa Maha Thero appointed the defendant by writing dated 14th September 1959 marked D2, to succeed him as Viharadhipathi of the temple. The defendant is admittedly a pupil of Saranatissa Maha Thero, though not the senior pupil. A Viharadhipathi has the right to nominate his successor from amongst his pupils, even a junior pupil over the head of the senior pupil. *Dhammajothi vs. Sobitha*,(10), *Piyatissa Terunnanse vs. Saranapala Terunnanse* (11). The Plaintiff has challenged the genuineness of the said writing and has averred that it is not the act and deed of the deceased Saranatissa Thero. The burden of establishing that the writing D2 was the act and deed of the deceased lay on the defendant. The trial Judge has, on the analysis of the evidence and the probabilities of the case, held that the writing D2 is not the act and deed of Saranatissa Thero and that it conveyed no right to the incumbency of the temple to the defendant. The Court of Appeal had disagreed with the finding of the trial Judge and has held that the writing D2 is a valid and authentic document and that it constitutes a nomination of the defendant to succeed the writer to the incumbency of the temple and its temporalities. Counsel for the plaintiff-appellant has relevantly urged that the Court of Appeal was not justified in reversing

the trial Judge's finding of primary fact. The question whether D2 is the act and deed of the deceased is essentially a question of fact and a Court sitting in appeal over the judgment of a trial Judge should be slow to interfere with the findings of fact reached by a trial Judge, unless it is satisfied that such finding is against the weight of evidence or that no person acting judicially and properly instructed as to the relevant law could have come to such conclusion.

Apart from the signature appearing in D2 which, according to the evidence and report of the handwriting expert was that of Rev. Saranatissa, the body of the document is not in his handwriting; it is typed. The Court of Appeal has observed that " there is complete absence of any suspicious features on the face of the document itself." I regret that I cannot share this perception of the document. I note an unexplained space between the body of the document and the signature. The circumstances in which the document D2 was alleged to have been executed and the probabilities of the case further caution against accepting it at its face value.

According to the defendant, the deceased priest had, on his return from the funeral of his brother from Ratnapura on 12.9.1959, that very night come to his room at about 12.30 a.m. and indicated to him that he was going to devise the Viharadhipathiship of the temple to the defendant and on the following night at about 12.30 a.m. had brought the typed document D2 and read it to him and Rev. Walane Ananda and handed over the document to Rev. Walane Ananda for safe keeping, a little after midnight on that day. Defendant at one stage said that he identified Rev. Saranatissa's signature on D2, but later, in cross examination tried to make out that the priest signed the document in his presence. The trial Judge has quite

justifiably pointed out that there are several circumstances relating to the execution of the document D2, which are suspicious and which militate against its acceptance. I agree with the observation of the trial Judge that " it seems most unlikely that the Nayake priest could have come to the defendant's room at about 12.30 a.m. on the very night that he returned from Ratnapura in order to tell the defendant that he had decided to change his mind in regard to the deed of gift of the Kotahena temple to the plaintiff. Moreover one would ordinarily have expected the Nayake priest to have summoned the junior priest to his room if he wished to speak to him. The defendant's evidence that he came again the following night at about the same time and read D2 to him and Rev.Walane Ananda, who had been got down by the defendant on the instructions of the Nayake priest seund too artificial to be believed - D2 is a typed document; there is no typewriter in the temple, it would have been typed elsewhere. It must necessarily have been done on the 13th, since the document was handed over to Rev. Ananda for safe keeping a little after midnight on that day, but the document strangely bears the date of 14th September." I agree with the District Judge that the circumstances surrounding the execution of the document D2 as deposed to by the defendant are highly suspicious and questionable. It is a telling circumstance that though the defendant was well aware of the execution and existence of the document D2, by which the incumbency was devised to him, he had not, in the earlier case No. 9357/L based his claim to the incumbency on the writing D2 dated 14.9.59, nor was the said writing referred to in the defendant's pleadings in that case. This document surfaced only in the defendant's list of documents dated 5th July 1961. As the trial Judge has quite rightly observed "there is no reason why the defendant should have concealed the existence of D2, if it was a genuine and untainted document until after the trial in the

earlier case commenced." Further the defendant had not produced this document before the Sanga Saba which he said was convened immediately after the funeral at Ratnapura in order to decide the succession to the Viharadhipathiship of the two temples at Pelmadulla and Kotahena. The defendant did not produce D2 even when the plaintiff came to the Kotahena temple to assert his rights to the Viharadhipathiship, shortly after the funeral of Rev. Saranatissa Maha Thero. He has also not mentioned the existence of the writing in his complaint to the Police dated 18.9.60 - D27. The trial Judge's observation " all these circumstances confirm the suspicious and questionable character of the writing D2" is, in the perspective of the case, apt and well-founded.

A writing such as D2 by which an incumbent of a Buddhist temple nominates a person to succeed him on his death is in the nature of a testamentary disposition. Where such writing is relied on to support nomination to incumbency the burden lies on the party who relies on such document to establish to the satisfaction of Court that the document is the act and deed of the deceased and if circumstances exist which arouse the suspicion of the Court, as to the genuineness of the document or as to the circumstances in which the document is alleged to have been executed, the Court should be vigilant and jealous in examining the evidence in support of the writing which it should not accept and act upon unless the suspicion is removed and it is judicially satisfied, as in the case of a Last Will, that the writing represents the true disposition of the deceased.

In my view the very legitimate suspicions respecting the execution of the document D2, and its belated disclosure by defendant, taken together, conduce to a high degree of improbability

that the writing is authentic. The acceptance of the authenticity of the writing depends on defendant's evidence. It is to be noted that the defendant's evidence on a number of matters had rightly been rejected by the District Judge. In the circumstances one cannot, with confidence act on the defendant's evidence and accept the document as the act and deed of the deceased priest which it purports to be.

The Court of Appeal was not justified in reversing the finding respecting the validity and genuineness of the document D2 by the trial Judge.

I therefore set aside the judgment of the Court of Appeal dismissing the plaintiffs action and allowing the defendant's claim in reconvention. I also set aside the judgment of the District Judge dismissing the plaintiff's action with costs. I allow the appeal of the plaintiff-appellant with costs and enter judgment for the plaintiff-appellant declaring him the lawful Viharadhipathi of the Wijewardana Aramaya, Skinner's Road North, Kotahena, entitled as controlling Viharadhipathi of the said temple and its temporalities, to control, administer and manage the same. I dismiss the defendant's claim in reconvention. The Plaintiff as Viharadhipathi is entitled to be in possession of the temple and the temporalities. The defendant respondent had wrongfully denied the plaintiff's rights of the Viharadhipathiship of the temple and its temporalities and has been wrongfully in possession of the temple and its temporalities and collecting the rents therefrom. The Plaintiff in his evidence has assessed the damage that he has suffered by the defendant's wrongful possession at Rs. 450/- a month. The defendant has not suggested that this amount is excessive. I direct the defendant to pay the plaintiff-appellant a sum of Rs. 400/- per month, from the date of the plaint

i.e. 23rd August 1963 until the plaintiff is restored to and quieted in possession of the said temple and the temporalities. Since the defendant is admittedly a pupil of Saranatissa Thero he is as such entitled to reside at the Vihare.

I do not order the ejectment of the defendant and I direct the defendant to put the Plaintiff in quiet possession of the temple and its temporalities. The defendant-respondent will pay the plaintiff-appellant the latter's costs in this Court, in the Court of Appeal and the District Court.

RATWATTE, J., I agree.

COLIN THOME, J., I agree.