

REV. PALLEGAMA GNANARATHANA
v.
REV. GALKIRIYAGAMA SORATHA

SUPREME COURT

SHARVANANDA C.J., ATUKORALE J.,

L.H. DE ALWIS J., SENEVIRATNE J. AND

H. A. G. DE SILVA J.

S.C. APPEAL No. 42/87.

C.A. APPEAL No. 292/79(F).

D.C. ANURADHAPURA CASE No. 9259.

AUGUST 31, SEPTEMBER 1, 2, 3, 4, 8, 9, 10, 11, 14, 15, 16, 17, 18, 23, 24,
OCTOBER 5 AND 7, 1987.

Buddhist Ecclesiastical Law—Mode of succession to Atamasthanadhipathiship of Atamasthana—Sisyenu sisyā paramparawa or appointment by Atamasthana Committee on nomination by the head of Nuwarawewa family?—Sivuru paramparawa—Sāṅghika property—appointment by writing by Atamasthanādhipathī— Custom and usage—Burden of proof—Mixed question of fact and law raised for the first time in appeal.

Atamasthanaya in Anuradhapura is the aggregate name for the eight principal places of worship in Anuradhapura, the holiest of which is the Sri Maha Bodhiya referred to as the Bomaluwa or Udimaluwa and the others Ruwanveliseya, Thuparamaya, Mirisawetiya, Jetawanaramaya, Abhayagiriya, Mahaseya and Lankaramaya. The Chief

Priest of this group of 8 temples is known as the Atamasthanadhipathi or Anunayake of the Atamastana and resides customarily at Bomaluwa Vihare. Sri Sumana Revata Nayaka Thero functioned as the Atamasthanadhipathi from 1944 and upon his death on 20.11.1977 a dispute arose as to the succession to him. The plaintiff priest claimed the Atamasthanadhipathiship on the basis that he was the most senior pupil of the deceased priest claiming that the applicable rule is the rule of pupillary succession known as *Sisyanu sisya paramparawa*. The defendant priest claimed the Atamasthanadhipathiship by virtue of nomination by the Chief of the Nuwarawewa family and appointment by the Atamasthana Committee in accordance with long established custom or usage. Further the defendant was also a pupil of the deceased priest and appointed to the post in writing by him.

Held—

(1) Succession to the Atamasthanadhipathiship can be presumed to be by the rule of *sisyanu sisya paramparawa* only where the customary mode of succession by nomination of the Chief of the Nuwarawewa family and approval by the Committee comprising the three, Ratamahattayas of Nuwara Kalaviya and the seventeen Koralas of Nuwara Kalaviya is not proved.

(2) The custom (or usage or mode of election or nomination—per *Seneviratne, J.*) according to which the Atamasthanadhipathi is appointed upon a nomination by the head of the Nuwarawewa family and an election by a body of electors comprising the Ratamahattayas and Koraias and later upon the passage of the statutes of 1905 and 1931 relating to Buddhist Temporalities, from 1.2.1907 onwards by an Atamasthana Committee whose membership was basically drawn from the same sources as before, was well recognised and accepted and invariably followed except for explicable reasons, on two occasions.

(3) Although the temple is *sanghika* property the office of *viharadhipathi* is not *sanghika* property and the right to the office depends primarily on the terms of the original dedication.

(4) What the Buddhist Ecclesiastical Law on any matter is has to be established on evidence as a matter of fact. It is not a pure question of law but of fact and law. Hence it was not open to the Court of Appeal to have permitted argument for the first time on the question whether laymen could participate in the appointment of a *viharadhipathi*.

(5) *Per Seneviratne, J.* "D13 the document by which the defendant priest claimed that the atmasthanadhipathiship came to him by a written appointment from his dead tutor priest was not attacked as a forgery in the trial Court. It was not open to the Appeal Court to proceed to make findings on this question after itself comparing signatures. Further the Court of Appeal thought D 13 was not listed by the defendant priest when in fact it was."

APPEAL from judgment of the Court of Appeal.

E. S. Amerasinghe, P.C. with *H. L. De Silva, P. C. K. N. Choksy, P. C., P. A. D. Samarasekera, P. C., D. H. N. Jayamaha, M. B. Peramuna* and *Miss D. Guniyangoda* for defendant — appellant.

Dr. H. W. Jayewardene, Q.C., N. R. M. Daluwatte, P.C., L.C. Seneviratne, P.C., Walter Wimalachandra, S. C. B. Walgampaya and *Miss J. Keenawinne* for plaintiff-respondent.

Cases referred to:

- (1) *Ratnapala Unnanse v. Kevitigala Unnanse* (1879) 2SCC 26.
- (2) *Sumanatissa v. Guneratne* (1937) 39 NLR 251.
- (3) *Morantuduwe Sri Naneswara Dhammananda Nayaka Thero v. Buddegama Piyaratana Nayaka Thero* (Maligahakanda Case) (1958) 52 NLR 412 S.C. affirmed by P.C. - see (1963) 65 NLR 196 (4 below).
- (4) *Morantuduwe Sri Naneswara Dhammananda Nayaka Thero v. Kalukondayawe Pannasekera Nayaka Thero and others* (1963) 65 NLR 196(PC).
- (5) *Piyananda Terunnanse v. Uyangoda Sumanajothi Terunnanse* (1963) 66 NLR 178, 180.
- (6) *Unnanse v. Unnanse* (1921) 22 NLR 323.
- (7) *Dharmapala Unnanse v. Medagama Sumana Unnanse* (1910) 2 Cur LR 83.
- (8) *Mapalane Dharmadaja Thero v. Rotumba Wimalajothi Thero* (1977) 79 (1) NLR 145.
- (9) *Gunanada Unnanse v. Dewarakkitha Unnanse* (1924) 26 NLR 257, 274.
- (10) *Dantura Unnanse v. Government of Ceylon (Board of Commissioners of Kandy - 4.6.1828 and 8.8.1829) 1869-1871 Vanderstaaten's Reports - Appendix E, XLI.*
- (11) *Eriminne Unnanse v. Senabowe Unnanse* (1869-1871) Vanderstraaten's Reports - page XII, XLV Appendix D (5.5.1833 confirmed by S.C. on 21.10.1833).
- (12) *Wellegama Dhamma Jothy Unnanse v. Wellegama Sarananda Unnanse and Sangaratana Unnanse and two others* (1882) 5 SCC 8.
- (13) *Sangharatana Unnanse v. Weerasekera* (1903) 6 NLR 313.
- (14) *Saranankara Unnanse v. Indajoti Unnanse* (1918) 20 NLR 385, 396.
- (15) *Adam's Peak case (Siripada case)* (1871) Vanderstaaten's Reports p. 215.
- (16) *Okandeyaye Wangeesa Thero v. Mulgrigala Sunanda Thero (Mulgrigala Case)* (1962) 65 NLR 388, 392.
- (17) *Dharmarakkita v. Wijitha* (1940) 41 NLR 401.
- (18) *Piyananda Thero v. Indanada Thero* CA 864/75(F)-DC Galle No. 8091/L-CA Minutes of 24.10.1986.
- (19) *Terunnanse v. Terunnanse* (1927) 28 NLR 477.
- (20) *Premaratne v. Indasara* (1938) 40 NLR 235.
- (21) *Kirikitta Saranankara v. Medagama Dhammananda* (1954) 55 NLR 313.
- (22) *Watugedera Amarasekhe Thero v. Tittagalla Sasantilleke Thero* (1957) 58 NLR 289.

February 2, 1988

ATHUKORALE, J.

This appeal has, on the directions of His Lordship the Chief Justice, been heard by a Bench of five Judges as it involves questions of some importance pertaining to the mode of succession to the office of the Chief Priest of the eight sacred places of Buddhist worship in

Anuradhapura collectively called and known as the Atamasthana. The Atamasthana comprises the following 8 temples or places of worship:

- (1) Sri Maha Bodhinwahanse or Udamaluwa or Bomaluwa Viharaya,
- (2) Ruwanveliseya,
- (3) Thuparamaya,
- (4) Mirisawetiya,
- (5) Jetawanaramaya,
- (6) Abhayagiriya,
- (7) Mahaseya, and
- (8) Lankaramaya.

The Chief Priest of this group of 8 temples is called and known as the Atamasthanadhipati (also referred to as the Anunayake of the Atamasthana) who is customarily resident at Bomaluwa Vihare, which being the site of the Sacred Bo Tree, constituted the principal temple of the group. The origin of the office of Atamasthanadhipathi is obscure. The Atamasthanadhipathi is by virtue of his office nominated and appointed the chief priest or viharadhipathi of each of the other 7 temples of the group.

The respondent filed this action in the District Court of Anuradhapura seeking, *inter alia*, a declaration that he is the Atamasthanadhipathi. He pleaded that succession to the said office devolved according to the rule of pupillary succession known as *sisyanu sisya paramparawa*. The appellant in his answer denied that this rule of pupillary succession determined succession to this office and averred that succession thereto was according to an old and well established custom of appointment by the Atamasthana Committee upon a nomination made by the head of the Nuwarawewa family. Thus the substantive point of contest between the parties was with regard to the determination of the mode of succession to the Atamasthanadhipathiship - whether it was on the basis of the rule of pupillary succession known as *sisyanu sisya paramparawa* as maintained by the respondent or whether it was upon an appointment made by the Atamasthana Committee on a nomination by the head of the Nuwarawewa family in accordance with an old and well established custom as maintained by the appellant.

The following matters were common ground, namely, that the Atamasthana is *sanghika* property, the terms of its original dedication to the Sangha being, however, not known, that Pahala Talawe Sri

Sumana Medankara Nayaka Thero (hereinafter referred to as Medankara Nayaka Thero) was and functioned as Atamasthanadhipathi from 1885 until his death in 1908; that after his death Pallegama Ratanapala Nayaka Thero (hereinafter referred to as Ratanapala Nayaka Thero) functioned as Atamasthanadhipathi from 1908 until his death in 1944; that after his death Sri Sumana Revata Nayaka Thero (hereinafter referred to as Revata Nayaka Thero) functioned as such from 1944 until his death on 20.11.1977 and that the appellant acted in the post of Atamasthanadhipathi for a short period immediately prior to the death of the said Revata Nayaka Thero who at the time was very feeble and sick.

It was the contention of the respondent that in the case of every instance set out above whereby a priest succeeded to the office of Atamasthanadhipathi it was the senior pupil who automatically succeeded to his tutor on the latter's death. The point of contest between the parties relating to the mode of succession to the office of Atamasthanadhipathi was pinpointed in issue No. 1 raised on behalf of the respondent and issues Nos. 7 to 9 raised on behalf of the appellant. However, during the course of the trial the appellant relying on a writing (D13) by which he was allegedly appointed Atamasthanadhipathi by and in succession to his tutor (the said Revata Nayaka Thero) raised, without objection, a further issue (No. 10a) as to whether even if the rule of *sisyanu sisya paramparawa* applied he had upon D13 been appointed Atamasthanadhipathi by his tutor. The respondent challenged the genuineness of this writing on several grounds without, however, having raised any specific issues thereon. I must add that at the trial it was conceded that the respondent was the senior pupil of the late Revata Nayaka Thero.

The learned District Judge after trial found as a matter of fact that succession to the office was governed by an old and well established custom of nomination by the head of the Nuwarawewa family and election by the Atamasthana Committee as evidenced by documents D3 to D12 and not according to the *sisyanu sisya paramparawa* rule of succession. He also held that, in any event, Revata Nayaka Thero by his writing D13 had appointed the appellant as his successor. Accordingly on both grounds he answered the relevant issues in the appellant's favour and dismissed the respondent's claim. He declared the appellant the lawful Atamasthanadhipathi. It is not in dispute before us that the evidence in the case, as far as the ancient records

went, established that Ipolegama Thero was, a very long time ago, the Atamasthanadhipathi, that he was disrobed by the Malwatte Chapter in 1843 and that he was succeeded in office by the following priests in their respective order, each of them holding office for the periods specified against them: Ulapathagama Buddharakkita Thero; Pailegama Revata Thero (1844-1863); Katuebe Dhammarakkita Thero (1863-1872); Halmillewe Ratanapala Thero (1872-1885) followed by the aforesaid Medankara Nayaka Thero (1885-1908), Ratanapala Nayaka Thero (1908-1944) and finally by the said Revata Nayaka Thero (1944-1977) on whose death on 20.11.1977 the present dispute arose.

There being, admittedly, no direct evidence of the actual terms of the original dedication of the Atamasthana to the Sangha it was urged by learned Queen's Counsel for the respondent and conceded by learned President's Counsel for the appellant that evidence of usage or custom, if any, relating to the mode of succession to the office of Atamasthanadhipathi would be relevant and may be considered only as constituting proof of the terms of the original dedication, failing which the general rule of pupillary succession known as sisyanu sisya paramparawa will apply unless it is established that the special rule known as siwuru paramparawa determines the mode of succession. That this represents the correct legal approach is evident from the judgment of Sir John Phear C.J. in *Ratnapala Unnanse v Kewitiagala Unnanse* (1) which has been accepted as the leading authority on this point. In the course of his judgment the learned Chief Justice set down the following principles:

- (1) That the general rule of succession to temple property has two branches, viz., the sisya paramparawa and the siwuru paramparawa; and that it is the first branch of the rule which is to be presumed to apply to a given case, in the absence of evidence that it is the other.
- (2) That there are exceptional cases in which the succession of the temple property is in the appointment of the Government or even of private individuals.
- (3) That it is the terms of the original dedication that primarily impose the rule which is to govern the case.
- (4) That in the absence of direct evidence of those terms, usage may be looked to, and accepted as evidence thereof."

These principles which have been gathered by the learned Chief Justice from previous decisions have been consistently followed and applied in subsequent cases. In *Sumanatissa v. Guneratne* (2) Fernando A. J., referring to the above principles, observed as follows:

"If I may venture to formulate the position as governed by these principles as applying to the present case, the law is that the rule of succession is governed by the terms of the original dedication, or by one of the two rules of succession, and if the terms of the original dedication cannot be proved by direct evidence, the Court may accept evidence of usage as proving the terms of the original dedication. If the terms of the original dedication cannot be proved either by direct evidence or by the evidence of usage, then it must be presumed that the Sisyānu sisya paramparawa rule of succession applies unless it can be established that the succession is governed by the Siwuru paramparawa."

Other cases in which the above principles have been adopted and applied are *Morontuduwe Sri Naneswara Dhammananda Nayaka Thero v. Baddegama Piyaratana Nayaka Thero* (S.C.)(3); *Morantuduwe Sri Naneswara Dhammananda Nayaka Thero v. Kalukondayawe Pannasekera Nayaka Thero* (P.C.)(4) and *Kamburugamuwa Piyānanda Terunnanse v. Uyangoda Sumanajothi Terunnanse* (5). Applying the above principles to the instant case, it is clear that, in the absence of direct evidence of the terms of dedication of the Atamasthana to the Sangha, the burden of proving a custom or usage which may be acceptable to court as evidence of the terms of the original dedication is on the appellant.

To discharge this burden the appellant relied solely on documentary evidence, namely, the documents marked D3 to D12. I shall now refer to their contents in chronological order. D5 dated 25.07.1871 is a record made by the Government Agent of an interview held by him with Nuwarawewa Banda (who was claiming to be the head of the Nuwarawewa family) and the 3 Ratamahattayas of the Western, Eastern and Southern Divisions regarding the election of the Chief Priest of the Atamasthana. The relevant passages of this document are as follows:

"The annexed letters and papers will show all that has taken place here recently regarding the election of a Chief Priest—

According to the instructions given by Mr. Dyke after communicating with Government the nomination of Chief Priest was vested in the Head of the Nuwarawewa family and the election of

the Headmen as representatives of the people. Whether the election was to be considered a mere form confirming as of course the nomination made by the Head of the Nuwarawewa family or whether the Headmen were to be allowed to exercise the rights of rejecting (?) a candidate so nominated was not stated. In 1863 when the late Chief Priest was elected after Government gave up all interference in the concerns of the Temple and the appointment of the Priest (there was no representative of the Nuwarawewa family and no nomination therefore by its Head) the Headmen took upon themselves to elect a Priest without such nomination and he was recognised as Chief Priest by Government. The election thus made appears to me to have been illegal. The Headmen however wished it to be looked on as a precedent on which to carry out the recent election.

There has been as shown by the annexed papers a great deal of illegality created by the recent proceedings and as I have explained to the people, I believe both elections recently held viz. the nomination and so called election by Nuwarawewa Banda and the election without nominating by the Headmen to be illegal I informed the Ratamahatmayas and the so-called Head of the Nuwarawewa family (Banda) that in my opinion in order to constitute a legal election there must be a nomination by the Head of the Nuwarawewa family and an election by the Headmen as representative of the people and neither of the elections recently held did both these

D6 dated 2.9.1881 is a minute made by J. F. Dickson, Government Agent, Anuradhapura, upon a report dated 10.5.1881 received by him from the Ratamahatmaya of Nuwara Kalaviya and Thimbiriwewa Mudaliyar regarding allegations made against the Chief Priest of the Bomaluwa of having misappropriated the offerings made at the Bo Tree and of neglecting the duties of his office. The minute after setting out briefly the findings of the report adverse to the Chief Priest proceeds to state as follows:

"The Ratamahatmaya and the Mudaliyar submit that by allowing the present Anunayake to hold office the Vihara Establishment (i.e. the Establishment of the Bo-tree) will be ruined. They therefore wish that he be dismissed from his office and beg that the Government Agent be pleased to recommend to Government that the Unnanse's act of appointment be cancelled..... The ruling authorities on the

question of the removal and appointment of the Chief Priest of the Bo-tree are to be found in the correspondence between the Government Agent of Jaffna and the Colonial Secretary from 1843 to 1864 during the administration of Mr. Dyke; in Sir John Pakington's Despatch No. 123 of 4th December 1852; and in the judgment of the Supreme Court on the Adam's Peak case which will be found printed in the Report of the Service Tenures Commissioners for 1871 (Administration Reports 1891) pp. 372-375.

From these authorities it would appear that the Chief Priest must be a member of the Malwatte Establishment, and that the election to the office of the Chief Priest is vested in—

- (1) The head of the Nuwarawewa family
- (2) The three Ratemahatmayas of Nuwara Kalaviya
- (3) The Seventeen Korallas of Nuwara Kalaviya

Note.—The rights of the family in regard to this appointment were recognised and secured to Nuwarawewa Banda of Bulankulame by the decision of the D.C. of Anuradhapura in Case No. 156.

and before the Governor is requested to issue the Certificate of recognition, it is necessary that the election should be assented to by the people generally.

The Chief Priest is subject to his College, the Malwatte Vihara as regards his conduct as priest and if he were disrobed by his college would ipso facto cease to hold the office of Chief Priest but his college cannot remove him from his office for misconduct prejudicial to the rights or interests of the temple.

The power to remove a Chief Priest for such misconduct is vested in the Board of Electors.

Questions relating to this appointment have occurred from time to time after the lapse of several years and as some difficulty has been experienced and delay has occurred in tracing the authorities on the point it may be convenient here to note for future reference the leading authorities which have guided the Government Agent in the present case.

By letter No. 168 of 24th July 1843 the Colonial Secretary writing to the Government Agent of Jaffna stated that there was no ground for the Governor's interference with the proceedings of the Chief Priest and others of the Malwatte Vihare under which Ipalagama Unnanse was disrobed. His office of Chief Priest is therefore vacant. The gift is however not vested in the Governor but in the Nuwarawewa family with the approbation of the inhabitants.

The Government Agent of Jaffna by letter No. 218 of 13th August 1844 reported to the Colonial Secretary that great delay had occurred in electing a successor to Ipalagama Unnanse by the attempts of different parties to evade carrying out of the instructions of Government as to the mode of election. The family have endeavoured to evade the condition of the assent of the other parties, both they and the principal headmen to evade that of the assent of the people and some of the headmen have endeavoured to procure in an indirect way the recognition of a condition that the assent of the priests of the Malwatte at Kandy is necessary to the appointment.

On receipt of the instructions issued by Government under Sir John Pakington's Despatch the Government Agent of Jaffna pointed out by letter No. 60 of 12th April 1853 that it was declared by the Colonial Secretary's letter No. 168 of 24th July 1843 that the right of election was (not in the priests) but in the head of a particular family jointly with the people as represented by these headmen. To this the Colonial Secretary replied by letter No. 60 of 7th June 1853 that the parties with whom previously the right of election was vested are to elect. It is not the intention of Government to make any alteration in the existing practice.

This decision was quoted as the ruling authority by the Government Agent of Jaffna in his letter of 22nd September 1864 to the Colonial Secretary and was acted upon by the issue of a certificate of recognition in favour of Kaluebe Unnanse under letter No. 220 of 7th October 1864.

In the Adam's Peak case (District Court Ratnapura No. 9353) which arose on the removal from his office by the Board of Electors of Galagama Unnanse and the issue by the Government of a Certificate regarding the appointment of Hikkaduwe Sumangala who was elected in the place of Galagama Unnanse, it was decided that the Plaintiff having broken the condition of his appointment as High

Priest of Adam's Peak, and having been guilty of gross acts of misconduct and malversation was justly liable to be deprived of the said priesthood, and that he was properly deprived thereof by a convocation of the benefited Malwatte priests of the District of Sabaragamuwa having authority to do so, and that the election of the Defendant was good and valid.

Applying these authorities to the present case it appears to the Government Agent that the High Priest of the Bo-tree can be removed from his office by the Board of Electors for misconduct or malversation in the management of the Establishment of which he is the head but that such removal can only be cleared by the recognised Board of Electors, namely,

- (1) The Head of the Nuwarawewa family
- (2) The 3 Ratamahatmayas of Nuwara Kalaviya
- (3) The 17 Korallas of Nuwara Kalaviya

D8 dated 3.11.1885 is a letter addressed by the aforesaid Medankara Nayaka Thero to Bulankulame Bandara Mahatmaya "who has become the head of the Nuwara family" and to the other persons referred to therein all of whom were due to assemble at the Bo-maluwa temple as the Sammuthi Sabawa (Conventional Committee) for the purpose of selecting (චෝරු ගැනීම පිණිස) a member of the Sangha to the office of Anunayake of the Atamasthana. The writer himself describes the letter as an application to the Conventional Committee. He specifies therein the sacerdotal line that was appointed and functioned as Atamasthanadhipathi as having been in the following order: from 1844 till his death in 1863 Pailegama Revata Thero, a member of the Arangawasi Maha Madagalle paramparawa and pupil of Ulpothegama Buddharakkita Nayaka Thero; from 1863 until his death in 1872 Kaluebe Dhammarakkita Thero, a member of the same paramparawa; and from 1872 until his death in 1885 Induruwe Halmillawewe Ratanapala Thero, a pupil of the said Pailegama Revata Thero. The letter then proceeds to state that the said office now being vacant, the applicant who is the senior pupil of the said Halmillawewe Ratanapala Thero requests that he be appointed to the same being an heir thereto by virtue of the tutor paramparawa and as he, having learnt the doctrine of the Buddha Dharma and its practices under renowned and erudite tutor priests for a period of about 20 years after being ordained at Anuradhapura Maha Viharaya, has been conducting himself in

accordance with the tenets of Buddha Dharma and the advice given by his tutor priest and as he has worked resolutely and with determination for the upliftment of this place (of worship) and as his tutor paramparawa has been holding the said office from 1844 to 1885.

D 10 dated 24.4.1886 is the Aktapatra (act of appointment) issued by the Government to the applicant recognising his election in due form.

D 3 dated 28.12.1908 is the application made by Pailegama Ratanapala Nayaka Thero seeking appointment to this post. It is addressed to the 3 'Disapathi-thumas' (Bulankulama, Morawewa and Ratwatte), the Gamsabapathi (Headmen) of Ralapanawewa who are the Buddhist 'Radala-methithuman' (aristocratic gentlemen) all of whom are the Committee Members of the Atamasthana Committee. It recites that the applicant's tutor priest, Medankara Nayaka Thero, died on 27.10.1908 whilst holding the office of Atamasthanadhipathi; that their tutor paramparawa has been descending uninterruptedly from the time of Maha Madagalle Maha Thero; that from the time of the Sinhalese kings the 'radalawarun' (aristocrats) of the two walauwas known as Nuwarawewa and Bulankulamewewa have appointed (සෙරු පත් කරන) the Chief Priest to conduct religious services at the Anuradhapura Jaya Sri Maha Bodhiya and other chaitiyas and have been getting these services performed through those chief priests; that after the demise of the Sinhala Kings the British Government, with a view to continuing the old customs without a break, got the Atamasthana Committee consisting of the Chief Radalamahatun of the said two walauwas together with the other respectable Buddhist Radalawarun of Nuwara Kalaviya to assemble, and together with the consent of the committee made appointments to the Atamasthana office; and that in this manner Pailegama Nayaka Thero, Kaluebe Nayaka Thero, Induruwe Halmillewe Ratanapala Nayaka Thero and the applicant's tutor Medankara Nayaka Thero have been holding the post of Atamasthanadhipathi without interruption according to sisyanu sisya paramparawa. The applicant states that he understands that a meeting of the Atamasthana committee is to be held for the purpose of filling the said Atamasthana vacancy caused by the death of his tutor Medankara Nayaka Thero (අධිරාජ්‍යයා පැවිසි පුරප්පාඩුවට කෙනෙක් පත්කර ගැනීමට). Pointing out that he has been robed as the first pupil of his tutor priest and that as he has been ordained at the Maha Nuwara Pushparamaya Viharaya he has all the right according to sisyanu sisya

paramparawa to the post of Atamasthanadhipathi to which his deceased tutor was appointed (පන්තරුන්ගේ පන්තරු තිබුණු අවස්ථාව පදවීම) and also for other numerous reasons mentioned therein by him including his ability to perform all the functions pertaining to the said office, he requests that upon a careful and sympathetic consideration of the above matters by them he be appointed (පන්තරු ගන්නා අවස්ථාව) to the same. D 11 dated 21.2.1909 is the Aktapathra issued by the Government to him recognising his election in due form. D 4, dated 1.8.1942 is the letter addressed by Pallegama Ratanapala Nayaka Thero to the head of the Nuwarawewa family, B. P. Bulankulame Disapathi, the Chairman of the Atamasthana Committee, informing him that he has been holding the office of Atamasthanadhipathi for a period of 13 years but that as he is now sick he wishes to resign from the said office and requesting that a person of the Bo-maluwa paramparawa be appointed.

D9 is the minutes of the meeting of the Atamasthana Committee held on 1.9.1943. The letter of resignation D4 of Ratanapala Nayaka Thero was read, discussed and accepted by the Committee. On the proposal of Bulankulame Disapathi that Revata Thero, being a priest of the same Bo-maluwa paramparawa, was suitable for appointment, Revata Thero was unanimously appointed to the office of Chief Priest of the Atamasthana. D 12 dated 30.4.1943 is the Aktapatra issued to him by the Government recognising his election in due form.

D1 dated 14.9.1977 is a letter addressed to the Chairman of the Atamasthana Committee by Revata Nayaka Thero intimating that as he is ill a suitable person from the Bo-maluwa Sangha paramparawa be appointed (නෙරා පන්තරු ගන්නා මෙන්) to act for him for a period of six months. D2, the minutes of the special meetings of the Atamasthana Committee dated 14.9.1977 show that Revata Nayaka himself proposed the name of the appelland (no doubt with the concurrence of the Chairman, M. Bulankulame) for the acting appointment which the Committee unanimously resolved to accept and the appelland was appointed to act as Atamasthanadhipathi for a period of six months.

Of the 3 Aktapathras referred to above, namely, D10 of 1886, D11 of 1909 and D12 of 1943 issued by the Government recognising the election in due form of Medankara Nayaka Thero, Ratanapala Nayaka Thero and Revata Nayaka Thero respectively to the office of Atamasthanadhipathi, whilst D10 recites that Medankara Nayaka

Thero, was elected in due form by the Nuwarawewa Nilame, Ratemahatmaya, Korala and Arachchila of the Nuwara Kalaviya the other 2 Aktapatras recite that the other two Chief Priests were elected in due form by the Atamasthana Committee. D2(d), the minutes of the Atamasthana Committee meeting held on 28.11.1977, almost a week after the death of Revata Nayaka Thero, indicates that the meeting was presided by Mahinda Bulankulame and attended by the appellant and the respondent. The Public Trustee especially participated at the meeting. It is further recorded that at this meeting the secretary submitted to the committee a letter dated 19.11.1977 (D13) from Revata Nayaka Thero, appointing the appellant whom he had appointed on 14.9.1977 to act for him in the said office, as Atamasthanadhipathi. It also records that upon a proposal made by the respondent himself and seconded by Mahinda Bulankulame, the appellant was appointed as the permanent Atamasthanadhipathi.

The Court of Appeal after a consideration of the above documents (D3 - D12) and the statutory impact thereon of the Buddhist Temporalities Ordinances of 1905 and 1931 reached the finding that the custom relied upon by the appellant as governing succession to the office of Atamasthanadhipathi was bad as it lacked the essential ingredients of certainty and continuity and that it was also illegal. The Court held that the appellant had therefore failed to discharge the burden of establishing the custom which he alleged.

The main submissions made by Mr. Amerasinghe, learned President's Counsel for the Appellant, are that the Court of Appeal erred in its perception and evaluation of the meaning and effect of the above documents thereby arriving at a wrong conclusion on the issues relating to custom, that the documents clearly proved the existence of a customary procedure for the selection and appointment of the Atamasthanadhipathi and that this fact by itself was sufficient to displace the presumption of the applicability of the *sisyanu sisya paramparawa* rule of succession upon which the claim of the respondent was based. He contended that the Court of Appeal erred in law in forming the opinion that the custom sought to be established upon the documents had of necessity to conform to and comply with the legal requisites of a custom or usage having the force of a general law. He urged that the finding of the Court of Appeal that according to the documents the customary procedure referred to therein was not certain and/or continuous and that, in any event, it was illegal were

unsustainable. He also complained that the case for the respondent as presented in the District Court was substantially altered in the course of the argument in the Court of Appeal in two material aspects in spite of objections. Firstly whilst the respondent's case in the District Court was a bare denial of the fact of the existence of the customary procedure relied upon by the appellant, in the Court of Appeal the case set up by him in the course of the hearing was that the customary procedure to be valid must comply with certain legal requisites which make it acquire the force of a general law. Secondly, for the first time in the Court of Appeal it was submitted on behalf of the respondent that the Buddhist ecclesiastical law did not permit a layman to nominate or appoint the chief priest of a temple that had been dedicated to the Sangha. He pointed out that at the trial there was no issue formulated on the question of the legality of the alleged customary procedure according to Buddhist ecclesiastical law. This not being a pure question of law but a question of fact and law he submitted that the Court of Appeal should not have permitted the respondent to raise this question for the first time in appeal.

I shall first of all address my mind to the finding of the Court of Appeal that the documents produced in evidence by the appellant failed to establish that the custom alleged by him was either certain or continuous—a finding which was very strenuously sought to be challenged as well as supported before us by respective learned counsel appearing for the parties. Very briefly the view that the Court of Appeal seems to have taken on this point upon the documentary evidence is that the essential ingredients of a custom or usage referred to in documents D5 and D6 have not been shown to have been observed or complied with in a single instance. D5 of 1871 is the earliest document produced in evidence in the case. It is an official document being a contemporaneous report made by the Government Agent, Anuradhapura of a long interview he had with the three Ratamahattayas and a person called Nuwarawewa Banda who then was claiming to be the head of the Nuwarawewa family. The subject matter of the interview revolved on a matter of public or general interest, namely, the election of the Chief Priest for the Atamasthana regarding which the Government Agent and the persons with whom he had the interview would, no doubt, have been much concerned. The report affirms that according to the instructions given by Mr. Dyke after communicating with the Government the nomination of the Chief Priest was vested in the head of the Nuwarawewa family and the

election in the headman as representatives of the people. It states that the letters and papers (annexed thereto) showed what had in fact taken place recently regarding the election of the Chief Priest. In 1863 when the late Chief Priest was elected (this seems to be a reference to the election of Kaluebe Dhammarakkita) there was no male representative of the Nuwarawewa family living at the time and therefore no nomination by the head and the headmen proceeded to elect a Chief Priest without such nomination and the appointment was recognised by the Government. The Government Agent in his Report describes this election as illegal. The headmen, however, taking this as a precedent seem to have elected again without any nomination from the head of the Nuwarawewa family, a Chief Priest in 1871 also, i.e. on the death of Kaluebe Dhammarakkita Thero, whilst Nuwarawewa Banda, claiming to be the head of that family, appears to have nominated and elected a priest by himself. The Government Agent expresses the opinion that both elections—the nomination and the so called election by Nuwarawewa Banda as well as the election without a nomination, by the headmen are illegal. The letter of Mr. Dyke dated 18.7.1860 which has been annexed to the report confirms the death of the young Nuwarawewa Chief (Bulankulame Banda) "whose name has been frequently before the Government in connection with the question as to his hereditary rights in respect of the appointment of a priest to the temple of Anuradhapura." D6, on the other hand, is a document relating primarily to the right of removal of the Chief Priest from his office. It is an official minute made by J. F. Dickson, Government Agent of Anuradhapura, on 12.9.1881. The grounds urged for his removal are misconduct and malversation detrimental to the welfare of the temple. The minute whilst reaffirming that the election of the Chief Priest is vested in the head of the Nuwarawewa family, the three Ratamahattayas of Nuwara Kalawiya and in the seventeen korales of Nuwara Kalawiya states that the power of removal of the Chief Priest from office is vested in the same Board of Electors except, of course, in the circumstance of his being disrobed by his (Malwatta) chapter whereupon he would ipso facto cease to be the Chief Priest. It seems to me that learned President's Counsel was quite right in his submission that D5 and D6 on their face unequivocally refute the applicability of the *sisyanu sisya paramparawa* rule of succession to the office of Chief Priest of the Atamasthana. There is not even a passing reference to this rule in either of the documents. They are inconsistent with and negative, at least during the period preceding 1881, the applicability of this rule for the

purpose of determining succession to this office, a fact which in the present case appears to render the presumption in favour of its applicability a little more than fiction. The two documents make it abundantly clear that the powers of appointment to as well as removal from the office of Chief Priest are vested in the Board of Electors which at the time comprised the head of a particular family and certain officials as representing the people. The opinions expressed by the Government Agent in D5–D6 are their official, not personal, views and are entitled to much weight. They are based upon a consideration of official records and have been arrived at in the discharge of their official duty relating to a matter of general interest pertaining to the appointment of and removal from the office of Chief Priest of Atamasthana, which is one of the most venerated places of Buddhist worship in the country. It seems to me to be totally unrealistic to assume or to infer that the instructions of Mr. Dyke referred to in D5 were in defiance of or in conflict with the practice or usage that prevailed up to that time of determining succession to the office of Chief Priest. On the contrary it is quite legitimate to infer that Dyke's instructions given after communication with the Government were in accordance with the practice that existed at the time. It is inconceivable that those instructions should have sought to introduce or substitute a new method of determining the succession to such an important office. A radical change in the existing practice would doubtless have evoked a storm of protest from the Buddhist clergy and the laity. Although D5 describes the election in 1863 and the recent election in 1871 as illegal, yet so far as the election in 1863 was concerned it has to be borne in mind that at the time there was no representative of the Nuwarawewa family alive and thus no one to make a nomination—vide Dyke's letter of 1860. The position appears to have been the same in 1871 when the office of Chief Priest fell vacant once again upon the death of Kaluebe Dhammarakkita Thero. Nuwarawewa Banda's claim to be the head of the family was on that occasion in dispute. On both occasions the failure to observe very strict compliance with the customary electoral procedure set down in D5 and D6 with regard to the appointment of the Chief Priest has been due to unavoidable circumstances, in that there was either no or no accepted head of the Nuwarawewa family alive at the time to make a nomination as a result of which the headmen appear to have exercised the right of election as well. It seems to me that in the circumstances there has been no deliberate attempt by the headmen to disturb the mode of election envisaged in Dyke's instructions. One or two

exceptional instances of partial non-observance due to unforeseen circumstances of a custom cannot render it bad for uncertainty. In assessing the validity and binding force of the custom relied upon by the appellant it is, in my view, very necessary that the contents of documents D5-D6 should be read and construed not by themselves but in conjunction with and in the light of the other documentary evidence adduced by him. The most cogent evidence of custom could only be obtained by an examination of particular instances in which it has been acted upon. Two of the documents, namely, D8 and D3, are applications made by two priests who in pursuance thereof were appointed as Chief Priest on two consecutive occasions. D8 of 1885, the application of Medankara Nayake Thero to the head of the Nuwarawewa family and others due to assemble as the sammuthi sabha for selecting and appointing a member of the Sangha to the post of Atamasthanadhipati, is the very first document under the hand of a priest aspiring to be and securing appointment as Chief Priest. It undoubtedly constitutes an acknowledgment by him of the fact that the Chief Priest is appointed by a committee which at that time comprised the head of the Nuwarawewa family, the three Ratamahattayas and the Korals. It affirms that in the case of three preceding chief priests of the Atamasthana they were also appointed to their respective offices during the period 1844 to 1885. The applicant states that as the office is now vacant, he, being the senior pupil of the late Chief Priest, makes this application for appointment to the post. D3 of 1908 is a similar application made by Ratanapale Nayake Thero, the first pupil of the late Medankara Nayake Thero, for appointment to the office of Atamasthana Nayaka. As stated above it is addressed to the persons expressly named therein who are said to be members of and are functioning as the Atamasthana committee. After reciting the practice prevalent during the times of the Sinhala kings of appointing the Chief Priest and that after their demise the British Government, with a view to continuing the old customs without a break got the Atamasthana committee to assemble and together with the consent of the committee made appointments to the Atamasthana office and that in this manner the preceding four chief priests including Pallegama Revata (1844-1863) and Kaluebe Dhammarakkita (1863-1872) aforesaid have been holding the post of Atamasthanadhipati without interruption according to *sisya sisyanu paramparawa*, the appellant, having come to know that a meeting of the Atamasthana committee is going to be held for the purpose of filling the vacancy caused by the death of his tutor priest, requests that

he be appointed to the post. Equally important is D4 of 1942 which is a letter by Ratanapala Nayake Thero addressed to the head of the Nuwarawewa family (P.B. Bulankulame Disapati) the Chairman of the Atamasthana committee, expressing his desire to resign from the office of chief priest and requesting that a suitable priest of the Bomaluwe paramparawa be appointed. In pursuance of this request Revata Nayake Thero was unanimously appointed the Chief Priest at a special meeting of the Atamasthana committee on a proposal made by the said Bulankulame Disawe—vide D9. Finally as recently as September 1977 Revate Nayake Thero, the last holder of this office, by his letter D1 also addressed to the chairman of Atamasthana committee requests that a suitable priest from Bomaluwa Sangha paramparawa be appointed to act for him for a period of six months. In pursuance of this request at a meeting of the Atamasthana committee the appellant was appointed to act in the office—vide D2. This meeting was presided over by Mahinda Bulankulame who the respondent himself admitted in the course of his evidence was at that time the head of the Nuwarawewa family—a fact on which the Court of Appeal has misdirected itself. A careful scrutiny of the totality of the documentary evidence relied upon by the appellant, in particular D8, D3—D4, leads one to the irresistible conclusion that succession to the post of Chief Priest of the Atamasthanaya is determinable not on the rule of pupillary succession but by virtue of appointment, pupillage of the bomaluwa paramparawa being a requisite qualification and seniority being only an added qualification for such appointment. In spite of the valiant endeavour made by learned Queen's Counsel to show that the documentary evidence pointed to the fact that succession to this office was governed by the rule of *sisyanu sisya paramparawa*, I am satisfied that the documentary evidence amply warrants the finding that there was and still is a custom according to which the Atamasthanadhipati is appointed upon a nomination made by the head of the Nuwarawewa family and an election by a Body of Electors which comprised earlier of the sammuthi sabha and presently of the Atamasthana committee. In my view the only variation or modification in the custom has been in respect of the composition and not the function of the Board of Electors which, apart from the

head of the Nuwarawewa family, earlier comprised ratamahattayas and koralas and later upon the establishment of the Atamasthana committee under the Buddhist Temporalities Ordinances 1905 and 1931 comprised the members thereof. Such minor variations in the composition of a part of the Electoral Body are natural and inevitable consequent upon the social changes that necessarily take place with the passage of time. But the essence of the customary procedure of selecting a chief priest in pursuance of the nomination by the head of the Nuwarawewa family and the election of that nominee by the body exercising the right to elect remains intact. The evidence indicates that these variations in the composition of the Electoral Body have been accepted and acquiesced in by all the chief priests who were appointed successively to the office since the enactment of the Buddhist Temporalities Ordinance in 1905. In the light of the conduct of, at least, the last three successive chief priests in the background of the unquestionable and unimpeachable documents referred to above it is too late in the day for the respondent to dispute either the existence or the validity or binding force of the custom upon which the appellant relied. In fact the conduct of the respondent himself in having proposed, apparently at the instance of Mahinda Bulankulame, the name of the appellant for the acting and permanent appointment is explicable only on the basis that he himself accepted and acted in the belief that there was such a valid custom governing appointment to the office of Chief Priest. In the light of all the above facts and circumstances I am of the opinion that the appellant has succeeded in establishing that there was a custom or usage of nominating and electing the Atamasthanadhipati, a custom which has been proved to be so very old and so well established that it could reasonably be accepted as evidence of the terms of the original dedication of the Atamasthana. I am further of the opinion that all the essential attributes of a custom or usage have been proved by the appellant and that the Court of Appeal erred in its findings that the custom was bad for want of certainty and/or continuity.

I shall now turn to the question of the legality of this custom. The Court of Appeal held that a dedication is Sanghika, of a temple, being one to the entire priesthood for all time, for the purpose of

perpetuating the Sasana, the laity cannot touch it; that it is settled law that the laity have no right to appoint the viharadhipati of a Sanghika temple; that the Buddhist ecclesiastical law does not recognise such a practice or custom and that a custom contravening a settled law cannot be given legal recognition. The authority relied upon by the Court of Appeal to show that it is settled law that a layman cannot appoint the Chief Priest of a temple dedicated to the Sangha is a decision of that Court itself in C.A. No. 864/75 (F) – D.C. Galle 8091/Z – C.A. Minutes of 24.10.1986 from which special leave to appeal to the Supreme Court was refused by the Supreme Court. I think the Court of Appeal was in grave error when it assumed that the office of viharadhipati is sanghika property because the temple itself is sanghika. What is dedicated to the Sangha is the property comprising of the temple and its appurtenances. It has no relevance or bearing at all on the office of the Viharadhipati of the temple. As stated above, the right to this office depends primarily on the terms of the original dedication. The decision in *Ratnapala Unnanse v. Kewitiagala Unnanse* (supra) envisaged as far back as 1879 the existence of temples dedicated to the Sangha in respect of which the lay founder or dedicators could retain for themselves the right of appointing or nominating incumbents – vide also *Unnanse v. Unnanse* (6). The latter case contemplates the legal possibility of a layman appointing the viharadhipati of a Sanghika temple. In *Dharmapala Unnanse v. Medagama Sumana Unnanse* (7) Pereira A.J., observed that “it is undoubtedly open to a person who at his own expense founds and endows a vihara to make provision by deed or otherwise regulating the succession to the institution.” In the judgment of the Court of Appeal in the aforesaid case C.A. No. 864/75 (F) no authority has been cited for the proposition enunciated therein. I am with respect unable to accept the view of the Court of Appeal. The fact that the Supreme Court had, without assigning any reason, refused to grant special leave to appeal from that judgment does not necessarily mean that the Supreme Court adopted or affirmed the view taken by the Court of Appeal on this point. There is also no warrant for the proposition that layman cannot touch sanghika property. Learned President’s Counsel has drawn our attention to several sections of the Buddhist Temporalities Ordinances of 1905 and of 1931 which contain express provision for layman to administer and manage properties belonging to sanghika temples. The legislative history pertaining to

Buddhist temporalities from 1889 shows that till the passing of the Buddhist Temporalities Ordinance of 1931 the trustees in whom the management and control of the temporalities granted to the sangha were vested were in fact layman, although the incumbent had control and administration of the viharaya itself. Incumbents were excluded from holding the office of trustee. There was a departure from this position in 1931 which was in consequence of the abuse of the trust reposed in the lay trustees. The 1931 Ordinance permits the viharadhipati in certain cases to nominate himself as trustee instead of appointing a lay trustee. The Court of Appeal also appears to have taken the view that a custom whereby the chief priest of a temple could be appointed by the laity is contrary to Buddhist ecclesiastical law. Its judgment, however, contains no exposition of the relevant ecclesiastical law. It has also held that the contents of Buddhist ecclesiastical law on a particular matter is a pure question of law and, as such, it could be raised for the first time in appeal. I do not agree with this view of the Court of Appeal. As pointed out by learned President's Counsel, what the Buddhist Ecclesiastical law on any matter is has to be established on evidence as a matter of fact. It is not a pure question of law but of fact and law. Apart from those disputed questions of Buddhist ecclesiastical law which have already been settled by judicial decisions, other questions such as the one under consideration involving as they do questions of fact have to be established in evidence adduced at the trial like any other fact. As such I hold that the Court of Appeal erred in permitting the respondent, in spite of objections thereto, to raise this point for the first time in appeal as a pure question of law.

In view of the above findings by me I do not think it is necessary for me to consider the alternative claim of the appellant based on the writing D13. In the result I allow the appeal, set aside the judgment of the Court of Appeal, dismiss the respondent's action and declare the appellant to be the lawful Atamasthanadhipathi. The appellant will also be entitled to costs of all three courts.

SHARVANANDA, C.J., – I agree.

L. H. DE ALWIS J., – I agree.

SENEVIRATNE, J.

Soratha Thero, the plaintiff has filed this action on 31.1.1978 praying for a declaration that "the plaintiff is the *Anuradhapura Atamasthanadhipathi*" (emphasis mine, and comment will be made re this prayer later). The plaintiff filed a Replication dated 24.7.78, and in paragraph (2), the plaintiff averred that he has succeeded to the "Bomaluwe Viharadhipathiship and Atamasthanadipathiship". In paragraph (6) of the Replication the plaintiff states that he is the lawful "Atamasthanadipathi". The term "Atamasthanaya" in Anuradhapura is the aggregate name for the eight principal places of worship in Anuradhapura, the holiest of which is the Sri Maha Bodhiya referred to as the Bomaluwa. The original name for these eight places has been merely descriptive of its importance i.e.—Atamahasthanaya, which word by passage of time has become contracted to Atamasthanaya. These eight places of worship in respect of which there is one Chief called the Atamasthanadipathi are as follows:

- (1) Thuparamaya built by King Devanampiyatissa (247-207 B.C)—was the first dagoba built in Anuradhapura after the introduction of Buddhism to Sri Lanka by the mission of Arahat Mahinda middle of 3rd Century B.C.,
- (2) Sri Maha Bodhiya or Bomaluwa.—This was the place where the present sacred Bo-tree brought to Sri Lanka by Bhikkuni Sanghamitta, was planted. The Bo-tree was brought 16 years after the visit of Arahat Mahinda and was accepted by King Devanampiyatissa. The Bodhiwansa (written 10 Century A.D.) which relates an account of the bringing of the Bo-tree states that eight princes came with the Bo-tree and one of them was Bodhigupta to whom King Devanampiyatissa conferred the title— "උකිඳි ජයමත ලේකවෝ" "Chief trustee/Custodian", and Bodhigupta was assigned the custody and caretakership of the sacred Bo-tree (Bodhiwansa edited by Kotagama Vachissara Thero, Pages 242-245.)

It is said that the Nuwarawewa family claims descent from Bodhigupta and also claims its connection to the Sri Maha Bodhiya from him.

- (3) Lowamahapaya—A storeyed building constructed by King Dutugemunu, (101-77 B.C.).

- (4) Ruwanwelisaya—This Dagoba was, at that time the world's biggest Dagoba, constructed by King Dutugemunu. (101-77 B.C.).
- (5) Mirisawetiya—A Dagoba and an Aramaya constructed by King Dutugemunu (101-77 B.C.). It is recorded in history that during the Anuradhapura period at least 500 monks resided in this Aramaya.
- (6) Abhayagiriya—A Dagoba constructed by King Gajabahu in the year (114 A.D). Prior to this Dagoba being constructed King Walagambahu had constructed a Viharaya at Abhayagiriya in the first century B.C.
- (7) Jethavanarama—A Dagoba constructed by King Mahasena (276 A.D.).
- (8) Lankarama Dagoba built by King Walagambahu (Vattagami—Abhaya)—First Century B.C.

Pahalatalawe Halmillewe Sri Sumana Rewetha Nayaka Thero was the Atamasthanadipathi from 1.9.43 till his death on 20.11.1977. The plaintiff Soratha Thero is the senior pupil. The defendant Gnanarathana Thero is the junior pupil. The plaintiff has stated in his plaint that "the succession of Atamasthanadipathi at Anuradhapura, the subject matter in this case is by rule of pupillary succession". The plaintiff has set out in his plaint the pupillary succession according to the seniority from Pahala Talawe Sri Sumana Medankara Thero. Atamasthanadipathi (1885-1908), Pahala Talawe Sri Sumana Medankara Thero Atamasthanadipathi Pallegama Ratanapala Thero (1908-1944), who was succeeded by the above-named Sri Sumana Rewatha Thero Atamasthanadipathi from 1.9.43 till his death on 20.11.1977. The plaintiff's case is that after the death of the said Sri Rewatha Nayaka Thero, as his senior pupil he succeeded to the post of Atamasthanadipathi. The plaintiff has further averred (see paragraph 7 of the plaint filed in Sinhala—the English translation filed is not correct and accurate), that the defendant who has no right to the post of Atamasthanadipathiship is claiming that the deceased monk Rewatha Thero had made a writing the day prior to his death appointing him to the post of Atamasthanadipathi, and as such he is making claims to the said post. The plaintiff has stated that the alleged writing relied on by the defendant is not a valid writing for reasons stated in paragraph 8 of the plaint; as such the plaintiff seeks a declaration that he is the Atamasthanadipathi.

The defendant has stated in the answer (Paragraph 8) that—

- (a) According to well established custom followed for a very long period of time the appointment to the said post of Atamasthanadipathi was done on original nomination by the Chief of the Nuwarawewa family and a Committee of the following persons—
 - (i) Chief of the Nuwarawewa family,
 - (ii) The three Rate Mahattayas of Nuwara Kalawiya,
 - (iii) The Seventeen Korals of Nuwara Kalawiya.
- (b) Once the appointment made on the original nomination is notified to the Government, an Akthapathra was offered to the said priest as the Atamasthanadipathi. According to the custom that prevailed the priest appointed should be a pupil of the priest who held the said post.
- (c) The Buddhist Temporalities Ordinance No. 8 of 1905, under the proviso to Section 5 for the first time recognised the Atamasthana, and provided for a Atamasthana Committee consisting of six members, one of whom was the Head of the Nuwarawewa family. This Committee continued to exercise the practice of appointing the Atamasthanadipathi, on being nominated by the Chief of Nuwarawewa family.
- (d) Even after the Buddhist Temporalities Ordinance No. 19 of 1931, the Atamasthana Committee created by this Ordinance continued to make the appointment of the Atamasthanadipathi on the nomination of the Chief of the Nuwarawewa family.
- (e) After the death of Sri Sumana Rewatha Nayaka Thero, the Atamasthana Committee met on 28.11.77 and upon the nomination of the Chief of the Nuwarawewa family and on the proposal of the plaintiff the defendant was appointed Atamasthanadipathi. The defendant has further stated that prior to his death, the said Rewatha Thero, proposed the name of the defendant to be his successor, and it was communicated to the Atamasthana Committee.

The plaintiff has filed a Replication dated 24.7.75 stating that on the death of Pahala Talawe Sri Sumana Medankara Nayaka Thero, his senior pupil Pallegama Ratanapala Thero succeeded to the *Bomaluwa*

Viharadhipathiship and Atamasthanadipathiship. The plaintiff has further stated that the Nuwarawewa family and the other Chiefs mentioned by the defendant had no right or authority to nominate for the post of Atamasthanadipathi. The Atamasthana Committee created by the Buddhist Temporalities Ordinance had the right to manage the temporalities of the Atamasthanaya, and had no control over the succession to the post of Atamasthanadhipathi. Succession to the Atamasthanadhipathi post was governed by the pupillary succession rule. The succession to this post *automatically goes to the chief priest of the Bomaluwa Viharaya Paramparawa*. The alleged nomination of the defendant by Rewatha Nayake Thero as stated in the plaint was unlawful and void. The plaintiff has further stated that when the Atamasthana Committee assembled on 28th November, 1977 the plaintiff proposed the defendant to act for the balance period for which he had been appointed by Rewatha Thero. At the trial three admissions were recorded, and what is now relevant is admission No. 3, which is as follows:—

“Atamasthanaya is sanghika property”.

This admission is very important as in appeal the plaintiff has strongly based his case on this admission. At the trial several issues were raised, and I shall only set out the issues now relevant to this appeal.

Issues of Plaintiff—

- (1) Is the succession to Atamasthanadhipathiship governed by pupillary succession rules?
- (6) Does the succession to the post of Atamasthanadhipathi go to the Chief Priest of Bomaluwa Viharaya Paramparawa?

The learned District Judge answered both these vital issues of the plaintiff in the negative.

Issues raised by the Defendant—

- (7) According to the very old established custom, was the appointment of the Atamasthanadhipathi firstly by nomination by the Chief of the Nuwarawewa family and approval by a committee consisting of persons set out in paragraphs 8(a) and 8(b) of the answer?

- (8) After the Buddhist Temporalities Ordinance No. 8 of 1905 came into operation and after the Ordinance No. 19 of 1931 (Cap. 318) came into operation, did the Committee consisting of persons referred to above, who had the power to appoint to the post, use their power of appointment through the Atamasthanadhipathi Committee set up under the provisions of the two said Ordinances?
- (9) After the death of Halmillewe Sri Rewatha Thero according to the custom and procedure referred to above, was the defendant appointed Atamasthanadhipathi at the Atamasthana Committee meeting held on 28.11.77?
- (10) Did Rewatha Thero propose the name of the defendant priest, who is a pupil of his to be the Atamasthanadhipathi by a letter dated 19.11.1977 (D13)?
- (10A) If issue No. 1 is answered in the affirmative, however, in view of the facts in issue No. 10, has the defendant priest being appointed in writing on 19.11.1977?

The learned District Judge answered all the issues raised by the defendant in favour of the defendant. As regards the main issue in the case raised by the defendant, issue No. 7 – the learned District Judge answered it in the affirmative firmly holding as follows:– “that there was a custom prevailing for over 100 years for the appointment of the Atamasthanadhipathi in manner set out by the defendant”. Having made that finding the learned District Judge has firmly held as follows:– “I hold that the Chief of the Nuwarawewa family and the Rate Mahattayas by well established custom had the authority to make the appointment”. As regards issue No. 10 raised by the defendant on the document dated 19.11.77 (D13), the learned District Judge has held that Rewatha Thero signed that document knowingly and having accepted the contents therein and as such he has held that the document (D13) had the effect of a valid nomination of the defendant by Rewatha Thero to succeed him. Having come to this conclusion the learned District Judge dismissed the plaintiff’s action.

The plaintiff appealed to the Court of Appeal against the judgment of the learned District Judge. In the Petition of Appeal so filed, there is a very revealing paragraph – to wit paragraph 7(d)(1) –

I number paragraph 7(d)(1) in sub-paragraphs as follows –

- “(a) It is respectfully submitted that there is evidence that for well over 100 years the pupil priest succeeded to the post of the Tutor Priest and both the plaintiff appellant and the defendant appellant have accepted this position.
- (b) The nomination by the Chief of the Nurwarawewa family and the appointment by the Rate Mahattayas and Korals prior to that, and recently the appointment by Atamasthana Committee was of general acceptance.
- (c) It is respectfully submitted that when a successor is appointed the pupillary succession rule was followed.”

This paragraph directly admits that for well over 100 years the appointment of Atamasthanadhipathi was in the manner set out under paragraph (b) above, which is the case of the defendant. As shown later it will be seen that excepting in one instance it was the senior pupil of the Atamasthanadhipathi that has been appointed as the successor. The learned President's Counsel for the defendant-petitioner submitted that this manner of selection of the senior pupil was not an acceptance of pupillary succession, but a monk being the senior pupil has been considered as a qualification for appointment. This submission is not a strange one as for example in the field of administration and that of the Judiciary seniority is always considered a qualification for appointment though there may be exceptions. In the succession to the Atamasthanadhipathiship which has been traced by the defendant from Ipalogama monk in 1843, there has been an Atamasthanadhipathi Kaluebe Dhammarakkitha (1863-1872), who was not even a pupil of his predecessor Pailagama Rewatha Thero. After that the senior pupil of Pailagama Rewatha Thero has been appointed. (See Application of Sri Sumana Medankara Thero dated 3.12.1885. (D8) and the Application of Pallegama Ratanapala Thero dated 28.12.1908 (D3)). The essence of the defendant's case has been admitted by the plaintiff-appellant in paragraph (2) of 7(d) as set out above. This manner or mode of appointment which as I shall state later was of inveterate usage. In paragraph (2) of 7(d), there is another admission of great value to the defendant's case. It has been submitted that even though a body headed by the Chief of the Nuwarawewa family appointed the Atamasthanadhipathi the Buddhist Temporalities Ordinance No. 8 of

1905 Section 5 proviso created an Atamasthana Committee. That Committee was vested with certain statutory powers re temporalities but had no right or power to appoint a Atamasthanadhipathi. Yet the 1905 Ordinance Committee did so in the appointment of Pallegama Ratanapala Thero (1908-1944). Later the Buddhist Temporalities Ordinance of 1931, Atamasthana Committee also did so in the appointment of Sri Sumana Rewatha Thero on 1.4.43, and now the appointment of the defendant Pallegama Gnanaratana Thero on 28.11.77. In paragraph 7 (d) (2), the plaintiff-appellant himself admits that "the appointment by the Atamasthana Committee was of general acceptance". This is the only premise on which the appointments by the Atamasthana Committees created in 1905, and 1931 can be explained. My view is that as both these Ordinances made the Head of the Nuwarawewa family a member of the Atamasthana Committee, the practice/usage, of the Atamasthanadhipathi being appointed by a body of Rate Mahattayas and Korals headed by the Chief of the Nuwarawewa family, get attached to the statutory Atamasthana Committee by general acceptance or shall I say consent of all parties.

The Court of Appeal in C.A. 292/79(F), C.A. Minutes of 11.5.1987 set aside the judgment of the learned District Judge and held that –

- (a) The succession to the post of Atamasthanadhipathi was governed by the rule of sishyanu sishya paramparawa.
- (b) The Court of Appeal held that the writing of 19.11.1977 (D13) by which the defendant claimed that he was nominated by Sri Sumana Rewatha Thero was a suspicious document and not an act or deed of the said Thero, and as such the defendant got no rights from that document.
- (c) But on one point the Court of Appeal upheld the case of the defendant. It held that assuming that the writing of 19.11.1977 (D13) was a valid document, it had the effect of making a proper nomination of the defendant as successor to the deceased Sri Sumana Rewatha Thero, on the premiss that the right of succession was governed by the rule of sishyanu sishya paramparawa.

The basis on which the Court of Appeal has held that succession to the Atamasthanadhipathiship was governed by the rule of sishyanu sishya paramparawa was that that the defendant had failed to prove "the custom" of nomination and appointment by a body, the chief of

which body was the head of the Nuwarawewa family. As regards the writing dated 19.11.1977 (D13), the Court of Appeal held that the making of that writing was surrounded by suspicious circumstances, and there was only a sole witness to its execution to wit – Jayantha Dissanayake. And on examination of the signature of the deceased Thero, by the learned Judges of the Court of Appeal, in course of the hearing of the appeal, the Court has formed the view that the signature of the late Rewatha Thero in (D13) differed from the admitted signature of the late Thero in document (D1) of 14.9.1977.

The appeal has been made to this Court against all matters in respect of which the Court of Appeal has held against the defendant-respondent-petitioner. At the hearing of this appeal by this Court, three objections have been raised –

- (1) Learned Counsel for the defendant-respondent-petitioner objected to the learned Queen's Counsel for the plaintiff-respondent making submissions, that the laity cannot appoint a Viharadhipathi to Sanghika property, on the ground that this matter had not been urged in the original Court. This very objection has been raised in the Court of Appeal and has been overruled.
- (2) Learned Counsel for the defendant-respondent-petitioner objected to an application made in this Court to amend the plaint.
- (3) In the course of the argument the learned President's Counsel for the defendant-respondent-petitioner made submissions that the Atamasthanadhipathiship, the matter in dispute in this case was not the usual Viharadhipathiship in respect of which authorities have been cited, that the Atamasthanadhipathiship must be considered as an office or post, and as such the principles relied on by the respondent will not apply.

An objection was taken to this point (3) being raised for the first time in this Court. As regards the objection No. 1 above, it must be stated that this point of law has been raised in the Court of Appeal and allowed. As the matter has been fully argued in the Court of Appeal and the parties have made complete submissions on this matter in this Court also the objection cannot be considered. As regards objection No. 2, the matter of amendment of the plaint does not arise in view of

the order I will make in this judgment. The matter referred to in this objection No. 3 has been argued by eminent counsel, and as such it cannot be said that parties have been taken by surprise. As such this objection cannot be allowed.

The main question which has been urged in the District Court, in the Court of Appeal, and now urged in this Court is the mode of succession to what has been called "the post of Atamasthanadhipathi in Anuradhapura". It has been revealed in this case that the Atamasthanadhipathiship involves the Viharadhipathiship of the Bomaluwa Viharaya (Sri Maha Bodhiya) and that the Atamasthanadhipathi has the right of appointing the Adipathis to the other seven connected Viharas. The other seven connected Viharas did not have a line of succession to the Viharadhipathiship in respect of any of these Viharas. I must at this stage state that there was a contention on two matters relating to the Atamasthanadhipathiship to wit—

- (1) Learned Queen's Counsel for the plaintiff submitted that the holder of the Viharadhipathiship of the Bomaluwa was always by virtue of that Atamasthanadhipathi.
- (2) Learned President's Counsel for the defendant submitted that the Atamasthanadhipathi by virtue of that office becomes the Viharadhipathi of the Bomaluwa Viharaya.

It will be noted that as stated earlier in the Replication filed, the plaintiff refers to the Bomaluwa Viharadhipathiship and the Atamasthanadhipathiship and moves that he be declared the Atamasthanadhipathi. This contention has some effect on the consideration of the mode of succession to the Atamasthanadhipathiship. In the course of my judgment I shall deal with this aspect.

The defendant has filed a pedigree of succession beginning from 1843. The material for this pedigree has been obtained from two documents produced in this case – application of Medankara Thero dated 3.12.1885 (D8), and application of Pallegama Ratanapala Thero dated 28.12.1908 (D3). The succession set out by the defendant, which he says were appointments by a body headed by the Chief of the Nuwarawewa or Bulankulama family is as follows:—

Ipalogama Thero – disrobed 1843 by the Malwatte Chapter for ecclesiastical misconduct (D6) was succeeded as follows:—
Pailagama Rewatha Thero, (1844 – 1863). (D3)

Kaluebe Dhammarakkitha Thero (1863 – 1872) (D8) and (D3).
Uduruwe Halmillewe Ratanapala Thero, (1872 – 1885) (D3).
Pahala Talawe Sri Sumana Medankara Thero, (1885 – 1908) (D8).
Pallegama Ratanapala Thero (1908 – 1943) (D3) – (Resigned
1943).

Sri Sumana Rewatha Thero (1943 – 20.11.1977).

As stated earlier, except in the case of Kaluebe Dhammarakkitha Thero, who was not a pupil of his predecessor Pailagama Rewatha Thero, the other monks who assumed the Atamasthanadhipathiship were the senior pupils of the predecessors. It is due to this fact that the case of the plaintiff is that the succession went by the rule of Sishyanu Sishya Paramparawa. The defendant's case is that all these appointments have been made by a body headed by the Chief of the Nuwarawewa family and an additional qualification for appointment appears to have been, a claimant being the senior pupil of the predecessor in office.

An analysis of several documents produced has to be made to consider and decide whether there has been what the defendant has called in the plaint "a custom" and which I call a usage or mode of election, or nomination of the Atamasthanadhipathi by the head of the Nuwarawewa family, and election by the Rate Mahattayas and the Koralas as set out in paragraph 8(a) of the Answer. I must state that in considering the effect of such documents produced the Court of Appeal has:—

- (1) Ignored the essential features of the documents and its effects on the defendant's case of succession,
- (2) Not considered some of the documents and evaluated same,
- (3) Paid attention to the inessential contents of the documents.

A proper analysis of the documents only can place the case of the defendant in its proper perspective.

The earliest document produced by the defendant to prove the "custom" or what I call the mode of succession relied on by the defendant is the document (D5) of 25.2.1871, a minute made by Dickson, Government Agent, Jaffna with a postscript dated 18.2.1860. The main matter dealt with by Dickson is what he calls an illegality in the election of the chief priest of Anuradhapura in 1863. The reference as chief priest is undoubtedly to the

Atamasthanadhipathi. The Court of Appeal had drawn attention to the irregularities in the election pointed out by Dickson and has concluded that document (D5) is not helpful in the proof of the defendant's case. Leaving aside the irregularities of the election in 1863, the most vital part of the document is a statement by Dickson which certainly corroborates the defendant's case as regards the mode of election of the Atamasthanadhipathi. The second paragraph of the minute (D5) opens as follows:—"according to the instructions given by Mr. Dyke after communicating with Government the nomination of the chief priest was vested in the Nuwarawewa family, and the election in the headmen as representatives of the people". Having made this categorical statement the minute goes on to point out that the election made in 1863 was irregular and illegal. As stated earlier, the Court of Appeal has ignored the evidentiary value of the portion cited above. The next document is a document dated 12.9.1881 (D6). (D6) is a minute made by the Government Agent, Anuradhapura on 12.9.1881, and is very revealing. It really deals with the complaint made against Ipalogama Unnanse, who was referred to earlier by me as having been disrobed by the Malwatte Chapter. In dealing with this document the Court of Appeal does not show a proper appreciation of the value of this document, but directs its attention to some irrelevant contents and sums up as follows—(I suppose both in reference to documents (D5) & (D6))—"the change to the Atamasthanaya Committee took place only on 1.2.1907 upon the creation of the Committee by the 1905 Ordinance which became operative only on the aforesaid date. In the result the contents of the documents are not helpful in proving custom or that what was done was in accordance with ancient custom". I cannot understand why at this stage these two documents (D5) and (D6) or (D6) only was/were connected to the said Buddhist Temporalities Ordinance of 1905. Further, as I have pointed out, the plaintiff-appellant himself in the Petition of Appeal to the Court of Appeal has stated that "the nomination by the Chief of the Nuwarawewa family and the appointment by Rate Mahattayas and Korals prior to that and recently the appointment by Atamasthana Committee was of general acceptance". Further the Court of Appeal has lost sight of the fact that the predecessor from whom the plaintiff purports to derive title, that is Rewatha Thero was himself appointed by the Atamasthana Committee under the 1931 Ordinance on the resignation of Pallegama Ratanapala Thero and also that Rewatha Thero's predecessor Pallegama Ratanapala Thero was appointed by the Atamasthana Committee of the 1905 Ordinance. The minute (D6)

which deals with a complaint made against the Chief Priest of the Bo-tree (otherwise called Annunayake Unnanse of the Atamasthana in Anuradhapura), is one made by Dickson, the then Government Agent, Anuradhapura whom the Court of Appeal in its judgment has described as a learned man, a scholar graduate of the Oxford University, who held with distinction the highest administrative posts of Ceylon. What is relevant and important is that at page (2) of his minute (D6) Dickson states that "the ruling authorities on the question of the removal and the appointment of the Chief Priest of the Bo-tree are to be found in the correspondence between the Government Agent, Jaffna and the Colonial Secretary from 1843-1864 during the administration of Mr. Dyke, in Sir John Packington's Despatch No. 123 of 4.12.1852 and in the judgment of the Supreme Court in the Adam's Peak Case which will be printed in the Report of the Service Tenures Commissioners for 1871-(Administration Reports 1891, Pages 372-375). From these authorities it would appear that the Chief Priest must be a member of the Malwate Establishment and the election to the office of the Chief Priest is vested in-

- (1) The head of the Nuwarawewa family.
- (2) The three Rate Mahattayas of Nuwara Kalawiya.
- (3) The seventeen Korals of Nuwara Kalawiya."

(Note.-"The rights of the family in regard to this appointment were recognized and secured to Nuwara Banda of Bulankulama by the decision of the District court, Anuradhapura in case No. 156").

The Court of Appeal judgment makes this remark regarding this note-"Further there is a reference to a D. C. Anuradhapura Case No. 156. The record of that case too has not been produced for the inspection of the Court". The Court has lost sight of the fact that a responsible officer who may be presumed to have seen the record or a copy himself is making this observation in 1881, nearly 100 years before this dispute arose. (The record in Case D.C. 156 Anuradhapura is available in the National Archives - proceedings - S.L.N.A. (Sri Lanka National Archives) Vol: No. 41/269 - and the judgment in S.L.N.A. Vol: No. 41/734. I have read and perused same).

There is a document produced in this case dated 19.12.1886 (D7) with the address at Udimaluwa Temple at Anuradhapura that is the Bo-tree Temple. This document contains a set of rules framed for the improvement of the Anuradhapura Atamasthanaya by three Rate

Mahattayas of Nuwara Kalawiya and the Korals of the said Palatha – (i.e. these who formed the electoral body headed by the Chief of the Nuwarawewa family). The set of rules has been signed by these officials and its clause 1 is as follows:–

- (1) "That this convention can appoint a Anunayaka Unnanse for the present vacant post of Anunayaka of Atamasthanaya, Anuradhapura".

Thus it will be seen that those who have signed this document a hundred years ago have asserted the right of that body to appoint an Anunayaka of the Atamasthanaya. There is no evidence to show that these rules were adopted and implemented. But what is valuable in this document is that it deals with the appointment of the Anunayaka of Atamasthanaya and draft rules for the better management of the temporalities of the Atamasthanaya. The comment made by the Court of Appeal on this document (D7) is as follows:– "(D7) is a document in Sinhala dated 19.12.86, containing a resolution passed by some people regarding certain Convention Rules for the advancement of the Atamasthanaya. This document has not been prepared by the Committee. It does not make custom and is not relevant". In my view document (D7) is most relevant as it contains and refers to the appointment of an Atamasthanadhipathi as stated by the defendant.

The defendant has produced an application dated 3.11.1885 (D8) for the post of Atamasthanadhipathi made by Pahala Talawe Sri Sumana Medankara Thero (1885 – 1908) who succeeded Halmillewa Ratanapala Thero. Medankara Thero gives the order of succession and states he is the senior pupil of Ratanapala Thero, who had been the Anunayaka of the Atamasthanaya. This application is addressed to "Bulankulama Bandara, Chief of the Nuwarawewa family, Dissamahatun of Nuwara Kakawiya, Tunpalata and other lay and clergy who have assembled at Sri Maha Bodhi Temple to select a priest for the post of Anunayaka, Anuradhapura Atamasthanaya". The Court of Appeal judgment merely sets out in a few lines the contents of the document (D8), does not evaluate it, consider its evidentiary value, and its effect on the case of the defendant. The importance of this document is that this is called an "application submitted to the Committee", and makes a request that he "be appointed to the vacant post of Anuradhapura Atamasthana Anunayake". If the succession was only by virtue of being the senior pupil of the paramparawa, there was no need to make an application such as this. The comment was

made that the application is also addressed to "the lay and clergy assembled at Sri Maha Bodhi to select a priest for the post". My view is that this document does not include the lay and the clergy who have assembled as part of the body that makes the election. They seem to be the persons gathered to see the selection of the Anunayake of the Atamasthana just as persons usually gather to hear results of an election. It has not at all been suggested that besides the Chief of the Nuwarawewa family, Rate Mahattayas and Korals, other laymen and clergy also participated in the election. In (D8) Medankara Thero sets out his claims and states as follows:— "I hereby request that I the applicant Pahala Talawe Medankara Unnanse be appointed to the vacant post of Anuradhapura Atamasthana Anunayaka". The value of this document is that over hundred years ago a predecessor of Sri Sumana Rewata Thero, from whom the plaintiff claims the "post" acknowledges that a body headed by the Chief of the Nuwarawewa family appointed the Atamasthanadhipathi and inferentially it shows that the "post" did not as of right pass over to the senior pupil of the holder of the "post" of Atamasthanadhipathi.

The defendant has produced an application dated 28.12.1908 (D3) by Pallegama Ratanapala Thero, senior pupil and successor of Sri Sumana Medankara Thero whose application dated 3.12.1885 (D8), has been considered above. This application (D3) of 28.12.1908 is of great significance and value to the defendant. The Court of Appeal has stated that the application (D3) has been made to the Atamasthana Committee created by the Buddhist Temporalities Ordinance of 1905, which Committee had no power to make such an appointment. The document (D3) is dealt with in that manner and the comment is finally summed up as follows:— "(D3) is a record not of the observation of previous custom, but a break with it". I have earlier pointed out that in the petition of appeal the plaintiff has admitted that "recently the appointment by Atamasthana Committee was of general acceptance". The Court of Appeal faults Pallegama Ratanapala Thero for making the application to the Atamasthana Committee, but even irrespective of that, does not at all consider and evaluate the document. The document (D3) is of great importance and significance to the defendant. The application (D3) is addressed to the Bulankulame Dissapathi of Nuwaragam Palatha and some others who are described as "the Buddhist Radala Mathituman, who are the Committee Members of the Atamasthana Committee". Then (D3) states as follows:— "My tutor priest Sri Sumana Medankara Abhidana

Maha Viharadhipathi and Atamasthanadhipathi expired on 27th October, 1908 from the days of the *Sinhala Kings* the Radala Warun of the two Walawwas known as Nuwarawewa and Bulankulamawewa have selected a Nayaka Thero to conduct religious services at the Jaya Siri Maha Bodhiya Anuradhapura After the demise of these Sinhala Kings, British having assembled the Atamasthana Sabha consisting of the Chief Radala Mahatun of the said two Walawwas have continued to appoint to the post of Atamasthanadhipathi". Then this monk traces the line of succession and states that they have held the post of Atamasthanadhipathi continuously according to the Sishyanu Sishya Paramparawa. This monk applies for the "vacancy" created by the death of his tutor. This monk sets out his scholastic achievements which shows that he was a very learned monk. Ultimately this monk states as follows:— "I have all the right to the post of Atamasthanadhipathi to which post my tutor priest has been appointed in terms of Sishyanu Sishya Paramparawa". What is most important in this letter is that it states that the Atamasthana Committee has appointed the Atamasthanadhipathi from the days of the Sinhala Kings, and that the practice continued after the British took over. This document (D3) has been written as long ago as 1908 by the predecessor-in-title of Sri Sumana Rewatha Thero, whose senior pupil is the plaintiff in this case. It must be noted that the Buddhist Temporalities Ordinance No. 8 of 1905 for the first time recognized the Atamasthanaya at Anuradhapura as a "temple" and in the proviso to Section 5 provided for a Atamasthana Committee, and one of the members of this Committee had to be the head of the Nuwarawewa family. This Ordinance No. 8 of 1905 came into operation in 1907. Thus, when Pallegama Ratanapala Thero made the application of 28.12.1908 (D3), it was made to the Atamasthana Committee created by this Ordinance. From this time both the Atamasthana Committee under the 1905 Ordinance, and under the 1931 Ordinance have dealt with both the appointment and the acting appointments pertaining to the Atamasthanadhipathi. Thus, from 1908 till 1978 for 70 years the statutory Atamasthana Committee has dealt with the Atamasthanadhipathiship, and it is now too late in the day to contest this practice which has grown up "with the general acceptance" of the monks who claimed the post and the monks who received acting appointments.

I now refer to another set of documents on which the defendant relies for his case, as regards the appointment to the Atamasthanadhipathiship. Before I deal with these documents, it is necessary to set out the historical background to these documents. From the establishment of Buddhism in the time of Devanampiyatissa, the King, was regarded as the protector of the Sasana and the secular head of Buddhism. The principal Monks were appointed by the King. When the Kandyan Provinces were ceded to the British on the 2nd day of March 1815, the Kandyan Convention was signed between Robert Brownrigg the Governor and Commander in Chief of Ceylon, and the Adigars, Dissawes and the other principal chiefs of the Kandyan Provinces on behalf of the inhabitants. It was declared under Clause 5 of this Convention that "the religion of Boodho, professed by the chiefs and inhabitants of these provinces, is declared inviolable and its rights, ministers and places of worship are to be maintained and protected." (CLE Volume XI Cap. 390). The Constitutional result of this convention was that the Sovereign of England, a Christian took over the obligations of the Kandyan King in respect of the Buddha Sasana. The Dalada Maligawa was placed in the custody of an agent of the Government; and the appointments and dismissals of monks, and the control of domestic matters of the Buddhist temples was vested in the Governor. "The principal Bhikkus were appointed by the Governor as were the Basnayake Nilames and some Kapuralas to principal Devalas". (Ceylon Historical Journal – Volume X – Buddhism under the British in Ceylon (1840-1855) Dr. K. M. de Silva). There was opposition by the Christian clergy to a Christian monarch – a Christian Government – concerning itself with the internal affairs of the Buddha Sasana which they considered as an "idolatrous and immoral faith". The leader of this movement was Jingoist Wesleyan clergyman Rev. Spence Hardy. Dr. K. M. de Silva in the article referred to above states as follows: "In 1839 Rev. Spence – Hardy a Wesleyan Missionary issued a pamphlet calling upon the Government to sever its connection with Buddhism. This connection of the British Government with Buddhism was described as between a Christian Government and a idolatrous religious system". As a result of this agitation the British Government in the United Kingdom considered the effect of the said Clause 5 of the Kandyan Convention and gave it various interpretations. Due to this agitation the British Government in Ceylon sought to pass the Ordinance No. 2 of 1846 the preamble to which was as follows: – "Whereas it is expedient for the British to relinquish

the charge of the Dalada or tooth, of Budhu, and to withdraw from the direct interference in the appointment of the priests and chiefs of Vihares and Dewalas, and to enable the professors of the Buddhist religion to provide for the commandment of their Vihares and Dewales and of the revenue appertaining thereto." This was the first attempt to overcome the effect of Clause 5 of the Kandyan Convention, but the then Queen of England Queen Victoria refused to assent to this legislation. Further representations continued from the Christian community in the Island taking offence that a Christian King was concerned with the appointments of priests for Buddhist temples. The result of these memorials and petitions addressed to Her Majesty was a Despatch dated 4.12.1852 by Sir John Pakington Her Majesty's Secretary of State for Colonies. This Despatch which is a landmark in the history of Buddhism under British Rule had as its object to put an end to the previously existing practice of appointments made by the British Government to the officers of the Buddhist Chief Priesthood and other temples and Dewales. The Despatch directed that the elective bodies consisting of the monks and any other officers, Chiefs should elect or nominate persons for office and submit the same to the Governor for approbation, upon which the Governor will issue his diploma or/recognition of appointment. After this Despatch the practice of appointments by the Governor ceased in respect of such appointments and the Governor continued to issue what was described as the "diploma of appointment" – or the "recognition of appointment". By this Despatch the Governor was authorised to issue "an instrument, which while avoiding altogether the form of an appointment, productive as it is of false notions, should simply profess to be a recognition by government of the title of the party". (G. W. Wood House – The Ceylon Antiquary – Volume 111, Part III, 1918).

The defendant produced some such documents Akthapatras which were presented to the monks who were appointed as Atamasthanadhipathi. The first such document is a document dated 24.4.1886 issued by His Excellency's Command from the Colonial Secretary's Office dated 24.4.1886 (D10). This document is partly damaged and the name of the monk is not decipherable, but the date shows that this is the appointment of Atamasthanadhipathi Sri Sumana Medankara Thero (1885–1886). The next Akthapatra produced is the Akthapatra issued to Sri Sumana Ratnapala Thero dated 21.2.1909 (D11). This document is very revealing in view of

the objection taken that the Atamasthana Committee created by the Buddhist Temporalities Ordinance had no right or power to make appointments.

The document (D11) is as follows:

"Whereas Pallegama Sri Sumana Ratanapala Unnanse has been elected in due form, by the Atmasthana Committee under Ordinance No. 8 of 1905 to be Anunayake of the Eight Sacred places (Atamasthana) of Anurahapura. It is hereby declared that the said election of Pallegama Sri Sumana Ratanapala Unnanse to be Anunayake of the Eight Sacred places (Atamasthana) of Anuradhappura is recognized by Government".

His Excellency's Command.
Sgd.....
Colonial Secretary.

Colonial Secretary's Office,
Colombo,
21.2.1909.

It has to be noted that the Colonial Government has recognized the appointment made by the Atamasthana Committee of 1905 even though the Ordinance did not give the Committee any power to appoint an Atamasthanadipathi. The defendant has also produced the Akthapatra issued to Halmillewe Sri Sumana Rewatha Thero, the tutor of the plaintiff dated 30.4.1946 (D12). The document (D12) states that Rewatha Thero "has been elected in due form, by the Atamasthana Committee to be the Anunayake of the Eight Sacred Places (Atmasthana) of Anuradhappura". It further states that the election is recognized by the Government. This document (D12) is issued by His Excellency's Command from the Governor's Office. In the course of the judgment the Court of Appeal merely mentions the Akthapatra (D10) of 24.4.1886 and the Akthapatra (D11) and makes the comment that this is the first time such an appointment has been made by the Atmasthana Committee and it is in the 20th Century. In making this comment the Court of Appeal overlooks the fact that for the first time an Atmasthana Committee was created in the 20th Century by the Ordinance of 1905 which came into effect in 1907. The document (D12) is not even mentioned. Thus the Court of Appeal

has not considered the effect of documents (D10), (D11) and (D12) in respect of the defendant's case. The defendant does not at all state that these documents are any appointments made by the Government as such, but has produced these documents to show that the Government recognized the appointments so made. The act of appointment by the Governor issued to a Kaluebbe Dhammarakkita Thero, Atamasthanadhipathi (1863–1872) is available in the Government Archives. This is a document issued before the Pakington Despatch of 1852, and it is most helpful to sustain the defendant's case. The act of appointment is as follows:

"Whereas Kaleebbe Dharma Rakitte Unanse has been elected by the Headmen and priest of Nuwera Kalawia to be the chief priest for the Eight Sacred Places at Anuradhapura in the District of Nuwera Kalawia.

It is hereby declared that the said election of Kaleebbe Dharma Rakitta Unanse to be the chief priest of the Eight Sacred Places at Anuradhapura is recognized by the government".

By His Excellency's Command
Colonial Secy.

Date—Illegible.

I am annexing to this judgment as appendix 1 a photo copy of this "recognition of appointment" obtained from the Government Archives. The document recognizing the appointment of Kaluebbe Dhammarakkita Thero has necessarily followed from the recognition of the mode of appointment of the Atamasthanadhipathi in the minutes (D5) and (D6) made by the Government Agent, Dickson. These documents (D10), (D11) and (D12) and appendix 1 clearly show that there has been an appointment to the post of Aatmasthanadhipathi earlier by a body headed by the chief of the Nuwarawewa family and after 1907 by the Atmasthana Committee. It has to be noted that Sri Sumana Rewatha Thero from whom the plaintiff seeks to claim title has been appointed by the Atamasthana Committee created by the 1931 Buddhist Temporalities Ordinance.

There is another set of documents which shows that the monks who held the post of Atamsathanadhipathi acknowledged the rights of the Atamsasthana Committee created after 1905 to wit—the letters of resignation. Pallegama Ratnapala Thero the Atamasthanadhipathi

from 1908-1944 has addressed a letter of resignation from the post, dated 1st August 1942 (D4) to Punchi Bandara Bulankulama Dissapathi "Chairman of the Atamasthana Committee and chief of Nuwarawewa family". He has stated that he has held the Atamasthanadhipathiship for about 33 years and added as follows:—"However, I am sickly and would like to Inform you that I would like to resign from the post and also remind you to appoint a suitable person from our Bomaluwa Paramparawa to the said Nayaka post". This letter has a special significance apart from the resignation. The Thero requests the Atamsathana committee—one appointed under the 1931 Ordinance "to appoint a suitable person to the said post". At a meeting of the Atamsathana committee held on 1.9.43 (D9) presided over by the chief of the Nuwarawewa family P. B. Bulankulama Dissapathi, the letter of resignation of Ratanapala thero (D4) dated 1.8.42 has been accepted and on a nomination by P.B. Bulankulama Sri Sumana Rewatha has been appointed as the Atamasthanadhipathi. Sri Sumana Rewatha was the Atamasthanadhipathi from 1.9.42 till his death on 20.11.1977. Before he died he addressed a letter dated 19.11.1977 (D13A) to the Chairman Atamsathana Committee and informed him that as he was sickly he will be resigning from the said post of Nayaka with effect from 1.12.1977. At the time Rewatha thero wrote this letter he was sick and was an inmate of the Anuradhapura hospital. In this letter he recommended that Pallegama Gnanaratana Thero the defendant be appointed to succeed him in the post. As stated earlier these letters of resignation tendered by senior monks clearly show that they acknowledged the right of the Atamasthana committee, even though created under the Ordinances of 1905 and 1931, to make the appointment of Atamasthanadhipathi and to accept resignations addressed to this Committee. Another document of significance is a letter dated 14.9.1977 (D1) addressed by Rewatha Thero from the Anuradhapura Hospital in which he was a patient at the time to the Chairman, Atamasthana Committee as follows:—

"I do hereby inform you that I, Sumana Rewatha Nayaka thero Anuradhapura Atamasthanadhipathi, am presently is sickly, as such

to *elect a suitable priest* from the Bomaluwa Sangha Paramparawa to act in the post of Atamasthanadhipathi for a period of six months.

Sri Rewatha

Atamasthanadhipathi Nayaka Thero,
Copy sent to the Public Trustee
Jayantha Dissanayake.
Secretary.

(This is the witness Dissanayake, who according to the evidence was the Secretary of the Atamasthana Committee at this time)."

This is a specific act of acknowledgement by the tutor of the plaintiff monk that the Anuradhapura Atamasthana committee dealt with the post of Atamasthanadhipathi. As such in order to get an acting appointment Rewatha Thero addressed this letter to the Committee. A meeting of the Atamasthana committee was held on that day, at which meeting Rewatha Thero was present, and on his proposal Pallegama Gnanaratana Thero (the present defendant) was appointed to act from September 1977 to March 1978.

Rewatha Thero was at the relevant time about 93-94 years old. He was ill and had been admitted to the Anuradhapura General Hospital on 8.11.1977. While an inmate in the hospital Rewatha Thero made a writing dated 19.11.1977 (D13) addressed to the Chairman, Atamasthana committee, Anuradhapura. By this writing (D13) Rewatha Thero informed the Atamasthana Committee as follows:-

- "(1) As I am presently sickly I hereby inform you that I will be resigning the said Nayaka post with effect from 1.12.1977.
- (2) My pupil Pallegama Gnanaratana Thero is the most suitable person at present in our Bomaluwa sishyanu sishya paramparawa, who has been appointed by me to act on my behalf on 14.9.1977. As such I hereby inform you that by virtue of the paramparawa powers I have appointed the said Gnanaratana Thero to the post of Atamasthanadhipathi created vacant by me. I further inform you that my appointment be confirmed by the Atamasthana Committee".

This writing (D13) is of utmost importance in this case. I will deal with the facts pertaining to the writing without any comment of the

submissions made on (D13) by both parties. There are three important aspects to this writing (D13) –

- (1) In (D13) Rewatha Thero states that he has been the Atamasthanadhipathi for about 29 years. As such he was a monk well acquainted with the matters pertaining to the Atamasthanadhipathiship, and the relations of the Atamasthanadhipathi with the Atamasthana Committee.
- (2) The writing (D13) is addressed to the Chairman of the Atamasthana Committee, which was one formed under the Buddhist Temporalities Ordinance No. 19 of 1931.
- (3) The Atamasthana Committee prior to 1907 has been described as a Committee of laymen, and on this the submission has been made that laymen have no right to make an appointment of a Viharadhipathi of a temple. But at this time under the 1931 Ordinance in terms of Section 9(2) there were at least 2 monks in this Committee.

It has been submitted that (D13) was invalid as a resignation of Rewatha Thero as a Viharadhipathi cannot resign. This submission was based on the Supreme Court decision of *Mapalane Dhammadaja Thero vs. Rotumba Wimalajothi Thero* (8), a judgment of a Divisional Bench of Five Judges. In fact this submission can also have relevance to the resignation of Rewatha Thero's predecessor Pallegama Ratanapala Thero by writing dated 1.8.1942 (D4). This writing (D13) has no relevance in this case as a resignation, because Rewatha Thero passed away on the following day 20.11.1977. It has a significance and relevance to another aspect of this case which I will deal with later.

The most important matter in this writing (D13) is the nomination by Rewatha Nayaka Thero of Pallegama Gnanaratana Thero the defendant to the post of Atamasthanadhipathi from 1.12.1977 – (that was the date of the expected resignation).

It is this appointment that has created this case because Rewatha Thero has overlooked his senior pupil Galgiriyaagama Soratha Thero the plaintiff in this case and appointed or nominated his junior pupil Pallegama Gnanaratana Thero to the post of Atamasthanadhipathi.

Pallegama Gnanaratana Thero the defendant claims the post of Atamasthanadhipathi both by right of appointment by the Atamasthana Committee and by right of nomination on document (D13). The cremation of Rewatha Thero took place on 27.11.1977. On 28.11.1977 the Atamasthana Committee met to appoint an Atamasthanadhipathi to succeed late Rewatha Thero, presided over by Mahinda Bulankulama, at that time considered the head of the Nuwarawewa family (this fact has been admitted by the plaintiff in his evidence). The other members present were Gnanaratana Thero, Soratha Thero who was then the representative of the Nayaka Thero of the Bomaluwa, i.e. the late Rewatha Thero and the Public Trustee Senarath Dias was also present on invitation. At the start of the meeting Jayantha Dissanayake the witness announced that Rewatha Thero had left the writing (D13) and it was read aloud. The plaintiff monk Soratha Thero then proposed the name of the defendant monk Gnanaratana Thero to the post of Atamasthanadhipathi, and the proposal was seconded by Mahinda Bulankulama. Thus, the defendant monk was elected the Atamasthanadhipathi on 28.11.1977. Thereafter the Public Trustee made a short speech followed by a short speech by the defendant monk. Thereafter the Public Trustee got the inventory of the articles made, and also on the suggestion of the Public Trustee the writing (D13) was put in an envelope and sealed with the seal of the Public Trustee. This sealed envelope was opened after that only at this trial. The plaintiff monk has stated in his evidence that he proposed the name of the defendant as Atamasthanadhipathi as he was under the belief that the appointment was being made for the balance acting period, that is up to March 1978. He has also stated that the writing (D13) was not shown to him. Having considered all the evidence pertaining to the meeting of 28.11.1972, which proceedings as stated by the defendant, are supported by an independent and unimpeachable witness Senerath Dias, Public Trustee, I do not want to be unkind to a monk. I will only hold that the evidence of the plaintiff monk regarding the proceedings of this meeting is most unacceptable and must be rejected. I hold that on 28.11.1977 the Atamasthana Committee appointed the defendant monk Gnanaratana Thero as the Atamasthanadhipathi.

The plaintiff claims a declaration that he is the Anuradhapura Atamasthanadhipathi, both in prayer (a) of the plaint, and in paragraph 6 of the Replication, by right of sishyanu sishya paramparawa, that is the pupillary succession from tutor to the senior pupil. I will now deal with this claim of the plaintiff: (The plaintiff has also attacked the document (D13) on certain grounds, and stated that no rights accrued to the defendant on (D13). I will discuss the writing (D13) later. The rule of succession to the Viharadhipathiship of a temple based on sishyanu sisya paramparawa is not one known to the preachings of the Buddha, that is the Buddhist texts Tripitaka and particularly the Vinaya Pitaka. This rule of succession to the incumbency of a temple is considered to be a rule originating in this country. The origin of this rule of succession does not appear to be known and even how long this rule of succession has prevailed in this country does not appear to be definite. In the case of *Gunananda Unanse v. Dewarakkitha Unanse*⁽⁹⁾ Jayewardane A.J., states as follows:— "The origin of sisyanu sisya paramparawa cannot be traced There is no reference to sisyanu sisya paramparawa in Buddhist Ecclesiastical works, it has been in existence for about 500 years, and it is by a purely customary rule that a pupil inherits what his tutor possessed". In this judgment Jayewardane, A.J. does not give the basis on which the opinion is expressed that this rule "has been in existence for about 500 years". In this case of *Piyananda Therunanse v. Sumanajothi Terunanse*⁽⁵⁾ Tambiah, J. states as follows:— "according to the pupillary succession known as sisyanu sisya paramparawa, after the death of the chief incumbent of a Buddhist temple, his eldest pupil succeeds him unless he had deserted his tutor or suffered what may be termed "ecclesiastical death", such as being disrobed etc. This rule, which has had a flourished existence for over 200 years, has undergone known deviations". There is a belief among a certain school of the learned Buddhist monks that the rule of sisyanu sishya paramparawa must have originated after the British came to Ceylon, as this rule is based on the English principle of primogeniture — right of succession belonging to the first born — which is the rule of succession in the British Monarchy. According to these monks the rule of succession in ancient Ceylon was the succession to the King by the King's brother. If this ancient rule was followed the senior co-pupil of an incumbent should succeed an incumbent. In the case of sishyanu sishya paramparawa there is another category sivuru paramparawa or the gnathi paramparawa, the consideration of which is not necessary in this instance.

In one of the earliest cases on Buddhist Ecclesiastical Law *Danture Unanse v. Government of Ceylon*⁽¹⁰⁾ heard by Board of Commissioners at Kandy (the then Civil Court) dated 4.6.1828 and 8th August 1829 it is recorded that the Malwatte Vihāra were called upon to define sishyanu sishya paramparawa and sivuru paramparawa. They did so in writing. The next oldest case, is the case of *Eriminne Unanse v. Senabowe Unanse*⁽¹¹⁾—(Vanderstraaten's Reports—Page XII—Appendix "D"). The Board of Commissioners by an Order delivered on 5th May 1832 decided as follows:— "the sishya paramparawa being the general rule of succession to Wihāres and the Siwooros, the exception to the general rule, the burden of proof vested on the plaintiff who pleaded the exception. (In appeal the S.C. on 21st October, 1833 confirmed this decision of the Court of the Judicial Commissioner at Kandy). This rule of law has been since followed up to date, that is that "the general rule of succession to a temple is the sishyanu sishya paramparawa rule and any party who pleads an exception must prove so". I will later refer to another form in which this rule has been expressed. The case of *Eriminne Unanse* was considered by a Divisional Bench in the case of *Ratnapala Unanse v. Kewitigala Unanse*⁽¹²⁾ and Phear C.J. enunciated the principles laid down in the *Eriminne* case as follows:— "This case has always been a leading authority upon the law of succession to Buddhist temple property. We gather from this case the following principles:—

- (1) that the general rule of succession to temple property has two branches viz., the sishya paramparawa and the sivuru paramparawa, and it is the first branch of the rule which is to be presumed to apply to a given case, in absence of evidence that it is the other.
- (2) that there are exceptional cases in which succession to temple property is in the appointment of the Government or even of private individuals.
- (3) that it is the terms of the original dedication that primarily impose the rule which is to govern the case.
- (4) that in the absence of direct evidence of those terms, usage may be looked into, and accepted as evidence thereof.

The case of *Welleagama Dhamma Jothy Unanse v. Welleagama Sarananda Unanse and Sangaratana Unanse and two others*⁽¹²⁾ considered the principle of succession sishyanu sishya paramparawa and further extended its application on the facts of that case. This case decided that by sishyanu sishya paramparawa tenure the

succession devolved first to the pupil of the incumbent, but when the descending line has been exhausted resort must be had to the ascending line, and the tutor of the last incumbent is the proper person to succeed.

I have earlier set out that the rule that there is a presumption in favour of sishyanu sishya paramparawa has been amended in later decisions. I will now refer to such decisions. The case of *Ratnapala Unanse v. Kewitiagala Unanse*⁽¹⁾ (supra), held that *in the absence of evidence of any other definite rule of succession* the sishya paramparawa must be presumed to be the rule applicable in the case. This principle has been extended in the case of *Sangharatana Unanse v. Weerasekera*⁽¹³⁾. In this case Layard C.J. held "there is absolutely no evidence to establish the terms of original dedication of this vihare that primarily imposes the rule which is to govern the case. Of course in the absence of such direct evidence we are at liberty to see if any usage has been established, and if such usage has been clearly proved it may be accepted as evidence of the terms of the original dedication". This case held that that "the terms of original dedication of a Buddhist Vihare must govern the method of succession as to its incumbency. *In the absence of definite terms attached to the dedication, sishya paramparawa must be presumed to be the rule of succession*". It is because of this line of decisions that I stated earlier that the rule in favour of the presumption of sishyanu sishya paramparawa has been amended by later decisions. There is a long line of cases from the *Eriminne* case up to today which have followed the principle, that in absence of any proof of succession in terms of the dedication, succession according to the rule of sishyanu sishya paramparawa must be presumed. In the leading case of *Morontuduwe Sri Naneswara Dhammananda Nayaka Thero v. Baddegama Piyaratana Nayaka Thero*⁽³⁾ T. S. Fernando, J. cites with approval the rules of succession set out by Phear C.J. (with Stewart, J. and Clarence, J.) in the old case of *Ratnapala Unanse v. Kewitigala Unanse*⁽¹⁾ which I have quoted above and has summed up as follows:— "These principles have been consistently followed by our courts and I might with advantage here refer to the following observations of Fernando, A.J. in the case of *Sumanatissa v. Gunaratne*⁽²⁾ in regard to them. If I may venture to formulate the position as governed by these principles as applying to the present case, the law is that the rule of succession is *governed by the terms of the original dedication, or by one of the two rules of succession, and if the terms of the original dedication cannot be*

proved either by direct evidence or by evidence of usage, then it must be presumed that the sishyanu sishya paramparawa rule of succession applies unless it can be established that the succession is governed by the sivuru paramparawa. T. S. Fernando, J. in the same page further refers to the observations of Pereira, A.J., in *Dharmapala Unanse v. Medagama Sumana Unanse*⁽⁷⁾ where Pereira, A.J. has held that the rule of succession to vihares is governed by the terms of dedication and when no such terms of dedication can be proved "the succession should be presumed to be in accordance with the rule of descent known as sishyanu sishya paramparawa". Further T. S. Fernando, J., states that Jayewardene, A.J. in *Gunananda Unanse v. Dewarakkitta*⁽⁹⁾ in summarising the rules regulating the succession to temples as laid down in the authorities stated, inter alia, that, succession to an incumbency is regulated by the terms of original dedication, and that, if the original dedication is silent as to the mode of succession, then the succession is presumed to be in accordance with the rule of sishyanu sishya paramparawa". The same principles I have discussed above have been set out by Bertram, C.J. (with De. Sampayo, J) concurring in *Sarankara Unnanse v. Indajoti Unnanse*⁽¹⁴⁾ as follows:— "strictly speaking, the right of pupillary succession should be proved and determined by the original instrument of dedication but it is only in exceptional cases, such as that of the Kelaniya Vihara that we have in possession this original instrument But our Courts have, in effect, held that in Ceylon every Vihare is presumed to be dedicated in pupillary succession unless the contrary is proved (*Ratnapala Unanse v. Kewitigala Unanse*). The authorities cited above really indicate that our Courts through a long stream of decisions up to the present day have taken two views as regards the rule of succession sishyanu sishya paramparawa.

- (1) That in respect of all temples there is a presumption that the rule of succession sishyanu sishya paramparawa governs succession and any exception to this rule must be proved by the party who relies on such an exception.
- (2) That the rules of succession are governed by the original instrument of dedication, and if such original instrument of dedication or terms of dedication cannot be proved then the presumption that the succession is governed by sishyanu sishya paramparawa operates.

I will not refer to the more recent decisions that set out these two lines of decisions as it is not necessary to do so.

On the facts of this case, it is necessary to discuss the exceptions to the rule of succession according to sishyanu sishya paramparawa. The oldest case pertaining to this exception is the *Adam's Peak case*, (1871) Vanderstraaten's Reports at 215—Creasy, C.J., Temple, J. and Lawson, J.; D. C. Ratnapura 9353. In this case the plaintiff set up a claim for the Temple Establishments of Adam's Peak—

- (1) by descent pupillage,
- (2) by right of election and recognition.

It was held that the plaintiff has no right to the incumbency by descent and pupillage, and the only right he can claim was by election by the benefited Malwatte Priests of the District in 1859, and the said election was recognized by Sir Henry Ward, the then Governor by a document dated 4th April 1860. On 10.6.1866 the Chapter of the Malwatte Priests in the District took proceedings against the plaintiff monk for misconduct and removed him from office on that account and then elected the defendant monk as the High Priest of Adam's Peak. This District Chapter of the Malwatte Priest having elected the defendant monk informed the Govt. Agent that the plaintiff was removed for misconduct and that the defendant monk was elected High Priest of Adam's Peak. On 8.6.1867, the then Governor Sir Hercules Robinson recognized the election of the defendant monk by granting a document. On 23.3.1868 the Assistant Government Agent requested the plaintiff to return the letter of recognition granted to him by the Government. The plaintiff did not comply with this request and brought this action on 28.4.1869 against the defendant monk claiming the incumbency of the Adam's Peak Temple.

It was held that in order to decide this dispute, it was necessary to ascertain—

- (1) in whom the right of appointment was vested,
- (2) in whom the power of removal was vested.

It was held that in the *Adam's Peak case* the Chapter of the Malwatte priests of the District had the power of dismissal of a monk from office for improper conduct, and that the Chapter of the Malwatte priests in the district had the power of electing the Adam's Peak high priest. What is relevant to the present case is that, this case held that the right to the incumbency of the Adam's Peak Temple was not by right of

pupillary succession, but was by right of election by the Chapter of the Malwatte monks of the district. A relevant case on this aspect of the law is the case known as the Mulgirigala case that of *Okandeyaye Wangeesa Thero v. Mulgirigala Sunanda Thero* (16). This was a dispute for the Viharadhipathiship of the ancient Buddhist temple Mulgirigala Raja Maha Viharaya in Tangalle District. There was no evidence, in view of the lapse of time and absence of records, of the terms by which the succession to the incumbency was regulated by the original dedication. T. S. Fernando, J. with H. N. G. Fernando, J. concurring held that, in the circumstances, it was necessary to fall back upon such evidence as was available relating to the *mode of succession* upon and after the death of the first incumbent. Their Lordships held that "it was indisputably established by the evidence that the rule of *sisyānu sisya paramparawa* did not apply to the temple, and that the traditional and customary mode of appointment was for the Maha Sangha Sabha to make the appointment, from among the Mulgirigala *paramparawa*, a suitable monk being elected irrespective of whether he was a pupil of the last incumbent". In this case also T. S. Fernando, J. touches on that aspect of the law pertaining to the rules of succession to the incumbency of a Buddhist Temple which I discussed as there being two schools of thought. Page 389—T. S. Fernando, J. states as follows:— "it is now settled law that the succession to an incumbency is regulated by the terms of original dedication"—(See *Gunananda Unanse v. Dewarakkitha Unanse*⁽⁹⁾). It is in this context that T. S. Fernando, J. laid down the principle—"In view of the lapse of time and the absence of records since the original dedication of this temple there is no evidence of these terms, and one is compelled to fall back upon such evidence as is available in regard to the mode of succession.....". In the case of *Dharmarakkitha v. Wijitha* (17) the plaintiff monk claimed the incumbency of a temple by right of pupillary succession *sisyānu sisya paramparawa*. The defendant's case was that the right to incumbency was by election among the pupils. It was held by Keuneman, J. that the pupils of the deceased monk had a right to elect one of their own number other than the senior pupil, as incumbent when the senior pupil consents to or acquiesces in such election. Keuneman, J. in the course of his judgment states as follows:— "the first question to be decided is whether the right of pupillary succession applies to the incumbency in dispute. It has been held that where the right to an incumbency is in question, in the *absence of evidence to the contrary*, (emphasis mine)

it must be presumed that the incumbency is subject to the sishyanu sishya paramparawa rule of succession—Vide *Ratnapala Unnanse v. Kewitigala Unanse* (1) and *Unnanse v. Unnanse* (6)". It must be noted that the case cited above the *Adam's Peak* case (15) the *Mulgirigala Case* (16) and the case of *Dhamarakkitha v. Wijitha* (17) deal with sanghgika temples, sanghgika property, but it had been held that though the temples were sanghgika property succession to the incumbency of these temples was by a mode other than that of sishyanu sishya paramparawa. In this connection the dicta of T. S. Fernando, J. in the *Mulgirigala case* (16) at page 392 are very relevant. His Lordship has stated as follows:— "in a carefully reasoned judgment, the learned trial judge has stated that it has been indisputably established by the evidence that the rule of sishyanu sishya paramparawa does not apply in the case of this temple, and that the traditional and customary mode of appointment was for the Maha Sangha Sabha to make the appointment from a monk among the Mulgirigala paramparawa, a suitable monk being elected irrespective of whether he was a pupil of the last incumbent". The Supreme Court in this case upheld this finding. The above cases have established that the rule of succession sishyanu sishya paramparawa in respect of sanghgika temples is not an absolutely inviolable principle, but that there can be deviations from that principle by "traditional and customary mode of appointment".

It was argued for the plaintiff-respondent, that in the cases referred to above, though there have been deviations from the sishyanu sishya paramparawa rule: in case of succession to the incumbency, the dominant feature of this mode of appointment was that it was ultimately the Sangha that made the appointments of the Viharadhipathis. The attack was made on the mode of succession relied on by the defendant in this case on the ground that originally the laity and later (after 1907) a layman and monks appointed the Atamasthanadhipathi. It was submitted that the laity cannot have any hand in the appointment of a Viharadhipathi, and this submission was further extended to state a principle that the laity cannot touch sanghgika property. In fact the Court of Appeal judgment deals with this submission at great length. At page 69 of the judgment of the Court of Appeal the heading is as follows:— "on the question whether the laity can appoint a Viharadhipathi to Sanghgika property". Under this heading the Court of Appeal judgment discusses the case of the defendant-petitioner re the mode of appointment to the post of

Atamasthanadhipathi. In fact the judgment states that this submission "goes to the root of the case". The Court of Appeal judgment states (Page 70) "where property is sanghika, laity have no authority to appoint a Viharadhipathi to sanghika property. Alleged custom violates a fundamental principle of ecclesiastical law". This aspect has been emphasised and over-emphasised in the judgment, and in fact the Court of Appeal judgment is based on this line of thought. The judgment states at page 62—"Mr. Jayawardene submitted that property should not be understood in the Roman Dutch Law sense of the word. In Buddhist Ecclesiastical Law property included the right to the office of Viharadhipathi in respect of sanghika property. So the fundamental principle is, it was submitted, that the moment one accepts that property is sanghika the laity cannot touch it. No custom can develop in defiance of Buddhist ecclesiastical legal concepts". The judgment further states (at page 74)—"The theory of the defendant has no place in Buddhist religion. It is impossible for the laity to appoint a Viharadhipathi". In support of this principle several authorities are cited in the judgment of the Court of Appeal. I will deal with such cases later. At the outset, I must state that the principles of these cases have not been properly analysed with reference to the facts of the present case, that is the mode of appointment to the Atamasthanadhipathiship.

The theory that the laity cannot touch sanghika property is not in accordance with the history of the Buddhist establishment in Sri Lanka since the visit of Arahata Mahinda. From the introduction of Buddhism, Buddhism became the state religion of Ceylon. This status of Buddhism in Ceylon has been adequately described by the learned monk *Walpola Rahula* in his authoritative book—History of Buddhism in Ceylon—The Anuradhapura Period—3rd century B.C.—10th Century—in Chapter V—"Buddhism as State Religion". The learned monk states as follows:—"It is quite natural therefore that the King of Ceylon was regarded as the secular head of Buddhism who protected the sasana..... as the secular head and the defender of Buddhism, it was one of his primary duties as the King to look after the well being of the sasana. Hence we find quite often Kings engaged in the "purification of the sasana, whenever they found it disorganised and corrupt, it was the duty of the State to suppress by law or expulsion undesirable heretical elements that stained the purity of the sasana. The King also felt it his duty to intervene whenever there arose within the sangha disputes that could not be easily settled by the monks themselves".

(Pages 66-67). Walpola Rahula Thero further states in this book—"In fact the sasana constituted a fully fledged State Department safeguarding the purity and well being of the sasana and maintaining the sangha and the monasteries were duties incumbent mainly on the State, although private individuals and the public collectively established and maintained Aramas on a smaller scale. There were full and permanent staffs paid by the State to look after the business of the large Monasteries such as Mihintale and Abhayagiri. These were governed by rules and regulations laid down by the King with the approval of the Sangha..... even taxes on goods were levied for the maintenance of Aramas trading on Poya Days was prohibited by law". (Page 72). Rahula Thero sums up this Chapter with a loud expression of a thought apt and relevant to the present day, as follows:— "We have to admit that from the day that Buddhism was adopted as a State religion, it began to lose its original spirit of renunciation and simplicity, and gradually developed into an ecclesiastical organisation with its numerous duties, religious, political and social. It is impossible for any religion, when it becomes an organised body, to continue in its original form. It has to change with the times if it is to maintain its power and prestige. "Adapt or perish" is nature's inexorable imperative". The position of Buddhism in Ceylon is also adequately described by Professor K. M. De Silva of the University of Peradeniya. In his book—A History of Sri Lanka, in the Chapter—The Anuradhapura Kingdom, A Buddhist Civilization he says—"The King ruled as a protector of Buddhism. Buddhism as state religion in some form or other has prevailed in Ceylon throughout history up to the British times". At that time the Kings or sometimes the chiefs appointed monks to offices and also dismissed such monks. It is an expression of this concept of Buddhism as a State religion that has made the Kandyan chiefs to incorporate fundamental clause No. 5 in the Kandyan Convention of 2.3.1815. When on 2.3.1815 the Kandyan Kingdom was ceded to the British by its chiefs and "Bikkus" and the Kandyan Convention was signed by them and on behalf of the British by Governor Sir Robert Brownrigg, the British became the protector and custodian of Buddhism. Due to pressure by the Christian elements this custodianship was whittled down.

The Enactments referred to below, passed during the British era indicate that the theory that the laity cannot touch sanghika property did not prevail even after the British occupation. The Buddhist Temporalities Ordinance from 1889—1931 statutorily provided for

the laymen "to touch sanghika property". The Buddhist Temporalities Ordinance No. 3 of 1889 was an Ordinance "to provide for the better regulation and amendments of temporalities in this Island". These temporalities were sanghika property of the temples. Section 20 of this Ordinance provided that all movable and immovable property and all offerings do vest in the Trustee. The next Buddhist Temporalities Ordinance was No. 17 of 1895. This was an amendment to the Ordinance of 1889 and the main purpose of it also was to vest the temporalities of temples in Trustees. All the previous Buddhist Temporalities Ordinances were amended and consolidated by the Buddhist Temporalities Ordinance No. 8 of 1905. This Ordinance provided for the better control of the temporalities of the temples. The main feature of these Ordinances was that the temporalities of the temples were handed over to the control, solely of laymen and the monks had no place in these Committees. It was the 1905 Ordinance that for the first time brought within the ambit of the word "temple" – The Atamasthana at Anuradhapura and by Section 5 proviso provided for an Atamasthana Committee of six members, one of whom was the high priest for the time being of the Bomaluwa. There was agitation against the Buddhist temporalities being in the control solely of laymen, and certain eminent learned and leading monks of the day, the Maha Nayaka Thero who included the Maha Nayaka Thero of Malwatte Vihare, Asgiriya Vihare, and the eminent and highly respected monk Hikkaduwe Sri Sumangala Thero, petitioned to his Majesty King Edward VII against the control of the temporalities of temples by laymen only, leaving out monks who were the incumbents of these temples. (A copy of this petition was produced in this appeal by the learned Queen's Counsel for the plaintiff-respondent). The penultimate prayer of the petition was as follows:—

No. 3: "That all interference on the part of native headmen who are in Government employment, with the civil or religious rights of priesthood, or the management of temples or Buddhist temporalities, may be absolutely forbidden".

It is due to this agitation that the Buddhist Temporalities Ordinance No. 19 of 1931 was passed. Section 4(1) of this Ordinance provided that—

"The management of the property belonging to every temple not exempted from the operation of this sub-section shall be vested in a person or persons duly appointed Trustee under the provisions of this Ordinance".

Section 10(1) provided that—

The Trustee for every temple which is not exempted from the operation of section 4(1) may be nominated by the Viharadhipathi of such temple”.

Under this section the Viharadhipathi can nominate himself as the Trustee, and in that case he will become the controlling Viharadhipathi of the temple. Under the scheme of this Ordinance it is the Diyawadana Nilame of the Dalada Maligawa, the Atamasthana Committee of the Atamasthanaya partly consisting of a layman, and the Public Trustee a layman, who handled the temporalities of these institutions which are sanghika property. It has been stated by a learned writer, Civil Servant G. W. Woodhouse mentioned earlier as follows:— “It should be observed that there are lay incumbents of certain temples. These are persons, who managed and administered the temporal concerns and who may exercise supervision over the spiritual affairs of such temples: for instance the Diyawadana Nilame is the Chief lay incumbent of the Dalada Maligawa the temple of the sacred tooth relics in Kandy” (1918 – The Ceylon Antiquary – Volume III, Part 111, Page 174 at 176, Note 2).

I have set out the above material to show that an absolute proposition that laymen cannot touch sanghika property is not in accordance with the history of the development of Buddhism in Ceylon, and the history of the management of sanghika property up to the 1931 Buddhist Temporalities Ordinance and up to date. One can agree with the principle that a layman cannot touch sanghika property if it is used in the Buddhist dhamma sense that a layman must not appropriate to himself, misappropriate, or consume sanghika property. A Buddhist will not even drink water from a well in a temple land, will not consume any fruits of the trees in a temple, will not consume the food made sanghika before offering to the monks at a dana (except acolytes or beggars). It has been submitted by counsel for the defendant-petitioner that this case deals with a Viharadhipathiship, a status or an office and not with any property of a temple dedicated to the Sangha, that is sanghika property and that a Viharadhipathiship is not sanghika property.

To support the argument that a layman cannot touch sanghika property several cases have been cited, where the Courts have held that layman cannot appoint a Viharadhipathi, to a temple offered as sanghika. In my view those decisions relied on, which I will analyse and set out below, do not support the principle sought to be

enunciated in this case, that is that, layman cannot appoint a Viharadhipathi. These cases deal with instances in which succession to the incumbency of a temple which is sanghika property have been—

(a) On the rule of sishyanu sishya paramparawa, and (b) on the failure of the paramparawa the succession had been sought to be diverted to a different course of appointment by laymen on the grounds —

- (i) That the line of succession had failed, or
- (ii) That the laymen who set up the temple have a right to make such an appointment.

These cases have held that an appointment cannot be changed into an appointment as in (b) above in that manner in an instance where the temple is sanghika and subject to succession by sishyanu sishya paramparawa rule.

In the case cited as the oldest case on this subject that of (1832) *Eriminne Unnanse* (11) (supra), after the death of Eriminne Unnanse a dispute arose among his pupils regarding the incumbency of the temple. At that stage the villagers interposed and had the plaintiff robed and installed him, they deeming him the rightful heir to the incumbency. On 20.6.1832 the Commissioners of the Judicial Court at Kandy unanimously held "that the succession of the temple in question is and should be regulated agreeably to the law of sishyanu sishya paramparawa". The Supreme Court affirmed this decision on 21st October 1833. In the case of *Ratanapala Unnanse v. Kewitigala Unnanse* (1) (Supra) — the plaintiff claimed to be the incumbent of the Buddhist Temple Kongala Vihare as the sole pupil of the former incumbent Sumangala Unnanse. The defendants while denying that the plaintiff was a pupil of Sumangala Unnanse pleaded that the Vihare had been endowed by the villagers of Kongala and was under the patronage of the latter and that they in the exercise of this right, appointed the second defendant as Sumangala's successor. In appeal Phear, C. J. laid down the four principles extracted from the *Eriminne* case, which have guided the law of succession to temples. The Supreme Court held that in this case the succession to the temple was on the rule of sishyanu sishya paramparawa and that the mode of succession pleaded by the villagers has not been proved and as such the plaintiff was the lawful incumbent of the temple. Among the

principles laid down in this case (quoted above) the principles (2) and (4) set out in this case are vital to the present case before this Court to wit: -

- (2) That there are exceptional cases in which succession to temple property is in the appointment of the Government or even of private individuals.
- (4) That in absence of direct evidence of the terms usage may be looked to and accepted as evidence thereof.

The case of (1881) - *Wellegama Dhamma Jothy Unanse v. Wellegama Sarananda Unanse* (12) (supra) was a claim to the incumbency of a Vihare Talarambe Pansale. The plaintiff's case was that the line of sishya paramparawa succession to the temple got exhausted and that the plaintiff as the tutor of the predeceased incumbent was entitled to succeed him. The defendant monks in the answer alleged that they were put in possession of the pansala, by certain dayakas who originally dedicated the pansala. It was held that after a temple is dedicated in sanghgika the dedicators ceased to have any right or control over it, and that the succession of the incumbency of the temple must be regulated by the well-known principle of sishyanu sishya paramparawa. The defendants were mere trespassers and the plaintiff was the lawful incumbent. In the case of (1910) - *Dharmapala Unanse v. Medagama Sumana Unanse* (7) (supra) - the plaintiff claimed that the line of succession got exhausted and the Maha Nayaka of the Malwatte Vihare to which school the vihare belonged appointed him as the incumbent. The defendant Sumana Unanse claimed title to the incumbency as the duly appointed incumbent elected by the dayakas and the villagers of Malwatte, this being a Vihare fully endowed by their ancestors and with whom alone lay the right of appointment. It was held that this was a sanghgika temple and the original terms of dedication did not provide for the mode of succession alleged by the defendant, as such the succession to this temple is governed by the sishya paramparawa. On the failure of this line of succession the Maha Nayake Thero of the Chapter has the right to appoint a successor. In the case of *Unnanse v. Unnanse* (6) the plaintiff claimed title to the incumbency by sishyanu sishya paramparawa. The defendant stated that the incumbency of the Vihare was to be governed by the rule of succession sishyanu sishya paramparawa, that the temple was a gift of the Dehigama and Giragama families who were entitled to appoint a priest to the vihare on any vacancy, and that the defendant has been appointed by the

Dehigama and Giragama families. De Sampayo, J. held that the defendant has not proved the mode of succession relied on and that the plaintiff was the lawful incumbent on the rule of sishyanu sishya paramparawa. With reference to the claim that the incumbent was appointed by the said two families De Sampayo, J., observed as follows:— "There are no instances to be found in the books of this kind of patronage exercised by private persons, but it is stated in the judgment of the Board of Commissioners who tried the case of *Eriminne Unanse* (11) (See Vander. Rep. Appendix D at p. xlv) that the exceptions to the two rules of succession abovementioned are those temples "which are in the gift of Government or of private individuals. There is no further exposition of the subject". In the case of 159/61(F) – D.C. Colombo. Case No. 8741/L – S.C. Minutes of 12.10.1965 names of parties not given in the caption) – the plaintiffs (laymen) claiming to be the Trustees of Gothami Vihare under a deed of 10th October 1906 marked P1, sued the defendant monks for a declaration that the plaintiffs were entitled to the control, management and administration of the vihare, and for a declaration that the defendants have no right to reside, manage, control or administer the vihare and for ejection of the defendants. It was the case of the plaintiffs that the vihare was not sanghgika property. The claim of the defendants monks was that the vihare was sanghgika property and that the deed P1 was of no avail in law. Abeyesundera, J. held that the vihare was a Buddhist temple *prior* to the execution of Deed P1 of 1906 as there had been a sanghgika dedication of the vihare in 1905. It was held that as such the plaintiffs were not competent to maintain their action for the said declaration.

In the case of *Piyahanda Thero v. Indananda Thero* (18), the plaintiff claimed that the temple was dedicated in sanghgika on a deed of 1936. In 1959 Dhammananda Thero disrobed and he had no pupils. The plaintiff who was a co-pupil of Dhammananda was entitled to succeed to the temple. The case of the defendant Piyananda thero was that he was appointed Viharadhipathi by the Dayaka Sabha as there was no incumbent to the temple. The plaintiff further pleaded that the temple being sanghgika property the dayakas have no right whatsoever to appoint a priest as Viharadhipathi. Bandaranayake, J. held that the temple was sanghgika property and as such the dayakas have no right to appoint a Viharadhipathi and that the plaintiff was the lawful incumbent. Much emphasis was placed on

this case by the plaintiff-respondent, who relied on the principles that laymen cannot touch sanghgika property. The facts of this case show that the temple was established in 1936 and was made sanghgika, that from 1936 succession to the incumbency has been according to the sishyanu sishya paramparawa. In 1960 the dayakas invited the defendant monk to reside in the temple and in 1971 the Dayaka Sabha confirmed the defendant as Viharadhipathi of the temple. Thus, this was an attempt by the Dayaka Sabha to change the mode of succession to the incumbency of this temple, which act of the Dayaka Sabha was held by the Appeal Court to be not in accordance with the rule of succession to the incumbency of that temple.

I have analysed above the cases which were relied on to prove the plaintiff's case, that laymen cannot touch sanghgika property, and its subsidiary rule that laymen cannot appoint a Viharadhipathi to a temple which is sanghgika property. As stated earlier it will be seen that these cases were instances where the dayakas, laymen, asserted a right of appointment to the incumbency when a vacancy arose and made an attempt to change the course of succession which prevailed already according to the rule of sishyanu sishya paramparawa, and the Supreme Court struck down such attempts. There is not a single case where the Supreme Court had dealt with an instance such as in the case before me, where for well over 100 years, but according to the document (D3 of 1908) from the time of Sinhala Kings, the mode of appointment has been firstly by a group of laymen and latterly after 1907 by a group consisting of a layman and monks. It is my firm view that none of the cases referred to above has any application to the facts of the case before me.

In this case before me there is overwhelming evidence that at least from prior to 1843 Minutes of the Government Agent (D5) of 1871 and (D6) of 1881 (See D6 para 2 P.2), that the mode of appointment of Atamasthanadhipathi has been by a group of persons presided over by the head of the Nuwarawewa family as stated in the answer. According to the records available the first monk who was so appointed has been Ipalegama Monk in 1843. Appointments have been consistently made in this manner until the Buddhist Temporalities Ordinance of 1907 and 1931 became law. Thus, after 1907 and 1931 the appointment of Atamasthanadhipathi has been by the Atamasthana Committee, and as pointed out earlier, the plaintiff in the petition of appeal to the Court of Appeal has stated that "appointment by the Atamasthana Committee was of general acceptance". In

considering the validity of this mode of appointment relied on by the defendant, it would be necessary to consider the principles gathered from the *Eriminne Unanse's* case by Phear, C.J. – in the case of *Ratnapala Unnanse v. Kewitigala Unnanse* Page 28, Column 2, Nos. 2 and 45 (supra) which I will repeat again due to its importance –

- (2) There are exceptional cases in which the succession to temple property is in the appointment of the Government or even of private individuals.
- (4) That in the absence of direct evidence, of these terms usage may be looked into and accepted as evidence thereof.

The word "terms" is a reference to "terms of original dedication". Tambiah, J. in the case of *Piyananda Terunnanse v. Sumanajothi Terunnanse* (5) (supra) dealt with a plea by the plaintiff that that temple had a peculiar rule of succession different from the sishyanu sishya paramparawa. While holding that the plaintiff has failed to prove such a plea, Tambiah, J. stated as follows:— "when a person alleges that any other rule of succession other than the aforesaid two rules of succession applies to a temple, the burden is on him to prove that such a rule had been adopted by long usage. Such usage must be certain, continuous and invariable to warrant the conclusion that it was laid down by the founder". Tambiah, J. further referred to the case of *Okandayaye Wangeesa Thera v. Mulgirigala Sunanda Thero* (16) (supra), the leading case of an exception to the rule sishyanu sishya paramparawa and held as follows:— "In that case, however, it was held that it was 'indisputably established by evidence' that the rule of sishyanu sishya paramparawa did not apply and the traditional mode of appointment of an incumbent of that temple was for the Sangha Sabha to make such an appointment". Thus in *Piyananda's case*, Tambiah, J. has held that in considering the succession to the incumbency of a temple the Court can consider whether "long usage" has been proved and also whether a "traditional mode of appointment of an incumbent of that temple" has been proved. As stated earlier in the case of *Moruntuduwe Dhammananda Nayaka Thero v. Baddegama Piyaratana Thero* (4) (supra) T. S. Fernando, J. cited at page 422, the four principles by Phear, C.J. in the old case of *Ratnapala Unnanse v. Kewitigala Unnanse* (2) (supra) and commented as follows:— "these principles have been consistently followed by our courts".

Both parties have admitted that the Atamasthanaya is sanghika property. Replying on this admission the case of the plaintiff is that there is a presumption that succession to the Atamasthanadhipathi was and is by the rule of sishyanu, sishya paramparawa. I have earlier pointed out that this principle has been set out in two ways. One view is that succession to a sanghika temple is governed by the terms of dedication and if such terms are not proved then the presumption is that succession is by the paramparawa rule. Basing my finding even on the plaintiff's case that the Atamasthanaya being sanghika property the succession is by rule of sishyanu sishya paramparawa, I hold that the defendant has led overwhelming evidence to rebut the presumption, and has proved, that at least for a period of over 100 years prior to the date of this action 31.1.1978, i.e., from time immemorial, succession to the Atamasthanadhipathiship has been by usage or by the mode of appointment, or even by custom, as set out in paragraph 8, sub-paragraphs (a), (b), (c) and (d) of the answer. It is difficult for the plaintiff, or should I say not possible for the plaintiff to deny this mode of succession as his own tutor priest from whom he claims title Sri Sumana Rewatha Thero has been so appointed on 1st September 1943 and the predecessor and tutor of Sri Sumana Rewatha thero, i.e., the Pallegama Ratanapala thero has been so appointed in 1908. Thus, even at the time of filing action for at least 70 years this has been the mode of appointment. There is no evidence whatsoever of any other mode of appointment. All evidence points out to the fact that except in one instance, i.e. when Kaluebe Dhammarakkita was appointed in 1863, in all other instances prior to and after 1863, being the senior pupil has been considered as a qualification for appointment. Paramparawa seniority has never been the cause of the appointment. If this seniority was the only reason for succession to the Atmasthanadhipathiship, then there was no reason for the claimant-monks to the post to make importunate applications (D3, D8) to a body of persons headed by the chief of the Nuwarawewa family to get the appointment, and for the Government to approve the appointment. The other qualifications for the post/appointment were that the claimant had to belong to the Malwatta Chapter and the Boraluwa paramparawa.

The plaintiff led the evidence of the Maha Nayaka Thero of the Malwatta Chapter Siri Malwatte Ananda Thero, to prove his case that succession was according to the rule of sishyanu sishya

paramparawa. The evidence of this eminent monk on this subject is inconclusive. The Maha Nayaka Thero was questioned as follows in examination-in-chief—

- ප්‍ර : තමුන්තාන්සේ දන්ත හැටියට ඒ කොමිටියට අටමස්ථානාධිපති කෙනෙක් පත් කිරීමට බලය තිබෙනවාද ?
- උ : එහෙම බලයක් තිබෙන බව මම දන්නේ නැහැ.
- ප්‍ර : කොයි විටියටද අටමස්ථානාධිපති පත්වන්නේ ?
- උ : මගේ දකුණේ හැටියට ශිෂ්‍යානු ශිෂ්‍ය පරම්පරාව ප්‍රධාන ශ්‍රේණියට පත්වීම ලැබෙනවා. මම දන්නා කාලයේ ශ්‍රී මහා බෝධිත් වහන්සේ තැනහොත් බෝමඵවේ කායක ස්ථාමීන් වහන්සේමයි අටමස්ථානාධිපති හැටියට පත්වන්නේ.

(In this paragraph I will use the departmental abbreviation S.L.N.A. for Sri Lanka National Archives as used by the Commissioner of Archives).

There are old documents which show that even at that time the Malwatte Chapter wanted the right of appointment to the Atamasthanadhipathiship vested in the Chapter, but did not consider that the succession to the Atamasthanadhipathiship was according to the sishyanu sishya paramparawa, and also that the then British Government did not admit the opinion regarding the succession expressed by the Malwatte Chapter. A petition dated 28.6.1871 was sent to W. J. Twynan G. A., N. P., from Medagama Maha Nayaka Unanse, Chief Priest and the Anu Nayaka and the other priests of Malwatte Chapter as follows:

“Kaluebbe Chief Priest of Anuradhapura died about May 1870. The practice that existed from ancient times and which was continued up this time, is, that during the Kandyan Government the Maha Nayaka Unanse of the Malwatta Vihara, Kandy *names a fit person to be appointed as Chief Priest of Anuradhapura to the Kandyan King and see him appointed, and during this government also the vacancies which occurred in the Chief Priesthood of Anuradhapura was filled up with the concession of the Chief Priest and other Priests of Malwatte Vihara.....* what we now humbly submit to your honour’s kind and serious consideration is that neither Galagoda Banda Mahatmaya nor Orwilla Kumarihamy have any claim, title, or right of interference whatever in these matters. That there are several other places in the Island equal to Anuradhapura to wit – Mahiyangane, Mutiyangane, Siripada, Dambulla Ridi Vihara and several other places, and no layman had

any right whatever to exercise any power in the election of priests, over any of these places. We have heard that upon representations made to His Excellency the Governor your honour has been requested to make an inquiry which inquiry is fixed for 28th of this month..... Therefore we, your humble petitioners earnestly pray, that your honour will be kindly pleased after inquiry to make an order that the former practice be again resumed and that the body of priests forming the Malwatte Committee be allowed the *election* of a person as hitherto done.

Signed by Maha Nayaka Thero and 26 other monks".
(S.L.N.A. Vol: 11/788).

(The italicising is to emphasise that in this petition it is not at all stated that succession to the Atamasthanadhipathiship was according to the rule of sishyanu sishya paramparawa as alleged by the plaintiff). Of the temples referred to in this petition the mode of succession to Siripada has been referred to earlier in connection with the *Adams Peak case* (15); in the *Siripada case* the Court decided as follows:— "It is necessary to ascertain in whom the right of appointment vested and also in whom the power of removal was vested..... It is sufficient to begin with the time of the later Kandyan Kings. It is quite clear that the Kandyan Kings possessed and exercised the power of appointment..... shows an instance of a high priest of this temple being deprived of high priesthood by King Rajadi Rajasinghe". This case also held that all the prerogative rights over the "Buddhist Priesthood" vested in the British Sovereign, so far as the British Sovereign might think fit to exercise them". The succession to Siripada referred to in the above quoted petition was held by the Court to be an exception to the sishyanu sishya paramparawa rule as succession was by election by a Committee of monks. The documents (D5 of 1871 and D6 of 1881) show that the then British Government did not accept the mode of succession as set out in this petition. Even prior to that the Government Agent Anuradhapura then stationed in the Jaffna Kachcheri, by letter 7th September 1848, in reply to a petition dealing with the election to the Atamasthanadhipathiship commented as follows:— "You will find in the correspondence relative to the election of a priest in 1843, a copy of which is herewith sent that the right of election is in the Nuwarawewa family and the Headman of the district conjointly, and with which the priests of Kandy have not any concern in this matter". (S.L.N.A. Vol: 41/192).

As regards the mode of appointment to the Atamasthanadhipathship, I will now refer to the most authoritative work on this subject an unpublished thesis—

Nuwara Kalawiya and the North Central Province, under British Administration.

1838 – 1900 by Ukku Banda Karunananda— Thesis submitted for the Degree Doctor of Philsophy, University of Sri Lanka, Vidyalanikara Campus, 1977.

(U. B. Karunananda is a Lecturer in History at the Kelaniya University).

(The following abbreviations have been used by this learned Writer—

C.N.A.—Ceylon National Archives.

N.K.—Nuwara Kalawiya).

In Chapter 8—Social Policy and Social Change—

The Buddhist Problem, the learned Writer states as follows:—

“According to the Convention of 1815 the British Government was responsible for the appointment of the Maha Nayakas—the Basnayaka Nilames of Devalas and the temple officials in connection with such matters. The only problem that arose in Nuwara Kalawiya was that concerning the Anunayaka or the Chief Monk of Atamasthanaya”. (Dyke to Col. Secy, 22 Dept. 1864—C.N.A. 41/113)..... a special feature governing the selection of the Anunayaka Unnanse was that the right of selection and dismissal was vested in the Nuwarawewa family, and the inhabitants of the district on such occasions were represented by their Chiefs, the Headmen, and that the Maha Nayaka Thero has no power to intervene in this matter”. (Brodie to G.A., N.P., 15 February 1851—C.N.A. 41/154).

Then the learned author goes into the history of this mode of appointment—

“the first appointment of an Anunayaka after the Kandyan Province came under British rule was probably in 1816—Ipologama Unanse”. (Duke to A.G.A., Nikaweratiya 27 August 1851—C.N.A. 41/91 No. 174—Encl. Circular letter of Col. Secy. 22 August 1851).

It is clear that the selection of the Anunayaka when the office fell vacant was the prerogative of a Committee which consisted of the Chief of the Nuwarawewa family and the headmen as representatives

of the people. The inhabitants of the district were represented by three Rate Mahattayas and 17 Korals. It is not, however, possible to trace the origin of this Committee. According to a statement made by Ratwatta Rate Mahattaya in this connection, the Committee according to tradition had originated during the time of King Kirthi Sri Rajasinha". (Levers to Col. Secy. 18 December 1889—C.N.A. 41/64—Page 580).

To sum up my finding the defendant's case as regards the succession to the Atamasthanadhipathiship by election has been proved. I must state that succession to a Viharadhipathiship has no relation to any Buddhist law, that is the doctrine preached by the Buddha. In Sri Lanka the various modes of succession to an incumbency have been of native origin. The principle that was emphasized in the judgment of the Court of Appeal that layman cannot touch sanghika property is not a valid proposition as a Viharadhipathiship—incumbency is not sanghika property. A temple or any other corporeal or material things offered to monks are offered as sanghika, an abstract concept, status or any incorporeal thing like a Viharadhipathiship is not made sanghika. A Viharadhipathi, head of a temple may or may not be a head of a temple which has been offered as sanghika. The recent White Paper issued—THE REPORT OF THE COMMITTEE TO CONSIDER AND REPORT ON THE EFFICIENT MANAGEMENT OF TEMPLE PROPERTY, November, 1987 states as follows:—

"There are other temples which are controlled by trustees. Accordingly their temporalities are not Sanghika—Maligakanda Pirivena, Vajiraramaya of Bambalapitiya, Sri Visuddharama of Sri Dhamma Mawatha, Colombo 10, are temples which are not Sanghika and not governed by the Buddhist Temporalities Ordinance. There is no difference between such temples as sanghika temples in their functions".

In view of my observations above the mode of succession to the Atamasthanadhipathiship is not contrary to any Buddhist Law or doctrine as preached by the Buddha. There is no reason whatsoever to upset this mode of succession which has come down from time immemorial for at least more than over 100 years.

It was submitted that the monk who succeeds to the Viharadhipathiship of the Bomaluwa is the one who by virtue of that becomes the Atamasthanadhipathi. In the light of the documents in this case this submission cannot be accepted. The right of succession

to the Adhipathiship of the Bomaluwa has been considered only as a qualification to the post of Atamasthanadhipathi. Further, one of the chief duties of the Atamasthanadhipathi is to continue the observances of the ancient religious rites and customs pertaining to the Bomaluwa, really the Uda Bomaluwa. For this purpose the Atamasthanadhipathi has to take up residence in the Bomaluwa. Documents D8 of 3.11.1885 and D3 of 28.12.1908 are two applications "for the post of Atamasthanadhipathi", the Bomaluwa Adhipathiship is not mentioned in those two applications. I hold that the correct position seems to be that the monk who is Atamasthanadhipathi becomes the Viharadhipathi of the Bomaluwa and other seven appurtenant temples of the Atamasthanaaya.

Counsel for the defendant-petitioner strenuously submitted that the Atamasthanadhipathi was an office held by a monk and was not a Viharadhipathiship or as under the Buddhist Temporalities Ordinance (1931) controlling Viharadhipathiship. This submission was opposed by the learned Queen's Counsel for the plaintiff-respondent. An analysis of the relevant documents will help to determine whether the Atamasthanadhipathiship was a post. The documents D8 and D3 are framed as applications. In the document D3 of 28.12.1908 Pallegama Ratanapala Thero states as follows in Sinhala— "අයදුම්කර වූ පල්ලේගම රතනපාල" "Pallegama Ratanapala Thero, applicant". He ends up the letter by stating අටමස්ථානයේ කාරක පදවියට මා පත් කර ගන්නා ගැටියට ඉතා කරුණාවෙන් මෙයින් ඉල්ලා සිටිමි. "Appoint me to the post of Atamasthana Nayaka". In D8 of 3.11.1885 Pahala Talawe Medankara Thero states "අනුකායක පදවියට තෝරා ගැනීම විනිස මල්ලු කර සිටින අයදුම් පත්‍රයයි "Application submitted to select for the post of Anunayaka, Anuradhapura". This application ends up as follows" මෙම ඉල්ලුම්කර උත්තරායේට පත් කර ගන්නා ලෙස මෙයින් ඉල්ලා සිටිමි. "That I the applicant -monk be appointed to the vacant post".

It had been submitted that the Viharadhipathi cannot resign from his post. However, D4 of 1.8.1942 is a letter of resignation from the post of Atamasthanadhipathi addressed by P. Ratanapala Thero Anunayaka. D13 of 19.11.1977 is a letter of resignation addressed by Sri Sumana Rewatha Thero. An application for the post and the resignation from the post are two characteristics of any post. If the succession to the Atamasthanadhipathi devolved by the rule of succession sishyanu sishya paramparawa, there can be no applications for the post of letters of resignation, but succession would come to the senior pupil as of right. Further in every instance of

these letters of resignation the Atamasthana Committee met and accepted the resignation. There are official duties attached to the post of Atamasthanadhipathi in the management of eight Viharas. These erudite monks who made the applications to the post of Atamasthanadhipathi, and have sent letters of resignation undoubtedly considered the Atamasthanadhipathiship as a post. The Maha Nayakaships of Malwatta, Asgiriya, Maha Nayakaship of the Amarapura Sangha Sabha, The Ramanya Sangha Sabha are posts and the holders of these offices are Viharadhipathis of various other temples.

In the Buddhist Ecclesiastical Law as developed in our country, in considering the limitation of an action for a declaration of Viharadhipathiship, it has been held that the Viharadhipathiship is a status—

Terunanse v. Terunanse (19)

Premaratne v. Indasara (20)

Kirikitta Saranankara v. Medagama Dhammananda (21)

Watugedera Amraseehe v. Tittagalla Sasanatilaka (22)

The later (Divisional Bench) Case—

MAPALANE DHAMMAAJA THERO V. ROTUMBA NIMALAJOTHI THERO. (8)

reconsidered the law pertaining to the limitation of an action for a declaration to an incumbency in the light of the Buddhist Temporalities Ordinance (1931). Though this case changed the law pertaining to the limitation of an action it nevertheless went on the basis that a Viharadhipathiship was a status.

The Viharadhipathiship is not a concept known to the Buddhist doctrine as found in the teachings of the Buddha. The Constitution of the Buddhist Monasteries in the time of the Buddha was on an entirely different basis, from that which had developed in our country at a later stage. But even in Buddha's time as the organisation of Monasteries expanded on instruction given by the Buddha, monks were appointed to various offices in the Monasteries to wit—

Civara—Patiggahaka (robe receiver)

Civara—Nidahaka (robe depositor)

Bhandagarika (store keeper)

However, there was no Viharadhipathi for a Monastery, or as in the Buddhist Temporalities Ordinance (1931) a controlling Viharadhipathi. On the material available in this case and after consideration of the organization and structure of the Monasteries in Sri Lanka after the introduction of Buddhism, I hold that Atamasthanadhipathi is an office. As such the rule of sishyanu sishya paramparawa does not prevail in this instance—*Maligakande Case (3)* (supra).

The final matter I will deal with is the construction of the document D13 of 19.11.1977. In the plaint the plaintiff attacked the document D13 on several grounds—vide paragraph 8 (a)–(e). Paragraph 8 (a) specifically stated that D13 “is not a document with the signature of the said Rev. Rewatha Nayaka therō”. At the trial no issue has been raised on this averment, and the evidence clearly shows that the document D13 was not attacked on the basis that it was a forgery. The document D13 was attacked mainly on the ground that at the time Rewatha therō signed it on 19.11.77, he was not in a conscious state to understand the contents of the document. The learned District Judge having carefully considered all the evidence pertaining to document D13 firstly held “that Nayaka therō signed D13 knowingly and having accepted the contents therein”. The learned District Judge also held that assuming the succession was by the paramparawa rule D13 was a valid nomination. The Court of Appeal also held that assuming that the paramparawa rule applied in this instance D13 if a genuine document constitutes a valid nomination of Gnanaratana therō as a successor of Rewatha Nayaka therō. The Court of Appeal posed to itself the question “is D13 a genuine document?”. Then the Court compared the admitted signature of Rewatha therō in D1 with that in D13 and held as follows:—“It bears no resemblance to the other i.e. D13 is not a genuine document”. In coming to this conclusion the Court of Appeal has misdirected itself on several matters. Firstly it has lost sight of the fact that in the trial court, this document was not attacked as a forgery, particularly there was no issue on that matter, and there was no evidence either way. As such, there was no basis for the court in terms of Section 73 of the Evidence Ordinance to compare the signatures and come to a conclusion. There was no material for the Court of Appeal to take that step. Further, the Court of Appeal has emphasised these two matters as against the acceptance of document D13. The Court of Appeal has several times emphasised that document D13 is not in the list of the defendant’s document, whereas this document is listed as No. 10 in that list. The

Court of Appeal held that Jayantha Dissanayake the drafter of this document has drafted D13 in exactly the same manner as D4 of 1.8.1942 has been drafted, and added as follows:—"Jayantha Dissanayake states he looked at old documents only after the institution of these proceedings which was on 31.1.1978. No man could possible divine the contents of D4..... This means Jayantha has probably looked at the documents before he made D13. If so, why does he not admit this?". This is a grievous misdirection on the facts because Jayantha states in examination-in-chief as follows:—"I prepared that document D13. I prepared it according to the manner the old documents have been prepared". Obviously this is a reference to the old document D4 of 1.8.42, the resignation of Ratanapala Thero. I set aside the findings of the Court of Appeal pertaining to D13 and affirm the findings of the learned District Judge that D13 was a genuine document.

For the reasons given above I set aside the judgment of the Court of Appeal. I hold that the defendant-petitioner Pallégama Gnanaratana Thero "is the lawful Atamasthanadhipathi Anuradhapura" and allow the appeal and dismiss the plaintiff's action with costs in all courts. I agree with the conclusion of my brother Atukorale, J., allowing the appeal.

APPENDIX-1

Whereas Kale Ebbe Dharme Rakitte Unanse has been elected by the Headmen and priests of Nuwerekalawiya to be the Chief Priest for the Eight sacred places at Anuradhapura in the District of Nuwerekalawia.

It is hereby declared that the said election of Kale Ebbe Dharme Rakitte Unanse to be Chief Priest of the Eight sacred places at Anuradhapoorā is recognized by the Government.

By His Excellency's Command
Col. Secy.

H. A. G. DE SILVA, J.

I have had the privilege of reading the judgments prepared by my brothers Atukorale, J., and Seneviratne, J., and I wish to state that I am in complete agreement with them and as such the appeal of the Defendant-Appellant should be allowed and the case of the Plaintiff-Respondent dismissed. The Defendant-Appellant will be entitled to costs of this appeal as well as the costs in the Courts below.

Appeal allowed.