SOMARATNE THERO

v.

PANNALOKA THERO AND OTHERS

COURT OF APPEAL.
G. P. S. DE SILVA, J. (President, C/A) AND GOONEWARDENA, J.
C.A. 207/76 (F) SC.
D.C. KALUTARA No. 1886/L.
NOVEMBER 17, 18, 19 AND 21, 1986.

Buddhist Ecclesiastical Law–Succession–Validity of oral nomination of successor–Contumacious conduct.

Although an oral nomination of a successor is valid yet the court must look for corroborative evidence as a counsel of prudence.

A nomination, like any other declaration for which a legal effect is contended must be in clear and intelligible terms so that such terms are capable of being examined for the effect claimed. The testimony available must be as clear and as precise as if they were contained in a written document so that they could be examined to ascertain the intention of the author, else the Court would virtually be abdicating its function of being the ultimate interpreter. Construction is always a matter of law and for the Court.

A mere statement that there was a nomination far from meets the requirements of the case.

The conduct of the 1st to 4th defendants in the circumstances of the case was of a contumacious nature. Their very act of challenging the plaintiff's title amounts to contumacious conduct and they are therefore liable to be ejected from the temple.

Cases referred to:

(1) *Saranankara Unnanse v. Indajoti Unnanse–(1918) 20 NLR 385.*

(2) *Dhammadaja Thero v. Wimalajothi Thero–(1977) 79 NLR 145.*

(3) *Sobitha Unnanse v. Ratnapala Unnanse–(1861) Beven and Siebels Reports 32.*

(4) *Pemananda Thero v. Thomas Perera–(1955) 56 NLR 413.*

(5) *Panditha Watugedera Amaraseeha Thero v. Tittagalle Sasanatilake Thero–(1957) 59 NLR 289.*

(6) *Waharaka alias Moratota Sobitha Thero v. Amunugama Ratnapala Thero–S.C. No. 62/79–S.C. Minutes of 6.4.1981.*

(7) *Siriniwasa Thero v. Wimaladharma Thero–[1985] 2 S.L.R. 40.*

(8) *Dhammananda Thero v. Saddananda Thero – (1977) 79(1) N.L.R. 289.*

APPEAL from judgment of the District Court of Kalutara.

Dr. H. W. Jeyewardene, Q.C. with *L. C. Seneviratne, P.C., Miss T. Keenawinne and K. Wattage for plaintiff-appellant.*

T. B. Dissanayake, P.C. with *Raja Bandaranayake, U. C. D. Ratnayake* and *Hilton Seneviratne* for defendant-respondents.

Cur. adv. vult.

January 29, 1987.

GOONEWARDENA, J.

The claim in this action is to the Viharadhipathiship of a temple called Duwe Deeparamaya situated in the Kalutara district.

The following facts emerge. One Kalutara Ratnapala Thero admittedly was prior to times material the Viharadhipathy of this temple and of two others in the paramparawa namely Anandaramaya and Dharmaramaya. Upon his death, in accordance with the applicable mode, the sisyanu sisya paramparawa, his senior pupil Mahagoda Sumanatissa Thero succeeded to the Viharadhipathyship of all three temples. Mahagoda Sumanatissa Thero had two pupils Wataddara Somaratne the original plaintiff since deceased, admittedly the senior of them, and Benthara Saddhatissa Thero. The temple being exempt from the operation of section 4(1) of the Buddhist Temporalities Ordinance of 1931 but not exempt from the operation of the entire Ordinance and therefore governed by section 4(2), with the coming into operation of such Ordinance the management and the title to the property of the temple became vested in the Controlling Viharadhipathy, Mahagoda Sumanatissa Thero.

The case of the plaintiff was that upon the death of Mahagoda Sumanatissa Thero in 1953 he as senior pupil succeeded him as Controlling Viharadhipathy in terms of the applicable rule of Pupillary Succession. He contended that his co-pupil Benthara Saddhatissa Thero was permitted to remain in the temple till his death in May 1969 after which of his six pupils (i.e. the 1st to 6th defendants) the 1st to 4th defendants denied and disputed his right as such Viharadhipathy to control and manage the temple and its temporalities, thus being guilty of contumacious conduct. The plaintiff therefore asked that as Controlling Viharadhipathy he be declared entitled to the custody and

management of the temple, for an order of ejectment of the 1st to 4th defendants and for damages. Upon his plaint the plaintiff in addition sought certain other reliefs in particular that some properties which Benthara Saddhatissa Thero had allegedly acquired during his lifetime constituted a part of the temporalities of this temple and that Anandaramaya constituted an appurtenant temple and formed part of the temporalities of Duwe Deeparamaya, but these were whittled away by the District Judge in the course of the trial and need not therefore concern us here.

The position of the defendants in the main was that Benthara Saddhatissa Thero had in the year 1929 been orally nominated and appointed as Controlling Viharadhipathy of the temple by Mahagoda Sumanatissa Thero and that he therefore succeeded the latter in 1953. They contended that Benthara Saddhatissa Thero died on 17.5.1969 leaving a Last Will which was duly proved and in terms thereof that the 1st defendant is since such death the lawful Viharadhipathy of this temple and of Anandaramaya.

The principal question before the District Judge was as to the validity and efficacy of the alleged oral nomination of 1929 which he decided in favour of the defendant and dismissed the plaintiff's action. Hence this appeal.

The case of the defendant-respondents as argued before us is not that the nomination of Benthara Saddhatissa Thero which they claimed took place in 1929 had immediate effect (a position not tenable in law) but that such nomination became effective only upon the death of his tutor Mahagoda Sumanatissa Thero in 1953. It must be pointed out here that according to the documents 6D4 and 6D5 declarations made in March 1932 as required by section 41 of the Buddhist Temporalities Ordinance of 1931 by Mahagoda Sumanatissa Thero and Benthara Saddhatissa Thero respectively, whereas the permanent residence of both are given as Duwe Deeparamaya, the temple in question, the residence at the time of declaration given by the latter is this same temple but that given by the former is Anandaramaya. This tends to show that Mahagoda Sumanatissa Thero was at that time not in residence at the Duwe Deeparamaya temple, but in the Anandaramaya temple also belonging to this paramparawa. It would appear then that Mahagoda Sumanatissa Thero considered Duwe Deeparamaya as his place of

permanent residence, and though living at Anandaramaya in 1932, according to the case presented moved into Dharmaramaya where he functioned as Viharadhipathy till his death. Two questions arise then, firstly in what capacity did Benthara Saddhatissa Thero figure in the Duwe Deeparamaya temple and having regard to what I have already said secondly, whether anything took place in 1953 at Sumanatissa Thero's death which brought about a change in the capacity of Saddhatissa Thero's residence. With respect to the first question, if as is the case of the defendants the nomination claimed did not become effective till Mahagoda Sumanatissa Thero's death, necessarily up to that time he (Sumanatissa Thero) was the lawful Viharadhipathy and Saddhatissa Thero was not, it not being possible for them to have held that office jointly (*Saranankara Unnanse v. Indajoti Unnanse* (1). What then was the character of Saddhatissa Thero's residence up to the time of Sumanatissa Thero's death? The evidence, documentary and otherwise, suggests that he had been performing all the functions of Viharadhipathy and was treated as such by others, both members of the public and members of the priesthood. But the question remains what did that make him. The answer in my view will form a guideline to the correct evaluation of much of the evidence in the case.

In *Dhammadaja Thero v. Wimalajothi Thero* (2) upon an examination of the judgment of Gunasekera, J. (at page 197) one finds that as far back as 1861 the distinction between de facto and de jure with respect to trustees, seems to have been recognised. (*Sobitha Unnanse v. Ratnapala Unnanse* (3)). A similar distinction with respect to incumbent is referred to by Gunasekera, J. (at page 188) in a citation from Woodhouse – Pupillary Succession as follows:

> "A priest is entitled to be declared an incumbent de facto of a Vihare, provided that his right thereto is superior to the party or parties litigating with him and that the incumbent de jure does not intervene or otherwise assert his title to such incumbency."

Although these statements were with reference to a time prior to the Buddhist Temporalities Ordinance of 1931 when the temporalities were vested in lay trustees, one finds that subsequent cases show that this distinction has been recognised up to present times. As examples we find the cases of *Pemananda Thero v. Thomas Perera* (4) and *Panditha Watugedera Amaraseeha Thero v. Tittagalle Sasanatilake Thero* (5). Indeed in *Pemananda Thero v. Thomas Perera (supra)* (4) Sansoni, J. suggested (at page 416) as a probable

rationale for the change brought about by the Ordinance of 1931 in the definition of 'Viharadhipathy' to the effect that he is the principal bhikku "whether resident or not", that "a priest can be an incumbent of more than one temple", a situation of relevance to the case before us. It is possible then without much exertion to conclude upon the evidence that that was what Benthara Saddhatissa Thero was, a de facto Viharadhipathy of this temple while the de jure Viharadhipathy, Mahagoda Sumanatissa Thero was living and officiating as Viharadhipathy at Dhammaramaya temple and if one keeps this in mind it becomes in my view unnecessary to deal with the aspect of the evidence pertaining to the period between the alleged nomination in 1929 and the time of Saddhatissa Thero's death in 1953, all of which becomes compatible with this position. The evidence does not disclose that anything took place upon Sumanatissa Thero's death in 1953 other than the fact that his tenure of Viharadhipathyship terminated with such death, nor is such claim made. The pivot on which the case of the defendants was made to rest is the nomination which they claimed took place in 1929 regarding which if they fail, their case too must necessarily fail. Since in the year 1929 what was in force was the Buddhist Temporalities Ordinance No. 8 of 1905, if in fact Sumanatissa Thero made a nomination as claimed, such nomination would have been with respect to the position obtaining under such Ordinance and his intention would then have been that Saddhatissa Thero was to have the rights and privileges he himself was then enjoying under that Ordinance. It would therefore be useful to refer to certain aspects of the position under such earlier Ordinance and the changes brought about by the Ordinance of 1931. Under the Ordinance of 1905 by virtue of section 20, all property of temples was vested in lay trustees of such temples to be held and used in accordance with the provisions of that section. The presiding officer of a temple (as the expression was sometimes used) was called an 'incumbent' which term was defined in section 2 to mean the chief resident priest of the temple. Samarakoon, C.J. in the case of *Waharaka alias Moratota Sobitha Thero v. Amunugama Ratnapala Thero* (6) S.C. No.62/79 S.C. Minutes of 6.4.1981 a decision of a Bench of 5 Judges of the Supreme Court, stated that this definition was wide enough to include both the Viharadhipathy if he was resident in the temple and the chief resident priest officiating on his behalf (if he was not) the latter being known as Adhikari. The Ordinance of 1931 brought about a change in the nomenclature of the presiding officer who was thereafter called the 'Viharadhipathy' and defined to mean

(by section 2) the principal Bhikku of a temple whether resident or not. Samarakoon, C.J. in the same case said with respect to such functionary that he carried with him all the powers accruing to that office and that the chief resident monk (Adhikari) was in fact merely an agent of the Viharadhipathy resident elsewhere. He pointed out that by section 20 of that Ordinance title to all temple property was vested in the Viharadhipathy or trustees appointed by such Viharadhipathy.

Temples subject to this Ordinance are governed by section 4(1) or section 4(2). If governed by section 4(2) the management of the property is vested in the Viharadhipathy who then is termed the 'Controlling Viharadhipathy'. If governed by section 4(1) such management is vested in the trustee who is nominated by the Viharadhipathy (section 10(1)) who had the power to nominate himself (section 11(1)). In the latter event where a Viharadhipathy of a temple subject to the provisions of section 4(1) nominates himself as trustee in my view he holds both offices of Viharadhipathy and Trustee rather than as has sometimes been suggested the office of the Controlling Viharadhipathy (which can exist only in respect of temples governed by section 4(2)).

The legal positions before and after the 1931 Ordinance are set out to focus attention on the aspect that at the time of the alleged nomination in 1929 the change brought about by such Ordinance could not have been in the contemplation of Sumanatissa Thero. If in fact such nomination took place in 1929 as claimed, it seems to me in the highest degree probable that Sumanatissa Thero particularly having regard to the important changes brought about by the legislation of 1931 would have reiterated what he did in 1929. Instead, the evidence suggests a total silence by him up to the time of his death about 25 years later, a silence I find difficult to understand except upon a hypothesis that no nomination as claimed in fact took place in 1929.

Dr. Jayewardene for the appellant suggested at the hearing that there should be a rethinking on the question whether oral nominations of the kind claimed, having regard to the development and present state of the law, are adequate to achieve the desired object when examined against the provisions of the Prevention of Frauds Ordinance. He contended that any such nomination when it becomes effective involved a transfer of immovable property and thus nothing short of a notarially attested document would suffice.

As I have pointed out already the nomination in question is said to have taken place at a time when the old Ordinance of 1905 was in operation and the temple property was vested in lay trustees. One can see then that this contention need not be examined although if such contention be sound an obvious question arises whether even if there was a nomination in 1929 as claimed, subsequent legislation in 1931 (whereby the temporalities of the temple became vested in the Viharadhipathy Sumanatissa Thero) had any and if so what effect on such nomination. However for reasons which will presently become clear I do not propose to go into this question here.

In the case of *Siriniwasa Thero v. Wimaladharma Thero* (7) G. P. S. de Silva, J. took the view that an oral nomination of the kind claimed here is valid in law. I will now proceed to consider whether as contended by Mr. Dissanayake for the respondents the evidence is sufficient to support such a finding or whether on the contrary as contended by Dr. Jayewardene for the appellant the inference drawn by the trial judge from the evidence available to him that there was a valid nomination was erroneous and showed clearly that he misdirected himself. It would do well here to keep in mind the caution suggested by G. P. S. de Silva, J. when he said (at page 46):

> "Needless to say, a court would naturally view an alleged oral appointment with circumspection and as a matter of prudence may well look for corroboration before acting upon it".

The principal evidence relied on to establish such a nomination is that of witness Kalamulle Sugathadeera Thero. His evidence was in essence a bare statement that at a foundation stone laying ceremony which in his recollection took place around 1929 Mahagoda Sumanatissa Thero made this nomination in the hearing of the persons assembled including himself. Apart from this bald statement I see nothing in the evidence in elaboration thereof and I find myself hard put to accept that this is the kind of evidence that G. P. S. de Silva, J. had in mind as being sufficient to establish such oral nomination. As can be seen from what I have just stated, even with respect to the year in which this nomination is said to have been made the evidence is vague and the witnesses unsure and it is important to note that his evidence suggested that such nomination was with respect to Duwe Deeparamaya temple only and did not include Anandaramaya. Mr. Dissanayake contended that it would be unrealistic to expect the witness after so many years to recollect the terms in which such

nomination was made but if that be so, to my mind it is equally so to expect that evidence such as this would if properly examined be thought adequate to deflect the succession away from the senior pupil so as to disturb the normal rule. A nomination, like any other declaration for which a legal effect is contended must be in clear and intelligible terms so that such terms are capable of being examined for the effect claimed. That would be the case with respect to a written document which by its nature becomes capable of being scrutinized and interpreted and I can see no logical basis for saying that when any nomination is made orally it would suffice merely to say that there was a nomination, as in this case. Indeed the danger then would be that anyone testifying that he heard such oral nomination, even if speaking the truth could well have misunderstood what was said and his mere assertion that there was such a nomination if accepted would then lead to serious error. By way of illustration of the possibility of such error reference may be made to the aspect of Sugathadeera's evidence which can be interpreted in different places to mean that such nomination was to take effect immediately, as well as upon the death of Sumanatissa Thero. Such confusion (if confusion it be) there may well have been, if for instance the statement alleged to have been made by Sumanatissa Thero was that he merely intended to nominate Saddhatissa Thero in the future rather than that an immediate nomination was made to take effect upon his death. Again it could well have been the case that such nomination was one to take effect immediately, only to the office of Adhikari (in the sense in which the word was used by Samarakoon, C.J.) as he (Sumanatissa Thero) was intending to take up residence in another temple of the paramparawa as in the event he did. These possibilities are set out here not as an exercise in conjecture but rather to show the danger of permitting Sugathadeera to be the interpreter of what Sumanatissa Thero intended, without the Court being able to judge whether Sugathadeera's inference as to such intention was correct or not; his mere statement that there was a nomination being the only evidence available. To my mind when an oral nomination is sought to be given effect to the terms of such nomination upon the testimony available must be as clear and as precise as if they were contained in a written document, so that they could be examined to ascertain the intention of the author, else the Court would virtually be abdicating its function of being the ultimate interpreter. A mere statement as here that there was a nomination in my view far from meets the requirements of the case. G. P. S. de Silva, J. as I pointed out earlier referred to the

counsel of prudence that would call for corroboration before acting upon an oral nomination. In my view that corroboration, while not met by the large volume of evidence led in this case, had to be with respect to the fact that such nomination was in fact made. Apart from the evidence of the 6th defendant which I will be presently referring to the other evidence is capable of being interpreted as merely suggesting that Saddhatissa Thero was de facto Viharadhipathy of the temple or what Samarakoon, C.J. in the case earlier referred to called the chief resident monk or Adhikari who was merely the agent of the Viharadhipathy (Sumanatissa Thero) resident elsewhere.

The evidence of Godamune Sangarakkitha Thero the 6th defendant was that the information he had about the nomination in 1929 was obtained by him from his tutor (Saddhatissa Thero). His testimony was that the nomination was made in 1929 in respect of all three temples a position at variance with the evidence of witness Sugathadeera and of the case set up by the defendant which did not include any claim to the Viharadhipathyship of the Dharmaramaya temple. This is the only evidence which could have been thought to be corroborative, if in the event it was, but to my mind having regard to its contents it tends to have the opposite effect.

The District Judge has been strongly influenced by the testimony of Rev. Sugathadeera Thero who he states heard Sumanatissa Thero's announcement that he was nominating and appointing Saddhatissa Thero as the Viharadhipathy of this temple. As I pointed out earlier there are no clear and direct words on these lines in his evidence and what the District Judge has stated has to be an inference from what the witness stated, if inference it can correctly be called. It is my view that the District Judge should have analysed the evidence upon this most important aspect of the case before coming to the conclusion he did, something which I think he failed to do. Instead he has gone on to consider the other evidence and decided that that evidence was corroborative of the testimony relating to the nomination in 1929. In doing so he appears to have lost sight of the fact that up to the time of Sumanatissa Thero's death in 1953, Saddhatissa Thero was only the chief resident monk and in that capacity came to be handling the affairs of the temple, a character that did not change subsequent to 1953, whatever he or anyone else (including the plaintiff) did or said or others thought or said of him. In considering that the documents produced supported the evidence of Rev. Sugathadeera Thero that there was a nomination in 1929, I am of the view that the District

Judge misdirected himself. I think that the evidence of Sugathadeera Thero and of the 6th defendant, even if taken as true, is inadequate to establish an oral nomination of Saddhatissa Thero in 1929 (the burden of which was on the defendants) and that the District Judge has answered the relevant issues wrongly thus leading himself to the conclusion he reached. The relevant issues therefore must be answered in favour of the plaintiff so that the finding will be that upon the death of Sumanatissa Thero in 1953 the plaintiff as senior pupil succeeded him as Viharadhipathy of the temple in accordance with the sisyanu sisya paramparawa rule of succession.

One other matter may be adverted to. Mr. Dissanayake contended that an appellate tribunal should be slow to interfere with findings of fact reached by a trial Court, a proposition which in general one cannot quarrel with, but in this case there is to that a short answer to be gathered from what I have already said but may be re-stated although in somewhat different terms with respect to this contention. Whether and if so what Benthara Saddhatissa Thero said in 1929 were no doubt questions of fact to be decided by the District Judge upon the evidence and for that purpose the testimony of witness Sugathadeera Thero was of the utmost importance. The legal effect of what was said by Benthara Saddhatissa Thero however is in my view entirely a question of law also to be decided by the Trial Judge, but unaided by the witness. Construction is always a matter of law and for the Court. The evidence was no more than a bare assertion that there was a nomination so that without further evidence as to what in fact was said on that occasion the District Judge had no material on which to decide this question of law as to such legal effect. In holding therefore that there was a valid nomination in 1929 upon this evidence, the District Judge merely adopted the conclusion reached by witness Sugathadeera Thero and in so doing in reality surrendered his function of deciding such legal effect to the witness. The District Judge I think then committed an error of law on this most vital aspect of the matter which clearly cannot be allowed to stand.

There is no evidence upon which the relief prayed for in paragraphs *b, c* and *e* of the prayer to the plaint can be granted but there can be no doubt that the conduct of the 1st to 4th defendants in the circumstances of the case was of a contumacious nature (their very act of challenging the plaintiff's title in my view amounting to such conduct) and that they are therefore liable to be ejected from the temple.

The plaintiff-appellant died during the pendency of this appeal and the order for substitution of the substituted plaintiff-appellant was made by this Court on 2.8.85 on the admitted basis that he was the senior pupil of the deceased plaintiff-appellant. This was an order made in terms of section 404 of the Civil Procedure Code (*vide Dhammananda Thero v. Saddananda Thero* (8)).

The judgment and decree of the District Judge are therefore set aside and the substituted plaintiff-appellant is declared the controlling Viharadhipathy of the Duwa Deeparamaya temple described in the plaint and thus entitled to the control and management thereof. The 1st to 4th defendants will be ejected from this temple and the substituted plaintiff-appellant will be restored and quieted in possession thereof. The 1st to 4th defendants will pay the substituted plaintiff-appellant costs both here and in the Court below.

G. P. S. DE SILVA, J. – I agree.

Appeal allowed.