

1966 Present : Sri Skanda Rajah, J., and Manicavasagar, J.

W. A. RATWATTE, Appellant, and A. BANDARA
and another, Respondents

S. C. 202/61—D. C. Badulla, 13686/M

Buddhist ecclesiastical law—Ruhunu Kataragama Maha Devale—Claim by a person to be hereditary Maha Kapurala thereof—Burden of proof.

Appeal—Fresh evidence—Circumstances when reception of fresh evidence may be justified.

(i) Plaintiff sued the Basnayake Nilame of the Ruhunu Kataragama Maha Devale for a declaration that he was a duly appointed Kapurala of the Devale on the footing that his father (added defendant) was the hereditary Maha Kapurala who, according to custom, had the right to appoint subordinate Kapuralas and in the exercise of that right appointed the plaintiff as Kapurala on May 1, 1955. He alleged that the defendant refused to recognize his appointment and prevented him from functioning as a Kapurala.

Held, that the burden of establishing that the added defendant had the right to appoint the plaintiff a Kapurala was on the plaintiff.

(ii) Reception of fresh evidence in a case at the stage of appeal may be justified if three conditions are fulfilled, viz., (1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive, (3) the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible.

APPPEAL from a judgment of the District Court, Badulla.

H. V. Perera, Q.C., with *H. W. Jayewardene, Q.C.*, *C. R. Gunaratne*, *A. H. E. Molamure* and *L. C. Seneviratne*, for 1st Defendant-Appellant.

C. D. S. Siriwardene, with *B. Bodinagoda* and *Miss A. P. Abeyratne*, for Plaintiff-Respondent.

W. D. Gunasekera, with *W. S. Weerasooria*, for 2nd Defendant-Respondent.

Cur. adv. vult.

October 8, 1966. SRI SKANDA RAJAH, J.—

At the outset I would express my regret for the delay in setting down the reasons for the decision. It was mainly due to my having had to deal with three very long trials of election petitions and to my participating in some rather long Divisional Bench Appeals.

The plaintiff-respondent Adikaram Bandara filed this action against W. A. Ratwatte, the then Basnayake Nilame of the Ruhunu Kataragama Maha Dewale, for a declaration that he was a duly appointed Kapurala of the Dewale on the footing that his father Manis Appu, who was later added as defendant, was the hereditary Chief Kapurala, and who, according to custom, had the right to appoint subordinate Kapuralas and in the exercise of that right appointed the plaintiff as Kapurala on 1.5.1955. He further alleged that the defendant refused to recognize the said appointment and prevented the plaintiff from functioning as a Kapurala and claimed damages.

The defendant contested this claim and the right or power of Manis Appu to make such appointments.

After a very lengthy trial the learned District Judge entered judgment for the plaintiff declaring that—

- (a) there is an office of Maha Kapurala ;
- (b) the office of Maha Kapurala devolved by hereditary succession ;
- (c) the added-defendant Manis Appu is the holder of the office of Maha Kapurala ;
- (d) the added-defendant, by virtue of the office, is entitled to appoint and dismiss subordinate Kapuralas ; and
- (e) the plaintiff is a duly appointed Kapurala.

The defendant appealed. He died pending appeal and S. L. Ratwatte, the defendant's successor in office as Basnayake Nilame, was substituted.

The real issue in this case is whether Manis Appu had the right to appoint the plaintiff a Kapurala. The burden of establishing was clearly on the plaintiff. That appears to have been lost sight of by the learned District Judge ; for, he said, " The first defendant has failed to prove by any convincing evidence of any instance where the Basnayake Nilame had appointed a Kapurala to this Dewale ". In expressing himself thus he was misplacing the burden on the first defendant. Had he not approached the evidence in this case in this way he would have come to a different conclusion.

Chief Justice Howard's remarks in *The King v. Wegodapolu*¹ made in respect of an inordinately lengthened trial would apply with equal force to this trial in which the real issue was clouded by its inordinate length.

The document ID17 of 6.7.1951, to which the plaintiff was an attesting witness, would go to show that Basnayake Nilame Rambukpotha suspended Kapurala Solomon Appuhamy on a complaint by the Maha Kapurala (i.e., Manis Appu) on 13.4.1951 and reinstated him on 6.7.1951.

¹ (1941) 42 N. L. R. 459 at 469.

If Manis Appu had the right that is claimed in this case it is inconceivable that he would have complained in writing to the Basnayake Nilame against Solomon Appu instead of dealing with the latter himself.

The evidence of M. F. A. Fernando, Head Clerk, Buddhist Temporalities, Public Trustee's Office, is that after Rambukpotha, Basnayake Nilame, died an election was held and W. A. Ratwatte (the original defendant) was elected. One of the contestants at that election was the plaintiff. Thereafter, the plaintiff, his father Manis Appu and Mr. Advocate Suntheralingam interviewed the Deputy Public Trustee. Fernando himself was present at that interview. Their complaint was that the first defendant (W. A. Ratwatte, Basnayake Nilame) had refused to appoint Bandara (the plaintiff) as Kapurala. (This interview was on 19.5.1955 after W. A. Ratwatte's election as Basnayake Nilame.)

Manis Appu, in his evidence, admitted that he did not tell Mr. Suntheralingam that he had the right to appoint Kapuralas. Also he said, "This is the first time I have made an appointment of a Kapurala in writing. That is by letter P4. I gave the writing to be in evidence of the appointment in view of the dispute that has arisen with the Basnayake Nilame". He further said, "I went to the first defendant's Walawu and asked him to give me the place of Maha Kapuralaship On several occasions I went to him".

If Manis Appu was Maha Kapurala by hereditary right and custom what was the need for him to ask the Basnayake Nilame (the first defendant) for that post?

If the learned Judge had not misplaced the burden on the first defendant but had given due weight to the pieces of evidence I have just referred to he would have dismissed the plaintiff's action with costs.

The question of the admission of fresh evidence at the hearing of this appeal may now be referred to, though the above reasons are sufficient to support the decision we reached, viz., that the appeal should be allowed with costs and plaintiff's action dismissed with costs.

After appeal was filed in this case—but before the original defendant, W. A. Ratwatte, died—the added-defendant Manis Appu, presumably encouraged by the success in this case, filed Case No. 2163 D. C. Badulla against one T. R. Charlis Appu and W. A. Ratwatte, Basnayake Nilame, claiming that he, Manis Appu, was the holder of the office of Maha Kapurala of the Ruhunu Kataragama Maha Dewale, that he had in that capacity appointed Charlis Appu as a subordinate Kapurala and the appointment was terminable at his will and further claiming that he, Manis Appu, had the right to officiate as Kapurala during the Esala season.

The two defendants filed answer denying the existence of a hereditary office of Maha Kapurala and that the Basnayake Nilame had appointed Charlis Appu as Kapurala of the Dewale as he was lawfully entitled to.

At the trial the following issues were, *inter alia*, raised :—

28. Is the right to appoint Kapuralas a right belonging to plaintiff as Maha Kapurala ?

29. If so, was the appointment of first defendant (Charlis Appu) contrary to custom and irregular ?

During the course of the trial W. A. Ratwatte died and S. L. Ratwatte, his successor in office as Basnayake Nilame, was substituted.

While the trial was proceeding certain documents were discovered in the possession of one M. N. Rambukpotha, the son of a former Basnayake Nilame. One of them was a letter written by Manis Appu on 16.11.1938 to the then Basnayake Nilame G. B. Katugaha (marked D155 in D. C. 2163) and another (D156) notes of inquiry held by the Public Trustee in 1945 at which Manis Appu stated that Basnayake Nilame Katugaha dismissed certain Kapuralas and appointed others as Kapuralas and a third was letter (D195) by which the Basnayake Nilame appointed one Munasinghe to function as Kapurala for the month of Nawana (February-March) in 1946.

That action was dismissed and Manis Appu has appealed.

We decided to receive same in evidence for the reasons set out below.

In *Ramasamy v. Fonseka*¹ Weerasooriya, J., following the decision reported at page 74 in ¹*Balasingham's Notes of Cases*, held that fresh evidence would not be permitted to be adduced in appeal unless it is of a decisive nature ; it must be such that, on a new trial being ordered, it would almost prove that an erroneous decision had been given. It may be observed that the admission of these documents in D. C. 2163 proved to be decisive against Manis Appu, who claimed the very same right in that case, and through whom this plaintiff claimed to have derived the office of Kapurala.

In *Ladd v. Marshall*² Denning, L.J., said, " In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled : first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial : second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive : third, the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible ".

Basnayake Nilames are elected. Therefore, they may not be aware of the existence of relevant documents in the possession of their predecessors or elsewhere. D155 was with the son of the former Basnayake Nilame.

The three conditions enumerated by Denning, L.J., are fulfilled.

Manis Appu was questioned (in D. C. 2163) as to whether he wrote the letter (D155) to the then Basnayake Nilame Rambukpotha. He attempted to disown it, but, ultimately admitted, " This is like my

¹ (1958) 62 N. L. R. 90.

² (1954) 3 A. E. R. 745 at 748.

signature". His subsequent evidence regarding one of the Kapuralas, viz., Theris, suffering from parangi, to which disease D155 makes reference, makes it highly probable that he wrote this letter (D155). If he had the right and power in accordance with custom, as alleged both in this case and in D. C. 2163, to appoint and dismiss Kapuralas at his will and pleasure he would not have written D155 to the Basnayake Nilame.

In D156 (in 1945) Manis Appu admitted to the Public Trustee in the presence of the First Accountant, Public Trustee's Office, that the Basnayake Nilame Katugaha dismissed some of the Kapuralas and appointed five other Kapuralas, with whom he was prepared to co-operate.

These three documents go to fortify the decision reached independently of them.

MANICAVASAGAR, J.—

The issue which has to be determined in this action relates to the claim of the plaintiff that he is the duly appointed Kapurala to the Kataragama Devale: his appointment is derived from his father, the added defendant, who he says holds the office of Maha Kapurala to the Devale, and according to the custom, coming down from time immemorial, he alone has the right to appoint Kapuralas to the temple.

An essential characteristic to a claim such as this is the enjoyment, as of right, *nec vi nec clam nec precario*, without interruption, of the alleged custom, and without acknowledgment or acquiescence of that right in another, for such a length of time, sufficient in the opinion of the Court to infer as a fact that the custom has existed for a substantial period.

The onus of establishing this is on the plaintiff who relies on its existence. Even assuming that the added defendant holds an office bearing the designation, Maha Kapurala to the Devale, by *right of hereditary succession*—I consider the quality of the evidence relating to this falls quite short of the standard of proof that a Court requires—the plaintiff's action must fail; he has not discharged the burden of proving the existence of the custom he claims: not only is the oral evidence, which consists in the main of the evidence of the added-defendant, who is keenly interested in the success of this suit, not weighty enough to rely upon, but the documentary evidence produced at the hearing in the original Court, and in appeal establishes that the Basnayake Nilame has in the past exercised the right to appoint, and to take disciplinary action against Kapuralas, and the added-defendant has himself acquiesced, without demur, in the act of the Basnayake Nilame, until the present dispute arose.

I agree with the reasons stated by my brother for the order we made at the conclusion of the argument, allowing the appeal, and dismissing the plaintiff's action, and the cross-appeals with costs.

Appeal allowed.