1937

Present : **Soertsz J.**

MAHA NAYAKA THERO, MALWATTA VIHARE *v.* REGISTRAR-GENERAL *et al.*

In re Application for a Writ of Mandamus.

Buddhist Temporalities Ordinance—Expulsion of Buddhist priest from the Order—Application to remove his name from the register—Refusal by the Registrar-General—Ordinance No. 19 of 1931, s. 41 (5).

The Registrar-General is under a legal duty under section 41 (5) of the Buddhist Temporalities Ordinance, No. 19 of 1931, to remove the name of a Buddhist priest from the register on being required to do so by the Maha Nayaka on the ground that the priest has been expelled from the Order.

The section contemplates the total removal of a name and not merely a modification of the details set out in the form.

The Supreme Court will not exercise its discretion to issue a writ of *mandamus* where it is not convinced of the propriety of the motives of the applicant.

ON February 14, 1934, a public meeting of the beneficed Bhikkus of the Malwatta Fraternity resident in the Ratnapura District was held at Pelmadulla and it unanimously elected Urapola Ratnajoti Thero, the intervenient, to be the Viharadhipati of Sripadasthana. On February 18, another meeting which was held at Kiriella elected Morontuduwe Dhammananda Thero to be the Viharadhipati. The former officiated in that office from June, 1934. On a complaint made by Dhammananda Thero, the Maha Nayaka Thero of Malwatta Vihare, the petitioner, summoned Ratnajoti Thero to attend a meeting of the Maha Sangha Sabhawa on August 27, 1934. The intervenient refused to submit to the jurisdiction of this tribunal. On May 26, 1935, he was informed that he had been expelled from the Sangha by the Maha Sangha Sabhawa which inquired into his conduct in his absence.

On May 29, 1935, the Maha Nayaka Thero wrote to the Registrar-General that he had removed Ratnajoti Thero's name from his register and requested the Registrar-General to make the necessary modification under section 41 (5) of the Ordinance. This request was not complied with, a similar request was made on October 12, 1936, with the same effect. In January, 1937, he asked for a writ of *mandamus* on the Registrar-General.

On February 23, 1937, Ratnajoti Thero prayed to be allowed to intervene. He submitted an affidavit which questioned the motives underlying the application of the Maha Nayaka Thero.

H. V. Perera (with him *J. R. Jayewardene, Muttucumaru,* and *Gooneratne*) in support of the petition.—Section 41 of the Buddhist Temporalities Ordinance, No. 19 of 1931, requires a register to be kept by the Registrar-General and the Maha Nayaka. Further it provides that the Maha Nayaka must make the necessary corrections to keep it up to date. The intervenient was expelled on May 6, 1935, and the Registrar-General refused to alter his register. This is a test case, because bhikkus are expelled from the Order for misconduct.

[SOERTSZ J.—What happens if the Registrar-General does not modify ?]

The register is *prima facie* evidence of the facts contained therein. In view of the fact that some people masquerade as bhikkus, those bhikkus whose names do not appear in the register could be prosecuted under

section 42. The Maha Nayaka, himself, is liable if he does not perform his duties. The Ordinance does not say how a bhikku ceases to be one. It has nothing to do with the ecclesiastical laws. The Registrar-General does not say that expulsion is one of the ways of ceasing to be a bhikku. He has quite rightly modified the register with regard to deceased bhikkus.

The Registrar-General is not required to make any inquiries to the correctness of the decision of the Maha Sangha Sabhawa which expelled the intervenient. (*Attadassi Unnanse v. Rewata* .[1]) The intervenient says that he did not subject himself to the jurisdiction of the Maha Sangha Sabhawa and he cannot be disrobed except on his own voluntary will. (*Dharmarama v. Wimalaratna*[2].) He can take appropriate proceedings if he is dissatisfied with the decision of the tribunal.

Counsel cited Woodhouse on *Sissiyanu Sissiya Paramparawa, pp. 19, 22.*

Wijewardene, S.-G. (with him *Basnayake,* C.C.), for the Registrar-General.—Under section 41 of Ordinance No. 19 of 1931, an Upasampada Bhikku sends a form in duplicate countersigned by his Nayaka Thero to the Registrar-General. A Nayaka Thero may be the leader of ten or twelve priests. There is no office as Nayaka Thero or Maha Nayaka Thero known to Buddhist ecclesiastical law, which recognizes only Upasampada Bhikkus and Samaneras. The Registrar-General sends one of the forms to the Nayaka Thero. The Registrar-General has to make the forms into a bound volume. This bound volume corresponds to the Lekam-mitiya of the olden days. It is a mere collection of forms giving the names of the bhikkus, the dates of robing, the dates of ordination. When a person ceased to be a bhikku no entry was made to that effect in the Lekam-mitiya.

The register kept under the Ordinance also does not provide for such an entry. Section 41 (5) provides only for corrections, additions, and alterations. Obviously the word "alterations" has a very restricted meaning, as otherwise the Legislature would not have included "corrections" and "additions". With this restricted meaning "alteration" cannot connote "deletion".

[SOERTSZ J.—Then what is meant by keeping the registers up to date ?]

The registers are kept up to date by making the necessary corrections, additions, and alterations in respect of the particulars mentioned in the forms. The form does not provide for an entry to be made when a bhikku disrobes himself.

Moreover, the Nayaka or Maha Nayaka cannot compel the Registrar-General to make the alterations. There is a duty imposed on the Registrar-General but there is no corresponding right in the Nayaka Thero to compel the Registrar-General to perform that duty.

To interpret section 41 as making it obligatory on the Registrar-General to remove the name of a bhikku from his register at the request of the Nayaka Thero against the wishes of the bhikku concerned, will place the bhikkus in a dangerous position. A Nayaka dissatisfied with a particular bhikku may report him to have ceased to be a bhikku and the Registrar-General will then have to remove his name. The bhikku cannot then hold himself out as a bhikku, for if he does so he makes himself liable to be charged under section 45. Such an interpretation will lead to results

[1] *(1928) 29 N. L. R. 361.*

[2] *(1913) 5 Bal. Notes. 57.*

not countenanced by Buddhist ecclesiastical law. No one can compel a bhikku to disrobe himself. Even the Maha Sangha Sabhawa has no such authority. .It has no right of deprivation, and its decrees can only be enforced by ordering other bhikkus not to associate with the delinquent bhikku (*Sumangala Unnanse v. Dhammarakkita* [1]).

Attadassi Unnanse v. Rewata (*supra*) is distinguishable. It dealt with the office of incumbent and not with the status of a bhikku.

The present application is closely connected with the Viharadhipatiship of Sripadasthana. The Maha Nayaka Thero does not appoint such a Viharadhipati nor can he dismiss him. A writ of *mandamus* will not be granted unless the application is made in good faith.

L. A. Rajapakse (with him *Canakaratne, Ranawake,* and *Senaratne*), for the intervenient.—As this is an extraordinary remedy, there must be a legal right in the applicant himself to obtain a writ. If he happens to come in as a Buddhist, then there must be a specific right. (*Rex v. Lewisham Union* [2], *Rex v. Peterborough Corporation* [3])

Since the issue of a writ of *mandamus* is an equitable remedy, the Court must see whether its issue would cause someone to do something not in keeping with the law. The issue of the writ will cause incalculable damage to the intervenient.

The *bona fides* of the petitioner must be inquired into.

Adam's Peak Case [4] gives the history of the claim to appoint the Viharadhipati of Sripadasthana. Modification in section 41 (5) of the Ordinance will not include the cancellation of a name. It refers to partial alteration. (Shorter Oxford Dict., vol. I., p. 1269.)

The Ordinance does not enlarge the powers of a Nayaka.

H. V. Perera, in reply.—Only the ecclesiastical law as enforced in Courts must be considered (*Saranankara Unnanse v. Indajoti Unnanse* [5].) *Attadassi Unnanse v. Rewata Unnanse* (*supra*) considers only the jurisdiction to expel a bhikku. Once the order of expulsion is there, the Maha Nayaka and the Registrar-General must make the necessary alteration. A priest can cease to be a priest by expulsion. He would lose his civic rights as a bhikku (*Devarakkita v. Dhammaratne* [6], *Dharmarama v. Wimalaratna* (*supra*)). If the applicant is one of a special position, he can ask for a writ of *mandamus.* (*The King v. Manchester Corporation* [7].)

Cur. adv. vult.

May 27, 1937. SOERTSZ J.—

This is an application for a writ of *mandamus* on the Registrar-General. The petitioner is the Maha Nayaka Thero of the Malwatta Vihare in Kandy. He complains that although acting in pursuance of the power given to him by section 41 (5) of the Buddhist Temporalities Ordinance, No. 19 of 1931, he had removed the name of Urapola Ratnajoti from his register on the ground that that priest "has been declared by the Karaka Maha Sangha Sabhawa at Malwatta to be unfit any further to continue as a bhikku", the Registrar-General to whom he duly conveyed that fact, refuses to fulfil his obligation under that section of the Ordinance "similarly to modify the registers he is required to keep".

[1] *11 N. L. R. 360, at p. 365.*
[2] *(1897) 1 Q. B. 498.*
[3] *44 L. J. Q. B. 85.*
[4] *Vanderstraaten Rep. 215.*
[5] *(1919) 20 N. L. R. 385.*
[6] *(1918) 21 N. L. R. 355.*
[7] *(1911) 1 K. B. 560.*

The facts are as follows:—On May 29, 1935, the petitioner wrote letter R 1 to the Registrar-General informing him that he had removed Ratnajoti Thero's name from his register and "trusting that the Registrar-General would make the necessary correction in his". The Registrar-General, however, replied by letter R 2 of June 6, 1935, stating that section 41 (5) "does not contemplate cases of expulsions of bhikkus from the Sangha". Again, on October 12, 1936, the petitioner wrote letter C informing the Registrar-General that he had removed the names of five bhikkus from his register. Ratnajoti Thero's name is among them. The Registrar-General by his letter D replied that he had modified his register in respect of four of the five names mentioned but that "no endorsement was made in the declaration of Urapolla Ratnajoti, as the Buddhist Temporalities Ordinance does not contemplate expulsion from the priesthood". The petitioner appears to have then addressed himself to various authorities and quarters to secure the Registrar-General's compliance with the law, but without success.

He came into Court with this application in January, 1937.

After order *nisi* had been issued on the Registrar-General, Urapola Ratnajoti submitted his petition and affidavit on February 23, 1937, and prayed to be allowed to intervene, and to be heard before final order was made. As he was vitally concerned in the matter, he was given the opportunity he sought and his Counsel was heard. The Solicitor-General was heard on behalf of the Registrar-General.

I wish to say at once that the position taken up by the Registrar-General has no legal or logical justification. In response to the request addressed to him by the petitioner, he made the necessary modifications in the case of those bhikkus who were reported to have died or disrobed, but he refused to modify the register in regard to the bhikku who was reported to have been expelled on the ground that the Ordinance does not contemplate expulsion from the priesthood. This sounds to me, if I may describe it so, like an anticipatory echo of the argument of the learned Solicitor-General that, in law, a Buddhist priest can never be expelled from the priesthood. To use his own words "once a priest, always a priest". Whether that is a correct proposition in pure Buddhist ecclesiastical law is not as clear as the Solicitor-General sought to make out. Mr. Perera quoted passages from the *Vinaya Pitaka* which seemed to refute that proposition. Be that as it may. There can be no doubt that so far as the Courts are concerned, expulsions from the priesthood have long been recognized. In *Attadassi Unnanse v. Rewata*[1], it was held that *a Buddhist Priest who has been expelled* from the priesthood cannot claim to retain an incumbency on the ground of prescription. In *Terunnanse v. Abeynayake*[2] it was held that *a priest* who had been *expelled from the priesthood* for the commission of any parajika offence must be considered to have suffered a "*degradation to the rank of a layman*". Woodhouse in a footnote on page 18 of his *Sissiyanu Sissiya Paramparawa* quotes from F. Spiegel as follows: *Qui sacerdos cum femina coitum fecit non amplius sacerdos erit, non sakyaputrae asscela sicut vir aliquis deciso capite amplius vivere non potest ita sacerdos postquam cum famina coitum habuit, non amplius sacerdos erit.* And parajika is only one of the grounds of expulsion. The Solicitor-General however relied on a passage from the

[1] *29 N. L. R. 361.*

[2] *(1908) 2 Matara Case 21.*

judgment of the District Court of Kandy which was affirmed on appeal to the effect that even the Maha Sangha Sabhawa the highest ecclesiastical court of the Buddhist Church "has no right of deprivation and its decrees can only be enforced in a negative way, namely, by an interdict ordering all other priests to boycott the delinquent by ceasing to associate with him in any religious functions until he is brought back to the paths of rectitute". (*Sumangala Unnanse v. Dhammarakkita*[1].) I do not find much support for the Solicitor-General's argument in this passage, for the fact remains that whatever the process, negative or positive, the result achieved is the same. The delinquent is for all practical purposes no longer a priest. He may continue to perform the functions of a priest, but he has not the right to do so. He is a pretender "until he is brought back to the paths of rectitude". In my opinion, therefore, the refusal by the Registrar-General to modify his register for the reason urged by the Solicitor-General is unwarranted. The reason put forward by the Registrar-General himself that *the Ordinance* does not contemplate expulsions is hardly intelligible. The Ordinance does not expressly refer to death or disrobing and yet the Registrar-General has taken notice of them. All the Ordinance does is to invest the Maha Nayaka Thero and the Nayaka Thero of every Nikaya with the right and imposes upon them the duty "to make all such corrections additions or alterations as may be necessary to keep up to date their registers". Death and disrobing are two events that necessarily affect the "up-to-dateness" of the register. And no less must expulsion effect it, provided, of course, the expulsion is recognized in Buddhist law. As I have already observed, our Courts have always proceeded on the footing that Buddhist law recognizes expulsions.

With regard to the contention that this would amount to giving the two Theros referred to arbitrary powers, it must be assumed that the Legislature was satisfied that ecclesiastical dignitaries of that eminence would act with a proper sense of responsibility. If, however, the Legislature did not intend to give the Maha Nayaka Thero and the Nayaka Theros such power, the remedy is surely in the hands of the Legislature.

The next point taken by the Solicitor-General and by the intervenient's Counsel was that the "corrections, alterations, and additions" referred to in section 41 (5) are corrections, alterations and additions in the details set forth in Form A of the Ordinance, and that those words and the words "modify" and "modification" in the latter part of section 41 (5) show that the total removal of a name from the register was not in contemplation. I am quite unable to entertain this argument. The words "corrections, alterations and additions . . . . as may be necessary to keep up to date *his registers of Upasampada bhikkus* . . . . and *the relevant details* regarding them" suggest no doubt whatever to my mind that both total removal of the names of bhikkus and alterations, corrections and additions in and to the details were intended.

As for the bearing of the words "modify" and "modifications" on the meaning of section 41 (5), it was strongly urged that these words do not fit the case of a removal of a form, but only the case of some change effected in the form. But that it is to overlook the fact that the section refers not to "modifying" or "the modification of" *forms*, but of

[1] 11 N. L. R. at p. 365.

registers. And to me it seems beyond question that one "modifies" a register or there is a "modification" of a register when one removes one or more forms from it. Moreover, in the case of death, disrobing, or expulsion it is not necessarily by the removal of the relevant form that the modification of the registers is effected. It may be effected by an endorsement on the form, and letter D seems to indicate that that is the course the Registrar-General takes.

I am, therefore, of opinion that if the matter stood in this position, and no other considerations arose, a clear case has been made out for the issue of a writ directing the Registrar-General to modify his registers. It is a duty the Statute casts upon him in imperative terms. It gives him no discretion and he is usurping functions he does not possess when he acts in the manner in which he acted in this case. But the rejoinder suggests itself at once that it would not have been possible for the Court to exercise its discretion in the way in which it has been decided to exercise it in this case if the Registrar-General had complied with the petitioner's request. The answer to that, as I conceive it, is that it is inevitable that sometimes curious results should flow from a strict adherence to the law. Nevertheless the law must take its course. But when an application like the present finds its way into Court, albeit as a result of an obvious failure on the part of some authority to discharge a duty imposed on him by law, it is subject to certain well-known principles and rules by which Courts guide themselves in these matters. Some of those rules and principles are set forth as follows in Halsbury's *Laws of England* :—"The writ of *mandamus* is a high prerogative writ and the granting of it is a matter for the discretion of the Court. It is not a writ of right and is not issued as a matter of course. Accordingly, the Court may grant the writ even though the right in respect of which it is applied for appears to be doubtful, and on the other hand, the writ may be refused not only upon the merits but also by reason of the special circumstances of the case. The Court will take a liberal view in determining whether or not the writ will issue". *(10 Halsbury, p. 78.)*

In view of this responsibility to which Courts are called, I have considered most anxiously the facts that I have been put in possession of by the affidavits of the different parties to this application and I have reached the conclusion that I should not use my discretionary power in favour of the petitioner in this instance because I am not convinced of the propriety of his motives.

The intervenient is a priest of longstanding and high status. He was robed in the year 1884 and ordained in 1900. He is the Anunayaka of the Sabaragamuwa District, and at a meeting held in Pelmadulla on February 14, 1934, he is said to have been elected unanimously by duly qualified voters to the office of Viharadhipati of Sripadasthana. It is this election that has brought him into sharp conflict with the petitioner. The Maha Nayaka Thero questioned the validity of the intervenient's election and held in favour of a rival candidate Morontuduwe Dhammananda Thero. Regardless of this, the intervenient entered upon the office. The Maha Nayaka Thero retaliated by summoning him to appear before him and the Karaka Maha Sangha Sabhawa, and on his failure to do so, expelled him from the priesthood.

It is not my purpose, and indeed it is hardly possible for me here, to enter into the merits of this matter. Suffice it to say that I am satisfied on the material before me that there is a substantial dispute between the intervenient on the one side and Morontuduwe Dhammananda Thero and the Maha Nayaka Thero on the other, for adjudication and determination by a proper tribunal in a regular action. In this state of things, were I to make the order for a writ of *mandamus* absolute, I feel I should be placing the intervenient in a position of great disadvantage, and even of great danger. The modification of the register by the Registrar-General in obedience to the writ, will result by operation of section 41 (6) in the register so modified being *primâ facie* evidence of the facts contained therein in all Courts and for all purposes, and will render the intervenient guilty of an offence under section 42 of the Ordinance, and liable on summary conviction to a fine of fifty rupees.

Bearing this in mind, and on a careful consideration of the whole matter, I have come to the conclusion that by reason of the special circumstances of this case, I should exercise my discretion to refuse the application.

In regard to costs, I think the fairest order is that each party should bear his own costs.

Application refused.