

1938

Present : Maartensz and Koch JJ.

PREMARATNE *v.* INDASARA.

338—*D. C. Tangalla, 3,768.*

Buddhist ecclesiastical law—Right to incumbency—Deprivation of incumbency by misconduct—Expulsion by tribunal—Prescription.

A Bhikku does not cease to be a member of the Order by reason of immoral conduct until he is expelled for the offence by a tribunal having jurisdiction in that behalf.

A claim to an incumbency of a temple is prescribed in three years.

A PPEAL from a judgment of the District Judge of Tangalla.

H. V. Perera, K.C., (with him *N. E. Weerasooria* and *A. W. H. Abey-sundera*), for defendant, appellant.

F. A. Hayley, K.C. (with him *L. A. Rajapakse* and *C. J. Ranatunga*), for plaintiff, respondent.

Cur. adv. vult.

June 3, 1938: MAARTENSZ J.—

The defendant in this action who was officiating as the incumbent of the Tissamaharama Temple, situated in Tissa, appeals from a judgment of the District Judge of Tangalla declaring the plaintiff entitled to the incumbency of the temple and to eject him, the defendant, therefrom.

The Tissamaharama Vihare, according to the evidence, was built by King Kavantissa. At some period of time the temple was abandoned and was discovered about the year 1853 by a Samanera named Sumana. What he found was a dilapidated dagoba. Sumana commenced the work of restoration which was carried on after his death by Galpita Medankara. In 1882 by a letter dated July 4 (D 1) the then Governor confirmed the permission granted to Walpita Medankara Terunnanse and his brethren priests of the Siam ordination of Buddhists to occupy the Great Dagoba of Tissamaharama now under restoration with ten acres of land surrounding it free of rent or service. A similar grant of another Dagoba is referred to in the case of *Malalankara Thero et al. v. Simananda Thero*¹. Walpita Medankara gave evidence in case No. 700 (D 2 is a copy of his evidence) and described himself as the incumbent of the Tissamaharama Dagoba by virtue of a grant from Sir James Longden.

In 1897 a society called the Tissamaharama Kariya Sadhaka Sabha was inaugurated to assist in the restoration of the temple. It appears to have consisted of a president, Medankara, and two members, Messrs. Jayawickreme and Amarasinghe.

The latter were succeeded by Messrs. Jayawickreme and Amarasinghe, the witnesses. It was suggested in appeal that there were other members. In D 2, Medankara stated that three members form the society, and I can find no evidence that there were other members.

Medankara Terunnanse died in 1916 and was succeeded in the incumbency by his pupil Hikkaduwa Dhammananda Thero who, the plaintiff alleges, was also the pupil of Upatissa, the senior pupil of Medankara Unnanse. Upatissa predeceased Medankara.

The plaintiff claimed the incumbency as a pupil of Upatissa and Dhammananda the latter having disrobed himself in May, 1931.

The defendant put the plaintiff to the proof that Dhammananda was a pupil of Upatissa Thero, that Dhammananda disrobed himself in May, 1931, and denied that plaintiff was a pupil of Dhammananda Thero and succeeded him as incumbent of the temple. He pleaded that Dhammananda in January or February, 1931, informed the Kariya Sabha of his inability to perform the functions of incumbent of the Maha Vihare (this

¹ *D. C. Tangalla, No. 700—(1908) 31 N. L. R. 259.*

letter dated February 16, 1931, is marked D 16) and the Sabha in February, 1931, appointed him, the defendant, Adikari Bikshu of the Maha Vihare.

I need not decide whether by letter D 16 Dhammananda desired to resign from the presidentship of the society or from the incumbency or whether he asked the Sabha to appoint another incumbent or another president for it was conceded in appeal that the society had no authority to appoint an incumbent. It was also conceded that the rule of succession to the temple is that known as *Sisyanu Sisya Paramparawa*. It was so held in the case of *Malalankara Thero et al. v. Simananda Thero (ubi sup.)*. The grant considered in that case was, as I have already said, similar to the grant D 1.

The action was tried on 17 issues. But the only questions argued before us and which fall for decision are :—

- (1) whether the plaintiff is a pupil of Dhammananda;
- (2) whether Dhammananda disrobed himself, and if so, when;
- (3) whether plaintiff's action was brought within three years from the date the cause of action accrued to the plaintiff;
- (4) whether Dhammananda was the senior surviving pupil of Medankara Terunanse.

The District Judge held that plaintiff's evidence that he was a pupil of Dhammananda and Upatissa is corroborated by the extract P 4 from the Malwatte Vihare register, the declaration P 3 sent to the Registrar-General and the photograph P 12 of the plaintiff taken on the occasion of his ordination in which Dhammananda appears standing on one side of the plaintiff.

P 4 sets out that "The ordination ceremony took place of Godapitiya Pameratana Samanera living as a pupil of the four tutors Walpita Medankara, Incumbent of Tissamaharama in Magampura and Muruthamura Subaddararama in Hakmana and of his pupil Beragama Upatissa Mahasthavira, and Polwatte Dhammaratana presently residing in the said temple, and similarly, Hikkaduwa Dhammananda".

In P 3 the names of the Robing Tutors are : "Walpita Medankara and Beragama Upatissa, Incumbents, Magampura Tissamaharama Viharasthana and Denagama Sri Vijerama Viharasthana"; and the names of the tutors presenting for ordination are : "Walpita Medankara Maha Isthawirayanwahanse, Incumbent of Magampura Tissamaha Vihara, Subaddararama Vihara of Murutamure and pupil Beragama Upatissa Maha Isthawirayanwahanse; Polwatte Dhammaratane and Hikkaduwe Dhammananda were the tutors of Godapitiye Pameratane at the ordination".

It was contended that this finding of fact was erroneous as the plaintiff had stated in his evidence that Dhammaratane was named as a tutor because he was a well-wisher and Dhammananda because he was a relative and that Dhammananda did not instruct him, but he said later on (at page 120 of the record), "From the day of ordination he (Dhammananda) became my tutor".

Medankara and Upatissa were dead at the time the plaintiff was ordained. Dhammananda and Dhammaratane must have been named as tutors because they presented the plaintiff for ordination as stated in

P 3, and whatever may have been the reasons for their presenting him for ordination, they became his tutors. It was held in the case of *Saranankara Unnanse et al. v. Indajoti Unnanse et al.*¹ that it is not essential that the pupil should have received instruction from the tutor whom he claims to succeed, also that it is not necessary that the priest who robed the pupil should present him for ordination.

I am accordingly of opinion that the learned District Judge's finding that the plaintiff was a pupil of Dhammananda cannot be disturbed.

On the second question the District Judge held that Dhammananda had disrobed himself on May 19, 1931. He also held that on that day Dhammananda ceased to be a priest because he had sexual intercourse with a woman. On the night of May 19, 1931, Dhammananda was found in the house occupied by a woman named Dingirihamy and her daughter Nonohamy. He was lying on a mat under a bed without his robes, which were in a trunk with some clothes worn by women.

The District Judge holds that because Dhammananda took off his robes to have sexual intercourse with, I presume, Nonohamy, he must have done so with the intention of giving up his priestly office. This might have been a fair inference if Dhammananda had not resumed his robes but the evidence is that he has; and I am of opinion that in the circumstances it does not follow that Dhammananda discarded his robes with the intention of disrobing himself. The fact that there is evidence in proceedings between other parties that Dhammananda had sexual intercourse with a woman that night is insufficient to establish that he had ceased to be a priest, particularly because Dhammananda has not given evidence. There must be evidence that he had been expelled from the priesthood for the offence by a tribunal having jurisdiction to make an order of expulsion.

Dingirihamy's evidence that Dhammananda had not visited her house before is contradicted by her daughter who said Dhammananda came to the house when they were living in Murutamure and Batuduwe. Dingirihamy's evidence that Dhammananda threw off his robes saying that he was disrobing himself and spent the night with her daughter cannot therefore be accepted.

I am of opinion that the plaintiff has failed to establish that Dhammananda had disrobed himself.

As regards the plea that plaintiff's action was barred by lapse of time the District Judge held that the defendant had been officiating as incumbent since February, 1931, but that plaintiff's action was not prescribed as he had no cause of action until Dhammananda disrobed himself on May 19, 1931. He was of opinion that plaintiff's position was analogous to that of a *fide commissarius* whose right to the property which is the subject of the *fidei commissum* does not arise until the right of the *fiduciarius* to the property is extinguished by death or otherwise. This proposition, appellant's Counsel argued, was even if sound not applicable to the case of the plaintiff as Dhammananda was not the senior pupil of Medankara.

This argument is based on plaintiff's admissions (1) that the senior pupil at the time of Medankara to act was Dhammaratane and that

¹ (1918) 20 N. L. R. 385.

Dhammaratane was still alive (page 74 of Record). This admission was made after he had said that he claimed the incumbency on the testament P 7 and on P 6; (2) that if succession is direct from Medankara, Dhammaratane has the better right. The order of seniority of the pupils of Medankara is Dhammaratane, then Dhammananda and lastly myself (pages 114 and 120).

The contention that Dhammananda was not entitled to succeed Medankara does not appear to have been raised in the Court below, for there is no such plea in the pleadings or issues, but issues 15 and 16, which read as follows:—

(15) Is the succession to the incumbency in question governed by the rules of *Sisyanu Sisya Paramparawa*?

(16) If so, is plaintiff the lawful successor to the said incumbency?

are wide enough to enable the defendant to raise the plea in appeal. According to the rules of *Sisyanu sisya paramparawa* succession the senior surviving pupil is by custom entitled to succeed him as tutor in the incumbency unless the tutor had appointed another pupil to succeed him. Bertram C.J. observed in the case of *Saranankara Unnanse et al. v. Indajoti Unnanse et al. (ubi sup.)* at page 397, that "it would appear from the evidence recorded in the case of *Dhammaratane Unnanse v. Sumangala Unnanse*¹, that the right attaching to seniority is not so unqualified as some of our decisions appear to suggest". But in the present case the plaintiff admits that Dhammaratane as senior pupil was entitled to succeed to the incumbency.

Dhammaratane is therefore the lawful successor of Medankara unless Medankara appointed another pupil. According to plaintiff's evidence he claims the incumbency by virtue of the deed of gift P 6 and the will P 7 executed by Medankara.

P 6 is a deed of gift of certain parcels of land owned by Medankara personally to Upatissa and his pupillary successors who were to spend a certain part of the income on the Tissamaha Dagoba. There is no appointment of Dhammananda as incumbent of the temple in place of Dhammaratane, and the deed does not help the plaintiff.

Nor does the will P 7 which is a disposition of Medankara's temporal property. The executors of the will and the devisees are Dhammaratane, Dhammananda and the plaintiff. One of the clauses—3 (b)—provides, "that in the event of the disrobing of or of the death of any one of my said pupils or of their succeeding pupils the said property shall not at any time devolve on any one of their lay heirs but the same shall devolve on the surviving pupil or pupils and on the death of the last surviving pupil intestate the same shall devolve on his pupil or pupils subject always to the same condition, to wit (here follows a prohibition against alienation):" I cannot by any process of reasoning construe this will into a disposition of the incumbency of the temple in question.

I do not think the plaintiff was able to really formulate a legal right, for at page 118 he said, "I don't know by what right I am claiming".

It follows from the fact that Dhammananda was not the senior pupil of Medankara that plaintiff cannot claim the incumbency as his pupillary successor. Whatever rights he may have—I confess I cannot say what

¹ 14 N. L. R. 400.

they are—did not depend on Dhammananda ceasing to be a priest. His cause of action is therefore barred by the lapse of three years after the defendant became incumbent in January or February, 1931.

The passage in the defendant's evidence (at page 185) which reads, "in June, 1931, Dhammananda gave up his incumbency and I took charge" should obviously read "in January, 1931"

I have incidentally dealt with the last question in dealing with the question of prescription. On plaintiff's own evidence Dhammananda was not the senior pupil of Medankara and had no legal right to the incumbency of Tissamaharama, neither has the plaintiff. His action therefore fails and must be dismissed with costs in both Courts.

Koch J.—I agree.

Appeal allowed.

