1958 *Present :* **H. N. G. Fernando, J., and T. S. Fernando, J.**

K. VAJIRAWANSA THERO, Appellant, *and*

P. H. ABRAHAM SILVA *et al.*, Respondents

S. C. 191-193 (Inty.)—D. C. Kegalle, 8,036.

*Buddhist ecclesiastical law—Deed "promising to dedicate" a temple and its lands—Effect—*Gihi santhaka *property—Property belonging to a religious institution—Transfer of rights of management and possession thereof—Transferee's right to maintain action against persons who disturb possession.*

Where a Society which was formed to establish a Buddhist temple executed a deed entrusting the charge of the temple and its premises to a priest provisionally, intending to effect a permanent transfer and dedication at some later time—

Held, that the deed did not divest the Society of all its rights and prevent it from subsequently entrusting the control and management of the temple to persons other than those named in the deed. The premises remained *gihi santhaka.*

Held further, that, just as a tenant is entitled to recover possession from persons who have disturbed his possession without the necessity of making the landlord a party to the proceedings, so also were the persons, to whom the Society had conveyed its admitted rights of management and possession, entitled to maintain an action for the assertion and recovery of those rights as against those who disturbed such rights.

APPEALS from a judgment of the District Court, Kegalle.

C. R. Gunaratne, with *B. S. C. Ratwatte,* for the 1st and 2nd defendants-appellants in 193 and 1st and 2nd defendants-respondents in 191 and 192.

H. W. Jayewardene, Q.C., with *P. Ranasinghe,* for the 3rd defendant-appellant in 192 and 3rd defendant-respondent in 191 and 193.

H. V. Perera, Q.C., with *C. V. Ranawake,* for the 4th defendant-appellant in 191 and 4th defendant-respondent in 192 and 193.

A. L. Jayasuriya, with *A. B. Perera* and *J. C. Thurairatnam,* for the plaintiffs-respondents in all the appeals.

Cur. adv. vult.

March 21, 1958. H. N. G. FERNANDO, J.—

The nine plaintiffs in this action claimed a declaration that certain lands forming part of the premises of the Bodhirajaramaya, situated in the district of Kegalle, be declared property subject to a charitable trust, for a vesting order vesting the property in the plaintiffs as trustees, and for the ejectments therefrom of the four defendants. The claim was based on the following averments :— that a Society known as the Sasana Abhiwardana Society was formed about 1908 for the purpose of founding an institution for the advancement of the Buddha Sasana and the residence and maintenance therein of Buddhist monks; that certain members of the Society had purchased certain lands (now forming part of the premises of the Institution) in furtherance of the objects of the

Society, that these lands were donated to the Society and constitute an extent of 3 acres, 2 roods and 32 perches ; that the buildings and improvements on the lands were erected by the Society from private and public subscriptions ; that at a meeting held on September 25th, 1949, one E. M. Appuhamy, the vice president, was authorised to convey the right title and power vested in the Society in and over the land to the plaintiffs as trustees ; and that in pursuance of this resolution E. M. Appuhamy by deed P 29 of 14th and 15th January, 1950, constituted and appointed the plaintiffs and one K. T. S. de Silva as trustees.

The 1st defendant in his answer denied that the Sasana Abhiwardana Society had any legal rights to the temple, although he admitted that the Society did in fact supervise, look after and improve the temple. He also denied the right of the plaintiffs to be trustees of the temple or to sue as such. In addition the 1st defendant pleaded that the premises are Sanghika property by virtue of a dedication to the Sangha ; that the control, management and supervision belonged to the Viharadhipati, and that the 1st defendant was appointed an agent by the present Viharadhipati. The answer of the 2nd defendant was substantially to the same effect. The 3rd defendant's answer did not touch upon the averments in the plaint. The 4th defendant admitted that the Sasana Abhiwardana Society bought the land and put up the building on which the Bodhirajaramaya now stands, but he too relied on an alleged dedication to the Sangha and on the rights of the Viharadhipati and of the 1st defendant under him.

The question whether there had been a dedication in 1930 and whether the premises were Sanghika property was the principal one raised at the trial by the defence. The learned District Judge has in my opinion given convincing reasons for rejecting the plea that there had been a dedication.

The evidence for the plaintiffs was that the monk who was first placed in charge of the temple was one Dharmakirti Pada Thero and that he remained in charge of the temple at the instance of the Society for two years from 1909 leaving Dhamma Kusala Thero whom the Society accepted as Viharadhipati. Thereafter, according to the plaintiff, Dhammadinna, the pupil of Dhamma Kusala, administered the temple as Adikari under the authority of Dhamma Kusala. The defence called no witnesses to controvert this version of the early history of the temple, and indeed the case for the defence was only that a dedication took place in 1930. It is common ground that preparations for such a dedication were put in hand and that the permission of the Governor (then necessary under section 41 of the Buddhist Temporalities Ordinance, 1906) was sought to enable the Society to transfer the temple property to Dhamma Kusala. The necessary licence from the Governor was however withheld and in the result the document D9 which was signed on 13th March, 1930, by the Society and Dhamma Kusala and his pupil Dhammadinna was not a transfer, but only a promise to transfer within three years, after obtaining a permit from the Governor. In the meantime, however, this deed did purport to deliver charge of the temple premises to the two monks. In so far also as the monks themselves were concerned, they

would I think be bound by the recital in the deed that the premises belonged to the members of the Society, and it would not be open to any of the present defendants, if they base any claim under Dhamma Kusala, to deny the Society's title.

The apparent basis of the defendants' claim is that Dhammadinna was the chief pupil of Dhamma Kusala and that Dhammadinna is the *de facto* Viharadhipati, having succeeded Dhamma Kusala. There is nothing in the evidence adduced for the defence to support the claim in the pleadings that Dhammadinna was the chief pupil of Dhamma Kusala, and that being so, I see no reason to question the opinion expressed in the judgment that even if there has been succession to the temple under the rule of Sisyanu Sisya Paramparawa, it would be one Aththakusala and not Dhammadinna who would be entitled to succeed.

The learned District Judge has carefully considered the contention that a dedication did in fact take place on 14th March, 1930. I need refer only to a few of the circumstances which support his finding. In the first place the licence of the Governor not having been obtained for a transfer of the property, even the deed P9 is entitled a deed " promising to dedicate ". One Mrs. Badhrawathie Fernando, a daughter of Carnolis de Silva (a founder member of the Society), had appeared at the meeting and publicly protested against a dedication. Further, as the Judge remarks, it is unlikely that learned priests present at the ceremony would have accepted as an absolute dedication what was in terms only a promise to dedicate. Even if the monks imagined that there was to be a dedication, it can hardly be said that the members of the Society who had executed P9 could possibly have had an intention of immediate dedication when they were quite aware of the opposition on the part of the family of one of the founder members and holders of the legal title as well as the lack of the Governor's licence for the transfer of the land. The learned Judge also rejects the version that the ceremony of dedication was completed by the pouring of water upon a rock inscription, and I see no reason to doubt the correctness of his views that this ceremonial would not have been a proper substitute for the established custom of pouring water into the hands of the donee. In the result it seems clear that all that took place on the 14th March, 1930, was that the Society entrusted the charge of the temple to Dhamma Kusala provisionally, intending to effect a permanent transfer and dedication at some later time. There is no evidence that this intention was ever carried out. No authority was cited to us in support of the view that a document like P9 was sufficient to divest the Society of all its rights and to prevent the Society from subsequently entrusting the control and management of the temple to persons other than those named in the document.

The learned Judge has also accepted the evidence for the plaintiff that the Society appointed one Dhammavilasa in 1935 with the approval of Dhamma Kusala to manage the temple affairs and that when the 1st defendant originally interested himself in the temple, he did so under the authority of Dhammavilasa, the Society's nominee. I need only add in passing that there was ample evidence for the Judge's opinion

that the 1st defendant took forcible possession of the premises in April 1950 and now seeks to shelter under alleged authority from an alleged incumbent.

For these reasons I am in agreement with the findings of the learned Judge that the premises remained *gihi santhaka* and that the rights of management and control including the rights to nominate a monk to supervise the temple were, despite the events of March 14th, 1930, still vested in the Society.

It is necessary at this stage to refer to the various deeds affecting the land on which the premises of the Bodhirajaramaya are situated. By *P2 of 1904* one Kiriappu conveyed a land called Udamullahena of about 8 lahas to Dambadeniyage Don John Appu and Kankantantri Carnolis Silva. By *P3 of 1909* one Ran Kira conveyed an undivided half share of a land called Panuambagahamullahena of 8 kurunies to Idris Silva. By *P4 of 1911* one Kuda Ridi conveyed *to Abraham Silva* the 1st plaintiff, a liyadda of one laha in extent. By *P5 of 1918* Andy Perera conveyed the remaining portion of a land called Nikagolawatte of 5 kurunies excluding 1 laha previously sold, to five persons, Isanhamy, Andris Silva, Justin Perera, James Perera Goonewardena and W. M. Wijetunge. The 4th transferee on P5 as well as the sons of the the 1st and 2nd transferees respectively, subsequently sold an undivided 3/5 part of Nikagolawatte *to the 1st plaintiff* by P7 of 1949. Similarly by P8 of 1949 one Entin Silva, the son of Idris Silva, the transferee on P3, conveyed the undivided half share of Panuambagahamullahena *to the 1st plaintiff*. The effect of these transactions was that the 1st plaintiff by these means acquired title to all the lands, save Udamullahena conveyed on P2 and a 2/5 share of the land conveyed by P5. It would seem that the plaintiffs are faced with no difficulty in regard to the outstanding 2/5 share of the land dealt with in P5 for the reason that the owners of those outstanding shares, namely, Justin Perera and W. M. Wijetunge, are signatories to the deed P29 upon which the nine plaintiffs based their claim to be trustees and by which the lands in question were transferred to the trustees. The only issue raised by the defendants affecting the question of title pure and simple was issue No. 35 which challenged the right of the plaintiffs to maintain the action on the ground that the heirs of Carnolis Silva the transferee on P2 had not joined in P29 and were not parties to the action. In the absence of any issue concerning the ½ share which Dambadeniyage Don John Appu acquired under P2, I do not feel called upon to consider whether that share is outstanding, but would note that it is possible that one William de Alwis Goonetilleke, a signatory to P29, was the heir of Don John Appu.

The learned District Judge has apparently answered issue No. 35 in favour of the plaintiffs notwithstanding the fact that the heirs of Carnolis Silva have certainly not divested themselves of their legal title and it is necessary to consider what effect this circumstance has on the plaintiff's case. The evidence, which the learned District Judge has accepted without question, was to the effect that one of the moving spirits behind the plan to form the Sasana Abhiwardana Society and to fulfil its pious objects was Carnolis Silva himself. The evidence of

Mrs. M. W. R. de Silva, daughter of Carnolis Silva, was to the effect that her father died in 1928, that the temple in question was founded by her father with the collaboration of the plaintiff, and that the Society controlled the temple and looked after its properties. Clearly then, questions of legal title apart, the interest which Carnolis had in the land was subject to his own avowed intention that the land be utilised for the religious purposes in which the Society was interested. It would seem also from her evidence that the members of her family had never set up any claim inconsistent with their father's intention or with the religious uses to which Carnolis had in fact put the land. There is nothing in the evidence to controvert the position taken on behalf of the plaintiffs that for many years before the death of Carnolis the land had in fact been used and occupied for religious purposes and was therefore the subject of a religious trust. If the plaintiffs action had been for a declaration of title, the fact that title to some portion of the land is outstanding in the heirs of Carnolis Silva would undoubtedly be fatal to their claim. But in my understanding the action is not in essence one for such a declaration. Indeed the plaint contains no prayer regarding title but is restricted to a claim for a declaration that the land and premises, including the movables thereon, be declared to constitute a charitable trust and that the plaintiffs are entitled to the management, control and administration as its lawful trustees.

The term "trustee" is so defined in the Trusts Ordinance that it is applicable only to a person in whom the legal ownership of property is vested. While, therefore, it is probably correct that under the various deeds to which I have already referred the plaintiffs can properly claim to be owners and therefore the trustees of *some* of the allotments of land upon which the temple premises stand, they have no right to be declared trustees of the entire land because of the fact that the heirs of Carnolis Silva are still the legal owners of a portion. Nor would it serve any useful purpose to declare the plaintiffs to be the trustees of the portion to which they have title since that would not suffice to give them the effective control which they seek of the temple and its appurtenances.

As stated earlier, however, the case for the defendants has been that there was in fact a dedication in 1930 by the then owners of the property, that is the Sasana Abhiwardana Society. Even if the Society was not the legal owner at that time, there is ample material on record to show that the owners of the lands had in fact entrusted to the Society the right to possess, manage and control the lands and buildings for the purpose of maintaining thereon the religious institution. The defendants who base their claim on an alleged divesting of ownership and control by the Society are in my opinion estopped from denying that at the least the Society had the right, on behalf of those interested in the trust, to possession and management of the premises. All that the plaintiffs now seek to do is to regain the rights of possession and management of which they have been deprived by the unlawful acts of the defendants. Just as a tenant is entitled to recover possession from persons who have disturbed his possession without the necessity of making the landlord a party to the proceedings (Wille—Landlord and Tenant in South Africa—4th Edition p. 145), the plaintiffs, to whom the Society had conveyed its

admitted rights of management and possession, have a status to maintain this action for the assertion and recovery of those rights. If and when the heirs of Carnolis Silva desire to assert their own title or to deny the existence of the trust, any decree in favour of the plaintiffs in this action will of course not bind those heirs. While therefore the device of adding the heirs as defendants, particularly at the stage when issue 35 was raised, might or should have been adopted with a view to securing some conclusive determination ot questions of legal ownership and trusteeship, the present plaintiffs can rightly ask as against the defendants, that they are entitled to possession and control and for ejectment of those who have disturbed their rights.

The fact that one of the trustees named in P29 is not a party to the action does not prejudice the plaintiff's case. There is nothing in the evidence to controvert the explanation that that individual declined to accept the office of trustee.

In the result I would dismiss these appeals with costs and affirm the judgment and decree in D. C. Kegalle, No. 8,036 subject to the modification that the decree be amended by substitution for the 3rd, 4th and 5th paragraphs thereof of the following :—

> " It is further ordered and decreed that the plaintiffs abovenamed be and they are hereby declared entitled to the management, control and administration of the said premises.
>
> " It is further ordered and decreed that the defendants, their agents and servants be ejected from the said land and buildings and premises and the plaintiffs be placed in possession thereof."

T. S. Fernando, J.—I agree.

Appeals dismissed.