1954 *Present :* **Gratiaen J. and Fernando A.J.**

MAWELLE DHAMMAVISUDDHI THERO *et al.*, Appellants, *and* KALAWANE DHAMMADASSI THERO, Respondent

S. C. 348—D. C. Colombo, 5,517

Buddhist ecclesiastical law—Vihara—Dedication—Failure of donors to nominate first incumbent—Resulting position in regard to incumbency—Right of incumbent to appoint successor.

A Vihara was dedicated in 1904 in the presence of a number of priests belonging to the Ramanna Nikaya. G, the most senior of the priests, accepted the dedication on behalf of the Sangha. At the time of the dedication no Viharadhipathy was expressly nominated by the donors.

Held, that, in the absence of an express nomination of a Viharadhipathy by the donors, there was nothing to counter the inference that the intention was to constitute G himself as the first incumbent. Even if G could not be regarded as the incumbent, the legal position was that the incumbency was vacant and, in that circumstance, the right to appoint to the vacant incumbency vested in the Chapter on whose behalf the Vihara was accepted, as in a case where the chain of pupilary succession was broken.

Held further, that a Viharadhipathy was not entitled to appoint as his successor a priest who was not his pupil.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *D. S. Jayawickreme*, for the defendants appellants.

No appearance for the plaintiff respondent.

Cur. adv. vult.

July 19, 1954. FERNANDO A.J.—

Plaintiff instituted this action for a declaration that he is the Viharadhipathy of the Rajapushparama Vihara at Galkissa. He alleged that the Vihara was dedicated in 1904 in the presence of a number of priests belonging to the Ramanna Nikaya, the most senior of whom was Matara Gnaninda Sabha who accepted the dedication on behalf of the Sangha. The plaintiff further alleged that one Kodagoda Upasena was the original Viharadhipathy and his own claim is based on pupilary succession to Upasena.

The first questions for determination were whether Upasena was in fact appointed to be Viharadhipathy and if so whether the appointment was a lawful one. The learned District Judge has decided these questions in the plaintiff's favour and the present appeal is against that decision.

The evidence regarding the fact of Upasena's appointment is inconclusive and unsubstantial. The plaintiff who was present at the dedication ceremony in 1904 alleged that the appointment of Upasena as Viharadhipathy was made on the occasion of the dedication immediately after Gnaninda Sabha had accepted the gift of the Vihara on behalf of the Sangha. Plaintiff said in evidence " Matara Gnaninda Sabha asked my tutor priest to attend to all the religious ceremonies in this temple as he was staying close to this temple and therefore he appointed him as the Viharadhipathy of this temple. For the sake of the welfare of this temple he asked my tutor priest to attend to all the religious ceremonies ". The construction which the learned Judge has placed upon Gnaninda Sabha's conduct at the dedication is that he had no intention of himself becoming Viharadhipathy ; that his acceptance was symbolic both on behalf of the Sangha and of Upasena (who had attended to religious ceremonies at the Vihara before its dedication) ; and that it was therefore quite natural for Gnaninda Sabha immediately to call Upasena to the office of Viharadhipathy. This construction was in my opinion not justifiable. The dedication by the donor and the acceptance on behalf of the Sangha is one thing ; the nomination of the first incumbent is quite another. If the intention of the donors was that Upasena should be the first incumbent the nomination could well have come from them and not from Gnaninda Sabha, and in the absence of any evidence of nomination of Upasena (who was admittedly present at the ceremony) there is nothing to counter the inference that the intention was to constitute Gnaninda Sabha himself as the first incumbent. The passage from the plaintiff's evidence which I have cited above is itself more consistent with the view that Gnaninda Sabha immediately upon assumption of office authorised Upasena to act on his behalf. If the act of acceptance by Gnaninda Sabha did not also involve an acceptance by him of the office of Viharadhipathy, then, having regard to the absence of an express nomination by the donors, the legal position would in my opinion have been that there was yet no incumbent. That being so, the right to appoint to the vacant incumbency would have vested in the Chapter on whose behalf the Vihara was accepted as in a case where the chain of pupilary succession is broken. (*Dammaratna Unnanse v. Sumangala Unnanse*[1]). That right could have been exercised only by the Chapter after the observance of due formality and not by Gnaninda Sabha personally. All that can be assumed with safety is that Gnaninda Sabha must, in purporting to confer some authority on Upasena, have done so in the exercise of a lawful right. If he was himself the Viharadhipathy, he did have a right to delegate functions of management to Upasena ; if he was not, he had neither the right to appoint a Viharadhi-

[1] *(1910) 14 N. L. R. 400.*

pathy nor the right to appoint an Adhikari. His act therefore was effective and lawful only on the basis that he had already accepted the incumbency for himself.

The plaintiff produced a document executed in 1914 by Upasena in which reference is made to several temples in which Upasena was interested and it is significant that he describes himself in the document as the Adhikari of those temples and not as the Viharadhipathy. The plaintiff's explanation that Upasena was opposed to the use of the term "Viharadhipathy" is unacceptable. He alleged that Upasena thought it an unbecoming title for a Mahanayake (as he then was), but I should have thought the expression "Adhikari" which merely means Manager to be even less becoming. It may have been possible for the plaintiff to contend that Gnaninda Sabha, having assumed the incumbency, immediately thereafter appointed a successor, but this contention was not available because Upasena was admittedly not a pupil of Gnaninda Sabha and was not therefore eligible to succeed. (*Dhammajoti v. Sobita* [1]).

For these reasons I am of opinion that the plaintiff has failed to prove that his alleged tutor Upasena lawfully became the incumbent of the Vihare, and the plaintiff's own claim through Upasena must therefore necessarily fail.

Even assuming however the correctness of the finding of the learned Judge that Upasena was the lawful incumbent, it is doubtful whether the plaintiff has successfully proved his right of succession to Upasena. The only sentence in his evidence relevant to this question was "I became the pupil of Kodagoda Upasena by my being ordained as an Upasampada about 57 years ago". His claim that Upasena was his tutor has not been substantiated by any documents. He refers to a declaration made by him for the purposes of the Buddhist Temporalities Ordinance of 1931 in which the name of his tutor is alleged to have been specified, but made no attempt to produce a copy of the declaration. Nor did he produce his ordination certificate from the Nikaya which would have been valuable evidence in support of his claim. Moreover, he admitted that he had been in Kandy for about 15 years prior to the Japanese raid in 1942 and there is little or no evidence of actual acts of management on his part.

Having regard to the failure of the plaintiff to establish his right in law to the incumbency and to the admitted fact that the Vihara is now possessed on behalf of the 1st defendant (who is a minor), it is unnecessary to consider the evidence led for the defence for the purpose of establishing the rights of the 1st defendant.

The appeal must be allowed and the plaintiff's action dismissed with costs in both Courts.

GRATIAEN J.—I agree.

Appeal allowed.

[1] *(1913) 16 N. L. R. 408.*