Present : Ennis A.C.J. and Loos A.J.

1919.

DAVARAKKITA *v.* DHARMMARATNE *et al.*

175—D. C. Galle, 15,052.

Action to be declared to be entitled to an incumbency of a Vihare—Is it a purely ecclesiastical matter?—Prescription.

The presiding priest or incumbent has the control and administration of the Vihare itself, although, after the passing of the Buddhist Temporalities Ordinance, the property of the Vihare vests in the trustee, the right to an incumbency is still a legal right, and not purely an ecclesiastical matter.

THE facts appear from the judgment.

E. W. Jayawardene (with him *J. S. Jayawardene*), for the appellants.

A. St. V. Jayawardene (with him *Amarasekera*), for the respondent.

October 14, 1919. ENNIS A.C.J.—

In this case the plaintiff prayed to be declared entitled to the incumbency of the Kettarama Vihare. He also asked for ejectment and costs. The learned Judge allowed the plaintiff's claim. On appeal it is conceded by counsel for the respondent that he cannot maintain the judgment so far as it directs the ejectment of the defendants. I have, therefore, to consider the appeal of the defendants only as regards the declaration in favour of the plaintiff in respect of the incumbency. It was first contended that this was not a matter which the Civil Courts should take cognizance of, that it was purely ecclesiastical, and that the Civil Courts had no jurisdiction. Till the passing of the Buddhist Temporalities Ordinances a question of the incumbency involved without doubt the possession of the lands and other property of the Vihare. After the enactment of these Ordinances the property of the Vihare was vested in the trustee, and it is suggested now that the incumbent has no material interest in the property. I am unable to say that this is so; it would seem that the presiding priest or incumbent has the control and administration of the Vihare itself, although the property vests in the trustee, and, therefore, the right to an incumbency is still a legal right, and not purely an ecclesiastical matter. The case of *Saranankara Unnanse v. Indajoti Unnanse* [1] bears this out. That

[1] *(1918) 20 N. L. R. 385.*

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ENNIS A.C.J.

Dawarakkita v. Dhammaratne

was a case of a claim to an incumbency in which the Court exercised jurisdiction, and De Sampayo J. in his judgment expressly refers to the right of the chief resident priest as a " legal claim to such presidency. " I am, therefore, against the first contention made for the appellants.

With regard to the second contention that the plaintiff's claim has been prescribed, I am unable to say that this is so. It would seem that this Vihare belonged to one Amuhena Nayaka, and that on his death there were disagreements and uncertainties as to the succession, and four out of five of the pupils appointed themselves joint members in the incumbency in 1875, a position which they confirmed by deed. Two of them subsequently died, and in a case before the Courts on a claim by Mawella to be declared the incumbent of the Vihare, the Court decided that the survivors under the deed were joint incumbents, namely, Mawella and the present plaintiff. Mawella apparently did not personally reside at the Vihare, but placed there the first defendant as his representative, who took Mawella's share, or rather the share which Mawella considered himself entitled to. (Whether or not the trustee acquiesced in this division we are not told.) The first defendant remained at the Vihare until Mawella's death some two years ago, when he began to claim the right to administer the property as the presiding priest or " incumbent. " In these circumstances, I am unable to see how any question of prescription can arise, because it is clear that until Mawella's death there was no possession adverse to the plaintiff, and no assertion or exercise of a right adverse to him. The question only arose after the death of Mawella, and, therefore, is not within the prescriptive period, even if we assume that any question of prescription can arise in the case. On the death of Mawella the survivor of the joint incumbency in 1875 became the sole chief resident priest. So far as this matter is within the jurisdiction of the Courts, it is purely a question of fact, and it is hardly necessary to consider the authorities cited in support of the judgment, namely, the passages in the Vinaya, the original of which has not been produced. I would accordingly dismiss the appeal with the variation only mentioned at the beginning of my judgment, namely, the elimination of the order for ejectment contained in the decree. In my opinion each party should pay its own costs on the appeal.

LOOS A.J.—I agree.

Appeal dismissed.