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Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wendt.

SUMANGALA UNNANSE *v.* DHAMMARAKKITA *et al.*

D. C., Colombo, 23,308.

Kelani Vihare — Right of succession — Pupil — Robing — Dispute as to succession — Reference to Maha Sanga Sabhawa — Decision — Res judicata — Irregularity.

The Maha Sanga Sabhawa, or the Great Council of Buddhists, is not a recognized tribunal, and its decisions have not the effect of *res judicata*. Even if the decision of the Maha Sanga Sabhawa be considered as the award of arbitrators, such decision is liable to be set aside on the ground of irregularity or misconduct in the proceedings. It is an irregularity which vitiates the proceedings of an arbitrator for him to refuse to allow one of the parties to adduce evidence in support of his case.

APPEAL by the plaintiff from a judgment of the District Judge (F. R. Dias, Esq.) dismissing his action. The facts are fully set out in the judgment of the District Judge, which was as follows (January 20, 1908):—

"The plaintiff, a Buddhist priest, complains that he is being wrongfully kept out of the incumbency of the Kelani Vihare and

its income and emoluments by the first and second defendants, who deny his rights and claim to be sole incumbents. The third defendant is said to be jointly entitled with the plaintiff to a half share of the incumbency, and he has been made a defendant, because he refused to join the plaintiff in the action.

" The decision of this case involves most momentous issues to the whole of the Buddhist world, and it is therefore with a full sense of my responsibility that I approach it. I think it would have been far more satisfactory if these parties had settled their disputes once for all by a Committee of their own ecclesiastical dignitaries than forced a decision in a Court of Law; but, since they have adopted the latter course, I feel bound to give a decision on the evidence both sides have placed before me.

" The case centres on the genuineness or otherwise of a certain entry in the ' Lekammitiya, ' or ola register of ordinations, kept at the Malwatte Vihare in Kandy, and that is peculiarly a point which would have been best decided by a committee of experts nominated by the parties themselves. Perhaps such a course was impossible, in view of the considerable amount of feeling and division of opinion there seem to have arisen in the Buddhist Church of Ceylon on this very point.

" In order to understand the question properly it is necessary that I should briefly narrate the history of this Vihare and of its incumbents. As we all know, the Kelani Vihare is one of the most sacred and important temples in Ceylon. It was restored at considerable expense by King Kirti Sri Raja Sinha, who by a Royal Sannas dated 1779 A.D. conferred it on a priest named Mapitigama Buddharakkita and one of his pupils in succession in perpetuity.

" In the year 1858 the incumbent was one Mapitigama Sangarakkita, who by a notarial deed D 2 of that year purported to transfer and assign the Vihare and all its lands and other belongings to his two pupils Dompe Buddharakkita (1), and Mapitigama Dhammarakkita (2) (the present first defendant), to be held by them as joint owners for ever with pupillary succession. After the death of the grantor, Dompe and Mapitigama (2) continued as joint incumbents, and enjoyed the income in equal shares till the death of Dompe in January, 1903, after which these disputes arose. Admittedly, the first and second defendants are in sole possession, and they deny that the plaintiff, Kandeoluwe, is an adopted pupil of Dompe at all, or that he has any right to succeed him. They admit, however, that the third defendant was a junior pupil, but his right of succession would only arise if Dompe left no senior pupil.

" There is no question raised by plaintiff as to the first defendant's right to be in occupation either as a pupil of Mapitigama Sangarakkita, or under his deed of gift, but the plaintiff denies the rights of the second defendant altogether.

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"The second defendant is actually the person in sole possession, and he claims to be there by his own right and by virtue of a power of attorney granted to him a few years ago by the first defendant (his tutor), who is now too old and imbecile to attend to any active work. He claims to be the senior pupil of Dompe (1), having been duly adopted and robed by him as well as by the second defendant, and presented for ordination by them jointly in 1887. If that allegation is true, the claims of the plaintiff and third defendant, who were only ordained in 1896, must necessarily fail. The 'Lekammitiya,' or register of ordinations, kept officially by the high priest, bears out the second defendant's story, and shows that he was ordained as the joint pupil of Dompe and Mapitigama. This entry in the register is impeached as a forgery, and that is what we have now to consider.

"It will be seen that the second defendant has more defences than one, and no matter in what direction we approach the subject, the genuineness of the entry comes into play.

"If the deed of gift D 2 is valid, then first defendant would be entitled to half, and he (second defendant) as Dompe's senior pupil would be entitled to the other half. Whether he is the senior pupil or any pupil at all of Dompe must stand or fall by the genuineness of the register.

"If the deed of gift is bad, because the grantor had no right to transfer or assign by a deed inter parties the Vihare and its appurtenances in a manner inconsistent with the terms of the Royal Sannas and the ordinary rules of pupillary succession observed by the Buddhist Church, then the second defendant would be entitled to be sole incumbent as the senior pupil of Dompe (1), who in turn was the senior pupil of Mapitigama Sangharakkita, the grantor of the deed. Here, too, the question rests on the validity of the register.

"Then again, if as has been contended in this case, and as to which there seems to be a difference of opinion, there is a right of survivorship to the survivor of two joint incumbents, the first defendant as the surviving incumbent would be entitled to the entire incumbency, and the second defendant as his attorney is entitled to keep the plaintiff and the third defendant out.

"A great deal of evidence has been called for the purpose of impeaching the register relied upon by the second defendant, and I may say at the very outset that the plaintiff has failed to satisfy me that the entry is a forgery. This register consists of about a thousand ola leaves, strung together by means of a cord, and contains all the ordinations of priests carried out at the Malwatte Vihare during the last seventy years or more. It is suggested that the five olas containing the entries for the year 1887 have been bodily taken out of the volume and five spurious ones introduced with a false entry, showing Dompe as one of the tutors of the second defendant. No doubt it is not a difficult matter to insert new leaves

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in a volume of olas, but that is no reason why we should, in the absence of some sogent testimony beyond mere speculation, hold a document which comes from proper custody to be a forgery. That is a very serious matter; and I should be sorry to lightly throw any discredit on such an important document as the official register of the Malwatte Vihare. It is kept by the Chief High Priest, and handed down to his successor, and it has been now produced by the present High Priest Siddartha Sumangala. Both this High Priest and Hikkaduwe Sumangala, the High Priest of Adam's Peak, impeach this entry as a forgery. They are undoubtedly very eminent and learned men in the Buddhist world, and their opinions are entitled to respect, but I cannot say that their *ex cathedrâ* statements can be accepted by a Court of Law as conclusive, unless there is evidence to show that they are correct or even reasonable. The sum and substance of the evidence to impeach these five olas is that they are not of the same size or colour as the others in front and behind them; that the characters are slightly different to those in the preceding olas; that the language and spelling are unintelligent, the writing being done quickly and carelessly; and that a certain entry (No. 41 in the Index, P 6) has been omitted from the register, betraying the hurry with which the forger did his work. All these suggestions have been completely demolished in the cross-examination of the very witnesses who put them forward. Even Hikkaduwe has been forced to admit that some of the objections he raised with regard to the size, shape, and colour of these impeached olas, the orthographical errors he discovered in them, &c., are to be found in other admittedly genuine olas, also both in front and behind. I would particularly refer in this connection to the admission extorted from Priest Madugalle Siddartha, the expert called by the plaintiff, and who had made a special study of this volume for the purposes of this case. He candidly admits that he will not condemn the impeached olas on the ground of bad spelling alone, because bad spelling occurs in the genuine olas also through carelessness. During the trial he went through all the genuine olas of 1889 and found many similar mistakes in spelling in them. He also admits that the spelling of names in the register does not always follow the spelling given in their own index (P 6). He also admits that in all parts of this register there are genuine olas, which are different in length, size, and colour to those in front and behind them. There is also nothing in the alleged omission of " No. 41 " in the index from the entries in the register, because the index is only a rough list of candidates for ordinations, and not a list of those who have, in fact, been ordained. It is possible for a candidate whose name is sent in and is registered in the index not to come up for ordination at all through some unforeseen circumstance, and it is further admitted that the numbering in the register does not necessarily follow the numbering in the index. The way in which the

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register is entered up is this. As each candidate goes through the ceremony of ordination, his name and that of his tutors and date and time of ordination are entered in a separate strip of ola and preserved. Ordinations are only held during the Wesak season of each year, and are continued for about a month. The ola strips referring to the ordinations of a particular season are collected together and copied into the register by a scribe to whom the High Priest entrusts the work. This is not done immediately after the ordinations, but, as the evidence shows, once in six months or so, or even once in two or three years. A priest reads out the strips to the scribe, and he copies them. It is not necessary that the scribe should be a scholar well versed in the intricacies of Sinhalese orthography, so that one can well understand and explain any inelegant spelling that may occur in any of these entries. Moreover, as the entries for each year are not made by the same scribe, one can also well understand the difference in the shape and formation of characters appearing in different olas of this register.

" In view of all these facts, which are proved out of the mouths of the plaintiff's own witnesses, I am unable to say that he has even made out a case of suspicion against these olas. The register is an official document of this church, and it comes from proper custody. The presumption is that every leaf of it is genuine, and all I need say is that that presumption has not been rebutted by any of the evidence led before me.

" It transpired during the progress of this case that the second defendant is detested by some of the leading members and dignitaries of his sect as being a disreputable man, who is utterly unfit to be a priest, and much less to be the incumbent of so renowned a place as the Kelani Vihare. It was alleged that he was a forger, who had actually been tried before the Supreme Court, and a cattle-stealer, who had figured in the Police Court. There was some justification for those allegations, and it may even be that he was guilty of the charges, although he was never convicted; but so far as this Court is concerned his character has nothing whatever to do with the question before it. A man's bad character cannot deprive him of his civil rights, and if a Buddhist priest is of bad character and unfit to hold office, the congregation and their trustee must seek their remedy elsewhere and deprive him of his benefice.

" It seems to me, therefore, that the high priests and others who gave evidence against the second defendant's claim have been carried away, perhaps unconsciously, by reports against this priest's character, and were thereby prejudiced against him.

" Leaving aside the improbabilities of the case put forward by the plaintiff, I cannot overlook the very strong evidence called by the second defendant to show the truth of his statement that he was the joint pupil of both Dompe and Mapitigama, and that he was duly ordained as such in 1887. His chief witness on this point is no

other than the present Anunaike or Second High Priest of the Malwatte Vihare. This priest, who is eighty-two years old, and has been a fully ordained priest for sixty years, and the Anunaike of Malwatte Vihare for the last twenty-eight years, swears that he was present and took part in the ordination of the second defendant. He then came up with a letter of introduction to the then High Priest Hippola signed by both Dompe and Mapitigama, who presented him for ordination, their joint pupil, and he was accordingly ordained. When a tutor cannot personally attended his pupil's ordination, it is customary to send such a letter of introduction, and the witness from his personal knowledge knew that the second defendant was ordained as the joint pupil of those two priests. Perhaps in the case of an ordinary priest one might not remember or care to remember. after the lapse of so many years, who his master was; but in the case of such an important Vihare as Kelani it is a matter of the highest interest to every Buddhist. whether priest or layman, to know and to remember who the person presented for ordination by its incumbent was. This witness further says that he was well aware of the entry in the register referring to the second defendant's ordination, and that till this dispute arose he had never heard it suggested that the second defendant was not Dompe's pupil.

" I think the testimony of this High Priest, who, so far as we know, is a perfectly disinterested person, is entitled to quite as much respect as that of any of the High Priests called by the plaintiff. It fully corroborates the genuineness of the register, which, in my opinion, it is impossible to throw aside.

" Another of the issues raised in this case is, whether or not the second defendant is bound by a certain decision given by the Maha Sanga Sabhawa, or Great Council of priests, at Malwatte in 1904, which held that the plaintiff was entitled to his incumbency jointly with the defendants. I need only say a very few words touching this point, which I decide in the negative for two reasons:—

" (1) That was not the decision of a recognized tribunal, which could be pleaded as *res judicata* in a Court of Law; and

" (2) It was manifestly an improper decision, forced upon the second defendant without allowing him to put forward his best piece of evidence, namely, the register, and which decision was repudiated by him as soon as it was pronounced.

" Admittedly, the Maha Sanga Sabhawa is the highest ecclesiastical court of the Buddhist Church. The Mahanáike or Chief High Priest is the President of that assembly, and its decisions, so far as they relate to the internal discipline of the church and the conduct of priests, are final. It has no right of deprivation, and its decrees

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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 rectitude. In the present case it would appear that when Dompe died in 1903, the first and second defendants denied the rights of the plaintiff and of the third defendant as Dompe's successors, and the latter appealed to the Maha Sanga Sabhawa for a decision on the point. The chapter of priests met in November, 1903, and the second defendant loyally responded to the notice sent to him, and attended that meeting, but the first defendant was absent through ill health. The second defendant then stated his case, which was that he was the senior pupil of Dompe, and appealed to the register to prove his point. That was the only point in the case, and the evidence of the register would have been the best evidence to decide it. Although the second defendant pressed for the production of the book, the President declined to produce it, which was then close at hand in the Vihare. As Hikkaduwe High Priest, who took part at that meeting, says, the President retired into a room when the register was called for, and came back and said that he would not produce it before anybody except on an order of Court, as he had doubts about its genuineness, When that refusal was given, none of the other priests who formed the chapter dared to press for the production of the book, because, as it is said, it would have been an act of disloyalty and contumacy towards their Chief High Priest or Pope, whose word was as law to them. In other words, the chapter were prepared to subordinate their own opinions to that of their Chief High Priest and abide by his mere *ipse dixit*, even though they knew they were thereby denying justice to a man who was clamouring for it, and appealing to the only piece of evidence which would have conclusively proved his case, and which was then at the disposal of the very person who was refusing to produce it.

"The Chief High Priest himself admitted in his evidence that if such an entry was in his register and was correct, the second defendant would be the senior pupil of Dompe, and would as such take precedence over the plaintiff and the third defendant; and he further admitted that if the entry was correct, the decision they gave would have been wrong. He says that he did not produce the register because at no stage of the inquiry did the second defendant or any one else call for it. It is impossible to get over the utter improbability of such a thing, considering that the production of the register would have conclusively proved or disproved the claim of the man who was being then tried before them. The High Priest further stated that, until he opened the register two or three days after the inquiry was closed and judgment was deferred, he had no suspicion whatever that any entry in his register was not genuine. If he was acting fairly by the second defendant, it is extraordinary

that as soon as he made that discovery and found that there was some truth in the second defendant's claim he did not re-assemble his chapter and give them the benefit of this newly discovered piece of evidence before they came to a final decision one way or the the other. The conduct of the Chief High Priest in this connection can only be explained on the hypothesis that he was so firmly convinced in his own mind as to the second defendant not being a pupil of Dompe that he wanted to have his own way irrespective of what the register contained. We need not go so far as to say that he was deliberately doing an injustice to the second defendant in whatever he did, and I am prepared even to say that in his own mind he thought he was acting quite correctly, but in a Court of Law the attitude he took up will not bear scrutiny. No one claims infallibility for him, and although his utterances are accepted without question, even by such exalted personages as the High Priest of Adam's Peak, we yet cannot forget that he is only a human being, who is sometimes liable to make mistakes. His evidence with regard to what transpired at the Malwatte inquiry touching the production of the register is so hopelessly contradicted by the plaintiff's own witness, the High Priest of Adam's Peak, not to mention the defendant and his witness, the Annunaike of Malwatte, that I am compelled to throw it aside altogether.

"Having closed the inquiry without the production of the register, the chapter did not, as is usual, pronounce its decision there and then, but it would appear that three months later the Chief High Priest himself pronounced a judgment instead of the Judge, or 'Anu Wijjaka,' whose duty it was to pronounce it. That decision was, as I indicated before, nothing but the *ex cathedrâ* opinion of the Chief High Priest, which he wanted everybody to accept without question, in order, if possible, to get rid of an undesirable priest. That being so, it goes without saying that it was not a decision which any Court should uphold as being binding on the second defendant.

"In view of my above finding, it is unnecessary to touch upon any of the other questions that have been raised in this case. I find it proved that the second defendant was duly adopted and robed at the instance of both Dompe and Mapitigama, and, as being the senior ordained pupil of Dompe, he is at present solely entitled to Dompe's share of the incumbency to the exclusion of all other pupils. I therefore dismiss the plaintiff's action with costs."

The Royal Sannas dated 1779 A.D., and referred to by the District Judge, was as follows:—

"Hail! When His Renowned, Excellent, Heroic, and Valorous Majesty Kirti Sri Raja Sinha, the Great King, whose fame has spread not only in his own, but also in those of other countries, having ascended the throne of prosperous Lanka, which was brought

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under the one single canopy of his sway, was enhancing the growing success and furthering the propagation of the religion of the omniscient one, who is adored by Brahamas, Gods, Demigods, sages, and men, His Majesty was informed of the dilapidated condition of the Dagoba at Kelani, situated on the spot where our Buddha, at the invitation of Maninayana, Supreme King of Nagas, having made his advent through the sky, attended by five hundred of the lust-conquered priests, preached his Dharma (Buddhist scripture) to Brahamas, Gods, Demigods, and Nagas, sitting on the gemmy seat in the middle of the Jewel Hall, having partaken of the celestial food offered by the Chief Nagas.

" Then, on the occasion when His Majesty received information concerning the dilapidated condition of Dagoba at Kelani, His Majesty, granting thousands of money from the Royal Treasury to Mapitigama Buddharakkita, Priest, ordered him to repair the damages in the Dagoba. He, the Priest, constructed it with 550,000 bricks to the height of 40 cubits, plastering it with 500 amunams of chunam, and enclosing the same with a parapet wall, and the said Priest further built an image-house, wherein was placed an image of Buddha refulgent in all beauty of the ten great proportions of measurement; moreover, a top covering and stone steps being also put up, the priests reported the merits of the work to the King, when His Majesty was pleased to grant unto the said very energetic Priest Buddharakkita the establishment place, " isthane, " in perpetuity, in order that he and one of his pupils in succession, who is well conducted and learned in the Winaya and Dharma, may keep the works in due state of preservation for the future. And to enable them to carry out that purpose, it was ordered that 12 amunams of paddy be given and granted out of the produce of Maniangama, and this copperplate be engraved and granted, and by order of His Majesty, sitting like Indra on the golden Throne ornamented with nine precious gems, this copperplate was engraved.

" Given and granted on this Sunday, the 15th day of the Full Moon, in the Lunar Month of Nawan, in the year named Wikari, One thousand Seven hundred and One of the Saka era at Sriwardanapura. "

The plaintiff appealed against the judgment of the District Judge.

C. M. Fernando, C.C. (with him *H. Jayewardene* and *Batuwantudawe*), for the plaintiff, appellant.

H. J. C. Pereira (with him *A. St. V. Jayewardene* and *De Zoysa*), for the defendants, respondents.

Cur. adv. vult.

September 22, 1908. HUTCHINSON C.J.—

This is an appeal by the plaintiff. He claimed a declaration that he is a joint incumbent of the Kelani Vihare, and the District Court dismissed his claim. He alleged in his plaint that by virtue of a deed dated January 11, 1858, Dompe Buddharakkita and the first defendant were joint incumbents of the Vihare until the death of Dompe in 1903; that Dompe left him surviving his pupils, the plaintiff and the third defendant, but that after his death the first and second defendants disputed the right of the plaintiff and the third defendant to the incumbency, and exclusively enjoyed the income and emoluments of the post without giving them their legitimate shares; that the plaintiff and the third defendant thereupon made a representation to the Maha Sanga Sabhawa at Malwatte Vihare complaining that the first and second defendants were unlawfully depriving them of their legitimate shares of the emoluments and income; that the Sanga Sabhawa inquired into the complaint, and on February 12, 1904, ordered that the plaintiff and the three defendants should jointly have the incumbency; that the first and second defendants failed to act in conformity with the order, and that, for failure to do so, the second defendant was interdicted by the Sanga Sabhawa, and that in view of the said interdiction the second defendant is not entitled to any share in the incumbency.

The first and second defendants filed a joint answer. They said that the pupils of Dompe were the second and third defendants, and that the second defendant was the senior pupil, and is also a pupil of the first defendant; they denied the plaintiff's statements about the Sanga Sabhawa; they referred to the Sannas granted in 1779 A.D. by King Kirti Sri Raja Sinha, by which it was declared that the then incumbent and one of his pupils in succession should enjoy the incumbency and the emoluments of the Vihare in perpetuity, and they contended that the appointment of the two incumbents by the deed of January 11, 1858, was in violation of the decree in the Sannas, and that, on the death of Dompe, the first defendant, as the survivor of the two appointed, became the sole incumbent of the Vihare with the rights attaching thereto, and, further, that the rights, if any, of Dompe on his death devolved on the second defendant (as his senior pupil); and they claimed that the incumbency and all rights under the Sannas are now vested in the first defendant alone, or in him and the second defendant, and that neither the plaintiff nor the third defendant has any right thereto.

The following issues were settled:—

(1) Were the disputes between the parties referred to the decision of the Maha Sanga Sabhawa by the plaintiff and the defendants, and did the Sabhawa decide that the plaintiff was entitled to the incumbency jointly with the defendants? If so, is the decision binding on the parties?

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(2) Is the plaintiff a pupil of Dompe? If so, is he entitled to a share of the incumbency?

(3) Is the second defendant the senior ordained pupil of Dompe? If so, is he solely entitled to Dompe's share of the incumbency, to the exclusion of the plaintiff?

(4) Is the plaintiff's claim prescribed?

The second defendant is, in fact, in sole possession. He says that either the first defendant is the sole incumbent, or else, the first defendant and himself are the joint incumbents, and that he holds a power of attorney from the first defendant. There is strong evidence that the first defendant is now imbecile; but no objection has been made on that account either to his answer or to the present validity of the power of attorney. The real contest is between the plaintiff and the second defendant. The third defendant filed no answer, but appeared at the trial, and said he would stand or fall with the plaintiff.

The District Judge decided that the second defendant is not bound by the decision of the Sanga Sabhawa given in February, 1904, for two reasons: (1) That it was not the decision of a recognized tribunal, which could be pleaded as *res judicata;* and (2) that it was an improper decision, forced on the second defendant without allowing him to put forward his best piece of evidence.

It is not asserted in the plaint, and it is not proved, that the Sabhawa is a tribunal which has exclusive jurisdiction to decide such a dispute as this, that is, a dispute as to the right of succession to an incumbency. On a matter of such great importance one would have expected clear and decisive evidence. There is, however, no such evidence. Nor is there clear evidence as to whether the decision of the Maha Sanga Sabhawa is that of the High Priest alone, as it practically was in this case, or that of the majority of the members. Moreover, the order of February 12, 1904, was attacked by the second defendant as having been improperly made; a good deal of the evidence was directed to that point, and at the close of the evidence the plaintiff's counsel admitted that it is competent for the Court to set aside the award (meaning the order) on grounds of irregularity or misconduct; and I agree with the District Judge that the order was improperly made, because the most important evidence was improperly excluded. If, however, the first issue was intended to be, whether the parties agreed to refer the dispute to the Sanga Sabhawa, so that the order of February 12 was really an award on an arbitration, there is no evidence of such an agreement. In my opinion the District Judge was right in holding that the second defendant was not bound by the order.

The District Judge also found that it was proved that the second defendant is the senior ordained pupil of Dompe, and that as such he is solely entitled to Dompe's share of the incumbency, to the exclusion of all other pupils. The evidence that he is the senior

pupil is conclusive; and as to the *primâ facie* right of the senior pupil to be the sole successor, that is what I should have expected the rule to be, and the evidence satisfies me that it is the rule.

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For the purpose of this action it is not necessary to decide whether on Dompe's death the other joint incumbent, the first defendant, became the sole incumbent, or whether he and the second defendant became the joint incumbents.

The District Judge recorded no finding on the issue as to prescription, and I do not think it necessary to consider it.

In my opinion the appeal should be dismissed with costs.

WENDT J.—

I agree. There is no evidence to establish that the Maha Sanga Sabhawa had exclusive jurisdiction to determine the dispute as to the succession to the incumbency. Even the exact constitution of that tribunal is left somewhat doubtful. Assuming its jurisdiction, there is ample evidence to show that its decision was vitiated by illegalities in the procedure. Upon the evidence here given, I cannot reverse the District Judge's finding that the senior pupil is entitled to succeed in preference to his juniors.

Appeal dismissed.