1940 *Present :* **Moseley S.P.J. and Keuneman J.**

DHARMARAKKITA *v.* WIJITHA

20—D. C. Kalutara, 19,992.

Buddhist ecclesiastical law—Succession to incumbency—Right of pupils to elect a successor other than senior pupil.

The pupils of a deceased incumbent have the right to elect one of their own number, other than the senior pupil, as incumbent when the senior pupil consents to or acquiesces in such election.

APPEAL from a judgment of the District Judge of Kalutara.

N. E. Weerasooria, K.C. (with him *L. A. Rajapakse* and *C. V. Ranawake*), for defendant, appellant.

H. V. Perera, K.C. (with him *H. A. Wijemanne* and *A. C. Gunaratne*), for plaintiff, respondent.

Cur. adv. vult.

March 1, 1940. KEUNEMAN J.—

The plaintiff brought this action to be declared the incumbent of the Indasararama Maha Vihare, and that he be declared entitled to the rubber coupons issued in respect of certain rubber plantations on the temple property, and that the Rubber Controller be directed to issue to him certain coupons which had been allocated to the defendant, and for damages Rs. 900 and further damages at Rs. 60 per month till coupons are issued to the plaintiff.

The learned District Judge entered judgment declaring the plaintiff entitled to the incumbency, the rubber coupons and damages at Rs. 720 and furher damages at Rs. 30 a month till restored to possession. The defendant appeals from this judgment.

The temple in question was founded by Wettawa Indasara, who was the original incumbent. Plaintiff claimed the incumbency by pupillary succession, namely, *sisyanu sisya paramparawa.*

Plaintiff stated that Indasara was succeeded by his pupil Sumangala, and that Sumangala was succeeded by his pupil Dhammananda, and that Dhammananda was succeeded by his pupil Sumanasara. Plaintiff claimed that as a pupil of Sumanasara, he succeeded to the incumbency on the death of the latter in 1930.

At the trial the following issues were framed:—

1. Is the plaintiff the incumbent of the Indasararama Maha Vihare ?
2A. Is the defendant entitled to the incumbency by election or otherwise?
3. Did the defendant wrongly appropriate the rubber coupons from August, 1934 ?
4. Damages.
5. Has the defendant's claim, if any, to the incumbency been prescribed?

It was admitted in the proceedings that Sumanasara was the incumbent of this temple till his death on May 22, 1930, that the plaintiff was a pupil of his, and that the defendant was a co-pupil of Sumanasara, both being pupils of the previous incumbent Dhammananda. It further transpired in the evidence that the plaintiff was not the senior pupil of Sumanasara, and that he was also the pupil of the defendant by virtue of his ordination.

According to the plaintiff, on the death of Sumanasara all the pupils of Sumanasara, including the senior pupil Dharmasena, consented to the plaintiff succeeding as incumbent. The plaintiff produced document P 2 signed by his four co-pupils whereby they stated that they had selected and installed him to succeed Sumanasara to the incumbency of the temple.

P 2 purports to bear the date, May 29, 1930.

Dharmasena in his evidence said: "After Sumanasara's death all of us pupils of Sumanasara agreed that the plaintiff should succeed. I have a better right to the incumbency than the plaintiff, being his senior, but withdraw and recognize him as the rightful incumbent". He also added: "I remember writing P 2. It was about eight years ago". He was not however able to remember whether the date was on the document when it was originally written.

Another signatory of P 2, Sirinewasa, also acknowledged his signature in P 2, but was not certain whether the date was there when he signed. He was certain however that P 2 was signed some time before the defendant was appointed incumbent by the Buddhist Temporalities Committee.

P 2 has been impugned by Counsel for the defendant as a later fabrication, but on an examination of the evidence I am satisfied that it is a genuine document. The date has not been strictly proved, but I think the evidence establishes that it was executed shortly after the death of Sumanasara.

P 2 shows that all the pupils of Sumanasara, including the senior pupil Dharmasena, agreed that the plaintiff should succeed as incumbent in the place of Sumanasara, and there is no question that he was unanimously elected by his co-pupils to fill that office.

Plaintiff said that he reported this election to the Buddhist Temporalities Committee, and produced a reply from the Chairman, P 7, dated August 17, 1930, wherein he was recognized as incumbent.

The defendant denied that the rule of pupillary succession was applicable to the incumbency in question. According to him, the right to elect the incumbent resided in the Sangha Sabha which appears to comprise the priesthood of the whole sect in this district. Its members were therefore drawn not only from this temple, but also from the other temples in this district, and included the High Priest of his sect, Dewarakkita.

The defendant produced a document D 7, dated September 21, 1930, signed by Dewarakkita and a number of other priests of the various temples, including one priest from the temple now in question, whereby the Sangha Sabha declared that the defendant had been approved by them as a proper and suitable person to be the incumbent of the temple with which we are concerned. D 7 was sent to the President of the Buddhist Temporalities Committee of Kalutara, and on receipt of it, the President wrote D 8 of September 22, 1930, to the defendant, informing him of his appointment to the incumbency. D 9 of October 3, 1930, was also produced to show that the Assistant Government Agent, Kalutara, also accepted this appointment. The defendant claimed the incumbency by virtue of this appointment.

The plaintiff had earlier been notified that Kalyana Tissa was appointed incumbent—*vide* P 11 of June 17, 1930—and had protested against this appointment—*vide* P 12. But Kalyana Tissa appears to have declined the office on the ground of ill-health—*vide* D 7.

The first question to be decided is whether the right of pupillary succession applies to the incumbency in dispute.

It has been held that where the right to an incumbency is in question, in the absence of evidence to the contrary, it must be presumed that the incumbency is subject to the *sisyanu sisya paramparawa* rule of succession —*vide Ratnapala Unnanse v. Kewitigala Unnanse*[1] and *Unnanse v. Unnanse*[2].

In this case there is only the bare statement of the defendant that on previous occasions the Sangha Sabha has made the appointments to the incumbency. No corroboration of this has been given by the production of documents or by other satisfactory evidence. The plaintiff led evidence to the contrary effect, and pointed out that in every case the deceased incumbent was succeeded by his pupil. I must hold that the rule of succession which is applicable is the *sisyanu sisya paramparawa.*

In this connection, I may mention the evidence of Sri Dhammananda, High Priest of Colombo and Chilaw, Principal of the Vidyalankara Pirivena and Chief Officiating Priest for Ordination at Malwatta, admittedly very learned in Buddhist law and an authority on custom. He sets out the rule of succession in the case of *sisyanu sisya paramparawa,* namely, that the senior pupil suceeds the tutor as a matter of course, that the tutor can choose any pupil to succeed him, and that the pupils may choose one of themselves also. (I shall deal with this in another connection.) He then goes on to say: "Nevertheless the final choice rests with the Sangha Sabha. That right is exercised *when there is no suitable person or when the person elected is not suitable*". He speaks of the right of the Sangha Sabha "to interfere" when a person who is not suitable is elected. By "suitable" he meant "a pious or learned or just person".

Now, there are several points to be considered on this evidence. In the first place, the right of the Sangha Sabha never arises, unless there is no suitable person or the person elected is not suitable, *i.e.*, they only intervene when there is no election possible, or after an election has been made. Clearly they are not the body in whom the primary right of election resides.

In the second place, the witness admits that he does not remember a single instance where the Sangha Sabha interfered with the choice of the tutor or of the co-pupils.

Lastly, the Sangha Sabha mentioned by the witness is a very different body from that which purported to make the appointment in this case. The witness describes the Sangha Sabha as "*the priesthood attached to the particular temple in question*", clearly excluding thereby the priests of other temples. I do not think it is necessary in this case to consider the right which he mentions, because the facts of this case apply to a very different set of circumstances.

[1] *2 S. C. C. 26.*

[2] *22 N. L. R. 323.*

Several further points were raised by Counsel for the appellant and I think his main arguments may be summed up as follows:—

(1) As regards the history of this incumbency, the senior pupil has not in fact succeeded the incumbent, but some pupil other than the senior.

(2) Under the rule of *sisyanu sisya paramparawa,* the succession of the senior pupil is imperative, unless the incumbent has nominated some other pupil. Where the incumbent has not nominated anyone, there is no right on the part of the pupils to elect one of their number who is not the senior pupil. The further corollary to this is that where the senior pupil does not accept the incumbency or has relinquished it, the right to the incumbency is vested in the senior pupil of that senior pupil. In other words, it was contended that if Dharmaṣena can be regarded as having repudiated the incumbency, the proper person to succeed was Dharmasena's senior pupil.

(3) Where the pupil of an incumbent is also the pupil of another priest of the same temple who comes within the line of pupillary succession, such pupil cannot succeed to the incumbency until the death of the surviving tutor, and such tutor is entitled to the incumbency. In this case it was contended that as the plaintiff was the pupil both of Sumanasara and of the defendant who was a co-pupil with Sumanaṣara, his right to succeed must be deferred till the death of the defendant and that the defendant was entitled to the incumbency.

I shall deal with each of these points in turn.

(1) Counsel for the defendant stated that on the death of each incumbent, he was succeeded, not by his senior pupil, but by some other pupil, and depended upon this to show that the rule of pupillary succession, *sisyanu sisya paramparawa,* was not applicable to this temple.

There are questions of fact involved here which we must determine.

The first incumbent was Indasara. On his death, he was succeeded by his pupil Sumangala. It was contended that the senior pupil was Gunaratne. The plaintiff led evidence to the effect that Sumangala was the senior pupil. The defendant, in addition to his evidence, produced document D 3. D 3 is a document executed in 1889, and appears to be a statement of the movable and immovable property acquired by Indasara, and a statement of the pupils ordained by Indasara and his successor Sumangala. In the list of pupil priests ordained by Indasara, the name of Gunaratne appears first and that of Sumangala second. There is however nothing to show that the compiler of this document was directing his mind to the question of seniority among the pupils, and I cannot see that this document is conclusive evidence of the fact that Gunaratne was in fact the senior pupil.

As regards Sumangala, it was contended that his senior pupil was Devananda, on the ground that his name occurs in D 3 above that of Dhammakkhandha. The same argument applies to this case as to the previous one. Further, it is by no means clear that either Gunaratne or Devananda was alive at the time of the death of the incumbent tutor.

As regards Dhammakkhandha's pupils, it was contended that the senior pupil was Kalyana Tissa. Apart from the oral evidence, the defendant relied on a deed of gift by Dhammakkhandha, D 14 of September 27, 1913, in which the donor referred to Kalyana Tissa as his "chief pupil". As against this, the plaintiff led a body of oral evidence and produced document P 15 of October 14, 1917, wherein the Mahanayaka of the Sangha Sabha set out the names of "the living pupils" of Dhammakkhandha, placing the name of Sumanasara first and Kalyana Tissa third. I do not think that any conclusive inference can be drawn from this evidence. It has to be remembered that the burden of proving that some other rule of succession than the *sisyanu sisya paramparawa* rule applied to this temple lay on the defendant. I do not think that the defendant has succeeded in discharging that burden.

Further, the question as to the right of the pupils under the *sisyanu sisya paramparawa* to elect one of their number other than the senior pupil will be dealt with later. There is a distinct suggestion in the evidence of the plaintiff's witness Dharmasena that at least one of these persons referred to, namely, Dhammakkhandha, was selected by his co-pupils, because he was the cleverest of the pupils. If in fact there is such a right on the part of co-pupils to choose one of their number who is not the senior, then no inference can be drawn against the application of *sisyanu sisya paramparawa* to this temple.

(2) We may now consider the second argument urged by Counsel for the appellant, namely, that under the rule of *sisyanu sisya paramparawa* the right of the senior pupil to succeed is imperative and that no right resides in the pupils to choose any other person out of their number.

It has been pointed out by Counsel for the respondent that in *Saranankara Unnanse v. Indajoti Unnanse*[1] Bertram C.J. stated: "where there are several persons in the line of pupillary succession, the *adikhari* is appointed from among these persons, either by nomination of his predecessor or by selection of these persons. This selection . . . . is . . . . the formal choice of the other persons entitled to the succession. By custom the right to succeed is determined by seniority (though it would appear from the evidence recorded in the case of *Dammaratana Unnanse v. Sumangala Unnanse*[2], that the right attaching to seniority is not so unqualified as some of our decisions appear to suggest . . . .). When, therefore, in such cases, our Courts declare that any person is entitled to succeed to an 'incumbency', what they, in effect, decide is that the person in question, by virtue of seniority (or such other qualification as the Court may determine to govern the matter), is by custom entitled to be selected for the office by the other priests in the line of pupillary succession".

Again, in *Gunananda Unnanse v. Dewarakkita Unnanse*[3], Jayawardene A.J. said: "If an incumbent dies leaving several pupils, the senior pupil succeeds. The selection of the incumbent, however, rests with the pupils, and the right of the senior pupil might, in certain circumstances, be disregarded".

[1] *20 N. L. R. 385 at 397.*
[2] *14 N. L. R. 400.*
[3] *26 N. L. R. 257 at 275.*

It has been pointed out for the appellant that these statements are *obiter dicta* as the immediate point with which we are concerned did not come up for determination in these cases. This is undoubtedly the fact, but at the same time these statements are of great weight, as the whole question of *sisyanu sisya paramparawa* was investigated in each case, and expert evidence, not only in those cases, but also in *Dammaratana Unnanse v. Sumangala Unnanse*[1] was fully considered. In the last-mentioned case, at the instance of the Supreme Court, a series of nine questions was propounded to seven priests of the highest distinction and learning, and the evidence of these seven priests appears in the Appendix to Volume 20 of the *New Law Reports* at page 506. The Supreme Court considered that the answers to these questions "should form a very valuable source of information for future reference on the points inquired about".

Bertram C.J. had recourse to this evidence in *Saranankara Unnanse v. Indajoti Unnanse* (*supra*), and, in my opinion, correctly so. de Sampayo J. who sat with him stated: "I think . . . . that we may safely adopt such propositions as are supported by a concensus of opinion, or are approved by a majority of the learned and eminent priests whose evidence is available to us. The evidence in the Kandy case" (*i.e., Dammaratana Unnanse v. Sumangala Unnanse* (*supra*)) "is the most important, because it was given, not in the interests of the parties, but with a view of assisting this Court . . . .".

The evidence in the 14 N. L. R. case is available to us and has been studied by us. One of the questions formulated, namely, No. 3, was: "Does every pupil obtain the right of pupillary succession to his tutor; if so, in what order; if not, which pupil obtains the right?"

The answers to this question are illuminating. Four of the priests deposed to the right of the pupils to select one of their number, but recognized the right of the senior pupil to succeed, in the absence of nomination by the tutor. The emphasis on the two aspects of this question was differently placed by the various priests. Some said that the senior pupil succeeds, but if he is unfit or not learned enough, all the pupils join in selecting their head. Others laid more emphasis on the right of selection by the pupils, who were also influenced by the fact of seniority.

Three of the priests stated that in the absence of nomination by the tutor, the senior pupil becomes the incumbent. They did not refer to the right of the pupil in any circumstances to select one of their number. It was contended that they must be regarded as having denied any such right to the pupils. I am not satisfied that this conclusion must be drawn. I think the better opinion is to regard their evidence as silent upon that point.

It may well be that the right of the senior pupil to succeed cannot be displaced except with his consent or acquiescence. I do not express an opinion on that point, because it is not necessary for the determination of this case. But I think that there is a very strong body of expert opinion in favour of this proposition at least, namely, that the pupils have the right to nominate one of their number, where the senior pupil consents to or acquiesces in this.

[1] *14 N. L. R. 400.*

So far I have not dealt with the evidence called in the present case. Admittedly the most distinguished and learned of the experts on Buddhist Ecclesiastical Law called in this case was Sri Dhammananda, whose evidence I have referred to earlier. He was called by the defendant, but his evidence on this point is favourable to the plaintiff. On this particular point he said :

"The usual rule of succession is the *sisyanu sisya paramparawa*. The senior pupil succeeds the tutor as matter of course. The tutor can choose any pupil to succeed him. The pupils can choose one of themselves also. That is, the senior pupil can waive his right to the incumbency."

This was said in cross-examination. In re-examination he said :

"When there are several pupils, the senior pupil is selected; but if there are more suitable pupils, then the most suitable is chosen."

I do not propose to comment on the other evidence on this point, because in respect of weight and authority it is inferior to that of Sri Dhammananda. I need only say that plaintiff called evidence in support of his contention and the defendant called certain evidence to the contrary.

I think that all the evidence to which I have referred undoubtedly establishes the right of the pupils of a deceased incumbent to elect one of their own number, other than the senior pupil, when the senior pupil consents to or acquiesces in this. This is a right pertaining to the rule of succession *sisyanu sisya paramparawa*. I hold that the plaintiff has been selected by the correct authority, and that his right to the incumbency has been established.

In view of this decision, the further corollary argued, namely, that in any event, if Dharmasena relinquished the right of succession, the proper person to succeed was Dharmasena's senior pupil, does not arise. I may however add that this proposition appears to be contrary to authority.

(3) The third proposition of the appellant's Counsel was, that in view of the fact that plaintiff was a pupil not only of Sumanasara but also of the defendant who was a co-pupil with Sumanasara, the plaintiff cannot succeed to the incumbency until the death of the defendant, and that the defendant is now entitled to the incumbency. No previous authority to this effect has been cited to us, nor have we been able to trace any case where such a right has been mentioned. On the contrary, one of the questions propounded in the *14 N. L. R.* case, namely, No. 4, was :

"If a person who has been a pupil of one tutor becomes the pupil of another tutor, does he lose the right of pupillary succession to his former tutor from that fact ?"

All the answers positively stated that he would not lose his right, and no mention was made by anyone of any special exception as is contended for here.

Further, in the case, decided by a Divisional Bench, of *Gunananda Unnanse v. Dewarakkita Unnanse* (*supra*), where the right of a pupil to succeed as against the fellow-pupil of his tutor was expressly considered, it was held that the rights of fellow-pupils of the tutor can only arise when that tutor has no pupils of his own or when the direct line of succession is

exhausted—*vide* at pages 264 and 275. In spite of considerable inquiry made in that case, no mention was made of the special instance which is now put forward.

The evidence led in the present case, apart from that of the defendant, is as follows :—

Sri Dhammananda, the witness already mentioned, stated :

"A pupil can have more than one tutor. If a pupil has two tutors in the same temple, if pupillary succession applies, then the pupil must wait until both die. That is the case if both tutors belong to the same line of pupillary succession."

He added that where the tutors were in different temples this rule had no application.

Now this witness did not expressly mention that the surviving tutor had a right to the incumbency; but even if I assume that he meant to say so, several questions arise which have not been satisfactorily answered.

First, has such a tutor the right, which is conceded to the ordinary incumbent, of nominating his successor from among his pupils ? If he has that right, he is entitled to pass over the senior pupils of the deceased incumbent, and even to direct the succession to another line. Is this in keeping with the rule of pupillary succession ? I think not. If, on the other hand, the right of the pupil is merely suspended during the lifetime of the co-tutor, what exactly are the rights of the surviving co-tutor, and how are these rights consonant with the rules of pupillary succession ? No satisfactory answer is available to these questions.

One other witness, Wimala Nayaka, cited his own case. He is now the Chief Priest of a certain temple at Walana. His predecessor in the office, Mangala Nayaka, was a co-pupil of the witness under a previous incumbent. Both of them had a pupil in common. On the death of Mangala Nayaka, witness succeeded to the exclusion of the common pupil. Witness also mentioned the names of two temples in which, he said, the same thing had happened.

Witnesses for the plaintiff contested the proposition so enunciated, which I think gives a right to a co-pupil of the incumbent difficult to reconcile with the decision of the Divisional Court. Further, while it is possible that there may be one or more modern instances on which the appellant can found an argument, I do not think there is that degree of proof which will enable us to hold that any custom has been established whereby the right of the plaintiff to succeed to the incumbency has to be deferred until the death of the defendant. It has not been suggested that this proposition has been spoken to by an expert, until the trial of this case, and I think that for the establishment of so novel a proposition, a strong and satisfactory body of expert opinion is necessary. Such testimony is lacking in this case, and I must hold accordingly that the contention for the appellant fails and that the plaintiff is entitled to succeed to the incumbency in spite of the fact that his co-tutor is alive and is a priest in this temple.

The appeal is dismissed with costs.

MOSELEY S.P.J.—I agree.

Appeal dismissed.