[IN THE PRIVY COUNCIL.]

1937

Present : **Lord Thankerton, Lord Alness, and Sir Lancelot Sanderson.**

K. DHAMMANANDA *v.* DAVITH RANASINGHE.

Buddhist temporalities—Property acquired by incumbent on Crown grants—Succession to property—Title transmitted to succeeding incumbent—Prohibited bequests to temples—Proclamation of 1819.

Property dedicated to a Buddhist vihare is the property of the incumbent for the time being, for the purposes of his office including his own support and the maintenance of the temple and its services ; and on his death it passes by a special rule of succession, which secures its transmission to the succeeding incumbent.

Land acquired by an incumbent on Crown grants and certificates of quite possession may be similarly transmitted.

The proclamation of September 18, 1819, which makes it unlawful for a person to make a donation or a bequest to or for the use of a temple does not apply to Crown grants.

An appellant cannot be permitted to raise for the first time in appeal questions which should have been put in issue at the trial so as to afford the respondents the opportunity of producing all the evidence available.

APPEAL from a judgment of the Supreme Court.

November 23, 1937. Delivered by LORD THANKERTON.—

The appellant, who is defendant No. 1 in a suit for declaration of title to land, appeals against a decree of the Supreme Court of the Island of Ceylon, dated March 11, 1935, which affirmed a decree of the District Court of Colombo, dated July 26, 1933.

The respondents brought the suit on September 5, 1929, as the trustees of the temple called Pilikuttuwa Purana Vihare duly appointed under the Buddhist Temporalities Ordinance, No. 8 of 1905. They asked for a declaration that nine contiguous allotments of land, eight of which are described in the schedule attached to the plaint, and the ninth of which is the land called Galkandahena described in paragraph 5 of the plaint, are the property of the said temple, and for quiet possession and damages. Of the six defendants, defendants Nos. 1 and 2 claimed as owners of the suit properties, the remaining defendants being their lessees. The defendants Nos. 1 and 2 claimed to have acquired the properties under a deed of March 30, 1928, executed in their favour by one Sonuttara, whom they alleged to have been in possession by a title adverse to and independent of the temple for some thirty years.

In the trial Court the defendants disputed the validity of the appointment of the respondents as trustees of the temple, but the District Judge held that their appointment was valid, and his decision was not challenged. In fact, before the date of trial the respondents' term of office had expired, and the first respondent had been duly appointed as their successor under Ordinance No. 19 of 1931, and the decree was granted in his favour as trustee of the temple.

The appellant, at the hearing of this appeal, felt bound to accept the concurrent findings of fact by the Courts below and it will be convenient to state shortly the relevant facts, which are either undisputed or have been concurrently found by these Courts.

The temple is a very old one ; early in the last century the chief priest was one Sobitta Terunnanse. He had four pupils : (1) Sumangala Attadasi Terunnanse, (2) Kinigama Seelawanse Terunnanse, (3) Kondana, (4) Aturuwella Sonuttara Terunnanse, also called Induruwella Sonuttara Terunnanse. On the death of Sobitta, apparently about 1862-65, he was succeeded by Attadasi, who died on July 5, 1872.

On Attadasi's death, without pupils, the succession fell to Seelawanse, who died in 1900.

There was some dispute as to whether Seelawanse was succeeded by his pupil Kinigama Saranapala or Sonuttara, or both jointly. The trial Judge, after saying that it was unnecessary to decide the question, held, on the evidence, that it was proved that Saranapala became the chief priest. The Supreme Court, while appearing to accept this finding, treated it as immaterial. In the opinion of their Lordships, it is immaterial in view of the concurrent findings as to the nature of the holding of the suit properties by all the chief priests, including Sonuttara.

In any event, it is clear that, after the death of Saranapala in 1910, Sonuttara was the chief priest until his death in April, 1929.

The Courts below have concurrently found in fact that all the chief priests held and administered the suit properties as *de facto* trustees of the temple, and this finding disposed of the main contention of the appellant on the facts, which included an allegation that Attadasi had made a gift of the suit properties to Sonuttara before his death. Indeed, the appellant does not appear to have challenged the trial Judge's findings on this matter in the Supreme Court, and appears to have confined his argument to a question of law based on section 41 of the Ordinance No. 8 of 1905, which provides as follows :—

> 41. From and after the time when this Ordinance shall come into operation, it shall not be lawful for any temple, or for any person in trust for, or on behalf, or for the benefit of any temple, to acquire any land or immovable property or any interest in any land or immovable property of the value of fifty rupees or upwards, unless the licence of the Governor under the public seal of the Island be obtained. And if any person shall by devise, grant or conveyance, or otherwise purport or attempt to vest in any such temple or in any person or persons in trust, for or for the benefit or on behalf of any such temple, any land or immovable property, or any interest therein, of the value aforesaid, and such licence as aforesaid is not obtained, such land or property or interest shall devolve, on, and become vested in, the lawful heir or heirs of such person, notwithstanding such devise, grant or conveyance to the contrary ".

It may be here noted that section 42 provides :—

> "No alienation of movable or immovable property belonging to any temple by sale, mortgage, gift, or otherwise between the date of the

passing of this Ordinance and the appointment of trustees to such temple in manner herein provided shall be of any force or avail in law, but the same shall be absolutely null and void".

As already stated, the appellant, who is defendant No. 1, and defendant No. 2 claim right to the suit properties under a deed of gift in their favour by Sonuttara, dated March 30, 1928. If the properties were validly held by Sonuttara in trust for the temple, section 42 would render the deed of gift null and void, as it was prior to the appointment of the statutory trustees in 1929, and that apart from any question of breach of trust.

In the plaint the plaintiffs claim that the title of the temple was by right of long and prescriptive possession. In their answer the defendants claimed that Sonuttara by possession adverse to the temple and all others for over thirty years prior to 1928 had acquired title to the properties.

Before the Supreme Court the appellant maintained that, in view of section 41 above quoted, neither the temple nor anyone on its behalf could acquire a title by prescriptive possession. This contention, which does not appear to have been submitted to the trial Judge, was rejected by the learned Judges of the Supreme Court, on the ground that section 41 did not apply to the acquisition of title by prescription, following certain decisions of the Courts in Ceylon to which they refer.

Before their Lordships the appellant did not challenge this ground of decision of the Supreme Court, and their Lordships express no view as to its soundness, and reserve any opinion on the question.

The only contention submitted by the appellant to their Lordships was an entirely new one, which he admitted had not hitherto been submitted at any stage of the case, and which is not even mentioned in his case in this appeal. He contended that, in the absence of any proof of the necessary licences under section 41 of the Ordinance of 1905 or the corresponding enactments which preceded it, having been obtained, the temple were not entitled to the suit properties.

For the purpose of his argument he divided the properties into three groups as follows :—

Group I.

No. 6 in the schedule. Acquired by Attadasi by a Crown Grant dated October 16, 1872, under the public seal of the Island.

No. 7 in the schedule. Acquired by Attadasi under a similar grant of the same date.

Group II.

No. 5 of the schedule. Certificate of Quiet Possession in favour of Attadasi dated May 23, 1872.

Group III.

Nos. 1, 2, 3 and 4 of the schedule. Certificates of Quiet Possession in favour of Attadasi, all dated May 23, 1872.

No. 8 of the schedule. Certificate of title in favour of Saranapala as purchaser at a sale dated August 30, 1898.

Galkandahena, referred to in paragraphs 5 and 6 of the plaint. Acquired by Seelawanse under a deed of exchange dated March 2, 1896, in exchange for land called Lindamulawatta.

It will thus be seen that, with the exception of No. 8 of the schedule and Galkandahena, the titles date back at least to 1872. The certificates of quiet possession are granted under clause 7 of Ordinance No. 12 of 1840. They certify that the Crown has no claim to the land, of which the applicant for the certificate is in possession, and they are given with the consent of the Governor. Nos. 3 and 4 of the schedule are entered in the Grain Tax Commutation Register of February 24, 1880, as the property of the temple. As regards No. 5 of the schedule, it is shown on title plan No. 32,084 dated September 2, 1827, where it is described as "a piece of Government high ground called Wiharelande" claimed by Sobitta.

It will be noted that section 41 of Ordinance No. 8 of 1905 only operated after the Ordinance came into force. It superseded section 48 of Ordinance No. 3 of 1889, which was in identical terms. The matter was regulated prior to 1889 by the Proclamation of September 18, 1819, which provided as follows :—

> "It has not been, nor shall be hereafter lawful to any inhabitant of these provinces to make either a donation or a bequest of any land whatsoever to or for the use of any temple, whether vihare, dewala, or otherwise called, without having first signified to us, through the Honourable the Resident, or through any Resident Agent of Government, his or her desire to make such bequest or donation, and having received a licence in writing to give or bequeath the same ; and any land given or bequeathed contrary to this order shall not be considered as the property of a temple, but shall be given to the nearest heir of the person who has disobeyed the law by attempting to give and bequeath such land, provided he sues for the same before the Judicial Commissioner or Agent of the Government within twelve months from this date, or from the date of such gift or bequest, or from the time the possession has been taken for any temple ; or else the land shall become forfeited to the Crown".

It will be noted that this provision only applies to bequests and gifts, and also that it does not apply to Crown grants.

The appellant pointed out that none of the Crown writs or certificates of quiet possession were in favour of the temple, but in favour of the chief priest as an individual, though he was in each case described as a priest. But it must be remembered, as pointed out by the Supreme Court, who cite the authorities, that in the Island property dedicated to the vihare is the property of the incumbent for the time being, for the purposes of his office, including his own support and the maintenance of the temple and its services, and that, on his death, it passes by a special rule of succession, which secures its transmission to the succeeding incumbent. In the present case, it is evident that the suit properties were so transmitted. In his reply to the address of the respondents' Counsel to their Lordships, the appellant's Counsel confined his claim to three of the suit properties, viz., Nos. 5, 6, and 7 of the schedule.

Their Lordships, however, are of opinion that the contention thus raised by the appellant for the first time involves questions of fact, namely, whether licences were necessary at the date on which each property was

acquired, and, if so required, whether they were obtained. The appellant cannot be permitted at this late stage to raise questions which should have been put in issue at the trial, so as to afford the respondents the opportunity of recovering and producing all the evidence available.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.