

1945

Present: Soertsz A.C.J. and Canekeratne J.

FERNANDO *et al.*, Appellants, and JINALANKARA TISSA THERO,  
Respondent.

319—D. C. Avissawella, 3.

*Estoppel*—Plaintiff's claim for incumbency of a Vihare—Ten defendants—Claim for same incumbency by ninth defendant—No objection raised by the other contesting defendants as to irregularity of ninth defendant's claim—Judgment in favour of ninth defendant—Contesting defendants estopped from submitting, in appeal, that the incumbency could not have been declared in favour of a defendant—Estoppel by election.

*Buddhist Law*—Incumbent dying leaving no pupil—Right of sole fellow pupil to succeed.

The plaintiff claimed the incumbency of a Vihare averring that the first to eighth defendants, *dayakayas* of the Vihare, and the ninth and tenth defendants who were Priests prevented him from entering into possession of the Vihare.

The ninth defendant claimed the incumbency himself on the ground that he was the co-pupil of the last incumbent.

The trial Judge held that the ninth defendant succeeded to the incumbency and made a declaration in his favour.

It was argued that as the plaintiff had failed in the claim for the incumbency the Judge should not have made a declaration in favour of the ninth defendant:—

*Held*, that the appellants had acquiesced in the irregularity complained against and should not be allowed to raise the question in appeal.

*Held, further*, that where an Incumbent of a temple dies leaving no pupil his fellow pupil succeeds.

**A** PPEAL from a judgment of the District Judge of Avissawella.

*H. V. Perera, K.C.* (with him *C. V. Ranawake* and *D. D. Athulathmudali*), for the fourth to eighth and tenth defendants, appellants.

*N. E. Weerasooria, K.C.* (with him *S. E. J. Fernando* and *T. B. Dissanaike*), for the ninth defendant, respondent.

*Cur. adv. vult.*

November 21, 1945. CANEKERATNE J.—

The plaintiff claimed the incumbency of Sri Poorna Aramaya Vihare standing on the land called Godellekele situate at Puwakpitiya. Plaintiff came to Court on January 18, 1943, and averred that he was appointed incumbent by the High Priest of the *Nikaya* and that first to eighth defendants, *dayakayas* of the Vihare, and ninth and tenth defendants who were priests prevented him from entering into possession of the Vihare on November 6, 1942. The first and second defendant filed no answer. The position taken up by the fourth to eighth defendants who filed one answer was that they and the other *dayakayas* were entitled to

appoint the incumbent of the Vihare and that the tenth defendant was appointed by them. The ninth defendant claimed the incumbency himself on the ground that he was the co-pupil of the last incumbent.

The learned Judge found as a fact that with the consent of the late Mudaliyar Sri Chandrasekera a temple was built on the land Godellekele belonging to him in 1899 by Rev. Somananda Thero with the help of a number of inhabitants of the locality including one William Fernando a close relative of the Mudaliyar, that thereafter the *dayakayas* of the temple obtained subscriptions and erected a dagoba and a *pilimage* and in 1903 the *dayakayas*, one Peiris the manager of the Mudaliyar's properties in the district and one George the conductor of the Mudaliyar's estate at Puwakpitiya got down the Rev. Kottagoda Punnandana the tutor of Somananda and formally dedicated the Vihare to the Sangha. Punnandana was the first incumbent; he was succeeded by Somananda who continued to be the incumbent for about forty years and died without leaving any pupil. The learned Judge held that the ninth defendant succeeded to the incumbency on the death of Somananda and made a declaration in his favour.

It was strongly urged that there is no justification for the learned Judge making a declaration in favour of a defendant. The action came on for hearing on March 28, 1944; after certain admissions had been made six issues were framed: issue 2 deals with the right of the High Priest of the *Nikaya* to appoint an incumbent. Issue 6 reads thus: is the ninth defendant entitled to the incumbency of this temple as a co-pupil of Rev. Somananda Thero? Five more issues were then suggested by counsel for the appellants. Counsel for the ninth defendant then raised an issue—issue 12. Even if issue 2 is answered in the affirmative does ninth defendant's right to the incumbency prevail over such appointment?

The right to succeed to the incumbency on the death of Somananda was asserted at the earliest opportunity by the ninth defendant and a claim for relief was expressly put forward in his answer. It became clear to the contesting defendants that a claim to the incumbency was made as against them by two persons, the plaintiff and the ninth defendant. At the commencement of the hearing an issue was raised in respect of this right. It was clearly the duty of the contesting defendants at this stage, if they intended to rely on the irregularity now complained of, to ask that a direct issue on that point should be framed and tried. It is quite probable that had this course been adopted the ninth defendant would have taken appropriate steps immediately to make an independent claim to the incumbency against the fourth to eighth and tenth defendants. No such issue, however, was asked for and the case was disposed of on the merits. In this case Counsel had elected to go on and take his chance with the Judge on the case as it then stood and he failed; he ought not to be allowed to rely on a point, which he could have taken in the Court below, at this late stage. In these circumstances, there is now an estoppel by election against the appellants. They acquiesced in the irregularity they could have complained against, and they should not be allowed to raise the question now. (Spenser Bower on Estoppel, page 233, &c.)

It was also argued that there was no dedication. One reads how his devoted friend, King Seniya Bimbisara, four years younger than Buddha, his protector, gives him a park, perhaps the first donation of this sort, the origin of all the monastic foundations. The King of Nagadtha Bimbisara thought "here is this bamboo forest Veluvana, my pleasure ground, which is neither too near the town nor too far from it . . . what if I were to give it to the fraternity? . . . and he took a golden vessel of water and dedicated the garden to Buddha, saying 'I will give up the park to the fraternity with Buddha at the head.' and the Blessed one accepted the park". (*Mahavagga*, 1.22.) Then there is the gift of the Rajagaha treasurer. After he had entertained Buddha he spoke as follows:—

"Reverend Sir, how shall I act in the matter of these monastery cells? In that case, Oh, householder, dedicate these sixty monastery cells to the Order, both present, and to come and throughout the world". (*Cullavagga*, VI.I.I., see 20 N.L.R. pages 394, 395.)

The essentials of a gift seem to be the presence of the grantor and grantee before an assembly of four or more priests and the delivery of the subject of the gift in the presence of the assembly to the grantee; the grantor would use appropriate words so as to indicate sufficiently his intention to make a grant. The grant may be made by a writing or may be made verbally. (*Wickremesinghe et al. v. Unnanse et al.*<sup>1</sup>). The offering and reception of gifts was always accompanied with water in Buddhist circles. Once the gift is accepted the property becomes *Sanghika*.

The effect of a donation is that the donor divests himself of all right in the thing delivered in favour of the donee: a man may in good faith give a thing which is not his own and the donee will get all the rights of the donor in the property. The only reliable evidence on the question of a grant is that given by William Fernando whose testimony has been accepted by the learned Judge: it shows that there was a dedication ceremony at which ten priests were present and that the temple was formally dedicated; it must be assumed that all the necessary requisites for making the temple *sanghika* were complied with. There was thus a formal act accompanied by a solemn ceremony in the presence of ten priests; this fact is admissible as a starting point for acquiring a title by prescription. Punnandana entered into possession of the premises *ut dominus*; he and his successor had been in possession of the premises for a period of about forty years and they can claim a right by prescription against the *dayakayas* who made the dedication and their heirs. The fact that title to the land was in the Mudaliyar is not very material. He at least knew that strangers were beginning to build on his land and he either allowed them or left them to complete the building and to take possession of it; it is a question whether his successor in title can at this distance of time assert a title to the land.

A gift of property may be made by a royal donor or by a private person to a particular priest and his pupils: an example of such a gift by a King is the gift of the village of Dumbara in 1800 to D. Rakkita Unnanse,

<sup>1</sup> (1921) 22 N. L. R. 236.

the persons to take the income were referred to as "Dharmarakkita Unnansege sisyanu sissiya paramparawa" (4 N. L. R. 167). Kings in ancient times used to dedicate temples. Similarly a Vihara may be dedicated to a particular priest and his pupils in perpetual succession (20 N. L. R. pages 396, 402). Every Vihara is presumed to be dedicated in pupillary succession, unless the contrary is proved.

If at the original dedication no provision was made regulating the mode of succession to the incumbency then the general rule of *sissyanu sissiya paramparawa* applies and the persons who dedicated the temple or the grantors cease to have any right or control over the incumbency. (*Dhammajoti Unnanse v. Sarananda Unnanse*<sup>1</sup>; *Rathanapalla Unnanse v. Kewthagala Unnanse*<sup>2</sup>; *Saranankara Unnanse v. Indajoti Unnanse*<sup>3</sup>). No such provision was made at the time of the dedication. Where an incumbent dies leaving no pupil his sole fellow pupil succeeds provided he is in the line of pupillary succession to the Vihare; the ninth defendant was a pupil of Punnandana and is thus entitled to succeed.

The order as to costs should be varied slightly; the fourth to eighth and tenth defendants would be liable to pay only the costs of the hearing on March 28; the order against the plaintiff will remain.

The appeal is otherwise dismissed with costs.

SOERTSZ A.C.J.—I agree.

*Appeal dismissed.*

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