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DIGEST

the Commissioner – General after inquiry may if he is satisfied that such interference or attempted interference will result in damage or loss of crop or livestock, issue an order on such person, cultivator or occupier requiring him to comply with such directions as may be specified in such order necessary for the protection of such rights:

Provided that an order under this section shall not be made for the eviction of any person from such agricultural land:

Provided further that an order issued under subsection(1)

shall not prejudice the right, title or interest of such person, cultivator or occupier to such land, crop or livestock in respect of which such order is made.

[2] For the purpose of ensuring compliance with the provisions of an order under subsection (1) the Commissioner – General may seek the assistance of a peace officer within whose area of authority such agricultural land in respect of which such order is made lies, and it shall be the duty of such Peace Officer to render such assistance as is sought and the Peace Officer may for such purpose use such force as may be necessary to ensure compliance with such order.

[3] An order under subsection (1) shall be binding on the person in respect of whom it is made until set aside by a court of competent jurisdiction.

[4] Any person who fails to comply with an order made under subsection (1) shall be guilty of an offence under this Act.

[5] A certificate in writing issued by the Commissioner – General to the effect that the directions contained in an order made by him under subsection (1) has not been complied with by the person specified therein shall be prima facie evidence of the facts stated therein."

In *Mansoor vs. OIC Avissawella*[1] this Court reiterated the principle that where a Statute creates a right and in plain language gives a specific remedy or appoints a specific tribunal for its enforcement a party seeking to enforce the right must resort to that tribunal and not to others.

Taking into consideration the Agricultural Development Law (Section 90) and the ratio in *Mansoor Vs. OIC, Avissawella (supra),* I am of the opinion that the appeal preferred merits no favourable consideration. Accordingly, the appeal stands dismissed.

SUNIL RAJAPAKSE, J. – I agree.

Appeal dismissed.

PINNAWALA PEMANANDA THERO VS. MAIMBULE NANDARAMA THERO

COURT OF APPEAL
H. N. J. PERERA, J.
CA 1113/99(F)
DC GAMPAHA 30587/L
JULY 16, 31, 2013
AUGUST 8, 2013

Buddhist Temporalities Ordinance – Section 4, Section 41, Section 41 (1) – Sisyanu Sishya Paramparawa – Viharadhipathi – Registers kept by the Registrar – General prima facie proof of the facts contained therein? – Interference by an Appellate Court?

Plaintiff Appellant instituted action against the Defendant Respondent seeking a declaration that he is the lawful viharadhipathi of the temple in question and the ejectment of the Defendant Respondent. It was averred that, the temple was exempted under Section 41 of the Buddhist Temporalities Ordinance and succession is governed by the Sisyanu Sishya Paramparawa Rule.

It was the position of the Plaintiff that Udagampola Guneratne Thero was one time the Viharadhipathi, after his demise, his senior pupil Udagampola Sobhitha Thero succeeded – after his demise, his sole pupil one Wataddara Pagnasara Thero became the Viharadhipathi, upon his death, his senior pupil Meethotamulle Pagnaloka Thero succeeded and after his demise – on 31.08.1987 – without any pupils, the Viharadhipathiship vested on the Plaintiff Appellant who is the 2nd most senior pupil of deceased Wataddara Pragnasara Thero, and that the Defendant has from 07.09.1987 been disputing the Plaintiff's rights.

The Defendant while denying the allegations in the Plaint, stated that he was in possession in his own right as the sole pupil of Meethotamulle Pangaloka Thero, The Learned District Judge dismissed the Plaintiff's action holding in favour of the Defendant. The Defendant was robed in 1979 – disrobed and re-robed in 1983.

Held

(1) It is admitted that the Viharadhipathi of the temple was Meethotamulle Pagnaloka Thero and the Plaintiff Respondent are both pupils of the previous Viharadhipathi Wataddara Pagnasara Thero – Meethotamulle Pagnaloka Thero being senior to the Plaintiff Appellant succeeded to the Viharadhipathiship upon the death of Waraddara Pagnasara Thero in 1985. The fact that the Plaintiff Appellant is a pupil of Wataddara Pagnasara Thero and that he was the second most senior to Meethotamulle Pangaloka Thero has been proved.

(2) Sisyanu Sishaya Paramparawa if the last incumbent have no pupil and has not nominated a successor, that incumbency can pass to his co-pupils only if the common tutor was himself in the line of the succession from the original proprietor trust or incumbent After disrobing one ought to go through the procedure of robing and higher - ordination afresh to become a bhikku.

There are four classes of pupils :-

(1) Pupils by robing

(2) Pupils by ordination

(3) Pupils by obedience and dependence

(4) By in struction

(3) The Buddhist Temporalities Ordinance does not declare that the Register maintained there under is the only evidence of the robing or ordination of a Bhikku, nor does the fact that the Upasampada Register is maintained by a Nikaya exclude proof by other evidence of the fact that a Bikkhu obtained a higher education.

(4) The failure to produce documentary evidence of the robing or Upasampada of a bhikku does not render oral evidence or any other events liable to be rejected on that alone. Registers kept by the Registrar General would be prima facie evidence of the facts contained therein.

(5) If the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion been arrived on conflicting testimony by tribunal which saw and heard witnesses, the Appellate Court will bear in mind that it has not enjoyed this opportunity as to where credibility lies is entitled to greater weight.

Per H.N. J. Perera, J.

> "It is clear from the judgment that he accepted and was impressed by the evidence of the Defendant Respondent and the other witnesses who gave evidence on his behalf; the Learned District judge has carefully analyzed all the evidence in this case and has come to the conclusion that the Defendant respondent was robed as the pupil of Meethotamulle Pagnaloka Thero at a ceremony held at the Viharaya on 10.05.1983.

APPEAL from the Judgment of the Fistrict Court of Gampaha.

Cases referred to :-

(1) *Sri Dhammissara Thero Vs. Sri Kalyawansa Thero* 1966 69 NLR 514
(2) *Sumana Therunnanse Vs. Kansappuhamy* 1989 3 CLR 4
(3) *Gunananda Unnanse Vs. Unnanse Vs. Devarakkita Unnanse*
(4) *Kusalagama Thero Vs. Assaji Thero and others* 2005 1 Sri LR 281
(5) *Saranankara Unnanse Vs. Indajothi* 20 NLR 385
(6) *Dharmatilaka thero Vs. Buddharakkita Thero* 1990 2 Sri LR 211
(7) *Saranajothi Thero Vs. Dhammaratne Thero* 61 NLR 76
(8) *M. P. Munasinghe Vs. C. P. Vidanage* 69 NLR 98
(9) *Thomas Vs. Thomas* 1947 Al 484 at 485 -486
(10) *Gunewardhane Vs. Cabral and others* 1980 2 Sri LR 220

Kuwera de Soysa, PC with *Thusitha Nanayakkara* for Plaintiff – Appellant

S. C. B. Walgampaya PC with *Upendra Walgampaya* for Defendant – Respondent.

20th June 2014

H. N. J. PERERA, J.

The Plaintiff-Appellant instituted this action in the District Court of Gampaha against the Defendant-Respondent seeking a declaration that he is the lawful Viharadhipathi of the Wataddara Sumanaramaya Vihare morefully described in the schedule to the plaint and for the ejectment of the Defendant-Respondent there from and for damages. It was averred, *inter alia*, in the said plaint that the said Vihare is exempted under the provisions of section 4 (1) of the Buddhist Temporalities Ordinance, Succession to Viharadhipathi was governed by the *sisyanusisyaparamparawa*-rule of succession, one Udagampola Guneratna Thero was one time the Viharadhipathi of the said Vihare, after the demise of the said Udagampola Gunaratna thero, his senior pupil, one Udugampola Sobhitha Thero succeeded as the Viharadhipathy, after the said Udagampola Sobitha Thero expired his sole pupil, one Wathaddara Pagnasara Thero became the Viharadhipathi of the said Vihare, upon the death of the said Wataddara Pagnasara Thero, his senior pupil one Meetothatamulle Pagnaloke Thero succeeded as the Viharadhipathi.

It is the position of the Plaintiff-Appellant that the said Meethotamulle Pagnaloka Thero died on or about 31.08.1987 without any pupils and the Viharadhipathiship of the said

Vihare vested on the Plaintiff-Appellant who is the 2nd most senior pupil of the deceased Wataddara Pagnasara Thero and that the Defendant – Respondent has from about 07. 09.1987 been disputing the Plaintiff- Appellant's rights.

The Defendant – Respondent filed answer denying the allegations in the plaint and claimed that he was in possession in his own right as sole pupil of Meethotamulle Pangnaloka Thero. After trial the learned District Judge delivered judgment on 13.12.1999 held in favour of the Defendant-Respondent and dismissed the Plaintiff–Appellant's action with costs. Aggrieved by the said judgment of the learned District Judge the Plaintiff-Appellant has preferred this appeal to this Court.

At the trial it was admitted that:-

(1) the said Vihare is governed by the Buddhist Temporalities Ordinance but is exempt from the provisions of section 4 (1) of the said Ordinance.

(2) Succession to Viharadhipathiship in the said Vihare is governed by the *Sisyanusisya Paramparawa* rule of succession.

(3) The said Meethotamulle Pagnaloka Thero was the Viharadhipathi of the said Wataddara Sumanaramaya.

(4) The said Meethotamulle Pagnaloka Thero died on 31.08.1987.

(5) The said deceased Meethotamulle Pagnasara Thero was the senior pupil of the said Wataddara Pagnasara Thero; the said Wataddara Pagnasara Thero was the Viharadipathi of the said Vihara and upon his demise the said Meethotamulle Pagnaloka Thero deceased became the Viharadipathi of the said vihare.

It is admitted that the viharadipathi of the Waraddar Sumanaramaya vihare was Meethotamulle Pagnaloka Thero. it is not disputed that the said Meethotamulle Pagnaloke Thero and the plaintiff-Respondent are both pupils of the previous Viharadhipathy of the said temple Wataddara Pagnasara Thero. This fact had not been challenged by the Defendant – Respondent. Meethotamulle Pagnaloka Thero being senior to the Plaintiff – Appellant succeeded to the Viharadhipathiship upon the death of Wataddara Pagnasara Thero in 1983.

It is the position of the Plaintiff-Appellant that according to the rule of pupillary succession, upon the death of Meethotamulle Pagnaloka in 1987, the Viharadhipathiship devolves on his senior most pupil. In the event that Meethotamulle Pagnaloka Thero did not have any pupil, the Viharadhipathiship will devolve on his senior most co-pupil, in this case that being the Plaintiff-Appellant. The Plaintiff-Appellant has in evidence marked documents P2 Plaintiff-appellant's samanera declaration certificate, as P4 Upasampada (ordination) Seettuwa and as P5 Upasampada declaration respectively. The Plaintiff-Appellant had very clearly established the fact that he was in fact robed by Wataddara Pagnasara Thero on 12.12.1995 in the name of Pinnawala Pemananda and ordained on 10.06.1965. The name of the robing tutor Wataddara Pagnasara Thero is also recorded in these declarations complying with the provision of section 41 of the Buddhist Temporalities Ordinance. The Defendant-Respondent has not challenged any of these documents and the said documents had been marked at the end of the plaintiff Appellants case without any objection from the defendant-Respondent. The *cursus curiae* of the original Civil Court followed for more than three decades in

this country is that the failure to object to documents, when read at the closure of the case of a particular party would render them as evidence for all purposes of the law. Furthermore the learned District Judge has answered the issue No. 2 in favour of the Plaintiff. Therefore the fact that he was the second most senior to Meethotamulle Pagnasara has been proved to the satisfaction of court by the Plaintiff-Appellant in this case. This fact is also not disputed by the Defendant-Respondent..

In Sri Dhammissara Thero V. Sri Kalyanawansa Thero(1) it was held that under the sisiyanusisya paramparawa rule of succession to the incumbency of a Buddhist temple, if a Viharadhipathi dies leaving pupils and also fellow pupils, the senior pupil succeeds in preference to any of the fellow-pupils. Where the succession by pupils fails and one of the co-pupils of the deceased incumbent has to succeed. "logic must favour the passing of the succession to the senior among the co-pupils.

In Sumana Terunnanse V. Kansappuhamy(2), it was held that that under the sisyanusisya paramparawa, if the last incumbent leaves no pupil and has nominated no successor by deed or will, the incumbency can pass to his co-pupils only if their common tutor was himself in the line of succession from the original proprietor-priest or incumbent of the vihare.

In Gunananda Unnanse V. Dewarakkita Unnanse Jayawardena,(3) A. J. summarized the rules regulating the succession to temples and vihares as laid down in the authorities.

(1) Succession to an incumbency is regulated by the terms of the original dedication.

(2) If the original dedication is silent as to the mode of succession, then succession is presumed to be in accordance with the rule of *sisyanusisya paramparawa* or pupillary seccession, to the exclusion of even the succession known as sivuru paramparawa, and the grantors or dedicators cease to have any control over it.

(3) The general rule of succession is the sisyanusisya paramparawa.

(4) 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.

(5) The incumbent can appoint or nominate one of his pupils to succeed him, the pupil so appointed or nominated, if a junior, succeeds to the exclusion of the senior pupils.

(6) He can appoint by will or deed more than one pupil to succeed him; in such a case these pupils, although called jointly, succeeds singly in rotation according to seniority. The pupil who succeeds last can appoint one of his pupils, and, in the absence of such an appointment, his senior pupil will succeed him to the exclusion of the pupils of previous incumbents.

(7) An incumbent cannot deprive his pupils of their right of succession by appointing a fellow pupil or stranger by deed or will.

(8) It is only where an incumbent dies having no pupils that his fellow-pupil succeeds him, but a fellow-pupil cannot succeed unless he is in the line of pupillary succession to the vihare.

(9) If an incumbent dies leaving no pupil or fellow pupil entitled to succeed, his tutor or other priests descending in the pupillary line from an incumbent of the temple succeeds.

The main issue for determination in this case is as to whether the Defendant-Respondent was the sole pupil of the said deceased Meethotamulle Pagnaloka Thero and therefore succeeded to the Viharadhipathiship of the said Vihare in terms of *Sisyanusisya paramparawa* rule of succession.

The Defendant-Respondent in his evidence stated that he was robed under one Balabowe Gunananda Thero of the Balabowe Vihara on 15.06.1979 at the tender age of 12 and that due to certain threats at that temple by the watcher he disrobed and went back to reside with his parents as a lay person and then later his parents sent him to his grandmother's residence at Ratnapura, while in Ratnapura he received a message from his father to come back to be re-robed. While returning with his uncle he took a photograph (V4) in lay clothes and came to the Wataddara Vihara where he was re-robed as a pupil of the Viharadhipathi of the Wataddara Sumanaramaya, the said deceased Meethotamulle Pagnaloka Thero.

The fact that the Defendant-Respondent disrobed is not disputed by the Plaintiff-Appellant. Disrobing is regarded in Buddhist Ecclesiastical law as a personal demise (death) of the bhikku disrobing. disrobing will disentitle the pupil

from succeeding to the incumbency and he cannot, after his disrobing, regret or repent his action, and claim to the incumbency. He cannot for that matter lay any claim as a bhikku. (Buddhist Ecclesiastical Law By Dr. Wickrema Weerasooriya Page 444,445)

Whether Meethotamulle Pagnaloka Thero was the Defendant's robing tutor when he was re-robed on 10.05.1983, becomes decisive as to the outcome of this case.

The Defendant-respondent was robed under Balabowe Gunananda on 15.06.1979. According to the Defendant-Respondent's own evidence, he left the said temple and disrobed thereafter with full intention of becoming a layman. The fact that the Defendant – Respondent disrobed is not disputed by the Plaintiff-Appellant in this case.

In Kusalagnana Thero V. Assaji Thero and others[6] it was held that after disrobing, one ought to go through the procedure of robing and higher ordination afresh to become a bhikku again. It is the Defendant-Respondents position that he was robed for the second time. There are four classes of pupils, Pupils by robing, by ordination, by Obedience and Dependence and by Instruction (Buddhist Ecclesiastical law by Dr. Wickrema Weerasooriya page 371, 372.)

Robing and ordination are essential to become a pupil of a Viharadipathy. Because of the decision in *Saranankara Unnanse V. Indajothi*[4] it is undisputed that what is important for pupilage and Pupillary Succession is (1) Robing and (2) Ordination. Section 41 of the Buddhist Temporalities Ordinance provides for the registration of both Samanera as well as Upasampada Bhikkus. In the case of Samanera the name of the robing tutor has to be entered. In the case of Upasampada

bhikku the name of the robing as well as the name of Upasamapada priest has to be entered. The application for registration in either case has to be made in duplicate. On receipt of the same, the Registrar General should retain one copy for his use and forward the other to the Mahanayaka Thero of the Nikaya mentioned therein. The Mahanayaka Thero or Nayaka Thera of every Nikaya, shall from time to time, make all such corrections in his Register as may be necessary to keep up to date his Registers of Upasampada Bhikkus and Samaneras of his Nikaya and the relevant details regarding them; and whenever the Mahanayaka Thero makes any modification in his register he should forthwith convey that fact to the Registrar General who should similarly modify the register he is required to keep.

Such Registers kept by the Registrar General would be *prima facie* evidence of the facts contained therein. Section 41(6) of the Buddhist Temporalities Ordinance states that "such registers kept by the Registrar General shall for the purposes of this Ordinance be *prima facie* evidence of the facts therein in all courts and for all purposes." In *Jayasuriya V. Ratnajoti* it was held that the Register mentioned is the Registrar General's Register and not the register kept by the Mahanayaka.

The witness Giridara Sumanajothi Nayaka Thero who was the Kruthiyadakari (Chief Executive Officer) of the Tripitikodaya Pirivena produced the register maintained at the pirivena relating to admissions, progress and departure of students. This witness admitted that although there is a legal requirement to register Samanera Bhikkus he has not done so, the reason being that large numbers of samanera bhikkus

leave the robes. Entries in the samanera certificate and Upasampada certificate is *prima facie* evidence of the facts therein . In the instant case the Defendant-Respondent admittedly does not have a samanera certificate.

What is necessary for pupilage and pupillary succession is Robing and Ordination, *in Saranankara Unnanse (Supra)* In D*harmathilaka Thero V. Buddharakiththa Thero*(6), it was clearly held that in order to become a pupil of a tutor, such tutor must essentially robe the pupil. In essence one can only claim title to the Viharadhipathiship if he has been robed by that Viharadhipathy during his lifetime and he is known as the robing tutor.

The Plaintiff-Appellant claimed to be declared the lawful Viharadhipathi of this temple. He relied on the *sisyanusisya paramparawa* rule of succession. The Defendant too claimed to be the Viharadhipathi of this temple based on the *sisiyanusisya paramparawa* rule.

It is settled law that under the Buddhist Eccleslastical Law pupilage is conferred by robing or by presenting for higher ordination. The Defendant claims that he is the pupil of Meethotamulle Pagnaloka Thero by robing. The Defendant was robed under Balabowe Gunanada Thero on 15.06.1979 at the age of 12 in the Balabowe temple. According to the Defendant's own evidence, the Defendant left the temple and disrobed thereafter with full intention to become a layman. He cannot thereafter claim to be a bhikku by putting on the robes again. He ought to go through the procedure of robing and higher ordination afresh to become a bhikku again. (*Kusalagnana Thero V. Assaji Thero and Others*(6). According to Defendant he was re-robed by Veyangoda Rath-

na Hothiyaramadhipathi Rathmale Gunarathna. Thereafter he was handed over by the said Rathmale Gunarathna to Meethotamulle Pagnaloka Thero. Entries in the Samanera certificate and Upasampada cerficate is *prima facie* evidence of the facts therein. However in the instant case, the Defendant admittedly does not have a Samanera certificate.

The Defendant says that he is the rightful successor to last incumbent Meethotamulle Pagnaloka, according to the rule of *sisyanussya paramparawa*, which governs the succession to this vihare. It is not his position that he became the successor to the said vihare in any other manner. V1 is the report of the Sangha Sabha held after the seven days alms giving of the deceased Meethotamulle Pagnaloka Thero. V3 is the report made at the Sangha Sabha held after three months alms giving of Meethotamulle Pagnaloke Thero. V6 is the agenda for the funeral ceremony of Meethotamulle Pagnaloka Thero. V5 is a vertified extract from the register of admissions maintained at the Mapagoda Thripitakodaya Pirivena.

It is contended on behalf of the Defendant-Respondent that it is the vinaya rules that lays down the requirements and procedure for a valid robing and if the vinaya rules are satisfied a person is legally robed notwithstanding a failure to register same in terms of the Buddhist Temporalities Ordinance. That the requirement to send the requisite form for registration is the duty of the tutor and the failure to do so by the robing tutor cannot and does not prejudice the rights of the robed bhikku.

In *Saranajothi Thero V. Dhamarathna Thero*[7] it was held that:-

"The Buddhist Temporalities Ordinance does not declare that the register maintained thereunder is the only evidence of the robing or ordination of a bhikku, nor does the fact that the Upasampada Register is maintained by a nikaya exclude proof, by other evidence, of the fact that a bhikku obtained a higher ordination. The failure to produce documentary evidence of the robing or Upasampada of a bhikku does not render oral evidence on any of those events liable to be rejected on that ground alone."

The Defendant-Respondent himself testified and relied on the evidence given by the following witnesses to prove that the was robed as a pupil of Meethotamulle Pagnaloka Thero.

Giridara Sumanajothi Nayake Thero. This witness the chief executive officer of the Thripitakodaya Pirivena produced the register maintained at the said Pirivena relating to admissions, progress and departure of students. He stated that Meethotamulle Pagnaloka Thero brought the Defendant-Respondent for admission to the Pirivena. Page 33 of the register marked V5 refers to the admission of the Defendant-Respondent. Meethotamulle Pagnaloka is recorded as the guardian of the pupil.

Bopitye Indagupta Thero. This witness stated that he prepared the agenda for the funeral ceremony (V6) and also the report of the seven days alms giving (V1) and three months alms giving (V3). This witness has further stated that he came to know that the Defendant-Respondent was a pupil of Meethotamulle Pagnaloka Thero through a pupil of his.

Meethotamulle Premaratne Thero. This witness stated that Meethotamulle Pagnaloka Thero came and informed him

that he was robing the Defendant-Respondent on the following day and invited him to participate at the function. He further states that he came to the temple after the ceremony had taken place and that at the seven day alms giving he was entrusted with the task of managing the affairs of the Vihare temporarily since the Defendant-Respondent was of tender years.

Samarasekera Gunasekera. This witness stated that he was the treasurer of the Dayake Subha and states that he was present on his day at the temple when the ceremony was been held.

Nissanka Arachchige David. The father of the Defendant-Respondent stated that Matikotamulle Pagnaloka Thero asked him to bring Defendant- Respondent to be robed and when his son arrived at the Wataddara Vihare he and his wife took the Defendant-Respondent by his hands and handed him over to Meethotamulle Pagnaloka Thero and the robing ceremony was arranged thereafter. This act clearly shows the intention of the parents of the Defendant-Respondent to make the Defendant – Respondent a pupil of Meethotamulle Pagnaloka Thero. In fact this witness had very clearly stated in his evidence that he informed Pagnaloka Thero that he does not wish to give his son to Balabowa but would like to give him to Wataradda.

Pallawa Dampitiye Chandrajothi Thero. This witness functioned as the Karmacharata at the robing ceremony of the Defendant-Respondent. This witness stated that the robing of the Defendant – Respondent was done following all the requirements of the Buddhist Vinaya rules. This witness admits the fact that Rathmale Gunerathna Thero was present and acted as the 'Upaadya' at this ceremony. He stated that

first Rathmale Gunanada Thero cut some hair from the head of the Defendant-Respondent and handed it over to the Defendant-Respondent. The Defendant-Respondent too corrobarate this fact in his evidence and refers to Rathmale Gunananda Thero as the robing tutor of the Defendant-Respondent. Although in his evidence he has stated that it was Rathmale Gunanda Thero who robed him, he has proceeded to explain and state that it was Rathmale Gunananda Thero who first cut his hair using a pair of scissors and handed him over to 'Karmacharya' Nawala Palawagawa Purwaramadhipathi Dampitiye Chandrajothi Thero and thereafter he was handed over to the deceased Meethotamulle Pagnaloka Thero.

It is the contention of the Counsel for the Plaintiff-Appellant that merely by presenting the Defendant-Respondent after robing to Meethotamulle Pagnaloka Thero does not entitle the Defenant-Respondent to be a pupil of Meethotamulle Pagnaloka Thero and therefore the Defendant-Respondent is not entitled to succeed to the Viharadhipathyship since Meethotamulle Pagnaloka was not his robing tutor.

The learned District Judge has carefully analysed all the evidence in this case and has come to the conclusion that the Defendant - Respondent was robed as the pupil of Meethotamulle Pagnaloka Thero at a ceremony hald at the Wataddars Sumanaramaya Viharaya on 10.05.1983.

It is clear from the judgment of the learned District Judge that he accepted and was impressed by the evidence of the Defendant- Respondent and of the other witnesses who gave evidence on his behalf. In *Dharmatilleke Thero V. Buddharakkita Thero (Supra)* it was held that:-

"The District Judge who saw and heard the witnesses and watched their demeanour had found for the defendant.

Where the personality of the witnesses is an essential element, the appellate court should not set aside the decision of the trial Judge save in the clearest of cases."

In *M. P. Munasinghe Vs. C. P. Vidanage*[8] was it held that the jurisdiction of an appellate court to review the record of the evidence in order to determine whether the conclusion reached by the trial Judge upon that evidence should stand has to be exercised with caution.

"If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion been arrived on conflicting testimony by a tribunal which saw and heard the witnesses the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given." per Viscount Simon *in Thomas V. Thomas*[9].

Further in *Gunewardene V. Cabral and Others*[10] it was held that the appellate court will set aside inferences drawn by the trial judge only if they amount to finding of fact based on:-

(a) inadmissible evidence; or

(b) after rejecting admissible and relevant evidence; or

(c) if the inferences are unsupported by evidence; or

(d) if the inferences or conclusions are not rationally possible or

perverse.

In the case before me I do not see that the findings of the learned District Judge and the inferences drawn by him are vitiated by any of these considerations. In my view there is no justification for interfering with the conclusions reached by the learned District Judge which I perceive are warranted by the evidence that was before him.

For the above reasons I see no reason to disturb the judgment of the learned District Judge. Accordingly the appeal of the Plaintiff-Appellant is dismissed with costs.

Appeal Dismissed.

NISHANTHA AND 3 OTHERS VS. STATE

COURT OF APPEAL
ABDUL SALAM, J. P/CA
RAJAPAKSE, J.
CA PHC 120/2012, 108/2012
107/2012, 119/2012
HCR RATNAPURA 21/2011
MAY 22ND 2014
FEBRUARY 17, 2014

Mines and Minerals Act No. 33 of 1992 – Section 63(6)(1) – Transporting sand in a lorry without a license – Could the lorry be 'forfeited' – "Machinery or equipment" does it include the vehicle? – Code of Criminal Procedure – Forest Conservation Ordinance Section 40, Section 78 – Excise Ordinance No. 8 of 1912 Section 54 (1) – Offensive Weapons Act – Section 8 – Motor Traffic (Amendment) Act No. 8 of 2009 Section 17(1), Section 13, Section 14 – Vehicle Ordinance Section 50, Sri Lanka Ports Authority Act – Customs Ordinance Section 37(2) – Coast Conservation Act No. 57 of 1981 Section 31A – Statutory Interpretation – Duty of Court – Constitution Article 28.

The Accused Respondent was charged in the Magistrate Court for transporting sand without a permit and found guilty on his own plea. The Magistrate held that by reason of the fact that transportation of sand being an offence and the conveyance has been done by the use of lorry, the term equipment and or machinery in Section 63 (6)(1) should be construed to include a vehicle and therefore liable to be forfeited under the Mines and Minerals Act. The High Court affirmed the confiscation of the vehicle concluding that a vehicle is a necessary equipment for moving a thing from one place to another – In Appeal -

Held:

(1) The legislature in enacting the provisions of the Mines and Minerals Act in its own wisdom has adopted a comparatively lenient

and tolerant attitude with regard to the vehicle of whatever nature that are used in the transportation of Minerals and contemplated only the machinery and equipment used in the commission of an offence.

Per Abdul Salam, J. (P/CA)

"It is axiomatic that in exercising the judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what has been enacted. On the contrary courts do not impute to the legislature an intention to abrogate or deprive the citizen of their possessory rights affecting properties by attempting to read in to the legislation what the legislature in reality did not intend."

(2) It is not without significance that the legislature vested, with exclusive right to deprive the citizens of their property rights had clearly thought is fit not to use the word "vehicle" or any other words of similar meaning in the Mines and Minerals Act.

(3) The duty of Courts is carry out the intention of the Parliament. It is by making sense of the enactment, the legislative wisdom is given effect to and not by giving extended meaning to the language, especially when such an extended meaning would result in the deprivation of a right.

Per Abdul Salam, J.

"Adverting us to certain decisions the state invited us to give effect to the confiscatory clauses in the Act by not altering the material of which the Act as woven by ironing out the creases. I regret my inability to respond to this invitation in a positive manner as an interpretation given on the lines suggested by the State would definitely alter the material of which the piece of legislation in question in woven. As regards the wording of the confiscatory clause in the Act, I find no creases or wrinkles in the Act and as a matter of law the legislature in question is crease proof"

Cases referred to:-

(1) *Shantha Vs. Attorney General and another 1991* – 1 SLLR 201

(2) *Perera Vs. Van Sanden* 46 NLR 187

(3) *Police Sgt. Vs. Ramen Kankanan* 37 NLR 187

(4) *Silva Vs. Muthai* 45 NLR 142

(5) *Govindan Vs. Nagoor Pitchche* 20 NLR 115

(6) *Fothergill Vs. Monarch Air Lines 1981* – Ac 251, 275

APPEAL from the Judgment of the High Court (Ratnapura)

Chathura Galhena for the Appellants in CA 108/2012

MCM Muneer for the Appellant in CA 107/2012, 119, 120/2012

Thusith Mudalige SSC for State.

Cur.adv.vult

03rd September 2014

A. W. ABDUL SALAM, J (P/CA)

This appeal involves the confiscation of vehicles used in the transportation of sand, contrary to the provisions of the Mines and Minerals Act No. 33 of 1992 [as amended] by Act No 66 of 2009. The appellants and respondents in CA 107/2012, CA 119/2012 and CA 120/2012 have agreed to abide by this judgment, since the only question of law that arises for determination in all these appeals and CA 108/12 is the same.

The background to this appeal needs to be set out in a nutshell. The accused-respondent was charged in the Magistrate's Court for transporting sand without a permit, and found guilty on his own plea.

Upon such conviction under the Act, the magistrate is left with a discretion to forfeit any, machinery or equipment, used in, or in connection with, the commission of the offence, to the State under Section 63 (b) (1).

In this case the accused stood charged with transporting sand in a lorry without a licence. The question that arises for determination in this appeal is whether the expression "machinery and/ or equipment" can be considered as a vehicle used for the commission of the offence.

The learned Magistrate took the view that by reason of the fact that transportation of sand being an offence and the conveyance has been done by the use of a lorry, the term equipment and/or machinery as used in Section 63 (b) (1) should be construed to include a "vehicle".

Discontentment in the mind of the owner of the vehicle arising from the ruling of the learned Magistrate resulted in his electing to invoke the revisionary jurisdiction of the High Court seeking a variation of the order. The end result of the revision application was that learned High Court Judge affirmed the confiscation of the vehicle concluding that a vehicle is a necessary equipment for moving a thing from one place to another and therefore is liable to be forfeited under the Mines and Minerals Act. This appeal has been preferred against the said judgment of the learned High Court Judge.

The learned High Court Judge was guided by the meaning attributed to the words *"machinery", 'equipment"* and "vehicle" in the Oxford Advanced Learners Dictionary (6th edition – 2000) and the Concise Oxford Dictionary of Current English (8th edition – 1990) to give effect to section 63 (b) (1) of the Act.

According to the dictionary meaning relied upon by the learned High Court Judge "machinery" means machines as a group, especially large ones, agricultural/industrial machinery and the parts of the machine that makes it works.

An alternative definition given in the judgment to "machinery" is machines collectively or components of a machine or mechanism. The word "equipment" in the impugned judgment is defined as "the things that are needed for a particular purpose or activity" or "the necessary articles, clothing etcetera for a particular purpose".

As is referred to in the impugned decision, as per the Oxford Advanced Learners Dictionary (6th edition – 2000) and The Concise Oxford Dictionary of Current English (8th edition – 1990), the word vehicle means " a thing that is used for transporting people or goods from one place to another or any conveyance for transporting people , goods etcetera especially on land."

Relying heavily on the meaning attributed to the relevant expressions, the learned High Court Judge arrived at the following conclusion.

> "It is the considered opinion of this court that the vehicle is a necessary article or thing for the purpose of transporting minerals. In that context vehicle could be considered as equipment for the purposes of the Mines and Minerals Act.
>
> This court is of the view that the learned Magistrate had not erred himself in law, when he made the order, while holding that word "equipment" has to be interpreted for the purposes of the Mines and Minerds Act to include the "vehicles" as well" .

The contention of the appellant is that a vehicle cannot be forfeited in terms of Section 63 (b) (1) of the Mines and Minerals Act, as vehicles are not included and therefore not meant to be forfeited.

There are several enactments which envisage the confiscation of a vehicle used in the commission of an offence. These enactments specifically refer to the word "vehicle" or such other expression to the like effect. For purpose of a fuller discussion on the question, I propose to refer to some of enactments in which the word vehicle or expression to the like effect has been referred to by the Legislature.

In terms of Section 40 of the Forests Conservation Ordinance upon the conviction of a forest related offence the tools. vehicles, implements, cattle and machines used to commit such offence, should necessarily be confiscated subject to the owner, if he be not the offender, being afforded an opportunity to show cause against an order of a possible confiscation.

It is quite clear that in the Forest Conservation Act, the words machines, tools and implements have been used as being articles subject to confiscation in addition to "vehicles" and "cattle". In the case of a cart usually drawn by cattle both the cart and the animals are meant to be confiscated as the confiscatory clause includes both.

Significantly, Section 78 of the Forest Conservation Ordinance defines the word "vehicle" as a boat, cart, motor vehicle, tractor, trailer, container, raft, tug or any mode of transport whether motorized or otherwise. Cattle, under Section 78 includes elephants, buffaloes, neat cattle, horses, ponies, mules, asses, pigs, sheep, goats and the young of the same.

The Animals Act – Chapter 570 of the Legislative Enactments – under Section 3A, enacts that any vehicle used in the

transportation of cattle without a permit shall, be liable, by order of the convicting Magistrate, to confiscation.

The Excise Ordinance of No 8 of 1912 which basically deals with the law relating to the import, export, transport, manufacture, sale and possession of intoxicating liquor and intoxicating drugs, by section 54 identifies as to what things are liable to be confiscated under that Ordinance when an offence is committed against the provisions of that Law. In terms of Section 54(1) whenever an offence has been committed under the Excise Ordinance, the excisable article, material, still, utensil, implement, or apparatus, and the other contents, if any, of the receptacles or packages in which the same is found, and the animals, carts, vessels, or other conveyance used in carrying the same, shall likewise be liable to confiscation.

Under the Offensive Weapons Act, in terms of Section 8, dealing with the powers of the police officers with regard to a search carried out in certain premises for offensive weapons, the Legislature specifically granted the power to the police to search vehicles for offensive weapons by defining the word "premises" so as to include any place or spot, whether open or enclosed, and any ship, boat or other vessel, whether afloat or not, and any vehicle.

In terms of Motor Traffic (Amendment) Act No 8 of 2009, any person who contravenes the provisions of Section 17(1), (13) of (14) shall be guilty of an offence and liable to the confiscation of such motor vehicle.

The Sri Lanka Ports Authority Act *inter alia* deals with property to be taken into custody for purpose of confiscation under Section 66A. Where there is reason to believe that an

offence has been committed under that Act, all equipment, tools, carts, vessels, guns, tackle, apparel, motor vehicles or any other means of conveyance used in committing any such offence may be taken into custody. However, such equipment, tools, carts, vessels, guns, tackle, apparel, motor vehicles or other means of conveyance used in the commission of any such offence shall not be taken into custody if they are liable to be taken over under the Customs Ordinance.

In terms of Section 37 (2) of the Customs Ordinance, if any goods are transshipped, or attempted to be removed from one vessel to another contrary to the provisions of the Law, such goods, together with the boat and other means used for conveying the same, may be seized and shall be liable to forfeiture.

Coast Conservation Act No 57 of 1981 deals *inter alia* with the survey, preparation, and management plan of the coastal Zone. It is aimed at regulating and controlling the development activities within the coastal zone. The objectives of the Coast Conservation Act are quite similar in many ways to the Mines and Minerals Act.

Section 31A(1) of the Coast Conservation Act enacts that it is an offence to (a) engage in the mining, collecting, possessing, processing, storing, burning and transporting in any form whatsoever, of coral; (b) own, possess, occupy, rent, lease, hold or operate kilns for the burning and processing of coral; (c) use or possess any equipment, machinery article or substance for the purpose, of breaking up coral; and (d) use any vehicle, craft, or boat in, or in connection with, the breaking up or transporting of any coral but the Director, may under the authority of a licence issued in that behalf, permit the removal of coral for the purpose of scientific research.