## SIRINIVASA THERO

v.

## WIMALADHAMMA THERO

COURT OF APPEAL.
G. P. S. DE SILVA, J. AND MOONEMALLE, J.
C.A. 255/79 (F).
D.C. CHILAW 19707.
MAY 20, 1985.

*Buddhist Ecclesiastical Law – Succession to Viharadhipathiship – Oral nomination of successor.*

A Viharadhipathi may nominate his successor from among his pupils. No particular form of nomination is necessary. Neither custom nor the law requires the appointment or nomination by a tutor of his pupil as Viharadhipathi of a temple to be in writing. An oral appointment or nomination is valid.

**Cases referred to :**

(1) *Sumangala Unnanse v. Dhammarakkita (1908) 11 NLR 360.*

(2) *Dhammajoti v. Sobita (1913) 16 NLR 408.*

(3) *Terunanse v. Terunanse (1929) 31 NLR 161.*

(4) *Punnananda Thero v. Welwitiye Soratha (1950) 51 NLR 372.*

(5) *Rewata Unnanse v. Ratanajothi Unnanse (1916) 3 CWR 1913.*

(6) *Dhammasiri Therunnanse v. Sudiranando Therunanse (1937) 39 NLR 430.*

(7) *Piyatissa Terunnanse v. Saranapala Terunnanse (1938) 40 NLR 262.*

(8) *Saddhananda Tissa Therunnanse v. Gunananda Therunnanse (1938) 11 CLW 42.*

(9) *Dhammavisuddhi Thero v. Dhammadassi Thero (1955) 57 NLR 469.*

APPEAL from the District Court of Chilaw.

*A. C. Gooneratne, Q.C.* with *Walter Wimalachandra* for plaintiff-appellant.

*T. B. Dissanayake, P.C.* with *Mrs. Anoma Hegoda* for defendant-respondent.

July 12, 1985.

**G. P. S. DE SILVA, J.**

The plaintiff brought this action for a declaration that he was the Viharadhipathi of Sri Sunandaramaya temple, for ejectment of the defendant and for damages. At the trial it was admitted that prior to the dates material to the action, Saranankara Thero was the Viharadhipathi and that he died on 25th July 1960 leaving two pupils, namely Seelananda Thero and Saranapala Thero. It was further admitted that the succession to the Viharadhipathiship was governed by the rule of succession known as Sisyanu Sisya Paramparawa. The case for the plaintiff briefly was that upon the death of Saranankara Thero, his senior pupil, Seelananda Thero, succeeded him as Viharadhipathi and that upon the death of the said Seelananda Thero on 1st February, 1970, the plaintiff as the senior pupil of Seelananda Thero succeeded him as Viharadhipathi. On the other hand, the defendant claimed that upon the death of Saranankara Thero it was Saranapala Thero who succeeded him as Viharadhipathi on the basis of an *oral appointment* by Saranankara Thero in or about July 1960. The defendant further averred that upon the death of Saranapala Thero on 13th March, 1972, he as the senior pupil of Saranapala Thero succeeded as Viharadhipathi.

At the trial several issues were raised, but for present purposes it would suffice to refer to issue No. 10 which reads thus :–

"Did Saranankara Thero on or about July 1960 orally appoint Saranapala Thero to the Adipathiship of Sri Sunandaramaya temple ?"

This issue as well as the other issues were answered in favour of the defendant and the plaintiff's action was dismissed. The appeal is against the dismissal of the action.

The learned District Judge answered issue No. 10 in the affirmative. Mr. A. C. Gooneratne, Q.C., Counsel for the plaintiff-appellant, did not canvass the finding of the District Judge on this issue. In other words, that there has been an oral appointment in fact as found by the District Judge was not challenged. Indeed Mr. Gooneratne did not challenge any of the findings of the District Judge which were against the plaintiff or which were in favour of the defendant. The one and only submission made by Mr. Gooneratne was that an oral appointment or nomination of a pupil by his tutor to succeed the tutor as Viharadhipathi is invalid in law and that such an appointment or nomination must necessarily be in a writing. Mr. Gooneratne further submitted that this question has come up for decision for the first time in this appeal since most of the reported decisions deal with an appointment by deed or will. It is right to add that at the trial no issue was framed in regard to the validity of an oral appointment or nomination of a pupil by a tutor. Since this was a pure question of law, we permitted Mr. Gooneratne to argue the point.

Mr. Gooneratne cited several decisions including *Sumangala Unnanse v. Dhammarakkita* (1), *Dhammajoti v. Sobita* (2), *Terunanse v. Terunanse* (3), *Punnananda Thero v. Weliwitiye Soratha* (4) and submitted that in practically all the reported cases the appointment has been made by will, or deed or by some writing signed by the tutor and that in not a single reported case was there an appointment by word of mouth. Counsel therefore urged that the absence of a single instance of an oral appointment in the reported cases tends to show that the law requires that the appointment must be in writing and that an oral appointment is of no force or avail in law.

Mr. Gooneratne drew our attention to the statement of Pereira, J. in *Dhammajoti v. Sobita* (supra) which reads thus :

"Now, the general rule of succession to the incumbency of a Buddhist temple is that involved in the line of succession known as the Sisyanu Sisya Paramparawa ; but it is clear that it is open to an incumbent to appoint by deed or will any particular pupil as his successor."

Mr. Gooneratne also cited the following passage from Hayley's Treatise on the Laws and Customs of the Sinhalese :

"An incumbent with the right to appoint a successor may do so by deed or will. It has been held that a deed for this purpose is in the nature of a testamentary disposition and is revocable" (at page 552).

Mr. Gooneratne conceded that in the subsequent cases, this view of Hayley has, to use his own words "been watered down" but he maintained that the appointment must be in writing though it need not be in a formal document such as a deed or will. It may be noted that in any event Dr. Hayley has not in that passage examined the question whether the appointment could be made only by deed or will.

I shall now turn to the other decisions cited by both Mr. Gooneratne and Mr. T. B. Dissanayake, Counsel for the defendant-respondent. But before I do so, it is right to add that Mr. Dissanayake stated from the Bar that in his experience there were numerous cases in which parties have relied on oral appintments or nominations of a pupil by his tutor and that our courts have over the years proceeded on the basis that such oral appointments or nominations were valid in law. I did not understand Mr. Gooneratne to state that his experience was otherwise, but he maintained that in these cases the validity of the appointment was not challenged and that this was the first case in which the issue has directly arisen for decision. It would therefore appear that for a long period of time the original courts in particular have acted on the basis that such appointments were regular and valid, since both Mr. Gooneratne and Mr. Dissanayake are counsel who have had considerable experience in this area of the law.

One of the earliest decisions cited before us is *Rewata Unnanse v. Ratanajothi Unnanse* (5), a case decided in 1916. This was an action where the plaintiff claimed a declaration that he was the lawful incumbent of the temple in suit on the basis that he was the senior

pupil of the last incumbent, succession being governed by the Sisyanu Sisya Paramparawa rule. The defendant denied the plaintiff's claim and relied inter alia on a "deed" executed by the last incumbent appointing him "to the succession of the incumbency of the Vihara". Referring to this "deed" Schneider, A. J. in the course of his judgment made the following observations which, no doubt, were obiter :

"It cannot operate as a deed of donation or a conveyance inter vivos of title to immovable property because the property is not definitely described. It cannot operate as a will because it has none of the attributes or characteristics of a will. It appears to follow a form commonly used in days anterior to legislation as regards Buddhist Temporalities when the succession was not only to the status, from a purely religious point of view, of the incumbent but also to the management and control of the temporalities of the temple. I regard this instrument as only a pure act of appointment or nomination or selection to the successsion to the incumbency. In this view the instrument may be in any form. *As at present advised the act of appointment may be done even by word of mouth. It need not be in writing* . . . . ". (The emphasis is mine)

The next case cited was *Dhammasiri Therunnanse v. Sudiranando Therunnanse* (6) decided in 1937. Fernando, A. J. while observing in the course of his judgment that "it would appear that in most of the cases that have come before the court, the appointment has in fact been by last will or by deed" held that the appointment need not be by a notarial instrument. The court accepted the contention of Mr. N. E. Weerasooriya, Counsel for the plaintiff-respondent that "there is no provision of law that requires such appointment to be by a notarial instrument". It is also relevant to note that the dicta of Schneider, A. J. in *Rewata Unnanse v. Ratanajothi Unnanse* (supra) were cited.

In March 1938, de Kretser, A. J. in *Piyatissa Terunnanse v. Saranapala Terunnanse* (7) considered the question of the form of nomination or appointment of a pupil. De Kretser, A. J. rejected the view expressed by the District Judge that a tutor could appoint one of his pupils to be his successor only by means of a deed or by last will. Said the learned Judge : "As I understand the law a priest always has the right to nominate his successor from among his pupils . . . . .". Prior to the time when trustees were appointed under the provisions of the Buddhist Temporalities Ordinance the Adikari was vested with the control of the temporalities and it therefore was common for a priest

to convey to his successor these temporalities by deed or will, *but the appointment to the incumbency rested on the selection or nomination and not on the form in which that selection or nomination was expressed.* The authorities quoted by the learned Judge do not lay down that the appointment can be made by deed or will only. In these cases the appointment has been so made. . . . The cases only insist on 'nomination'. Indeed this must be so for notarial documents would have been unknown in the times of the Sinhalese Kings. The opinion expressed by Schneider, A. J. in *Rewata Unnanse v. Ratanajothi Unnanse* commends itself to me and I have always understood the law to be that a priest may nominate his successor from among his pupils. The more solemn the form in which he nominates the easier will be the proof of the nomination, but there is no particular form of nomination." Thus it is seen that this case dealt with a nomination made by a writing and the principle was clearly laid down that the writing itself need not be in any particular form.

In the subsequent case of *Saddhananda Tissa Therunnanse v. Gunananda Therunnanse and others.* (8) Maartensz, J. followed the ruling of de Kretser, A. J. in the case cited above. There too Maartensz, J. cited with approval the dicta of Schneider, A. J. in *Rewata Unnanse's case (supra)*

Mr. Dissanayake cited *Dhammavisuddhi Thero v. Dhammadassi Thero* (9) where Basnayake, A. C. J. stated :

> "When a temple is built for the first time by devout laymen and offered to the Sangha, there is no requirement of law or custom that the Viharadhipathi should be appointed by a written document".

It is true that this statement refers to the situation of a temple being built for the first time, but I cannot see any objection in principle to its extension to a case of an appointment by a Viharadhipathi of a pupil of his as his successor.

Thus it is seen that there is no decision where it has been held that an oral appointment is not valid in law. Nor is there a single authority that lays down that an appointment can only be made by a writing. We have not been referred to a case which contains even an obiter dictum to that effect. Nor is there any provision of law which requires such an appointment to be in writing. On the other hand, it is not without significance that the obiter dicta of Schneider, A. J. were cited in the

three cases referred to above and not disapproved of. As stated earlier, Mr. Dissanayake informed us that oral appointments are not uncommon and that parties have acted on that basis over a long period of time. This may well be on the footing that the opinion expressed by Schneider, A. J. as far back as 1916 was correct, particularly in the absence of judicial disapproval of it. Nor has there been any legislation which has affected that opinion. Needless to say, a court would naturally view an alleged oral appointment with circumspection and as a matter of prudence, may well look for corroboration before acting upon it. But this is a matter which affects only the weight to be attached to a claim based on an oral appointment. It seems to me that neither custom nor the law requires the appointment or nomination by a tutor of his pupil as Viharadhipathi of a temple to be in writing. I accordingly hold that an oral appointment or nomination is valid.

In the result, the judgment of the District Judge is affirmed and the appeal is dismissed with costs fixed at Rs. 315.

**MOONEMALLE, J.** – I agree.

*Appeal dismissed.*