RATANAJOTHI THERO

v.

SOMARATHANA THERO

COURT OF APPEAL.
G. P. S. DE SILVA, J. (President, C/A) AND GOONEWARDENA, J.
CA/LA 150/81.
D. C. HOMAGAMA 1317.
JUNE 23, 1986.

Buddhist Ecclesiastical Law–Last Will not admitted to probate–Prevention of Frauds Ordinance, s.9–Buddhist Temporalities Ordinance, s. 26.

A document which is a Last Will but not admitted to probate is admissible as evidence of an appointment or nomination by a Viharadipathi of his successor. The provisions of s. 9 of the Prevention of Frauds Ordinance do not apply to such a document which should be treated as a writing subject to proof to the satisfaction of the court.

Cases referred to:

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

(2) *Dhammasiri Terunnanse v. Sudiranando Terunnanse–(1937) 39 NLR 430.*

(3) *Rewata Unnanse v. Ratnajothi Unnanse–3 CWR 193.*

(4) *Gunananda v. Deepalankara–(1930) 32 NLR 241.*

(5) *Dhammavisuddhi Thero et al v. Dhammadassi Thero–(1955) 57 NLR 469, 480.*

APPEAL from order of District Court.

T. B. Dissanayake, P.C. with *Prins Gunasekera* for substituted 1st defendant–appellant.

S. C. B. Walgampaya for plaintiff-respondent.

Cur. adv. vult.

August 8, 1986.

G. P. S. DE SILVA, J. (President, C/A)

The plaintiff filed this action for a declaration that he is the controlling Viharadhipathi of the Lenagala Raja Maha Vihare, for ejectment of the defendants and for damages. The defendants denied the plaintiff's claim and the 2nd defendant in his answer prayed for a declaration

that he be declared the lawful Viharadhipathi of the Lenagala Raja Maha Vihare. At the trial, the defendant sought to produce Last Will No. 19553 dated 25.2.79 (2D1) executed by the previous lawful Viharadhipathi of the temple, the late Jalthara Dhammarakkitha. This was objected to by counsel for the plaintiff on the ground that 2D1 has not been duly proved and has not been admitted to probate. The District Judge upheld the objection and rejected the document. This appeal is against that order.

It is not in dispute that 2D1 which, on the face of it, is a last will, has not been proved in the District Court and has not been admitted to probate. The District Judge, relying on the provisions of section 9 of the Prevention of Frauds Ordinance, held that the document was inadmissible in evidence. The only point that arises for our decision is whether the District Judge was right in rejecting 2D1 for the reason that it has not been proved and admitted to probate as required by section 9 of the Prevention of Frauds Ordinance.

Mr. Dissanayake, counsel for the appellant submitted that 2D1 must be viewed in the light of Buddhist Ecclesiastical Law and the provisions of the Buddhist Temporalities Ordinance. Although 2D1 is ex facie a last will, and purports to deal with the temporalities of the Lenagala Raja Maha Vihare, counsel argued that it does not constitute a devise of property as such, and that there is no requirement in law that 2D1 should be proved as a Last Will and admitted to probate. On the other hand, Mr. Walgampaya, counsel for the respondent contended that, while the law does not require the appointment of a Viharadhipathi to be in any particular form of writing, yet if a Viharadhipathi chooses to nominate his successor by will, then it is essential that the will should be proved in testamentary proceedings and admitted to probate if it is to be admissible in evidence.

It is now well settled that the nomination by a Viharadhipathi of his successor need not be in any particular form (vide *Piyatissa Terunnanse v. Saranapala Terunnanse* (1). and *Dhammasiri Therunnanse v. Sudiranando Therunnanse*(2)). It is true that 2D1 is ex facie a last will but in so far as it purports to deal with the temporalities of the Lenagala Raja Maha Vihare it would be inoperative–vide section 26 of the Buddhist Temporalities Ordinance. However, in my opinion, Mr. Dissanayake's submission that 2D1 is admissible as evidence of an appointment or a nomination or a selection of a Viharadhipathi is

well founded and must be upheld. A document which may be ineffective for one purpose may yet be operative and admissible in evidence for another purpose.

There is support for the contention of Mr. Dissanayake in the judgment of Shaw, A. C. J. and in the observations made by Schneider, A. J. in *Rewata Unnanse v. Ratnajothi Unnanse* (3). That was a case where the plaintiff alleging that he was the senior pupil of Medankara Unnanse, the late incumbent of the Pusulpitiya Vihare sued the defendant, a co-pupil of his, for a declaration that he is entitled to the incumbency of the Vihare and to reside therein. The defendant pleaded, inter alia, that the said Medankara Unnanse by "testament" dated 22nd March 1899 had appointed him as his successor to the incumbency. It is to be noted that the "testament" was not admitted to probate. Shaw, A. C. J. held that–

> "The appointment of the defendant by the late incumbent as his successor by the document of 22nd March 1899 is conclusive in his favour.....It is true that it is called a testament by the maker and purports to transfer the temple property after the maker's death to the defendant. In view of the provisions of the Buddhist Temporalities Ordinance 1905 it would be inoperative for this purpose. *Whatever the document may be called by the maker it is in effect the exercise by deed of a power of appointment vested in the maker and it having been made with the requisite formalities of a deed it is in my opinion a sufficient exercise of the power although it may have been made somewhat in the form of a will and has not been admitted to probate."* (The emphasis is mine)

In a separate judgment there appears the following obiter dicta of Schneider, A. J.:

> "I regard this instrument as only a pure act of appointment or nomination or selection to the succession 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. This instrument therefore operated to confer on the defendant the right to succeed to his tutor although he was only a junior pupil".

I wish to add that the above decision was considered and cited with approval by Maartensz, A. J. in *Gunananda v. Deepalankara* (4).

In considering the proper approach that a court should adopt in relation to a matter such as this, it may not be inappropriate to remind ourselves of the observations of Basnayake, C. J. in *Dhammavisuddhi Thero et al v. Dhammadassi* (5):

> "The secular courts when dealing with problems affecting the Sangha should view them against the background of the Vinaya and should be cautious in applying to the Sangha the rules that govern relations and transactions between laymen".

While it is correct that ".....nothing but the probate....or other proof tantamount thereto of the admission of the will in the Probate Division is legal evidence of the will" (Williams on Executors and Administrators, 14th Ed., Vol.I, page 53), yet the appellant in the present case is not seeking to rely on 2D1 as a testamentary disposition of the temporalities, but purely as a writing which is evidence of an appointment or a nomination or a selection of a Viharadhipathi. In this view of the matter, I hold that the provisions of section 9 of the Prevention of Frauds Ordinance are not applicable and that 2D1 is admissible in evidence subject, of course, to the "writing" being duly proved to the satisfaction of the court.

I accordingly set aside the order of the District Judge dated 6th November 1981 and direct that the record be returned forthwith to the District Court for the continuation of the proceedings. In all the circumstances I make no order as to costs of appeal.

GOONEWARDENA, J. – I agree.

Appeal allowed.

Case sent back for trial to be continued.