

KALEGAMA ANANDA THERO
v.
MAKKUDDALA GNANISSARA THERO

SUPREME COURT
G. P. S. DE SILVA, C.J.,
PERERA, J. AND
WIJETUNGA, J.
S.C. APPEAL NO. 74/95
C.A. NO. 468/84 (F)
D.C. KEGALLE NO. 1291/L
MARCH 8, 9, AND 11, 1999

Buddhist Ecclesiastical Law – Viharadhipathiship of a temple – Abandonment of Viharadhipathiship – Plea of abandonment – Burden of proof.

The original plaintiff instituted action against the defendant seeking a declaration that he was the Viharadhipathi of Lendaramulla Vihare which was an appurtenant temple of Helamada Vihare. The plaintiff claimed as the surviving senior pupil of Pemananda Thero who resided at the Helamada temple and died on 6.1.75. The defendant claimed under Dhammajothi Thero who was himself a pupil of Pemananda Thero and would have succeeded to the Viharadhipathship of Lendaramulle Vihare but for the fact that he predeceased Pemananda Thero, in 1966. Dhammajothi Thero was resident at the Lendaramulla Vihare and was in fact in charge of its affairs. The defendant based his claim on the plea that in view of the evidence given by Pemananda Thero in an action filed by Dhammajothi Thero in 1939 for the ejection of a trespasser from a land belonging to the Lendaramulle Vihare, Pemananda Thero had abandoned the Viharadhipathiship of Lendaramulle Vihare, in favour of Dhammajothi Thero. In the course of his evidence (marked V1) Pemananda Thero had said that he recognised Dhammajothi Thero as the Viharadhipathi of the temple and made no claim to the Viharadhipathiship.

Held:

1. There is a strong presumption against abandonment of the legal right of a lawful Viharadhipathi. "Abandonment" means desertion of the temple, viz giving up of the temple coupled with a clear manifestation of a decision not to attend to the functions and duties of such office. Whether a person, who was in law entitled to succeed to the incumbency has so conducted himself is a question of fact. Such conduct must be conscious, deliberate, and must be clearly established and should not be left in doubt.
2. The burden is entirely on the defendant to establish by clear, cogent and convincing evidence that Pemananda Thero abandoned his rights to the office of Viharadhipathi of Lendaramulla Vihare.
3. The evidence of Pemananda Thero relied upon showed that his intention was merely to protect the property of the temple by supporting the case filed by his pupil. On the other hand subsequent documents such as Upasampada declarations and deeds of purchase in favour of Dhammajothi Thero showed that Pemananda Thero continued as the Viharadhipathi of both Helamada and Lendaramulla temples. The evidence reflected no more than the *de facto* position, namely that Dhammajothi Thero being resident at Lendaramulla Vihare was in fact in charge of its affairs.

Cases referred to:

1. *Dhammaratne Unnanse v. Sumangala Unnanse* (1912) 14 NLR 400, 407.
2. *Welakanda Dhammasiddi v. Kamburuoitiya Somaloka Thero* (1990) 1 Sri LR 234.

APPEAL from the judgment of the Court of Appeal.

N. R. M. Daluwatte, PC with *Daya Guruge* for defendant-appellant.

P. A. D. Samarasekera, PC with *Keerthi Sri Gunawardana* for substituted plaintiff-respondent.

Cur. adv. vult.

May 24, 1999.

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

The original plaintiff (Ariyagnana Thero) instituted these proceedings in November, 1975, against the defendant (Ananda Thero) seeking a declaration that he is the Viharadhipathi of the Lendaramulla Watudeniya Vihare (Lendaramulla Vihare) and for the ejection of the defendant from the Vihare.

It is common ground that Tekewe Ratnajothi Thero was at one time the Viharadhipathi of Lendaramulla Vihare (the temple in dispute) and also of the Helamada Vihare which is the main Vihare. Upon the death of Ratnajothi Thero on 27.10.1927, his senior pupil Pohorambe Gnanissara Thero became the Viharadhipathi of both the Vihare in dispute and the Helamada Vihare. Pohorambe Gnanissara Thero died in 1928 and upon his death his senior pupil Pemananda Thero became the Viharadhipathi. Pemananda Thero was the Viharadhipathi of several temples including Helamada Vihare and the Lendaramulla Vihare. Pemananda Thero resided at the main temple, the Helamada Vihare. Pemananda Thero died on 6.1.75. His senior pupil Dhammajothi Thero, under whom the defendant claims his right to the Viharadhipathiship of Lendaramulla Vihare, died on 5.3.66. In other words, Dhammajothi Thero predeceased his tutor Pemananda Thero. Upon the death of Pemananda Thero on 6.1.75 his *surviving senior pupil* was Ariyagnana Thero, the original plaintiff in this case. It is to be noted that it is now not in dispute that upon the death of Pohorambe Gnanissara Thero, his senior pupil Pemananda Thero became the Viharadhipathi of the main temple, Helamada Viharaya, and the temple in dispute, the Lendaramulla Viharaya. Dhammajothi Thero did not survive his tutor Pemananda Thero and thus could not succeed to the Viharadhipathiship of his tutor's temples. Therefore, it was the original plaintiff (Ariyagnana Thero), *the senior surviving pupil* of Pemananda Thero who had the right of succession to the Viharadhipathiship of the temple in dispute, Lendaramulla Vihare.

The claim of the defendant to be the Viharadhipathi of Lendaramulla Vihare is under Dhammajothi Thero. As stated earlier, Dhammajothi Thero was himself a pupil of Pemananda Thero and would have succeeded to the Viharadhipathiship of Lendaramulla Vihare but for the fact that he died in 1966 before the death of his tutor Pemananda Thero. The case for defendant is that Pemananda Thero *abandoned the Viharadhipathiship of Lendaramulla Vihare* and that he recognised Dhammajothi Thero as the lawful Viharadhipathi of Lendaramulla Vihare. Therefore, the crucial issue in the case is whether Pemananda Thero abandoned the Viharadhipathiship of Lendaramulla Vihare on or about 16.6.1934 and recognised Dhammajothi Thero as the lawful Viharadhipathi of Lendaramulla Vihare. The District Court answered the issue of "abandonment" in favour of the defendant and dismissed the plaintiff's action. The Court of Appeal allowed the plaintiff's appeal on the ground that the defendant failed to establish his plea of

"abandonment". Hence the present appeal by the defendant to this Court.

Mr. Daluwatte for the defendant-appellant submitted that the case for the defendant rested entirely on the plea of "abandonment", and this plea was based on the evidence given by Pemananda Thero in 1939 before the Court of Requests, Kegalle, in case No. 11811. The evidence has been marked as V1 and the decree as V2. The plaintiff in that action was Dhammajothi Thero who was described in the caption as "Incumbent priest of Lendaramulla Vihare". The action was instituted for the ejection of a trespasser from a land belonging to the Lendaramulla Vihare. Dhammajothi Thero was successful in the action. He called as his witness Pemananda Thero who stated that he was the Viharadhipathi of the Helamada temple and proceeded to testify as follows:

" I recognise him (ie Dhammajothi Thero) as the rightful Viharadhipathi of the temple (ie Lendaramulla Vihare). I make no claim to the Viharadhipathiship."

It is upon this evidence that Mr. Daluwatte placed the utmost reliance in support of the defendant's plea of "abandonment". I may add that it is upon this evidence that the District Court held in favour of the defendant and dismissed the plaintiff's action.

Mr. Daluwatta strongly urged both in his oral and detailed written submissions that the testimony set out above was a solemn statement made by Pemananda Thero in judicial proceedings under affirmation. In support of the plea of abandonment Mr. Daluwatte strenuously contended (a) that the aforesaid evidence constituted an "express abandonment" (as opposed to an "implied abandonment"); (b) that the evidence on record (which was accepted by the Trial Judge) showed that Pemananda Thero never functioned as Viharadhipathi of the Lendaramulla Vihare after he gave evidence in Court in 1939 and even for some time before 1939; (c) that the consent decree V5 dated 26.3.64 entered in DC Kegalle case No. 15047 is another significant instance where Dhammajothi Thero asserted his rights as Viharadhipathi of Lendaramulla Vihare and sought the ejection of two laymen from land belonging to the Vihare; (d) that in terms of sections 18 and 20 of the Buddhist Temporalities Ordinance it is the "controlling viharadhipathi" who is entitled to sue in respect of property belonging to the Vihare and so it was Dhammajothi Thero (and

not Pemananda Thero) who instituted the actions in respect of Lendaramulla Vihare land.

What is meant by the expression "abandonment"? As submitted by Mr. Daluwatta, the concept of abandonment is known to the Roman Dutch Law. "An abandoned thing is something which its owner has thrown away or discarded with the intention of relinquishing his ownership. . ." Wille, Principles of South African Law, 8th edition page 283. In Buddhist Ecclesiastical Law there is a strong presumption against the abandonment of the legal right of the lawful Viharadhipathi to function as the Viharadhipathi of the Vihare. Upon a consideration of the opinions of several scholar monks Wood Renton, J. in *Dhammaratna Unnanse v. Sumangala Unnanse*⁽¹⁾ expressed himself in the following terms:

"The weight of the expert testimony decidedly supports the view that a right of pupillary succession will be forfeited if the pupil *deserts* his tutor and *the temple* the incumbency of which he claims." (emphasis added). Referring to the case of *Punnananda v. Welivitiya Soratha*, 51 NLR 372 Gunasekera, J. pointed out in *Mapalane Dhammadaja Thero v. Rotumba Wimalajothi Thero*, 79 NLR volume I 145 at 193 that it is not the renunciation of the right to function as Viharadhipathi but the *desertion* of the Vihare which constitutes "a forfeiture".

His Lordship Chief Justice Ranasinghe in *Welakanda Dhammasiddi v. Kamburupitiye Somaloka Thero*⁽²⁾ reviewed several decisions which dealt with the plea of "abandonment" and concluded as follows at page 243:

"On a consideration of the principles elucidated in the foregoing judgments of the Supreme Court, in regard to this aspect of the Buddhist Ecclesiastical Law, it would seem that, what works the forfeiture of the right to an incumbency is the abandonment of the temple, the incumbency of which is in dispute: that, in determining whether or not such an abandonment has taken place, a renunciation by him, who was, in law entitled to succeed, is an important item of evidence: abandonment connotes both a physical and a mental element: it means and requires both a giving-up of or going away from the temple, coupled with a clear manifestation of a decision not to attend to the functions and duties which are traditionally associated with and are expected to be performed by

one who holds such office: whether a person, who was, in law, entitled to succeed to the incumbency, has so conducted himself is a question of fact: that such conduct must be conscious, deliberate, and must be clearly established and should not be left in doubt."

As submitted by Mr. Samarasekera for the plaintiff-respondent, there is one other relevant matter which must not be overlooked in considering the plea of abandonment, namely, the burden of proof. The legal title to the Vihare was in Pemananda Thero and thereafter in the original plaintiff. There is *no* burden on the plaintiff to prove that Pemananda Thero resided at the Lendaramulla Vihare or that he exercised his lawful rights as Viharadhipathi. The burden is entirely on the defendant to establish by clear, cogent and convincing evidence that Pemananda Thero *completely* gave up all his rights to the office of Viharadhipathi and that there was a *total severance* of his association with the Lendaramulla Vihare. The question then is, has the defendant discharged the burden that lies on him?

The foundation of the case for the defendant is in the evidence of Pemananda Thero (V1) referred to above. This evidence, however, has to be considered in the context of the relationship that existed between Pemananda Thero the tutor and his pupil Dhammajothi Thero. Mr. Samarasekera stressed the fact that there is ample evidence (and indeed it is common ground) to show that the relationship between the tutor and his pupil was close, warm and cordial at all material times. It is in evidence that Pemananda Thero permitted Dhammajothi Thero to maintain a dispensary on a land at Polgahawela belonging to Pemananda Thero. When cross-examined about the actions filed in the Court of Requests (V1 and V5) the defendant stated that it was the intention of both Pemananda Thero and Dhammajothi Thero to protect the property belonging to the temple. This is an admission which throws light on the true reason for the institution of the actions in the Court of Requests. In other words, Pemananda Thero gave evidence in support of the case filed by his pupil in order to safeguard property belonging to Lendaramulla Vihare. This certainly was not a case where the issue of Viharadhipathiship arose for consideration. It is to be noted that the decree V2 merely declares that the property belongs to the temple. It seems to me that it is somewhat unreal to seize upon the literal meaning of the words used by Pemananda Thero in his evidence (V1) and conclude that Pemananda Thero has renounced his legal rights to the office of Viharadhipathi. A proper evaluation of the evidence (V1) necessarily involves due weight being

given to the purpose of the action and the prevailing cordial relations between tutor and pupil. It seems to me, therefore, that Mr. Samarasekera's submission that Pemananda Thero had given evidence relied on by Dhammajothi Thero solely to safeguard a property of the temple is well founded.

Besides, the documentary evidence tends to weaken the defendant's case of "abandonment." V6 is the Upasampada Declaration dated 28.5.43 of the original plaintiff. In column 19 of V6 it is stated that Pemananda Thero is the Viharadhipathi of both the Helamada and Lendaramulla temples. Pemananda Thero has signed V6 as the tutor who presented the original plaintiff for ordination. V6 shows that Pemananda Thero was the viharadhipathi of the Lendaramulla Vihare even in 1943. P2 is the Upasampada Declaration of Makuddala Gnanissara dated 3.6.68 wherein Pemananda Thero is described as Viharadhipathi of the Helamada and Lendaramulla temples. There are the two deeds V3 and V4 which are deeds of purchase in favour of Dhammajothi Thero. V3 was executed in 1960 and V4 in 1948. In neither V3 nor V4 is Dhammajothi Thero described as the Viharadhipathi of Lendaramulla Vihare. The omission is undoubtedly of significance.

Upon a consideration of the evidence the Court of Appeal has concluded that "Pemananda Thero's subsequent conduct as evident in the aforesaid documents is a manifestation of his claiming rights in the Viharadhipathiship of the Vihare in dispute. Such conduct does not establish a *complete giving up* of his claim to the Viharadhipathiship of the Vihare in dispute." (emphasis added). This finding is reasonable and is supported by the evidence in the case. Moreover V1, which is the basis of the defendant's case, when viewed in the context of the other documentary evidence reflects no more than the *de facto* position, namely that Dhammajothi Thero being resident at the Lendaramulla Vihare was in fact in charge of its affairs. I accordingly, hold that the defendant's plea of "abandonment" fails.

For these reasons, the judgment of the Court of Appeal is affirmed and the appeal is dismissed but without costs.

PERERA, J. – I agree.

WIJETUNGA, J. – I agree.

Appeal dismissed.