PAVISTHINAHAMY

v.

REV. AKURALA SEELAWANSA THERO

COURT OF APPEAL.
G. P. S. DE SILVA, J. AND MOONEMALLE, J.
C. A. 426/74 (F) – D. C. GALLE 8134/L.
MAY 13, 14 AND 15, 1985.

Buddhist Ecclesiastical Law – Donation – Is Buddhist temple a juristic person ? – Is Buddhist temple an institution capable of receiving property as a fideicommissary ?–

Buddhist Temporalities Ordinance – Property belonging to a temple – Sanghika property.

Appeal – Can question of mixed fact and law be raised for the first time in appeal ?

The plaintiff as Viharadhipathy of Abhinavaramaya Temple sued the defendant for declaration of title to three lands which had been donated to one Pemawathie subject to the condition that should she die without children the lands should devolve automatically on the Abhinavaramaya. Pemawathie died without children and the plaintiff claimed the lands on the basis of the donation.

Held –

(1) Our law recognises only two categories of persons who are capable of receiving or owning property – natural persons and legal persons. A temple not being a juristic person cannot receive property as a fideicommissary.

(2) The concept of property belonging to a temple found in several sections of the Buddhist Temporalities Ordinance is confined to sanghika property which the lands in suit were not.

(3) The question whether the deed of donation created a trust being a question of mixed fact and law and not having been raised at all in the District Court cannot be raised for the first time in appeal.

Cases referred to :

(1) *Silva v. Fonseka (1912) 15 NLR 239.*
(2) *Wimalasuriya v. Wickramaratne (1917) 20 NLR 140.*
(3) *Sudhananda Terunnanse v. Sumanatissa et al (1934) 36 NLR 422, 423.*
(4) *Rathanapala Unnanse v. Kewitigala Unnanse et al (1879) 2 SCC 26, 27.*
(5) *Pramatha Nath Mullick v. Pradyumna Kumar Mullick 1925 L.R. Ind. App. 245.*

(6) *Wijewardena v. Buddharakkita Thero (1957) 59 NLR 121.*
(7) *Buddharakkita Thero v. Wijewardena (1960) 62 NLR 49.*
(8) *Dharmakeerthi Thero v. Kevitiyagala Jinasiri Thero (1978) 79 (2) NLR 86.*
(9) *Setha v. Weerakoon (1948) 49 NLR 225.*
(10) *Maiyawe Saddhananda Thero v. Ratnayake [1984] 2 Sri LR 375*

APPEAL from the District Court of Galle.

Nimal Senanayake, P.C. with *Kithsiri Gunaratne, Miss. S. M. Senaratne* and *Saliya Mathew* for defendant-appellant.

N. R. M. Daluwatte, P.C. with *Bimal Rajapaksa* and *Miss. S. Nandadasa* for plaintiff-respondent.

Cur. adv. vult.

June 28, 1985.

G. P. S. DE SILVA, J.

The plaintiff as the Viharadhipathi of the Abinavaramaya temple instituted this action against the defendant for a declaration of title to the three lands described in the schedule to the plaint, for ejectment, and damages. In his plaint he averred that the Abinavaramaya temple was exempt from the provisions of section 4 (1) of the Buddhist Temporalities Ordinance (Chap. 318) ; that the original owner of the lands in suit was Somapala Jayaratne who by deed of gift No. 7361 dated 24th December 1959 (P 1) donated the lands to his adopted daughter Pemawathie, and to his brother Saumiel Jayaratne subject to the several conditions set out therein ; that Somapala Jayaratne died on 17th February 1960 and that Pemawathie died on 17th February 1971 ; that upon the death of Pemawathie her rights passed to the Abinavaramaya temple in accordance with the terms and conditions set out in the deed of gift, P1 ; and that since the death of Pemawathie, the defendant has been in unlawful possession of the lands.

The defendant in her answer denied that the Abinavaramaya temple acquired any rights on P 1 and further pleaded that Pemawathie died leaving as her heirs the defendant, her sister, two brothers and another sister who became entitled to the lands in dispute ; and that the defendant was presently in possession on behalf of herself as well as her brothers and sisters.

Admittedly, the claim of the plaintiff was based entirely on the deed of gift P 1. It was not disputed that Somapala Jayaratne was the owner. At the trial the main defence to the plaintiff's claim was that there was no valid acceptance of the gift P 1. The trial Judge held against the defendant on this issue, and it was his view that the main question which arose for decision was whether P 1 created a valid fideicommissum. The District Judge held that P 1 created a valid fideicommissum and that in accordance with its terms, upon the death of Pemawathie without issue, title to the lands in suit passed to the Abinavaramaya temple. Accordingly, judgment was entered in favour of the plaintiff and the defendant has now preferred this appeal.

At the hearing before us, Mr. Guneratne, Counsel for the defendant-appellant, did not canvass the finding that there was a valid acceptance of the gift. Counsel, however, strongly urged that P 1 did not create a valid fideicommissum and that upon the death of Pemawathie, the temple did not acquire title to the lands in suit. The principal submission of Counsel was that a Buddhist temple, not being a juristic person, does not possess the requisite capacity to receive property as a fideicommissary.

P 1 is a deed of gift. The donor was Somapala Jayaratne who gifted 5 lands to Pemawathie, his adopted daughter and Saumiel Jayaratne, his brother. The present action relates to lands Nos. 1, 3 and 4 in P 1. The entirety of land No. 1 was gifted to Pemawathie and a 3/4 share of the other 4 lands was also gifted to her. Saumiel Jayaratne was given 1/4 share of lands Nos. 2 to 5 in P 1. The gift was subject to the donor's life interest and to six "special conditions". The conditions material for the purposes of the appeal read as follows : –

1. තෑගි ලැබුම්කාර දෙදෙනාම මෙම දේපල විකිණීම්, තෑගි දීම්, උකස් තැබීම් ආදී අන්සතු විය හැකි කිසිදු ක්‍රියාවකට යටත් නොකොට ජීවිත කාලය තුල බුක්ති විඳිය හැකිවිය යුතුයි.

(1. The above said two donees should not do any act to subject the said properties to any transfer, donation or mortgage but should possess during their lifetime.)

2. එහෙත් එම දෙදෙනාගේ ඇවැමෙන් එම දෙදෙනාගේ පැවතෙන දරුවනට හිමිව ඔවුන්ට හා ඔවුන්ගේ උරුමක්කාරාදීන්ටත් තම තමනට පැවරෙන කොටස් ඔවුනොවුන් අතරේ විකිණුම් ආදී දේකට යටත් කළ හැකි විය යුතුයි.

(2. After the death of those two, the properties should devolve on their lawful children and they and their heirs should be able to subject their respective shares of the properties to transfer etc., among themselves.)

3. ඉදිරි තැඹි ලැබුම්කාරයන්ගෙන් කිසියම් කෙනෙකුට පැවතෙන දරුවන් නොමැති වුවහොත් එම දේපළ කොටස වැල්ලබොඩ පත්තුවේ අකුරල අභිනවාරාමයට නිතැතින්ම හිමිවිය යුතුයි.

(3. In the event of any one of the donees not having children the said properties should devolve automatically on Abinavaramaya in Akurala in Wellaboda Pattu.)

(4. . . . . .)

(5. . . . . .)

6. තවද ලැබුම්කාර පෙමාවතී හදිසියේ මියඹිය හොත් ඇගේ මෑණියන් වන දෙවත්ත කන්කානමගේ ඇලීස්ට එම දේපල කොටසින් දෙතෙත් පංගුවක් බුක්ති විඳීමටද, ඉතිරි දෙතෙත් පංගුව ජයරත්නට බුක්ති විඳීමටද, හැකි විය යුතුයි. තවද මෙසේ අයිති කරදුන් දේපල මෙසේ අයිතිකර දීමට හැකිව නීත්‍යානුකූල බව ඇති බවද, එම දේපල සියලුම බැඳීම් වලින් නිදහස් බවද, එම දේපළ තැඹි ලැබුම්කාරයනට වැඩිදුරටත් ස්ථිර වියයුතු ලියවිලි හා ඔප්පු ආදිය පත්තුකව ඉල්ලා සිටියහොත් ඒවා සාදවා දෙන බවද, තැඹි දිමතාකාර මම මා වෙනුවට සහ මගේ උරුමක්කාර පොල්මෑකාරාදීන් වෙනුවටද එකී තැඹි ලැබුම්කාරයන් සහ ඔවුන්ගේ උරුමක්කාරාදීන් වෙනුවටද එකී තැඹි ලැබුම්කාරයන් සහ ඔවුන්ගේ උරුමක්කාරාදීන් සමගද මෙයින් වැඩිදුරටත් ප්‍රකාශ කොට සිටිය යෙමි.

(6. Further, if donee Pemawathie were to die suddenly her mother Alawatta Kankanamge Alice should be able to possess 1/2 share of the said share of property and the balance 1/2 share by Jayaratne. *Further* I declare that I have a good and lawful title to convey this property and that the same is free from all encumbrances and if the said donees reasonably require any writings and deeds for further assurance I the donor and for my heirs and executors shall cause to prepare such deeds and writings.)

It is condition No. 3 in P1 which is of critical importance in this appeal. Admittedly Pemawathie died without issue, and Mr. Daluwatte, Counsel for the plaintiff-respondent contends that upon her death title passed to the Abhinavaramaya temple. Mr. Daluwatte did not submit that a temple was a juristic person. His submission was that a temple is an *institution capable of owning*

property. In support of his submission, counsel relied on several provisions of the Buddhist Temporalities Ordinance – Sections 4, 15 (1), 15 (2), 20, 26, 28 (1), 29 (1), 30, 31 (1), 32 (1), and 34 – in all of which the phrase "property belonging to any temple" or "property of any temple" occurs. In short Counsel's contention was that under our law there is a concept known as "property belonging to a temple" and that it is a concept sui generis and unknown to Western jurisprudence. Mr. Daluwatte maintained that it was precisely because there existed property which belonged to temples that legislation was enacted to protect, manage and control such property. Mr. Daluwatte further cited certain decisions, in particular, *Silva v. Fonseka* (1) and *Wimalasuriya v. Wickremaratne* (2) which speak of a temple acquiring property by prescription. As regards these two cases, I might state at once that the question whether a temple as such has the capacity in law to receive and own property was not considered. See also the observations of Dalton, J. in *Sadhananda Terunnanse v. Sumanatissa* (3) that the term "temple" has "in some of the earlier authorities been somewhat loosely used".

As far back as 1879, Phear, C.J. in *Rathanapala Unnanse v. Kewitigala Unnanse et al* (4) stated :–

> ". . . . . it is important to remember that the incumbent of a vihara or pansala in this Island is not a body corporate with perpetual succession, as is the case with the parson (persona) of an English parish . . . . Neither does the vihara or pansala cover any legal entity resembling the deity of a Hindu family or temple, in which case the dedicated property belongs by law to the deity, who is recognised in the civil courts as a perpetual corporation . . . . ".

It may be stated here that the Privy Council in *Pramatha Nath Mullick v. Pradyumna Kumar Mullick* (5) recognised that in Hindu Law idols are legal persons.

Wijewardena v. Buddharakkita Thero (6) cited by Mr. Guneratne is a case where the question whether a temple was capable of receiving property directly arose for consideration. In that case the court considered clause 5 of the Last Will of the testatrix. The clause was in these terms :– "I give 250 acres out of all that paddy field called Kalawewa Farm . . . . to the Raja Maha Vihara, Kelaniya. The selection of the 250 acres I leave to my Executors and the management of the

same for the benefit of the said Vihare I entrust to my Trustees hereinafter named". The District Judge held that the gift made by the testatrix was a bequest to the Raja Maha Vihare which was capable of receiving property. In the course of his judgment Basnayake, C. J. referred to the submission of Mr. H. V. Perera that "a Buddhist Vihare or temple which is an inanimate thing, is not a juristic person and cannot therefore receive or hold property" and unequivocally expressed his agreement with that submission. Indeed Counsel for the respondent, Mr. E. B. Wikremanayake, adopted the view of the trial Judge and argued that the property was given to the vihare which was a juristic person capable of taking property – a contention which did not find acceptance with the learned Chief Justice. I am therefore of the opinion that this case is an authority for the proposition that a Buddhist temple, not being a juristic person, cannot under our law receive or hold property.

Buddharakkita Thero appealed to the Privy Council and the judgment is reported in 62 NLR 49 *Buddharakkita Thero v. Wijewardene* (7). Before the Privy Council too, the contention was advanced on behalf of Buddharakkita Thero that a Buddhist temple is capable of owning property. This argument was firmly rejected by Lord Denning who expressed himself thus :

> "The Viharadhipathi sought in his case before their Lordships to say that a vihara (Buddhist temple) is a juristic person and as such entitled to accept and own property ; and that accordingly when the testatrix said 'I give two hundred and fifty acres . . . . . to the Raja Maha Vihare, Kelaniya', this operated as an outright gift to the temple. Their Lordships cannot accept this view. There is a long line of authority to show that a Buddhist temple is not a juristic person. It is not like the deity of a Hindu temple. It is not a corporation. It has no legal personality . . . . " (at page 51) . . . "But a vihare is not a juristic person. A place of Buddhist worship is not a juristic person. *It cannot have property belonging to it*" (at page 52) (The emphasis is mine).

Thus it is clear that the Privy Council affirmed the view expressed by Basnayake, C. J. that a temple not being a juristic person cannot receive or hold property. It is right to add that no case was cited before us where this precise question actually arose for decision, was considered by the court, and a different view taken.

As stated earlier, Mr. Daluwatte contended that a Buddhist temple was an institution sui generis, capable of holding property. Counsel submitted that the concept of "property belonging to a temple" is, as it were, the golden thread that runs through the provisions of the Buddhist Temporalities Ordinance. The answer to this contention is twofold. In the first place, " The Buddhist Temporalities Ordinance deals with Sanghika property which has been dedicated to the Sangha of a particular vihare . . . . The main object of the Buddhist Temporalities Ordinance is to regulate the management and control of the vast temporalities granted by the Sinhalese Kings to the Sangha of the ancient temples of the Island, as the Sangha being mendicants who have given up all worldly interests were unable to protect and manage them" per Basnayake, C. J. in *Wijewardena v. Buddharakkitha Thero (supra)*. Thus it is seen that the expression "property belonging to any temple" in many of the sections of the Buddhist Temporalities Ordinance refers to Sangika property and "the vast endowments made by the Sinhalese Kings to the cause of the Buddhist religion". I did not understand Mr. Daluwatte to seriously contend that the lands which form the subject of the present action constituted "sanghika property". In any event, such a view seems untenable since there is no evidence whatever in this case of a formal act of dedication in the manner prescribed by the Vinaya-vide *Dharmakeerthi Thero v. Kevitiyagala Jinasiri Thero* (8) Secondly, as held by Basnayake, C. J. in *Buddharakkita's case (supra)* the Buddhist Temporalities Ordinance has neither expressly nor impliedly given a corporate status to a Buddhist temple. To describe a Buddhist temple as an "institution", as Mr. Daluwatte did, is of no avail to the plaintiff, for our law recognises only two categories of "persons" who are capable of receiving or owning property – natural persons and legal persons. A Buddhist temple has not been incorporated by statute nor have our courts recognised it as a "person" in the eye of the law. In English law too, ownership can only vest in a "person" – vide Jurisprudence by Dias and Hughes 1951 Edn. page 339.

As an alternative submission, Mr. Daluwatte urged that condition No. 3 in P 1 created a trust in favour of the Abhinavaramaya temple. This position was not pleaded nor put in issue at the trial. The case was not presented on that basis. A trust was not suggested even at the stage of addresses in the District Court. It involves mixed questions of fact and law and such a question cannot be permitted to be raised for the first time in appeal – *Setha v. Weerakoon* (9). It was

the contention of Mr. Daluwatte that the properties would vest in the Vihardhipathi for the time being as trustee by operation of section 20 of the Buddhist Temporalities Ordinance. This submission is not well founded for the reason that section 20 applies to Sanghika property as was held both by the Supreme Court and the Privy Council in *Buddharakkita Thero's case (supra)*. In *Maiyave Saddhananda Thero v. Ratnayake* (10) the decision turned on the true meaning and effect of section 23 of the Buddhist Temporalities Ordinance.

In the result I hold that no rights to the lands in dispute passed on P 1 to the Abhinavaramaya temple upon the death of Pemawathie. I accordingly allow the appeal, set aside the judgment and decree of the District Court and dismiss the plaintiff's action. In all the circumstances, I make no order as to costs both in the District Court and in appeal.

MOONEMALLE, J. – I agree.

Appeal allowed.