AMARAWANSA THERO

v.

PANDITHA GALWEHERA AMARAGNANA THERO

COURT OF APPEAL.
G. P. S. DE SILVA, J. AND MOONEMALLE, J.
C.A. 73/76 – D. C. BALAPITIYA 1931.
MAY 16, 23 AND 24, 1985.

Buddhist Ecclesiastical Law – Succession in rotation to Viharadhipathyship of a temple – Right of controlling Viharadhipathy to devise mode of succession – Sisyanu Sisya Paramparawa – Section 4 (1) and (2) 18, 20 and 22 of the Buddhist Temporalities Ordinance – De jure Viharadhipathy and de facto Viharadhipathy – Possessory action.

Gnanatilleke Thero, the original Viharadhipathy of the Pushparamaya alias Nayake temple, appointed five of his pupils to succeed him by "Last Will" which was duly admitted to probate. The first pupil died and he was succeeded by the second Uttamagnana Thero in order of appointment. Uttamagnana Thero in writing appointed the plaintiff, his pupil, to be the Viharadhipathy.

After the death of Uttamagnana Thero the plaintiff claiming to be the Viharadhipathy sued the defendant who was resident in the temple (according to the defendant on the invitation of the Uttamagnana Thero and according to the plaintiff as his (plaintiff's) pupil brought in to look after Uttamagnana Thero during his illness) for a declaration that he (plaintiff) was the Viharadhipathy and for ejectment of the defendant and incidental relief.

Held –

(1) Succession to the Viharadhipathyship of a Buddhist temple will be regulated by the form of the original dedication. In the absence of evidence on this point succession will be according to the rule of Sisyanu Sisya Paramparawa.

(2) Apart from the original founder the lawful controlling Viharadhipathy for the time being is also entitled to bequeath the Viharadhipathyship in common to his pupils and they will become entitled to succeed in turn in order of seniority. This mode of succession is not contrary to the rule of Sisyanu Sisya Paramparawa.

(3) In the case of a temple exempted from the operation of section 4(1) of the Buddhist Temporalities Ordinance the controlling or de jure Viharadhipathyship has the management and title to the property of the Temple. A de facto Viharadhipathy has no locus standi to sue for possession of the temple property.

Cases referred to :

(1) *Sangharatna Unnanse v. Weerasekera (1903) 6 NLR 313.*

(2) *Dharmapala Unnanse v. Medagama Sumana Unnanse (1910) 2 C.L.R. 83.*

(3) *Unnanse v. Unnanse (1921) 22 NLR 323.*

(4) *Ratnapala Unnanse v. Kewitigala Unnanse (1879) 2 SCC 26.*

(5) *Eriminne Unnanse v. Sonabowe and Parakumbure Unnanse ; Agent's Court of Kurunegala No. 336 ; Vanderstraaten's Reports (1869-1871) XL 1 Appendix D.*

(6) *Dantura Unnanse v. The Government of Ceylon – Vanderstraaten's Reports App. D. p. XLI.*

(7) *Gunananda Unnanse v. Dewarakkita Unnanse (1924) 26 NLR 257.*

(8) *Kamburugamuwa Piyananda Terunnanse v. Uyangoda Sumanajothi Terunnanse (1963) 66 NLR 178.*

(9) *Saranankara Unnanse v. Indajothi Unnanse (1918) 20 NLR 385.*

(10) *Dewandra Unnanse v. Sumanagala Terunnanse (1927) 29 NLR 415.*

(11) *Piyaratne Unnanse v. Medankara Terunnanse (1931) 32 NLR 271.*

(12) *Dharmarakkita v. Wijitha (1940) 41 NLR 401.*

(13) *Dhammaratana Unnanse v. Sumanagala Unnanse (1910) 14 NLR 400.*

(14) *Sumana Therunnanse v. Somaratne Therunnanse (1936) 5 CLW 37.*

(15) *Chandrawimala Therunnanse v. Siyadoris (1946) 47 NLR 304.*

(16) *Pemananda Thero v. Thomas Perera (1955) 56 NLR 413.*

(17) *Dammadaja Thero v. Wimalajothi Thero (1977) 79 (1) NLR 145.*

(18) *Changrapillai v. Chelliah (1903) 5 NLR 270.*

(19) *Tissera v. Costa 8 S.C.C. 193.*

(20) *Banda v. Hendrick (1907) 1 Appeal Court Reports 81.*

(21) *Abdul Azeez v. Abdul Rahuman (1910) 14 NLR 317 (P.C.).*

(22) *Sameen v. Dep (1954) 55 NLR 523.*

APPEAL from a judgment of the District Court of Balapitiya.

H. W. Jayewardene, Q.C. with *M. L. de Silva* and *Miss T. Keenawinna* for defendant-appellant.

J. W. Subasinghe, P.C. with *Prins Gunasekera, Miss E. M. S. Edirisinghe* and *Miss Kumari Dasanayake* for plaintiff-respondent.

Cur. adv. vult

July 10, 1985.

MOONEMALLE, J.

The plaintiff instituted this action to be restored as controlling Viharadipathy to the possession of the Pushparamaya alias Nayake Temple and its temporalities described in the Schedule to the plaint, for ejectment of the defendant therefrom, and for damages.

It is common ground that Uddatta Ariyawansalankara Gnanatilleke Thero was the original Viharadipathy of this Temple, and that by Last Will No. 402 of 9.4.1941 (D1) which was admitted to probate in D. C. Balapitiya T 31, the said Gnanatilleke Thero appointed five of his pupils, Wellaboda Gnanawansa Thero, Wellaboda Uttamagnana Thero, Wellaboda Gnanawimala Thero, Alapalawala Mahindagnana Thero and Givilipitiya Mahindabuddi Thero to succeed him after his demise in that order. The plaintiff's case was that, the first pupil who succeeded Gnanatilleke Thero was Gnanawansa Thero who died on 26.8.1953, and he was succeeded by Uttamagnana Thero. Uttamagnana Thero, by a writing dated 22.9.1961 (P9) appointed the plaintiff who was his pupil to be the Chief Incumbent or Viharadipathy of the said Pushparamaya alias Nayake Temple. P15 is a writing dated 1.8.1961 in which Uttamagnana Thero states that he with the consent of his senior pupil Wijegnana Thero had entrusted the said Temple, and its temporalities as set out therein to the plaintiff. According to the plaintiff, from 22.9.1961, he functioned as the Viharadipathy and possessed the said Temple and collected its income till 10.12.1970 ; and that after the death of Uttamagnana Thero on 22.11.1961, neither Gnanawimala Thero nor Mahindagnana Thero possessed or officiated as Viharadipathy of the said Temple. According to the plaintiff, the defendant was his pupil and he got him to this Temple to attend on Uttamagnana Thero who was ill, and after the death of Uttamagnana Thero, the defendant continued to live in the said Temple while he (the plaintiff) managed the temple till 10.12.1970 without any dispute. The plaintiff had expelled and removed the defendant from pupilage (Vide Cage 23 of the defendant's Upasampada Declaration P 3). Then according to the plaintiff, from 10.12.1970, the defendant had prevented the plaintiff from collecting the income and profits of the Temple and remained in wrongful and unlawful occupation of the said Temple and its temporalities.

The defendant denied that the plaintiff had any claim to the said Temple in dispute and averred that the plaintiff had no cause of action against him. According to the defendant, the appointment by Uttamagnana Thero of the plaintiff as his successor as Viharadipathy by P9, is invalid and of no force or avail in law. Further, after the death of Uttamagnana Thero, in terms of D1, Gnanawimala Thero succeeded him, and after the death of Gnanawimala Thero on 11.5.1969, Mahindagnana Thero succeeded him. According to the defendant, he came to this Temple in the early part of 1960 on the invitation of Uttamagnana Thero, and after Gnanawimala Thero succeeded Uttamagnana Thero as Viharadipathy, the administration of the Temple was carried out by him (the defendant) with the consent of Gnanawimala Thero, and on the death of Gnanawimala Thero, Mahindagnana Thero who succeeded him as Viharadipathy, entrusted the administration of the Temple to him. The defendant's position was that the plaintiff never resided in the Pushparamaya alias Nayake Temple but had been resident throughout at the Pathiraja Pirivena in Walagedera.

The trial commenced on the following issues 1 to 10 :–

(1) Did Wellaboda Uttamagnana Thero as Viharadipathy of the Pushparamaya alias Nayake Temple appoint the plaintiff as his successor as the Viharadipathy of the said Temple on or about 22nd September 1961 ?

(2) Did the plaintiff function as Viharadipathy of the Temple from 22nd September 1961 till 10th December 1970 ?

(3) Has the plaintiff being in possession as pleaded in paragraph 4 of the plaint of the land and premises described in the Schedule to the plaint from September 1961 to 10th December 1970 ?

(4) Is the defendant in wrongful and unlawful occupation of the said land and premises from 10.12.1970 ?

(5) If issues 1-4 are answered in the affirmative, is the plaintiff entitled to have the defendant ejected from the said land and premises and to be placed in quiet possession thereof ?

(6) What damages is the plaintiff entitled to ?

(7) Has the plaintiff any claim to the Temple in dispute ?

(8) If the above issue is answered in the negative, can the plaintiff have and maintain this action ?

(9) Is the defendant in occupation of the said land and premises with the leave and licence of the plaintiff ?

(10) If issue 9 is answered in the affirmative, is the defendant estopped from denying the plaintiff's title to the said land and premises ?

The plaintiff's first witness Mahindagnana Thero gave evidence, and before his evidence was concluded, the trial was postponed. Before the next date of trial, an application was made on behalf of the plaintiff to amend paragraph 8 of the plaint which dealt with damages. Objection was taken on behalf of the defendant to the proposed amendment. The amendment was disallowed. On the next date of trial, the learned District Judge despite objections being taken on behalf of the defendant, permitted two new issues to be raised on behalf of the plaintiff, and he also allowed the plaintiff to delete issue No. 6 which dealt with damages. The two new issues are :

(11) Has the plaintiff possessed the land in question ut dominus from September 1961 till 10.12.1970 for more than a year and a day ?

(12) If so, is the plaintiff entitled to be restored to possession of the premises in question ?

This order of the learned District Judge remained without any steps being taken to have it revised. Thereafter the trial proceeded on issues 1 to 5 and 7 to 12. After trial, judgment was entered in favour of the plaintiff, directing the defendant to be ejected from the said Temple and premises, and the plaintiff to be restored to possession thereof. This appeal is from that judgment. Mr. H. W. Jayewardene, Q.C., on behalf of the defendant appellant submitted that the person who can claim the right to the possession of and the right to administer the said Pushparamaya alias Nayake Temple is the controlling viharadipathy or de jure viharadipathy of this Temple, and that the plaintiff who is not the de jure viharadipathy of this Temple has no legal status to maintain this action. He submitted that the learned District Judge erred in holding that the plaintiff was entitled to have the defendant ejected from the said Temple and to be placed in quiet possession of the same

on the basis that the plaintiff is the de facto viharadipathy of the temple. He further submitted that in terms of Last Will D1, the de jure viharadipathy of the said Temple is Wellaboda Mahindagnana Thero who succeeded as viharadipathy on the death of Gnanawimala Thero. He also submitted that P9 gave no rights to the plaintiff to the incumbency of this Temple. He further submitted that the plaintiff resided at the Pathiraja Pirivena and did not have possession of this Temple. He finally submitted that the evidence of dispossession led by the plaintiff is based purely on hearsay.

Mr. Subasinghe, P. C., on behalf of the plaintiff respondent submitted that D1 contravened the rule of Sisyanu Sisya Paramparawe, and that D1 operated only in respect of Gnanawansa Thero who was the first named pupil in D1 to succeed to the incumbency. He submitted that Gnanawansa Thero died leaving no pupils therefore Uttamagnana Thero who was the next senior pupil of Gnanatilleke Thero succeeded to the incumbency in accordance with the rule of Sisyanu Sisya Paramparawa, and that Uttamagnana Thero had the right to appoint anyone of his pupils to succeed him. Therefore, the plaintiff who was a pupil of Uttamagnana Thero succeeded to the incumbency by virtue of P9 by which he was appointed by Uttamagnana Thero to succeed him. He also submitted that it was only the founder Priest who could appoint his pupils to succeed him in rotation. So that, as Gnanatilleke Thero was not the founder priest of the said Temple, D1 had no force or avail in Law. He submitted that the plaintiff respondent therefore had the right to maintain a possessory action. He finally submitted that there was sufficient evidence led to support the plaintiff's case that he had been in possession of the said Temple for a year and a day and that he had been dispossessed. Mr. Subasinghe conceded that document P1 dated 24.12.72 was written after the institution of this action and therefore is not relevant to this appeal.

Admittedly, the Temple in suit is exempt from the operation of section 4(1) of the Buddhist Temporalities Ordinance of 1931 (Cap. 222). According to section 4(2) the management of the property belonging to every Temple exempted from the operation of section 4 (1)shall be vested in the *viharadipathy* of such Temple referred to as the *Controlling viharadipathy*. Thus, the management of the Temple in suit and its temporalities vest in the controlling viharadipathy of the said Temple. According to section 18, it shall be lawful for the trustee or controlling Viharadipathy of a temple to sue under the name and

style of trustee of the Temple for the recovery of any property vested in him under the Ordinance or of the possession thereof. Under section 20 all the movable and immovable property of the Temple shall vest in the controlling viharadipathy. By section 22 the viharadipathy is empowered to enforce all contracts and all rights of action in favour of the Temple. It is clear that the person who had the legal status to institute a possessory action to obtain restoration of the Temple in suit is the controlling viharadipathy of the said Temple.

In the present action, the plaintiff respondent prayed that he be restored as controlling viharadipathy to the possession of the Temple in suit, and issue 1 raised on his behalf at the trial is based on the footing that Wellaboda Uttamagnana Thero as viharadipathy of the Temple in suit appointed the plaintiff as his successor, as the viharadipathy of the said Temple. The legal status therefore, that the plaintiff claims to have to maintain this action is that he is the controlling viharadipathy of this Temple. Thus, the burden is on the plaintiff to prove that he is the controlling viharadipathy of this Temple in order that he can maintain this action.

The plaintiff relies on writing P9 to establish that he is the controlling viharadipathy of this Temple. He is the pupil of Uttamagnana Thero who as viharadipathy had appointed him by P 9 to succeed him as viharadipathy of the said Temple. It is common ground that Ukkatta Ariyawansalaskara Gnanatilleke Thero was the original viharadipathy of this Temple and that he by Last Will No. 402 of 9.4.41 (D1) appointed five of his pupils namely Gnanawansa Thero, Uttamagnana Thero, Gnanawimala Thero, Mahindagnana Thero and Mahindabuddi Thero to succeed him on his death in that order. According to Mr. Jayewardene, Uttamagnana Thero had no power to divert the line of succession given in D1, by appointing the plaintiff to succeed him in terms of P9. Mr. Subasinghe on the other hand, challenged the validity of D1 in that it contravened the rule of sisyanu sisya paramparawa and that the mode of succession set out in D1 could only be made by the founder Priest of the Temple. The crucial question then would be whether D1 is valid and effective in Law for the purpose of the succession set out therein. Thus, two questions arise for determination. Firstly, whether the mode of succession set out in D1 is consistent with the rule of sisyanu sisya paramparawa, and secondly, whether the mode of succession set out in D1 could only be made by the founder Priest or original proprietor of the Temple.

Succession to an incumbency is regulated by the form of the original dedication – *Sangharatna Unnanse v. Weerasekera* (1) *Dharmapala Unnanse v. Medagama Sumana Unnanse* (2) and *Unnanse v. Unnanse* (3).

Where the right to an incumbency is in question, in the absence of evidence to the contrary, it must be presumed that the incumbency is subject to the rule of sisyanu sisya paramparawa – *Ratnapala Unnanse v. Kewitigale Unnanse* (4) and *Unnanse v. Unnanse (supra).*

In the present case, there is no evidence as to the mode of succession to the Temple in suit as set out in the original dedication. Thus, the presumption would be that this Temple is subject to the rule of sisyanu sisya paramparawa. Moreover, it is common ground that the rule which governs the succession to the Pushparamaya alias Nayake Temple is the rule of sisyanu sisya paramparawa.

What is the definition of Sisyanu Sisya Paramparawa ? This question arose for determination over one hundred and fifty years ago in – *Eriminne Unnanse v. Sonabowe and Parakumbure Unnanse* (5). Appendix D of Vanderstraaten's Report *(supra)* contains an extract from the proceedings of the Board of Judicial Commissioners held at Kandy on 7th February, 1832 – The case was that of *Eriminne Unnanse v. Sonabowe and Parakumbure Unnanse (supra)* which was originally heard in the Agent's Court Kurunegala but was left undecided on account of a difference of opinion between the Agent and the Assessors and was referred to the Court of Judicial Commissioners in Kandy. One of the members of the Commission was of the view that it was material for the decision of the case to ascertain whether the succession to the incumbency was regulated by the Siwuru or Sisya Paramparawe. These proceedings were forwarded to the Governor who desired the Board of Commissioners to call a full assembly of the principal chiefs and obtain their opinion. The assembly of the Chiefs was convened accordingly. At this meeting, the Chiefs considered the opinions of the Mahanayakes of the Malwatte Temple and of the Asgiriya Temple as to the definition of Sisya Paramparawa and Siwuru Paramparawa, expressed by them in the case of *Danture Unnanse v. The Government of Ceylon* (6) which is referred to in the *Eriminne Unnanse Case (supra).* The Case of *Danture Unnanse v. The Government of Ceylon (supra)* had come up before the Judicial Commissioner's Court on 26th June, 1827, and was decided on 4th June, 1828, and the decision was affirmed on 8th August, 1829. In that case the Mahanayakes of the Malwatte Temple and the Asgiriya Temple were called on to define the terms Sisya Paramparawa and

Siwuroo Paramparawa. The Chiefs were unanimously of opinion that the rule as laid down in the proceedings by the Malwatte Priests is more correct than that which was expressed by the Asgiriya Priests. The Malwatte opinion was thus accepted in the *Eriminne Unnanse Case (supra)*.

The propositions of the Malwatte opinion on the Sisya Paramparawe as appearing in the *Report of Case No. 366 Agents Court Kurunegala* (5) *(supra)* are as follows :

"The lands Vihares, etc. belonging to a Bhikku or (Upasampada priest) will, although he had (so many as) five pupils, devolve solely to that pupil when an absolute gift was made thereof, and that pupil alone of the said donee will afterwards succeed thereof, who received a regular gift of the same from him. The uninterrupted succession of pupils in this manner is termed Sisya Paramparawa.

Should the priest, the original proprietor, declare his bequest common to all his five pupils, they will all become entitled thereto, and one of them being elected to the superiority the other four may participate in the benefits. The said Superior being dead, the next in rank will succeed to the Superiority and along with the rest of the (Survivors) will enjoy the benefits. This order having subsisted the last Survivor will enjoy the benefit and have the power to make a gift in favour of any other person. But the original proprietor priest may transfer his right to any other person he may choose, passing by his own pupils. In the event of the original proprietor dying intestate, the priests who happened to be assembled at his death, become entitled in common. Things which belonged equally to two priests devolve wholly to the survivor."

These propositions of the Malwatte Priests were analysed by Bertram, C.J. and Jayawardene, A.J. in their respective judgments in the case of *Gunananda Unnanse v. Dewarakkita Unnanse* (7).

Bertram, C.J's analysis is as follows :

"Where a vihara with lands, etc. attached is vested in a priest as the 'original proprietor', he may take any of the following courses –

(1) If he has pupils (say five pupils) he may make an absolute gift to one of them. In that case the vihare with its lands devolves absolutely on that pupil. The pupil may make a similar donation to a pupil of his own. When this goes on uninterruptedly, this is called sisya paramparawe.

(2) The original proprietor' may make a bequest common to all his five pupils. In that case all five succeed to the benefits of the vihara, but one is elected to the superiority, and this office passes in succession to all of the five to whom the bequest has been made. The last survivor may then make a gift in favour of any other person.

(3) The 'original proprietor', instead of making a gift to a particular pupil, and thus starting a line of pupillary succession, or making a common bequest to all his pupils, may, if he likes, transfer his rights to any other person passing over his pupils.

(4) The 'original proprietor' may, if he likes, do none of these things. He may elect to die intestate, without making any disposition of the temple and its lands. In that case (and here come the important words) : 'the priests who happen to be assembled at his death become entitled in common'. The opinion adds these words : 'things which belong equally to two priests devolve wholly to the survivor' "

Jayawardene, A.J. set out the propositions of the Malwatte opinion in a different form which are –

"(1) When a priest has several pupils, the temple property would devolve solely on that pupil to whom an absolute gift had been made.

(2) If the priest declares his bequest common to all his pupils, they will all become entitled thereto – one of them being elected to the superiority, the others only participating in the benefits. When the superior dies, the one next in rank will succeed to the superiority, and the superiority will devolve in that way until the last survivor, who will have the power to make a gift in favour of any other person.

(3) The original proprietor-priest may transfer his right to any other person passing by his own pupils.

(4) If the original proprietor-priest dies intestate priests assembled at his death become entitled in common.

(5) Things which belonged equally to two priests devolve wholly to the survivor."

The mode of succession set out in the first part of paragraph 2 of the Malwatte opinion is reflected in proposition 2 as set out in the analysis of the Malwatte opinion by both Bertram, C. J. and Jayawardene, A. J. This same proposition is reproduced in paragraph (*f*) of Jayawardene, A. J's summary of the rules regulating the succession to Temples and Viharas appearing at the end of his judgment at page 275.

Paragraph (*f*) reads thus –

"He can appoint by will or deed more than one pupil to succeed him ; in such a case these pupils, although called jointly, succeed 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 the previous incumbents."

This proposition that I have referred to clearly forms part of the sisyanu sisya paramparawa rule laid down by the Malwatte priests, and reported in the case of *Eriminne Unnanse v. Senabowe Unnanse and Parakumbure Unnanse (supra)*. The mode of succession set out in D 1 is precisely the same as described in the Malwatte opinion and in proposition 2 as set out in the analysis of the Malwatte opinion by both Bertram, C. J. and Jayawardene, A. J. (supra) and which is reproduced in paragraph (*f*) of Jayawardene, A. J's summary (supra).

There can be no doubt therefore that the mode of succession set out in D1 is consistent with the rule of sisyanu sisya paramparawa. This principle is enunciated in the case of *Kamburugamuwa Piyananda Terunnanse v. Uyangoda Sumanajothi Terunnanse* (8) where the original viharadipathy devised by last will the vihare and its temporalities to all his pupils to be shared equally by them, and after his death the pupils succeeded in turn as incumbents, according to their seniority. Tambiah, J. held that the finding that the original pupils succeeded in turn to the incumbency was not inconsistent with the applicability of the sisyanu sisya paramparawa rule.

I held that the mode of succession set out in D1 is consistent with the rule of sisyanu sisya paramparawa.

On the next question, whether it is only the Founder Priest or Original Proprietor Priest who could appoint his pupils to succeed him in rotation, Tambiah, J. in the case of *Kamburugamuwa Piyananda Terunnanse v. Uyangoda Sumanajothi Terunnanse (supra)* at pages 180 and 181 stated as follows :

"The early decisions of this Court recognised the right of the founder to appoint all his pupils to the incumbency. When the founder of a vihare appoints several pupils to succeed him, they all become entitled to the temple ; one of them is elected as superior and the others participate in the benefits *(vide Dantura Unnanse v. Government of Ceylon (supra)* and this rule received the approval of Bertram, C.J. in *Saranankara Unnanse v. Indajothi Unnanse* (9) and several other cases (compare *Dewandra Unnanse v. Sumanagala Terunnanse* (10) *Piyaratne Unnanse v. Medankara Terunnanse* (11))".

"Although the original rule as postulated by the Malwatte Priests, is that it is only the founder priest of a vihare who could appoint a number of pupils to succeed him, this right appears to have been extended to any incumbent. Jayawardene, A.J. in the case of *Gunananda Unnanse v. Dewarakkita Unnanse (supra),* in discussing the right of an incumbent to apoint his pupil, summarised the rule as follows (vide 26 N.L.R. at page 275)."

I have already set out this rule *(supra)* as appearing in paragraph (f) of Jayawardene, A.J's summary of rules regulating the succession to Buddhist temples or vihares. It is clear from this rule set out in paragraph *(f) (supra)* that any incumbent can appoint more than one pupil to succeed him in rotation to the incumbency on his demise.

Even when Jayawardene, A.J. analysed the propositions of the Malwatte opinion which were set out differently to that of Bertram, C.J. in the case of *Gunananda Unnanse v. Dewarakkita Unnanse (supra)* at pages 266 and 267 it is of note that proposition 2 (which is the relevant proposition) –

"The right of a priest to declare his bequest common to all his pupils-----" is not limited to that of the original proprietor priest. There is no reference in that proposition to the Founder Priest or original proprietor Priest. That proposition has nothing to do with the Founder Priest. It is only in propositions 3 and 4 that reference is made to that of the original proprietor priest. According to Jayawardene; A.J. proposition 3 had no application to a temple the succession to which is regulated by the sisyanu sisya paramparawa. At page 267 Jayawardene, A.J. stated as follows with regard to the Malwatte opinion –

"This opinion is not complete or exhaustive and some of these propositions have been considerably modified by judicial decisions. For instance, the third proposition which says that the original

proprietor priest may transfer his right to any other person passing by his own pupils would only apply where a priest founds a temple and becomes the incumbent without defining the mode of succession to it. It can have no application to a temple, the succession to which is regulated by the sisyanu sisya paramparawa".

Then in the case of *Dewandra Unnanse v. Sumanagale Terunnanse (supra)* it was held that the incumbency of a Buddhist Temple may be held by two priests officiating in alternate years.

In the case of *Piyaratne Unnanse v. Medankara Terunnanse (supra)* it was held that where several pupils of an Adhikari Bhikku succeed to the incumbency, they must exercise their rights singly and in rotation and not all together.

On a consideration of all these judicial decisions, I am of the view that the original rule laid down in the Malwatte opinion, that it is the Original Proprietor Priest who could appoint several of his pupils to succeed him in rotation has been modified and extended to any lawful incumbent. I thus hold that any lawful incumbent of a Buddhist temple or vihare may appoint several of his pupils to succeed him as viharadipathy in rotation after his demise, and I also , held that this mode of succession is consisent with the rule of sisyanu sisya paramparawa. I further held that the Last Will D1 does not contravene the rule of sisyanu sisya paramparawa, and the mode of succession set out therein is consistent with the rule of sisyanu sisya paramparawa. Thus, the appointment by Gnanatilleke Thera in D1 of his five pupils named therein to succeed him in rotation after his demise is valid and effective in law. Therefore by D1 the succession to the temple in suit operates as follows : On the death of Gnanatilleke Thera, Gnanawansa Thera succeeds. On the death of Gnanawansa Thera, Uttamagnana Thera succeeds. On the death of Uttamagnana Thera, Gnanawimala Thera succeeds. On the death of Gnanawimala Thera, Mahindagnana Thera succeeds and on the death of Mahindagnana Thera, Mahindabuddhi Thera succeeds. It is Mahindabuddhi Thera that would have the right to appoint any one of his pupils to succeed him, and if he dies intestate without making any appointment then by custom the right to succeed is determined by seniority. But the selection of the incumbent rests with the pupils. So that if Mahindabuddhi Thera dies intestate then his pupils assembled at

his death are called to succession and they may elect one of their own number other than the senior pupil as incumbent when the senior pupils consents or acquiesces in such election, but where the senior pupil does not consent, then the senior pupil succeeds as incumbent. *Dharmarakkita v. Wijitha* (12). In *Saranankara Unnanse v. Indajoti Unnanse* (supra) Bertram, C.J. stated :

> "By custom the right to succeed is determined by seniority (though it would appear from the evidence recorded in the case of *Dhammaratana Unnanse v. Sumangala Unnanse* (13) that the right attaching to seniority is not so unqualified as some of our decisions appear to suggest."

As Gnanawansa Thera, Uttamagnana Thera, and Gnanawimala Thera are admittedly dead, the controlling viharadhipathi or de jure viharadhipathi of the Pushparamaya alias Nayake Temple is Mahindagnana Thera. The resulting position is that P9 by which Uttamagnana Thera appointed the plaintiff to succeed him to the said Temple after his demise is invalid and is of no avail or effect in law. Uttamagnana Thera therefore had no right to divert the line of succession given in D1. Thus, the plaintiff has no legal status to claim to be the controlling viharadhipathi of the said temple. The learned District Judge came to the correct finding that the appointment of the plaintiff as incumbent by P9 was only to be effective during the lifetime of Uttamagnana Thera, and it was not an appointment which entitled the plaintiff to succeed Uttamagnana Thera after his death. He further came to the correct finding that the plaintiff had no legal title to be the viharadhipathi in terms of Last Will D 1. As the plaintiff has no legal title to be the de jure viharadhipathi of this temple, he has no legal status to maintain this action. However, the learned District Judge, instead of dismissing the plaintiff's action came to the finding that the plaintiff had in fact functioned as de facto viharadhipathi of this temple from 22.09.1961 till 10.12.1970. It is on this finding that the learned District Judge entered a possessory decree in favour of the plaintiff. Now the question arises whether the plaintiff who is not the *de jure* viharadhipathy of the said Temple could claim the right to maintain this action on the basis that he is the de facto viharadipathy.

At one time the view was that a de facto viharadhipathi could maintain an action to an incumbency – *Sumana Therunnanse v. Somaratna Therunnanse* (14) and *Chandrawimala Therunnanse v. Siyadoris (15)*. However, this view was quashed by Sansoni, J. (as he then was) in *Pemananda Thero v. Thomas Perera* (16) and the two cases mentioned (supra) were not followed.

I quote with approval the following illuminating passages from the judgment of Sansoni, J. where it is made clear that the Buddhist Temporalities Ordinance of 1931 (Cap 222) contemplated only a de jure viharadhipathi while the concept of de facto viharadhipathi earns no recognition – At page 414 Sansoni, J. stated, "The term viharadhipathi is defined in section 2 as meaning the principal Bhikkhu of a temple other than a devale or kovila, whether resident or not", and section 4 (2) reads "The management of the property belonging to every temple exempted from the operation of the last preceding section but not exempted from the operation of the entire Ordinance shall be vested in the viharadhipathi of such temple hereinafter referred to as the 'controlling viharadhipathi'." It becomes clear that the first qualification required of a controlling viharadhipathi is that he should be the viharadipathi of the temple ; He receives the statutory label "Controlling Viharadipathi" only because the temple is exempted from the operation, of section 4 (1) and the management of its property vests in him as viharadhipathi instead of in a duly appointed trustee.

At page 417, Sansoni, J. went on to state –

"To attach any importance to the circumstances that a Priest who is not the Chief Priest in the line of pupillary succession is actually living in a particular temple and managing its affairs while the Chief Priest is living elsewhere would be to lose sight of the most important elements of the definition of a viharadhipathi. It seems clear, therefore, that in enacting Cap 222 there was no intention on the part of legislature to draw a distinction between a viharadhipathi and an incumbent."

At page 416, Sansoni, J. stated –

"At no time in the history of Buddhist temples in this Island has a priest who had no right to the incumbency of the temple been invested with the title to, or the power to manage, the temporalities of the temple. I am unable to accept the suggestion that the Ordinance of 1931, Cap 222, had the far reaching effect of conferring an important legal status on one who may not even claim to be, and who is not in law, the Chief Priest of the Temple."

Finally, Sansoni, J. came to the conclusion that the correct construction to be placed on the provisions of the Buddhist Temporalities Ordinance is that it was intended, in the case of a temple which was exempted from the operation of section 4 (1) to vest the management and the title to the property of such a temple in

the Priest who is the principal Bhikkhu in the line of pupillary succession from the first incumbent of that temple. In the case of *Dhammadaja Thero v. Wimalajothi Thero* (17) Pathirana, J. reaffirmed and quoted with approval the judgment of Sansoni, J. in *Pemananda Thero v. Thomas Perera (supra)*. At the page 162 the judgment reads–

> "I am of the view that Sansoni, J. was right when he said that the viharadhipathi contemplated in section 4 (1) and section 20 of the Ordinance of 1931 is the de jure Viharadhipathi and not the de facto Viharadhipathi. The whole purpose of the Ordinance of 1931 will be defeated if temples and temporalities which should be safeguarded by the lawfully appointed custodian should be permitted to be in the hands of an imposter or one who had no legal claim and give such a person the protection of the Ordinance."

Thus it is very clear from the provisions of sections 4 (2) 18, 20 and 22 of the Buddhist Temporalities Ordinance of 1931, and the views of Sansoni, J. in *Pemananda Thero v. Thomas Perera (supra)* and of Pathirana, J. in *Dhammadaja Thero v. Wimalajothi Thero (supra)* that it is only a controlling Viharadhipathi who has the rights and powers in regard to a Temple exempted from the operation of section 4 (1). Thus, though the earlier decisions of the Supreme Court gave recognition to the concept of de facto Viharadhipathi, that concept no longer enjoys approval or acceptance in our Courts. Such a concept is contrary to the very spirit and letter of the Buddhist Temporalities Ordinance of 1931. I hold that it is the Controlling Viharadhipathi or de jure Viharadhipathi of the Pushparamaya alias Nayake Temple who could have and maintain the present action and no other.

Therefore, in the present action, the plaintiff not being the controlling Viharadhipathi or de jure Viharadhipathi of the temple in suit has no locus standi to sue for the possession of the temple property and for ejectment of the defendant therefrom. The plaintiff's action is clearly misconceived and must necessarily fail.

Mr. Subasinghe cited several authorities relating to persons who are entitled to maintain a possessory action. In the case of *Changrapillai v. Chelliah* (18) the manager of a Hindu Temple who had been ousted was entitled to maintain a possessory action.

In *Tissera v. Costa* (19) the Muppi of a Roman Catholic Church who was only a Caretaker was not entitled to maintain a possessory action.

In *Banda v. Hendrick* (20) a usufructuary mortgagee was held to have sufficient beneficial interest in the property to constitute possession ut dominus.

In *Abdul Azeez v. Abdul Rahuman* (21) a person appointed by the congregation of a Mohammedan Mosque as trustee for a term of years was entitled to maintain a possessory action.

In *Sameen v. Dep* (22) a contractual or statutory tenant who had been forcibly ousted could maintain a possessory action.

None of these cases cited by Mr. Subasinghe have any relevance to the present appeal as the Buddhist Temporalities Ordinance is a code which deals with the management and control of Buddhist temple property in this country, and the question whether the plaintiff has a legal status to maintain the present action has to be decided by reference to that Ordinance.

Regarding the question of possession, there is no doubt that on the evidence of the plaintiff's principal witness Mahindagnana Thero, the plaintiff has been resident throughout in the Pathiraja Pirivena in Walagedera and not in the Temple in suit. Therefore the plaintiff was not in possession of the said Temple.

Further, according to Mahindagnana Thero, he became the viharadhipathy of this Temple after the death of Gnanawimala Thero and he had authorised the defendant to manage this temple on his behalf ; thus, the possession of the Temple by the defendant is lawful.

Finally, on the question of dispossession, the only evidence led is that of the plaintiff which is based on pure hearsay and this evidence is vague and uncertain, and is insufficient to establish dispossession within the meaning of section 4 of the Prescription Ordinance.

For the reasons set out by me, the judgment of the learned District Judge cannot be sustained. Issues 1, 11 and 12 have been answered in the negative as against the plaintiff. I, accordingly set aside the judgment and decree entered in this case and I dismiss the plaintiff's action with costs.

I allow the appeal with costs.

G. P. S. DE SILVA, J. – I agree.

Appeal allowed.

Plaintiff's action dismissed.

(Note by Editor : Application (No. 88/85) to the Supreme Court for special leave to appeal from the above judgment was refused by the Supreme Court on 24.09.1985)