

1977

Present : Rajaratnam, J., Weeraratne, J.  
and Sharvananda, J.

REV. GALLE AMARAWANSA ISTAVIRA,  
Defendant-Appellant

and

REV. GALLE WIMALADHAMMA MAHA THERO,  
Plaintiff-Respondent

S. C. 264/68 (F)—D. C. Galle 7145/L

*Buddhist Ecclesiastical Law—Devolution of Viharadhipathiship—Rules of pupillary succession—Abandonment and surrender of rights of incumbency—Execution of deed of appointment by priest who had next claim for incumbency of a Buddhist temple—Whether a nullity.*

In 1932, A who had the next claim for incumbency of a Buddhist temple, executed during the life time of the then Viharadhipati, B, a deed D1, purporting to appoint four of A's pupils, one of whom was the plaintiff-respondent as joint-incumbents of the temple. The deed also stated that the four priests so appointed purported to renounce the said joint-incumbency and that A thereafter appointed C as the incumbent of the said temple.

The plaintiff-respondent, along with other priests so appointed, consented to the said appointment and renounced in favour of and surrendered to the said C, "all rights, title and interest whatsoever of, in, upon or out of the incumbency of the temple in anywise now be'nging to him or to devolve on him hereafter on the death of the said A". B was not a party to the deed.

In 1963, at the age of 80, the plaintiff-respondent executed another deed, D2, whereby he purported to assign all rights, title and interest of the said temple vested in him as Adhikari, to his pupil X. The deed stated that by virtue of this appointment of administration, incumbency or Adhikariship, the said X was empowered to protect the goods belonging to the temple and to appropriate the income to the temporalities and to spend them in a fitting manner according to Vinaya Rules. In 1965, another deed D4 was executed whereby the plaintiff-respondent obtained a re-transfer of the rights purported to have been assigned by D2.

*Held* : (1) That the deed D1 was a nullity as A who had himself never acted as Viharadhipathi, had no power to execute such a deed appointing incumbents during the lifetime of the Viharadhipathi. Consequently, any purported surrender of his rights by the plaintiff-respondent in the same deed was also ineffective.

(2) That the deed D2 by itself did not amount to a surrender, abandonment or renunciation of the plaintiff-respondent's rights of incumbency, and could only be effective as an appointment of X as his successor.

Cases referred to :

*Warakapitiya Sangnanda Terunnanse v. Meeruppe Sumanatissa Terunnanse*, 66 N.L.R. 394.

*Jinaratna Thero v. Dhammaratna Thero*, 57 N.L.R. 372.

*Dheerananda Thero v. Ratnasara Thero*, 67 N.L.R. 559.

*Saranankara Unnanse v. Indajoti Unnanse*, 20 N.L.R. 385.

*Jananda Therunnanse v. Ratnapala Therunnanse*, 61 N.L.R. 273.

*Gunananda Unnanse v. Dewarakkita Unnanse*, 26 N.L.R. 257.

*Punchirala v. Dharmananda Thero*, 48 N.L.R. 11.

*Algama v. Buddharakitta*, 52 N.L.R. 150.

*Pemananda Thero v. Thomas Perera*, 56 N.L.R. 413.

*Baddegama Sri Ratanasara Thero v. M. H. M. Basheer*, 66 N.L.R. 433.

**A**PPEAL from a judgment of the District Court, Galle.

*H. W. Jayewardene, Q.C. with N. R. M. Daluwatte and Miss S. Fernando*, for the defendant-appellant.

*H. A. Kottegoda, with D. H. Pandita Gunawardena and Daya Pelpola*, for the substituted plaintiff-respondent.

*Cur. adv. vult.*

October 20, 1977. SHARVANANDA, J.

The plaintiff-respondent instituted this action to be declared the Viharadhipati of Parama Vichitrananda Viharaya and the temporalities thereof. The plaintiff complained that the defendant was, from 28th July, 1964, wrongfully disputing the right of the plaintiff to function as the Viharadhipati of the aforesaid temple. The plaintiff averred in his plaint that the original Viharadhipati of this temple was Weligama Dhammarakkita Thero, who died leaving as his heir his chief pupil and successor Galle Ratanasara Thero. The latter is stated to have functioned as the Viharadhipati of the said temple till he reverted to his lay status in the year 1887. Whereupon, his senior pupil, Galle Ariyawansa Thero, succeeded him and held office till his death in 1933. The plaintiff has averred that though he was the senior pupil of the Rev. Ariyawansa and was therefore entitled to succeed him, he had permitted the Rev. Pannaransi, tutor of the plaintiff and a junior pupil of the Rev. Ratanasara, to function as the Viharadhipati of this temple till his death in 1946. The plaintiff stated that after the death of the Rev. Pannaransi in 1946, he, as the lawful incumbent, began to function as the Viharadhipati till his right to the said office was disputed by the defendant in 1964.

The defendant, by his answer, admitted the devolution of the Viharadhipatiship of this temple from the Rev. Dhammarakkita, who was followed by the Rev. Ratanasara, who in turn was succeeded by Galle Ariyawansa Thero as stated by the plaintiff. But the defendant specifically denied that the plaintiff was the senior pupil, or any pupil at all, of the said Galle Ariyawansa Thero. The defendant also denied that the Rev. Pannaransi at any time functioned as the Viharadhipati of the temple after the death of the Rev. Ariyawansa. According to the defendant on the death of the Rev. Ariyawansa in 1933, it was he who became the Viharadhipati of this temple as the senior pupil of

the Rev. Ariyawansa. By way of further answer, the defendant stated that even if the plaintiff had any right as the Viharadhipati of the said Vihara, he had renounced and abandoned the said rights and hence he was not entitled to maintain the present action. He further, in his answer, referred to the evidence given by the plaintiff in case No. L/6725 D. C. Galle, wherein he (the plaintiff) had stated that he had transferred his right of Viharadhipatiship to one Tihagoda Piyatissa Thero. The defendant also admitted in his answer that the successor to the Viharadhipatiship of the said Vihara is governed by the rule of Pupillary Succession called the 'Sisyanu Sisya Paramparawa'.

The case proceeded to trial on the eleven issues suggested by counsel for both parties. Significantly, the defendant omitted to frame any issue on the question of abandonment of his rights by the plaintiff as alleged by the defendant in his answer. Since the question of abandonment involves a question of law and fact, an issue should, have been framed on this disputed question of abandonment, and the plaintiff should have had the opportunity of rebutting the allegation of abandonment of his rights. Mr. Jayewardene's argument that the plaintiff had, in any event, abandoned his rights of Viharadhipatiship loses much of its force by the defendant-appellant's omission to frame an issue on this vital question. Since no such issue was framed at the trial, the trial Judge was given no opportunity to ascertain whether the plaintiff had, in fact, renounced and/or abandoned his rights by the execution of the two deeds, No. 410 dated 4th March, 1932 (marked D1) and No. 12640 dated 28th December, 1963 (marked D2). Anyway, in the absence of an issue, it seems to have been suggested in the lower Court that the plaintiff, by the execution of the said deeds D1 and D2, had renounced and/or abandoned his rights, for the District Judge, in the course of his judgment, observes :

“ It is quite evident to Court that the defendant relied on the document D1 and D2 to prove an abandonment of his rights by the plaintiff. The Court is satisfied that these two documents do not deprive the plaintiff of his lawful right to the Viharadhipatiship of this temple as the senior pupil of the Rev. Ariyawansa.”

After a critical analysis of the evidence, the trial Judge held with the plaintiff and entered judgment declaring the plaintiff the lawful Viharadhipati of the temple in dispute. The evidence in this case is overwhelming that Pannaransi Thero functioned as the Viharadhipati of the temple in question up to 1946 as referred to by the plaintiff and that the plaintiff succeeded to the incum-

bency on the death of the Rev. Pannaransi and that the defendant did not at any time function as the Viharadhipati of the temple. In the face of the vast volume of evidence led by the plaintiff, it is surprising that the defendant did not choose to give evidence, though he was the best person to substantiate his allegation that he had functioned as the Viharadhipati from the time of the death of the Rev. Ariyawansa in 1933. The finding of the trial Judge that the plaintiff is the senior pupil of the Rev. Ariyawansa by ordination and that the defendant never officiated as the Viharadhipati of the temple after the death of the Rev. Ariyawansa in 1933 is supported by ample evidence on record, and no serious attempt was made to canvass this finding. But, Mr. Jayewardene, counsel for the defendant-appellant, pressed his appeal on the ground that the plaintiff had abandoned his rights, if any, to the incumbency of the Vihara by the execution of the two documents D1 and D2. He submitted that by deed No. 410 dated 4th March, 1932 (D1), the plaintiff renounced and abandoned his claim to the incumbency of this temple in favour of the Rev. Sumangala. By this deed, the Rev. Pannasara, calling himself the Viharadhipati of the temple, purported to appoint, out of his twelve pupil-priests, four priests, one of whom is the plaintiff priest, as joint-incumbents of the temple. The deed states that the four priests who were so appointed purported to renounce the said joint-incumbency and that Pannaransi Thero, thereafter, appointed Sumangala Bhikku the Adhikari or incumbent of the said temple and that in view of the said appointment of Sumangala Bhikku as the incumbent, the plaintiff, along with the other two priests, consented to the said appointment and renounced in favour of and surrendered to the Sumangala Bhikku "all rights, title and interest whatsoever of, in, upon or out of the incumbency of the temple in anywise now belonging to him or to devolve on him hereafter on the death of the said Pannaransi Thero". It has been urged by Counsel for the appellant that this act of the plaintiff amounted to an abandonment or renunciation of his future rights to incumbency. It is to be noted however that Rev. Ariyawansa, who was admittedly the Viharadhipati of this temple, was still living at the time of the execution of D1 and that he died in the following year 1933 and that he was not a party to D1. Therefore, the Rev. Pannasara had no right whatever in 1932 to designate himself as the Viharadhipati of this temple and convey the status that he did not have at that time to the Rev. Sumangala, and hence whatever right that the plaintiff is alleged to have renounced by the execution of the deed D1 was the right that devolved on him through the Rev. Pannaransi and, as stated earlier, this renunciation amounted to nothing as the Rev. Pannasara had no right whatever, in the year

1932 when D1 was executed, to the Viharadhipatiship of this temple. It is to be noted that according to the defendant, the Rev. Pannasara had never acted as the Viharadhipati of this temple. Further, no evidence has been led in this case to show that the Rev. Sumangala, in pursuance of D1, ever functioned as the Viharadhipati. In the circumstances, this deed D1 was a nullity and has rightly never been acted upon. The fact that the plaintiff had been a party to such a deed does not in any way prejudice his rights. In the circumstances, it cannot be claimed that by the execution of D1 in 1932, the plaintiff had renounced and/or abandoned any of his rights or claims to the incumbency of the temple.

The next deed on which the defendant's plea of abandonment is based is Deed No. 12,640 dated 28th December, 1963 (D2). The recital in the deed states :

“ Now as I have exceeded the age of 80 years and although I am getting the work of the temple done by the four pupils, yet it is my desire to appoint someone for the administration and general welfare of the said valuable temple..... ”

By this deed, the plaintiff “ assigned, set over all rights, title and interest of Parama Vichitrananda Maha Viharaya vested in me as Adhikari to my pupil Pandita Tihagoda Piyatissa. Therefore, by virtue of this appointment of administration, incumbency or Adhikariship, the said Pandita Tihagoda Piyatissa Bhikku is hereby empowered to protect the goods belonging to the temple and to appropriate the income to the temporalities and to spend them in a fitting manner according to the Vinaya Rules. ” Counsel for the appellant vehemently contended that by this deed D2, the plaintiff has surrendered and/or abandoned his rights to incumbency.

“ The law is clear that although renunciation by a monk of his right to be Viharadhipati may be inferred from the facts and circumstances, such an inference will not be drawn if the matter is left in a state of doubt.”—*Warakapitiya Sangananda Terunnanse v. Meeruppe Sumanatissa Terunnanse*, 66 N.L.R. 394. In my view, one cannot spell out an intention to renounce or abandon the rights of incumbency on the part of the plaintiff from the terms of the deed D2. The terms of D2 are suggestive of the appointment of a manager of the temple to look after and manage it on behalf of the plaintiff, as the plaintiff was too old to attend to its administration. “ The basis of abandon-

ment is the intention to renounce one's rights, and this intention must be clear and unambiguous. If there is any doubt on this matter, the inference drawn must be against an abandonment." (See *Jinaratana Thero v. Dhammaratna Thero*, 57 N.L.R. 372). It has been observed in *Dheerananda Thero v. Ratanasara Thero*, 67 N.L.R. 559, that there is a distinction between abandonment and renunciation of one's rights, and a conveyance of those rights to another. "When rights are abandoned, they disappear and cease to exist and there is no person to whom those rights accrue. In the case of a conveyance the transferor asserts his rights and then transmits them to the transferee, so that the rights continue in the transferee. It may turn out that the act of transfer is ineffective (as in this case), but then the rights of the transferor do not disappear (for he never renounced them), but continue to remain in him. . . . Our Courts have held that a Viharadhipatiship cannot be transferred during a Bhikku's life-time. But the deed which purports to do so may, in certain circumstances, be effective as an appointment of a successor."—per Sirimane, J. at pp. 562 and 63. The observation of Sirimane, J. applies appropriately to the terms of the deed D2. It is quite clear from the provisions of the deed D2 that the plaintiff never intended to abandon his rights—in fact, abandonment was the last thought in his mind. He asserts his rights and then makes provision for their transmission, whereby those rights could be exercised by the transferee. From the mere execution of the deed D2, one cannot spell out an abandonment of his rights of incumbency by the plaintiff. The execution of such a deed constitutes only an item of evidence which, along with other evidence of conduct on the part of the executant, might establish such abandonment. But, by itself it does not amount to abandonment. The ultimate question is whether the plaintiff has, in fact, abandoned his rights—in the sense that, by executing such a deed as D2, he not only intended never to function as incumbent in the future, but also has, thereafter, in fact, ceased to function as incumbent. The onus lies fairly and squarely on those who assert that the right has been abandoned. The onus is a heavy one.

The deed D2, instead of operating as an immediate transfer of the Viharadhipatiship to the Rev. Piyatissa, can be effective as an appointment of Rev. Piyatissa as plaintiff's successor to the Viharadhipatiship on his death. Hence, the plaintiff could, even after the execution of the deed D2, continue to hold this office till his death. The deed No. 14766 dated 2nd July, 1965 (D4), by which the plaintiff got a re-transfer of the rights purported to have been assigned on D2, seems to have been executed out of

an abundance of caution, since the Rev. Piyatissa had no present rights to the incumbency that he could re-transfer to the plaintiff. The execution of such a deed of revocation as D4, reinforces the submission that the plaintiff never intended to abandon his rights of incumbency.

Counsel for the plaintiff, at one stage of the argument, stated that by the deed D2 the plaintiff sought to appoint Piyatissa Thero as Adhikari of the temple only and not as Viharadhipati or incumbent of the temple. This submission was made on the basis that the office of Adhikari is different from that of a Viharadhipati or incumbent. Reference was made to the judgment of Basnayake, C.J. in *Janananda Therunnanse v. Ratnapala Unnanse* (61 N.L.R. at 275). Mr. Jayewardene, however, referred us to the judgments in 20 N.L.R. 385, 26 N.L.R. 257, 48 N.L.R. 11, 52 N.L.R. 150, 56 N.L.R. 413 and 66 N.L.R. 433, which tend to show that this distinction is not well-founded and that there is only one office: Viharadhipati, Adhikari, or incumbent, and that these expressions refer to one and the same office. The observation of Basnayake, C.J. that "it is well established that the offices of Viharadhipati and Viharadhikari are not the same" is not supported by any authority and cannot be sustained.

However, I agree with the view of the District Judge that the two deeds marked D1 and D2 cannot be regarded as acts of abandonment or renunciation of the Viharadhipatiship by the plaintiff.

The appeal is dismissed with costs.

RAJARATNAM, J.—I agree.

WEERARATNE, J.—I agree.

*Appeal dismissed.*

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