1958 *Present :* **Pulle, J., and Sansoni, J.**

W. M. SURASENA *et al.*, Appellants, *and* K. REWATHA THERO, Respondent

S. C. 852—D. C. Kandy, 3983

Buddhist ecclesiastical law—Gift of pudgalika property by a Viharadhipathi to his pupil—Does it create a charitable trust in favour of the Vihare?—Trusts Ordinance (Cap. 72), s. 6.

Where a deed was, on the face of it, nothing more than a gift of pudgalika property by a Viharadhipathi to his pupil and the latter's "successors in the pupillary succession"—

***Held*, that it could not be contended that the donee held the land as temple property for the benefit of the Vihare.**

APPEAL from a judgment of the District Court, Kandy.

J. A. L. Cooray, with *F. X. J. Rasanayagam*, for the defendants-appellants.

N. E. Weerasooria, Q.C., with *B. S. C. Ratwatte*, for the plaintiff-respondent.

Cur. adv. vult.

July 28, 1958. SANSONI, J.—

The plaintiff filed this action as the Controlling Viharadhipathi and Trustee of Sirimalwatta Vihare, seeking to be declared entitled to the entirety of a field called Gedera Kumbura described in the plaint. He pleaded that Sumangala Nayake Unnanse who was the Controlling Viharadhipathi, having nominated and appointed his pupil Rathanajoti Unnanse the Viharadhipathi, by his deed P1 of 1918 conveyed the field to the latter to be held in trust by him and his successors in pupillary succession; and that upon Rathanajoti Unnanse's death in 1951 the plaintiff succeeded him as Viharadhipathi, and the field became vested in him. The four defendants were sued as persons in wrongful possession.

The defendants pleaded that one Lensuwa Heneya was the former owner of this field, and that he by deed 4D 2 of 1874 conveyed it to his wife Kuda Ridee and his son Rana Heneya. The 4th defendant claimed the ½ share of Rana Heneya upon a series of deeds, while the 1st and 2nd defendants claimed that the ½ share of Kuda Ridee had devolved on them upon another series of deeds.

In 1913 Kuda Ridee and one Koin Menika by deed 2D1 purported to transfer the entirety of the field to Sumangala Nayake Unnanse of Sirimalwatta Vihare and his heirs, executors, administrators and assigns for a sum of Rs. 1,500. By deed P1 of 1918 Sumangala Nayake Unnanse

purported to donate the field and other lands to his pupil Rathanajoti Unnanse. The terms of the deed are important and I shall therefore set them out in full :

" Know all men by these presents that I Sumangala Nayake Unnanse of Sirimalwatta Vihare in Sirimalwatta in Udagampola of Lower Dumbara in the District of Kandy in the Central Province of the Island of Ceylon (hereinafter calling myself the donor) for and in consideration of the love and affection which I have and bear unto my pupil Rathanajoti Unnanse of Sirimalwatta Vihare in Sirimalwatta aforesaid (hereinafter called the donee) and for divers other good causes and considerations me hereunto specially moving do hereby give, grant, convey, transfer, set over and assure unto the donee and his successors in the pupillary succession by way of gift the lands and premises in the Schedule hereunder written particularly described and of the value of Rupees Two Thousand of lawful money of Ceylon together with all rights, privileges, easements, servitudes and appurtenances whatsoever thereof or thereunto in any wise belonging or used or enjoyed therewith or reputed or known as part or parcel thereof and all the estate right title interest claim and demand whatsoever of me the donor in to out of or upon the same, to have and to hold the said premises hereby gifted with their and every of their appurtenances unto the donee and his aforewritten for ever. And I the donee do hereby accept the above gift thankfully. "

Rathanajoti Unnanse died in 1951 and the plaintiff thereupon succeeded him as Viharadhipathi.

Several issues were framed at the trial but the crucial question for the decision of the Court, as suggested by the plaintiff's counsel in issue (4), was :

" Did the said deed (P1) operate to create a trust in favour of the successors in pupillary succession to the said Rathanajoti Thero ? " The issue is based on paragraph 3 of the plaint and the amended plaint which reads :

" One Sumangala Nayake Unnanse was about 40 years the Controlling Viharadhipathi of the said Vihare and he having nominated and appointed his pupil Rathanajoti Unnanse the Viharadhipati of the said Vihare by his deed No. 1127 dated the 28th February 1918 conveyed the said field inter alia to him to be held in trust by him and his successors in pupillary succession. "

On this part of the case the defendants claimed

(1) that the field became the pudgalika property of Sumangala Nayake Unnanse when he acquired it upon deed 2D 1 of 1913; and

(2) that by deed P1 Rathanajoti Thero became absolute owner of it, or that at the most the pupils of Rathanajoti Thero were also intended to be benefited.

On the first point there is an admission by the plaintiff's counsel at the trial that on 2 D 1 the land became the pudgalika property of Sumangala ; in any event, there is no evidence that it bore any other character.

After trial the learned District Judge held that Sumangala Nayake Unnanse became entitled only to a ½ share upon the deed 2 D 1, and that the other ½ share belongs to the 4th defendant. He also held that the deed P 1 executed by Sumangala Nayake Unnanse created a charitable trust for the benefit of the Sirimalwatta Vihare, and he therefore gave judgment in favour of the plaintiff in respect of a ½ share of the field. The 1st and 2nd defendants have appealed from this judgment, and it was submitted on their behalf that the deed P 1 did not create a trust because certain of the essential elements of a valid trust are absent.

Section 6 of the Trusts Ordinance (Cap. 72) requires that the author of a trust should indicate with reasonable certainty, among other things.

(*a*) the intention on his part to create a trust ;

(*b*) the purpose of the trust ;

(*c*) the beneficiary.

It seems to me that none of these elements are present in the deed P 1, On the face of it the document is nothing more than a gift by a Buddhist Priest in consideration of love and affection to his pupil and the latter's successors in the pupillary succession. Neither the purpose, nor the beneficiary, nor the intention to create a trust in favour of the temple is set out in the deed. But it is urged for the plaintiff respondent that the donee Rathanajoti Unnanse held the land as temple property for the benefit of the Vihare because that is the necessary consequence of the gift to Rathanajoti Unnanse and his pupillary successors. The argument, as I understood it, was that the deed in effect appointed Rathanajoti Unnanse to succeed Sumangala Nayake Unnanse as incumbent of the Vihare, that Rathanajoti's pupillary successors would be his successors in the incumbency, and that as an incumbent's powers of dealing with Vihare property are limited to such objects as would benefit the Vihare, the Vihare was by implication the beneficiary of the trust, and the purpose of the trust was to benefit the temple. Such an argument would involve reading into the document a good deal more than it contains on its face. For one thing, Rathanajoti is not referred to as the next incumbent, and there is nothing to indicate that the donor even contemplated appointing him to that office. The gift is not limited to such pupillary successors as would fill the office of incumbent. Even if these difficulties can be explained away, precedent is against the plaintiff respondent's contention.

It seems to have been argued in the lower Court that the deed created a charitable trust and that is the view the learned Judge has taken, apparently being of the opinion that a gift by a priest of a temple " to his pupil of the same temple to be possessed by the donee and his successors in the pupillary succession " creates a charitable trust. It seems a novel and a bold view to take, that where the beneficiaries of a trust are Buddhist priests, the trust is charitable. The learned Judge answered issue (4) in the affirmative in this view of the matter, but he goes on in his judgment to say : " Though it is not stated in so many words in the deed itself, there is no doubt that the intention of the donor was that the gift

was for the benefit of the Temple". The beneficiary would then, in his view, not be the priestly successors of Rathanajoti Unnanse, but the Vihare. He then quotes a passage from Lewin on Trusts (15th Edition) page 455 cited by Fernando A.J. in his judgment in *Murugesoe v. Chelliah*[1] which reads: "A much greater latitude of expression is allowed in gifts to charity than in gifts to individuals, and a gift to charity will never fail for *uncertainty*". The true meaning of this passage appears from the very next sentence in that text book: "Where a trust instrument once shows a clear intention to devote the property to charity, it is immaterial that the particular mode in which the intention is to be carried into effect is left uncertain, for the Court will carry the intention into effect". An intention to create a charitable trust can never be gathered from language which does not point with certainty to that intention.

The question ultimately resolves itself into whether the deed P1 created a valid charitable trust for the benefit of the Vihare or could even be treated as a donation to the Vihare. Unless the plaintiff can establish one or the other position he cannot succeed. Now the Vihare is nowhere mentioned in the deed as a beneficiary; nor is it possible to find in the deed a clear intention that the lands dealt with were to be the property of the Vihare. The deed, it seems to me, is nothing but a deed of gift to Rathanajoti Unnanse and his pupillary successors. Rathanajoti Unnanse was not at that time the incumbent of the Vihare, he was not appointed by the deed to succeed the donor as incumbent, and it was not certain that he would ever hold that office. It cannot therefore be assumed from the terms of the deed that the donor's intention was to benefit the incumbent or his successors in office, still less that his intention was to benefit the Vihare. Even if one were to read the deed as being a gift to the incumbent of the Vihare and his successors in office, such a gift has been held not to be a gift to the Vihare but to the incumbent personally—see *Appuhamy v. Sundara Banda*[2]. De Sampayo A.C.J. in his judgment in that case (Garvin A. J. agreeing) said that the words "successors in office" were descriptive only, and he went on to say: "there is no difficulty in the conception of a gift designating the line of priests who are to take after the immediate donee. I therefore think that the gift was not to the temple and the property did not become Sanghika."

We were referred by the plaintiff-respondent's counsel to the judgments of Bonser C.J. in appeal[3] and in review[4] in the *Kiriella Vihare case*. The Sannas which was considered there granted certain lands to a priest, and provided that the income of the lands should be appropriated by the successive pupils of that priest and by priests who reside in the Vihare "maintaining the services of the Vihare hereafter without dispute". That clause in the Sannas was emphasized by Bonser C.J., and also by De Sampayo A.C.J. in *Appuhamy v. Sundara Banda*[2] as setting out the purpose and condition of the gift, and the absence of a clause of that nature from the deed P1 makes all the difference. In the present case I would follow, with respect, the view taken by De Sampayo A.C.J.

[1] *(1954) 57 N. L. R. 463.*
[2] *(1923) 1 Times of Ceylon L. R. 281.*
[3] *(1900) 4 N. L. R. 167.*
[4] *(1900) 2 Browne's Reports 333.*

It is true that the deed we have to construe is not in the same terms as the deed which that learned judge considered in *Appuhamy v. Sundara Banda* [1], but the *ratio decidendi* of that case is clearly applicable.

I would therefore hold that the land gifted on the deed P1 did not become the property of the Vihare, and that the plaintiff as the trustee of the Vihare is not entitled to the relief he seeks.

The declaration of title to a ½ share of the field in dispute, and the orders for damages and costs, made in favour of the plaintiff-respondent, are set aside. The 1st and 2nd defendants-appellants are entitled to their costs against the plaintiff-respondent in both Courts.

PULLE, J.—I agree.

Appeal allowed.