

1946

Present : Keuneman S.P.J. and Canekeratne J.

DHAMMADASI THERO, Appellant, and DHAMMASIDDI
THERO, Respondent.

294—D. C. Kandy, 610.

Buddhist Law—Dambulla Vihare—Dispute between Viharadhipathi and thewawa priest as regards the right to the keys and certain other articles belonging to one of the five shrines—Jurisdiction of Court to adjudicate in such dispute—Right of Viharadhipathi to appoint a new thewawa priest—Contract of bailment known as commodatum—Evidence Ordinance, s. 117.

The plaintiff, who was the Viharadhipathi of Dambulla Vihare, averred that he appointed the defendant as *thewawa* priest to perform the rites and ceremonies of the shrine room known as Devu Raja Vihare. The defendant, according to the plaintiff, held the office during the will and pleasure of the plaintiff. The defendant, on the other hand, contended that the right of officiating at the five shrine rooms of Dambulla Vihare was regulated by the *Sisyanu Sisya Paramparawa* rule of succession and refused to hand back to the plaintiff the keys and certain other articles of the shrine room which had been delivered to him by the plaintiff on a contract, express or implied, that they should be redelivered as soon as the time for which they were given should elapse.

In an action brought by the plaintiff praying that he be declared entitled to the right and privilege of appointing a new *thewawa* priest and that the defendant be directed to deliver the articles to him—

Held, (1) that there was a contract of bailment of the kind known as *commodatum* as regards the articles which had been delivered to the defendant ;

(2) that as the plaintiff must make provision for the preservation of these articles at Devu Raja Vihare he was entitled to appoint a new *thewawa* priest and entrust the same to him.

A PPEAL from a judgment of the District Judge of Kandy. The material facts appear from the head note.

N. E. Weerasooria, K. C. (with him *S. R. Wijcyatilake*), for the defendant, appellant.—The right of officiating at the *thewawa* of the five Vihares constituting the Dambulla Temple is regulated by the rule of succession known as the *Sisyanu Sisya Paramparawa*. The pupils of Pothuhera Ratnapala and their successors have exercised these rights since 1796 and the defendant and his predecessors being in the pupillary line have been performing the *thewawa* ceremonies at the Devu Raja Vihare, and the present action of the plaintiff who is the Viharadhipathi is an attempt to disturb the prevailing practice by making his own appointments. According to the decree the plaintiff has been given the right to appoint any priest, whether he be a successor of Pothuhera

Ratnapala or not. The system of hereditary succession of the Kapuralas at the Alutnuwara Dewale is analogous. See *Nugawela v. Mohathala* ¹.

Moreover, according to the system at Dambulla Temple, if a change is effected in respect of one Vihare like changes have to be made in the other Vihares too and the posts have to be confined to the sacerdotal line of Pothuhera Ratnapala. According to the evidence it is apparent that the changes have been only among the successors of Pothuhera Ratnapala and that they have been functioning in the five vihares in rotation.

This practice should be maintained. See Kandyan Convention, Legislative Enactments, Vol. VI., section 5, Chapter 274.

The plaintiff's action is misconceived as the Civil Courts have no jurisdiction to grant the relief claimed for as the matter in dispute is purely of a religious or ecclesiastical nature and the proper body to entertain it would be the Sangha Sabha—*Pitche Thamby v. Cassim Marikar* ²; *Vasudev et al v. Vamnaji et al* ³. The present dispute is over the performance of certain religious rites and therefore quite outside the scope of the Civil Courts.

The plaintiff has no status to maintain this action in respect of the articles used in the performance of the *thewawa* as he is admittedly not the Trustee. See sections 18 and 20 of the Buddhist Temporalities Ordinance; *Dias v. Ratnapala* ⁴.

E. A. P. Wijeyeratne (with him *Walter Jayawardene*), for the plaintiff, respondent.—The plaintiff as the Viharadhipathi has the right to make appointments for the performance of the *thewawa* in the five shrine rooms. In fact the defendant was appointed by the plaintiff on August 15, 1928, and on July 3, 1938. The defendant has acknowledged the plaintiff's authority to do so.

The present holders of the offices in the five shrine rooms are not the only successors of Pothuhera Ratnapala—there are several others. It is conceded that the appointment must be confined to the successors of Ratnapala but not necessarily to the present holders of these offices.

According to the evidence it is obvious that the changes were not made in rotation.

The present dispute is in regard to an office and the Civil Courts have jurisdiction to entertain this action. The case of *Pitche Thamby v. Cassim Marikar* can be distinguished.

The articles referred to are necessary for and appurtenant to the office in dispute and the plaintiff having handed them over is entitled to get them back. See *Gooneratne Nayake Thero v. Punchi Banda Korala* ⁵.

N. E. Weerasooria, K.C., in reply.—The alleged appointments in 1928 and 1938 were redundant. The right to officiate at the *thewawa* has been always governed by the *Sisyanu Sisya* rule of succession. The general right of a viharadhipathi to control the administration of a vihare should

¹ (1945) 47 N. L. R. 47.

² (1914) 18 N. L. R. 111.

³ I. L. R. (1880) 5 Bombay 80.

⁴ (1938) 40 N. L. R. 41.

⁵ (1926) 28 N. L. R. 145.

not be confused with the traditional practice prevailing at the Dambulla Temple from time immemorial. The defendant's right to officiate arises from the fact that he is in the pupillary line of Potuhera Ratnapala and any acknowledgment of the plaintiff's authority is inconsequential.

The decree as it stands is too wide even according to the position now taken by the plaintiff.

It has never been the practice to make a change in one vihare only. The evidence led indicates that the changes if at all were in rotation.

The *ratio decidendi* in the case of *Pitche Tamby v. Cassim Murikar* (*supra*) is really against the plaintiff.

The case of *Gooneratne Nayake Thero v. Punched Banda Korula* (*supra*) has no application to the facts of this case.

The Dambulla Vihare is one of the oldest temples and the ancient customs and practices should not be lightly disturbed.

Cur. adv. vult.

November 18, 1946. CANEKERATNE J.—

The appointment of the Viharadhipathi of Dambulla Vihare has been, since the middle of the last century, in the hands of the Chapter of Asgiriya Vihare. The present holder of the office is the plaintiff, the Annunayake Thero of Asgiri Vihare. Dambulla Vihare consists of five shrine rooms known as the Devu Raja Vihare, Maha Raja Vihare, Maha Alut Vihare, Paschima Vihare and Deweni Alut Vihare; Devu Raja Vihare appears to be the most important and in it are three devales—a Vishnu, Natha and Kataragama devales. The practice has been for the Viharadhipati who resides in Kandy to appoint a bhikku for each of these shrine rooms. His position seems to resemble that of an assistant to the Viharadhipati; he is called the *thewawa* Priest or *thewakarna Unnanse*.

The evidence shows that the bhikku appointed to officiate at a shrine room must be a sacerdotal descendant of Panawe Dipankara or of Madugalle Guneratne. This was not denied by Counsel for the respondent.

It appears that Panawe Dipankara had a pupil Nikawela Indrajoti, whose pupil was Nikawela Ananda; Nikawela Dhammadasi and Inamaluwe Sumangala were pupils of Nikawela Ananda. Muruthaoluwe Gunaratno was a pupil of the former, Inamaluwe (or Daniyagama) Ananda a pupil of the latter. The defendant is a pupil of M. Guneratne.

The plaintiff averred that he appointed the defendant on August 15, 1928, to perform the rites and ceremonies of the shrine room known as Devu Raja Vihare: the office is referred to hereafter as the office of *thewawa* priest. The defendant, according to the plaintiff, held the office of *thewawa* priest at this shrine room during the will and pleasure of the plaintiff. The defendant on the other hand contended that the right of officiating at the five shrine rooms is regulated by the *Sisyanu Sirya*

paramparawa rule of succession. He claimed that the right of officiating at Devu Raja Vihare devolved on the sacerdotal line of N. Dhammadasi, *i.e.*, on M. Guneratne, and then passed to the defendant. He also claimed that he had acquired a right to hold this office by prescription. There was another contention put forward by the defendant in the course of the trial that a pupillary descendant of M. Guneratne was entitled to be appointed the officiating priest at one of the five shrines at least. The learned Judge accepted the contentions advanced by the plaintiff: it is impossible to state that his conclusion is wrong.

The evidence shows that N. Dhammadasi was appointed the *thewawa* priest of Devu Raja Vihare about October 25, 1892, by U. (or Udugama) Buddharakkhita, the then Viharadhipati; he was reappointed to the post by Sri Sumana, the successor of U. Buddharakkhita, about May 12, 1898, and he continued in the said office till about June 13, 1901, when Inamaluwe Sumangala became the *thewawa* priest.

N. Dhammadasi appears to have become a layman and was appointed the trustee of Dambulla Vihare by the Committee in 1903. About May 21, 1905, Muruthaoluwe Gunaratna (the tutor of the defendant), who had been the *thewawa* priest of Deweni Alut Vihare since May 14, 1903, succeeded I. Sumangala in the office of *thewawa* priest of Devu Raja Vihare: he was succeeded by Embulambe Suwarnajoti about June 15, 1913, and Inamaluwe Sumangala succeeded the latter about June 11, 1917. On the death of I. Sumangala shortly afterwards Embulambe Suwarnajoti was appointed in his place by the then Viharadhipathi (Sri Sumana). The plaintiff, who succeeded Sri Sumana, went to Dambulla Vihare on October 16, 1924, and was given charge of the Vihare and its shrines. Embulambe Suwarnajoti was reappointed the *thewawa* priest on this day and the plaintiff handed over the shrine room to him. Suwarnajoti continued to officiate till about August 15, 1928, when the defendant was appointed in his place by the plaintiff. The defendant came over from Maha Alut Vihare to Devu Raja Vihare: he had succeeded his tutor Muruthaoluwe Guneratna in the office of *thewawa* priest of Maha Alut Vihare on the death of the latter in 1921. The defendant was reappointed by the plaintiff on July 3, 1938.

The defendant accepted the keys of Devu Raja Vihare and "the effects belonging to it", *i.e.*, the articles enumerated in a list, in August, 1928; on July 3, 1938, he handed over these articles to the plaintiff and on the same day he received them back from him. The plaintiff says that in 1938 he appointed the defendant to be the *thewawa* priest for a short period only—this is borne out by P 42. The plaintiff on March, 1943, requested the defendant to hand over the keys of Devu Raja Vihare and the articles to him. The defendant refused to give these up and this action was instituted. The defendant does not defend the action on behalf of any third person but on his own account.

The trial Judge gave judgment in favour of the plaintiff in terms of paragraph 1 of the prayer (*i.e.*, the right and privilege of appointing a bhikku); he directed the defendant to deliver the articles to the plaintiff (paragraph 3 of the prayer). These are the two main points of contest and they can be conveniently dealt with in the reverse order.

There was a delivery of articles by the plaintiff to the defendant for a particular purpose on a contract express or implied that the articles shall be redelivered as soon as the time for which they were given shall have elapsed. This is a contract of bailment of the kind known as *commodatum*. It does not matter if the thing lent is the property of a third party seeing that the ownership does not pass in the case of *commodatum* but only the natural detention and the use¹. It is sufficient if the lender has a special (or qualified) property in the thing lent or the lawful possession of it.² The right of the bailee may be determinable at any instant at the will of the bailor, or otherwise in accordance with the terms of the bailment. There has been a determination of the bailment in this case and the right to take the articles has reverted to the plaintiff. The law also creates an estoppel against a bailee (Sec. 117 of Evidence Ordinance). One who received property from another as his bailee must restore or account for that property to him from whom he received it. A bailee may set up a *jus tertii* if the facts show that there has been what is equivalent to an eviction by title paramount: if the bailee retains possession of the goods and there has been no eviction the bailee may nevertheless set up and rely upon the *jus tertii* if he defends this possession upon the right, title and authority of the *tertius*³. It is not enough that the bailee has become aware of the title of a third person. The contention of the defendant that the ownership of the articles is vested in the trustee of the Vihare affords no justification for the defendant's refusal to redeliver them; the present trustee is Daniyagama Ananda, who gave evidence for the plaintiff.

In the exercise of his right the plaintiff appointed the defendant the officiating priest in the shrine room: this is a religious office which is attached to a place. The office is now wrongfully usurped by the defendant. The right to the possession of the articles enumerated in the plaint is in the plaintiff: these are articles necessary for the performance of the ceremonies at the shrine room: they must be kept at Devu Raja Vihare and the plaintiff must make provision for the preservation of these articles at the Vihare. As he lives in Kandy it would be necessary to entrust the articles to some person living in the locality, preferably to a person in whom he has confidence. The most natural course in these circumstances would be to appoint a new *thewawa* priest and to give the articles to him. Rights of a temporal nature are involved in the action and a Court cannot refuse to adjudicate on such rights.

The appeal is dismissed with costs.

KEUNEMAN S.P.J.—I agree.

Appeal dismissed.

¹ 3 *Massdorp* 127 (4th Edition).

² 3 *Burge* 712 (see also *Voet* 13-6-1; *van Leeuwen's Censura Forensis*, 1-4. 6-1)

³ *Biddle vs. Bond*. (1859) 6 B & S. 225.

1*—J. N. A. 67430 (12/46)