1935 *Present :* **Macdonell C.J. and Koch A.J.**

RANASINGHE *et al. v.* DHAMMANANDA *et al.*

279—D. C. Colombo, 34,424.

Buddhist temporalities—Incumbent of vihare in possession of lands—De facto trustee for vihare—Prescription for benefit of vihare—Ordinance No. 22 of 1871, s. 3, and Ordinance No. 8 of 1905, s. 20.

Where the incumbent of a vihare, to which trustees have not been appointed, possesses lands not expressly gifted or dedicated to the vihare, he is in the position of a *de facto* trustee for the vihare and, as such, he can acquire title by prescription for the benefit of the Vihare.

APPEAL from a judgment of the District Judge of Colombo.

H. V. Perera (with him *Rajapakse*), for defendants, appellants.

De Zoysa, K.C. (with him *N. E. Weerasooria*), for plaintiffs, respondents.

Cur. adv. vult.

March 11, 1935. MACDONELL C.J.—

In this case the plaintiffs as duly appointed trustees, under Ordinance No. 8 of 1905, of the Pilikuttuwa Purana Vihare sued the defendants for a declaration of title to certain lands which the plaintiffs alleged were the property of that vihare. The defendants claimed the lands under a deed of March 30, 1928, executed in their favour by one Sonuttara who, they said, had been in possession of these lands by a title adverse to and independent of the vihare for some thirty years. The plaintiffs obtained judgment in the District Court from which the defendants bring the present appeal.

The first question is the identity of the lands in dispute. The defendants admit that they are in possession of the lands claimed by the plaintiff-trustees and they maintain that these lands were possessed and owned by one Attadasi who died in 1872 and had been incumbent of this vihare for an uncertain number of years before that date. These lands can be traced in the documents of about that date which were put in at the trial, and the learned District Judge after a careful examination of the evidence concludes that the lands now claimed by the plaintiff trustees and possessed by the defendants under their deed of 1928,

are identical with the lands named in the documents put in as owned by Attadasi the incumbent who died in 1872. I did not understand that these findings of the learned District Judge were challenged in the appeal and there is certainly sufficient evidence to support them. It may be taken then that the lands claimed by the plaintiff trustees are identical with those possessed by the defendants on their deed of 1928 and also identical with those owned by Attadasi the incumbent who died in 1872.

The next question is the title by which Attadasi possessed these lands, was it in his own right or on behalf of the vihare. The learned District Judge has found that Attadasi possessed them on behalf of the temple and there is certainly evidence—documentary and oral—to support this finding. The events following Attadasis death in 1872 are important in this connection. The lands in question had been conveyed to him—setting out his name followed by the "terunnanse"—and to his heirs. On his death on July 5, 1872, his brother Haramanis de Silva applied for letters of administration to his estate and obtained an appraisement list, P 15, of his properties, the lands in which list include or are identical with the lands now in dispute; as I understand it, the defendant's case is that the lands in dispute are included in the lands set out in P 15. In December, 1872, a petition, P 16, in the testamentary suit thus instituted by Haramanis de Silva, the brother of Attadasi, was filed by three priests, Seelavansa, Kondana, and Sonuttara (the latter being the same Sonuttara from whom the defendants obtained their deed of 1928) in which they say that Attadasi was the pupil of one Sobita "and as such was the incumbent of all temple property belonging to the establishment called 'Pilikuttuwa vihare' and that he died possessed of no property which belonged to him personally and which can be administered in the legal acceptation of that word. That the petitioners are the rightful incumbants of all the property belonging to the said temple". In June, 1875, the first of these petitioners, Seelawansa affirmed to an affidavit in which he states that Induruwe Sree Dharmabhi Dhane—whom the learned District Judge identifies clearly correctly with the "Sobita" of the petition of December, 1872—died leaving four pupils, namely, Kondana, the deceased Attadasi, the deponent Seelawansa, and Sonuttara, and he goes on to aver that he the deponent "is one of the pupils of the said Sobita chief priest residing in the said Pilikuttuwa vihare and to the best of his knowledge and belief that the properties so inventorized are all of them *sanghika* properties of the said temple either originally dedicated to the said temple or subsequently purchased by the said deceased priest out of the revenue of the said temple". The petition of 1872 and the affidavit of 1875 seem to have come before Berwick D.J. in March, 1876, when he refused to set aside the administration granted to Haramanis de Silva but said that the question of title could be tried either summarily in the then administration suit or in a subsequent action. The matter seems to have remained dormant till September, 1879, when a journal entry occurs "Case called. It is ordered that this case do lie over." It would seem that Haramanis de Silva took no further steps in this suit, for Seelawanse on the admission of both sides became, or rather was already, incumbent of the vihare in

the room of Attadasi deceased, and remained in possession of the lands in dispute till his death in 1900, an incumbency of some twenty-eight years. As to this the observations of the learned District Judge seem in point, "If these properties were not temple properties but had been gifted by Attadasi to Seelawansa and Sonuttara why did Seelawansa and Sonuttara object to their inclusion on the ground that they were temple properties? If these properties had been gifted to them, their claim would have been that the properties had been gifted to them but they made no such claim". I respectfully concur. The defendants in their answer say "These defendants plead that Sumanagala Attadasi Unanse who was lawfully seized and possessed of the said lands . . . . gifted the same by an instrument not in the possession of these defendants at present to Seelawansa Therunnanse and Sonuttara Therunnanse to be held by them with benefit of survivorship". No such deed of gift has been forthcoming in this case nor has any credible evidence been given as to its terms, date or even existence. As to it, I would again respectfully concur with the learned District Judge when he says that the evidence clearly shows that Seelawansa and Sonuttara were taking up the position that all the properties belonged to the temple and that they were certainly not claiming any of them under any deed of gift from Attadasi and according to them Attadasi had no personal property whatever, and the learned District Judge dismisses the alleged gift as a "myth".

There is a conflict of evidence as to what happened to the incumbency after Seelawanse's death in 1900. According to the plaintiffs he was succeeded in the incumbency by his pupil Saranapala, incumbent from 1900 to his death in 1910 when Sonuttara was fetched from a neighbouring vihare to reside at Pilikuttuwa vihare and look after the two young priests there, pupils of the deceased Saranapala. According to the defendants Saranapala died in 1900 and Sonuttara succeeded in that year as incumbent. The learned District Judge says it is immaterial which version is correct but, in other parts of the judgment, he accepts the plaintiffs' witnesses generally, and these witnesses are clear that Saranapala succeeded as incumbent in 1900 and remained so till his death in 1910. It seems to be common cause that at least in 1910 Sonuttara was holding the incumbency. He lived on till 1929, the year after he granted to defendants the deed of March, 1928, and is said to have been 87 or 88 when he died; he will therefore have been a very old man when he granted the lands in dispute to the defendants.

The Buddhist Temporalities Ordinance, No. 8 of 1905, which became law on August 25, 1905, vested (section 20) in elected trustees all property "movable and immovable, belonging or in anywise appertaining to or appropriated to the use of any temple, together with all the issues, rents, and profits of the same". Prior to its enactment the landed property of each temple was from an ecclesiastical point of view *sanghika*, that is, dedicated to the whole body of Buddhist priests at large, but for the practical purposes of municipal law it was possessed by the incumbent for the time being of the vihare to which the landed property "appertained or was appropriated". Seelawansa at his death in 1900

had been incumbent of this vihare for twenty-eight years and would, therefore, if there was any documentary flaw in the title of this vihare have acquired prescriptive title to all the lands of this vihare. The incumbent entering on Seelawansa's death in 1900, were it Saranapala or Sonuttara, would not have had time to acquire himself a prescriptive title at the date when Ordinance No. 8 of 1905 was enacted. On its enactment trustees should have been appointed but were not, until the appointment as trustees of the present plaintiffs, doubtless for the purpose of bringing this action. Wanting such trustees no doubt Sonuttara would have acquired between 1900 and 1928 or between 1910 and 1928 a prescriptive title to these lands 'adverse to and independent of' any other claim, and so could have acquired them for his own personal use and benefit. The evidence, however, which is accepted by the learned trial Judge is that throughout his incumbency he used these lands for the use and benefit of the vihare and that he at no time claimed to possess them adversely to the vihare—if that institution may be personified for a moment—or his own use and benefit. Certainly there is no proof of an original dedication of these lands or even that they were paid for with temple money; on the contrary they seem to have been acquired by grant or certificate from the Crown. But the evidence of how they were used showed that the persons in possession, Seelawansa and his successors Saraṇapala and Sonuttara, treated them as temple property and never suggested that they were anything else.

The parol evidence is ample to support the finding of the learned Judge to this effect and I did not understand that on appeal to this Court such finding on fact was challenged.

The appeal was argued to us on a different ground, which as I understand it was this. Where, as here, lands have come to a vihare not on some original gift to pious uses or on an admitted dedication but at a known time and on documents that make no mention of the dedication, the incumbent possessing them prescribes for himself only and not for the vihare. It was put to us this way. Title under prescription can only be acquired by a *persona* and a temple is no *persona*, actual or fictitious. So if an incumbent acquires, he acquires for himself. After such incumbent dies the possession of the lands passes to his natural heirs, not to his pupils. It may be admitted that the incumbent will be in possession of these lands, but an incumbent is not a trustee for the vihare at all. The person who succeeds to the incumbency is not a successor in title to him and the previous incumbent is not "a person under whom he (the succeeding incumbent) claims"—section 3, Ordinance No. 22 of 1871.

We must examine this argument. Property belonging or in anywise appertaining to or appropriated to the use of a temple—this is the terminology of section 20 of Ordinance No. 8 of 1905, so may be used without necessarily asserting that a vihare is a legal *persona*—is property subject to a religious trust. Hayley, *Sinhalese Customs, pp.* 558-559: "Sanghika property . . . . is property dedicated for the use of a temple or the priests even when the first incumbent is mentioned

by name and the grant made to his pupils". This was so even before the passing of Ordinance No. 8 of 1905 and is certainly the case since its enactment. In whom, before the Ordinance, did the property vest? Clearly in the incumbent. Hayley, at p. 547, "The essence of this tenure is described by the usual form of words by which it is created when embodied in a sannas or other deed of dedication, namely, 'to X and his pupils in their generations'. There results a sort of entail, based upon the sacerdotal relationship of pupil and master, or tutor as he is commonly called" and the same author at p. 546 describes it as an "uninterrupted succession of pupils". The essence of this tenure, that is by the incumbent, is described in *Rathanapala Unanse v. Kewitiagala Unanse*[1] as follows, *per* Phear C.J., "In this Island . . . . the property dedicated to the vihare or pansala appears to be the property of the individual priest, who is the incumbent of the foundation, for the purposes of his office, including his own support and the maintenance of the temple and its services, and on his death it passes by inheritance to an heir, who is ascertained by a peculiar rule of succession, or special law of inheritance, and is not generally the person who would be by general law the deceased priest's heir in respect to secular property". See also *Heneya v. Ratnapala Unnanse*[2] where Phear C.J. says, "I think it is well settled that although the incumbent of a vihare is in a sense the personal owner of the vihare property, yet he is limited in the exercise of the rights of property to the purposes and benefit of the vihare, and he can only alienate or incumber the property when the necessities of the vihare compel him to do so or justify him in doing so". Both cases just quoted are Full Bench decisions and therefore binding upon us. The possession of the incumbent is that of a *de facto* trustee. *Sidharta Unnanse v. Udayara*[3] *per* de Sampayo J., "The priest becomes in the course of years a trust *de facto* of the dagoba, or as the learned Commissioner puts it, caretaker of the dagoba property . . . . The *de facto* trustee who has proved his actual possession for a great many years and the recent ouster, is entitled to maintain such an action as he has brought", that is an action to recover possession. Such a trustee is recognized in English law, and since trusts have been received into our law from English law it is necessary to use the terminology of that law. *Lewin on Trusts (13 ed.), p. 222,* "We may add in conclusion, that if a person by mistake or otherwise assumes the character of trustee, when it really does not belong to him, and so becomes a *trustee de son tort,* he may be called to account by the *cestuis que trust* for the moneys he received under colour of the trust", and the same authority refers to *Lyell v. Kennedy*[4], where the House of Lords held that a person who had assumed to act as agent and receiver for heirs who were unascertained remained, so long as he continued to act, chargeable in a fiduciary character. The incumbent of the vihare, prior to the passing of Ordinance No. 8 of 1905 and even since its passing if no trustees have actually been appointed, is therefore in the position of a *de facto* trustee, and as such he can acquire for the temple by prescription in spite of section 41 of the Ordinance (now repealed) which,

[1] *2 S. C. C. 26.*
[2] *2 S. C. C. 38.*
[3] *6 C. W. R. 29.*
[4] *14 App. Cases 437.*

while in force, enacted a species of prohibition in mortmain on the acquisition of new properties for a vihare. As to this, see *Silva v. Fonseka* [1], where it was held that the prohibition continued in section 41 of the Ordinance was limited to acquisition by devises, grants and conveyances and did not apply to the acquisition of title by prescription. This case was followed in *Kiri Duraya v. Kuda Duraya* [2]. See also the case, *Saddhananda Terunnanse v. Suman Atissa,* where it was held that since in that case it had been proved that there were intervals when the vihare had no incumbent, during which the incumbents did not succeed each other by pupillary or other succession, there had not been uninterrupted possession as required by section 3 of Ordinance No. 22 of 1871, from which one infers that if there had been a regular succession of incumbents they could have acquired by prescription under section 3 of that Ordinance.

Authority then is against the argument raised to us on appeal and reason no less. How do certain lands come to be in possession of an incumbent? Because he is the incumbent of the vihare claiming them. If he were not its incumbent he would never come to the possession of those lands at all. No doubt if he took all the profits of the land to himself for his private benefit, if he openly refused to allow the other inmates of the vihare to participate and manifested by words or conduct or both that he claimed these lands as his own private property, and if he was allowed to persist in this course of successful assertion for ten years, then at the end of that time the lands might have become his as his private property. If however, as here, he uses the lands as and for temple purposes, then his possession enures to the benefit of the vihare and he is prescribing, if a prescriptive title is needed, for the vihare. Suppose he dies before he has been in possession for ten years and is succeeded by someone in pupillary succession, as was the case here. He the deceased incumbent with less than ten years possession is "a person under whom" the next incumbent "claims", for what other right to the incumbency can the latter have save that of succeeding to it in pupillary succession? He claims the incumbency itself "under" the previous incumbent; can it seriously be suggested that he claims the lands that go with the incumbency "under someone else"? The argument adduced to us on appeal is far fetched and contrary both to reason and authority?

In this case Attadasi prescribed for these lands for the use and benefit of this vihare during his incumbency of twenty-eight years. His successors whether they were Saranapala and Sonuttara, or Sonuttara alone, succeeded to his possession—he was the person under whom they claimed—and on the evidence neither of them did anything to assert a possession "adverse to or independent of" the right of their predecessor which was the right of the vihare until Sonuttara in the last year of his life, and doubtless in his dotage, made this conveyance under which the defendants claim. That was a claim to possess adverse to and independent of the rights of the vihare, but it came too late since it was only made in 1928 and this action was started on September 5, 1929.

[1] *15 N. L. R. 239.*

[2] *3 C. W. R. 188.*

[3] *14 C. L. R. 18.*

Certainly, it was an irregularity that all through the years from 1905 onwards no trustees were appointed under the Ordinance, but all that time the successive incumbents were holding as *de facto* trustees a property for which this particular religious trust, the vihare, had prescribed over and over again.

In the Court below the regularity of the appointment of the trustees, plaintiffs in this action, was contested, but the learned trial Judge found that their appointment had been quite regular, and this finding was not contested before us on appeal.

The judgment below was clearly right and must be affirmed, and this appeal dismissed with costs.

Koch A.J.—I agree.

Appeal dismissed.