94 C.2.

15, 1960

No. 10 of 1959.

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF CEYLON

BETWEEN

REV. MAPITIGAMA BUDDHARAKKITA THERO, TRUSTEE OF THE KELANIYA RAJAMAHA VIHARE, KELANIYA (Plaintiff) Appellant

- and -

1. DON EDMUND WIJEWARDENA
2. DON ALBERT TARRANT WIJEWARDENA
3. PHILLIP SEVALI WIJEWARDENA

(Defendants) Respondents

CASE FOR THE APPELLANT

Record

1. This is an appeal by Special Leave from a judgment and decree of the Supreme Court of Ceylon, dated the 18th June, 1957, reversing the judgment given by the District Court of Colombo, dated the 6th July, 1955, in favour of the Appellant, who is the Viharadipathi (Chief Incumbent) and Trustee of the Raja Maha Vihare (great royal temple) (hereinafter referred to as "the Temple") a famous Buddhist temple situated at Kelaniya in the Island of Ceylon, in an action brought by him in his said capacities of Viharadipathi and Trustee of the Temple, against the Respondents. pp.34-41; 42 pp.20-25

2. The action involved certain questions as to the rights of the Temple, or of the Appellant as its Viharidipathi and Trustee, to hold certain lands bequeathed to it by the late Helena Wijewardene (hereinafter called the testatrix) and to receive and enjoy the income therefrom. The principal questions arising on this appeal are :-

(1) whether a Buddhist temple is a juristic person under the law of Ceylon: and

(2) whether a Buddhist temple, even if it be not a juristic person, is nevertheless capable of holding property, either through a trustee or otherwise.

Exh.P.2,p.46, ll. 36-38, p.47 ll.1-4.

3. By clause 5 of her said Will, dated the 20th July, 1935, the Testatrix, who died on the 10th November, 1942, made a bequest of 250 acres of paddy land situate at Kalawewa, in the North Central Province of Ceylon, for the benefit of the Temple, in the following terms -

> "I give two hundred and fifty acres out of all that paddy field called Kalawewa Farm, situate in the North Central Province Ceylon, to the Raja Maha Vihare, Kelaniya. The selection of the 250 acres I leave to my executors, and the management of the same for the benefit of the said Vihare I entrust to my Trustees hereinafter named".

p.47, ll.10-48, p.48, ll. 1-24.

4. By clause 7 of the said Will the Testatrix created a separate charitable trust for religious as well as other purposes, and made bequests of other property to her children.

Exh.P.3, pp.53-57.

5. The estate of the Testatrix having been administered, the Executors, by deed duly notarially attested and registered dated the 27th November, 1942, transferred to the Rev. Mapitagama Dharmmarkkhitha, High Priest, as Trustee of the Temple, and his successors in office as such Trustee, the said 250 acres of paddy fields given as aforesaid under the said Will to the Temple.

p.54,ll.33-44. The habendum in the said deed of conveyance by the said Executors runs as follows :-

> "TO HAVE AND TO HOLD the said property and premises hereby conveyed unto the said Reverend Mapitagama Dharmarakkhita High Priest and his successors in office as aforesaid subject always to the conditions in the said Will expressly contained namely that the management of the said property for the benefit of the said Vihare shall be in the Trustees in the said Will named or provided for and their successors duly appointed in terms of the said Will such

"Trustees being at present the said Don Richard Wijewardene Don Edmund Wijewardene and Don Louis Joseph Wijewardene."

6. The said High Priest, the Rev. Mapitigama Dharmmarakkita died on the 19th July, 1947, and was succeeded by the Appellant. p.10, ll. 9-12.

7. Following a demand made on behalf of the Appellant and a refusal made thereto on behalf of the Respondents, the said action was instituted by the Appellant on the 15th October, 1954, in the said District Court of Colombo, against the three Respondents, of whom one is one of the original Trustees designated in the said Will and the other two are successors of the other two originally designated Trustees, now deceased. In the said action the Appellant claimed (inter alia) - Exh.P.6.p.72, ll. 3-17. Exh.P.8.p.73, ll. 3-20. pp.1-4. p.9, ll.10-28. p.3, ll.40-44, p.4, ll.1-4.

(a) that the Respondents be ordered to account for the income from the said lands given as aforesaid to the Temple and that judgment be entered in favour of the Appellant for such sum as may be found due to him on such accounting;

(b) that, in default of such accounting, judgment be entered in favour of the Appellant, ordering the Respondents jointly and severally to pay the Appellant the sum of Rs. 350,000/-.

8. The issues framed before the said District Court were as follows :- p.7, ll.13-40, p.8, ll.1-8.

1. Is the Plaintiff (Appellant) entitled.

(a) to an accounting in respect of the income from the 250 acres depicted in plan No. 278 of 10th May, 1947, referred to in the Schedule to the plaint;

(b) to be paid the said income.

2. If issue 1 is answered in the affirmative, what sum is the Plaintiff entitled to in the accounting?

3. In default of proper accounting, to what sum is the Plaintiff entitled?

4. Is the Plaintiff entitled to be placed in possession of the said 250 acres?

5. Did the last Will referred to in paragraph 3 of the plaint create a charitable trust in respect of the land referred to in the Schedule to the plaint for the benefit of (the Temple)?

6. Is the power to use the income of the said property for the benefit of (the Temple) vested in the 1st and 3rd Defendants (Respondents) and Mr. P. R. Wijewardene as trustees of the said last Will?

7. If issues 5 and 6 or either of them is answered in the affirmative, is the Plaintiff entitled -

(a) to maintain this action;

(b) to be paid the income derived from the said property?

p.8, ll.10-12. p.37,ll.10-11. 9. It was agreed by the parties that the said issues numbered 1, 4, 5, 6, and 7 should be tried first.

pp.8,ll.17-p.14, l.27. p.14,ll.33-34. 10. Evidence was given by the Appellant in support of his case on the said issues agreed as aforesaid to be tried first. No evidence on the said issues was called on behalf of the Respondents.

11. The answers given by the learned trial Judge to the said issues (supra, paragraph 8) were as follows :-

1. (a) Yes.

(b) Yes.

4. No.

5. No.

6. No.

7. Does not arise.

12. The learned trial Judge in his judgment stated the contentions on both sides, and his reasons for reaching his conclusions as aforesaid on the said issues thus - pp.20-25. p.20, l.20, p.25. l.16.

"The Plaintiff is the present Viharadapathi and duly appointed trustee (vide P1) of the Raja Maha Vihare. He complains that the trustees have neither given him the income nor accounted for it since 1942. He asks that they be ordered to hand over the income now, and for an accounting of the income up to date. He estimates the income at Rs. 350,000/-. He also states that the property vested in him and that he is entitled to possess it notwithstanding the provisions in the Last Will.

"The Defendants (who are the trustees) have taken up the position in their answer that the words used in the Last Will create a charitable trust over the land for the benefit of the Vihare, and that the power to use the income is vested in them.

"This being a testamentary disposition it is conceded that the primary object of the Court should be to give effect to the intentions of the testatrix. The language of clause 5 is simple - to repeat the first sentence I give 250 acres.... in the North Central Province.... to the Raja Maha Vihare Kelaniya, and whatever the legal implications may be, I think the intention of the testatrix is quite clear.

"She gave 250 acres to the Raja Maha Vihare, that is to say, she desired that the Vihare should get the benefit that could be derived from those 250 acres of land.

"Now, it has been argued for the Defendants that, though one loosely speaks of giving things to a "temple", yet a temple as a pia causa or a foundation known to the Roman Law is unknown to the Roman Dutch law - that a temple is not a juristic person and therefore incapable of receiving a gift.

"Two cases have been cited to me. In the case reported in 36 N.L.R. at page 422, a man

called Punchi Banda by an informal document purported to donate to a priest called Gnananda Tissa "and the priests of the Ariyawansa Saddamara Uttiki nikaya... and the Buddha Sasana" an undivided half share of an allotment of land "to pave the way for converting this land to a Buddhist temple". The question for decision was whether the temple had prescribed to the land. It was not established when the temple came into existence. Their Lordships said:

> 'Assuming for the moment that a temple is a juristic person the evidence does not entitle one to conclude that here it had been in existence for a period of 10 years prior to the date of the alleged ouster by plaintiff.... It is not necessary therefore for the purpose of this case to deal with the question whether in Ceylon a Buddhist temple is a juristic person.'

They did say later that 'the personification of what is sometimes known as a foundation is foreign to the law in Ceylon.' But this was I think obiter.

"In the case reported in 37 N.L.R. at page 19 the decision was that where an incumbent of a Vihare possesses land not expressly gifted to that Vihare he is in the position of a de facto trustee and as such can acquire the title by prescription for the benefit of the Vihare.

"There is no direct finding there that a temple was not a juristic person.

"For the Plaintiff, a very old case reported in Morgan's Digest Part III at page 474 was cited. The decision was in 1846. In that case a land which was seized was claimed by the Plaintiff who was the presiding Roman Catholic Missionary at Batticaloa and the manager of the Church and property thereof. The Plaintiff's claim was based on a deed on which the property was 'sold assigned and transferred unto the church of St. De Croos'. The District Judge dismissed the plaintiff's action holding that the deed was not a legal deed inasmuch as :

(1) the Church alone and no trustees were named in it and consequently there was no person able to be contracted with;

(2) that there was no one to deliver to and no delivery could therefore have taken place under the deed.

"The Supreme Court set aside the judgment and held that Deeds in this form ad pios usus are valid and that the plaintiff can maintain this action. 'The Dutch law restricting donations of this description', says the judgment, 'do not appear to have been acted on or enforced by the English Government in this island."

"The language used in the Buddhist Temporalities Ordinance, Chapter 222, also indicated that our law looks upon the 'temple' as capable of having property belonging to it. Apart from Section 20, we find the phrase 'property of the Temple' in Section 23, "property belonging to the temple" in Section 26 and the words in Section 24(1) indicate that the temple can even have a bank account.

"So that, in spite of the legal dicta referred to in the 36 N.L.R. cases, pious laymen have continued to make their donations 'to the temple', and everybody knew what they meant.

"All such property (in my view) became property belonging to the temple and the person or persons in charge of the management of its affairs would be entitled to utilize the income derived from such property for the benefit of the temple which was in their charge.

"In this instance, when the testatrix said 'I give 250 acres to the Raha Maha Vihare' it would be a mere pretence to say that one cannot understand what she meant. Nor should the gift be rendered ineffective (as Mr. Herat counsel for the Defendants (Respondents) suggests) on the ground that the temple being made of brick and mortar is incapable of receiving a gift.

"The first part of Clause 5 must of course be considered with the rest of that clause – 'the selection of the 250 acres I leave to my executors' (there can be no doubt about the meaning of this) 'and the management of the same for the benefit of the said Vihare I entrust to my trustees hereinafter mentioned.' Mr. Herat has argued that the words 'the management of the same for the benefit of the Vihare I entrust to my trustees' has the effect in law of creating a charitable trust, and that by these words the

testatrix gave to the trustees complete control of the income derived from the 250 acres.

"I have carefully considered this argument but I am unable to agree.

"I do not think that the words convey any meaning other than that which the language so clearly expresses - 'The management of the same' i.e. the 250 acres 'for the benefit of the Vihare I entrust to my trustees'. It is the management of the property (in my view) which was entrusted to the trustees, not the control of the income. They were enjoined, of course, to manage the property in such a way as to get the maximum benefit for the Vihare.

"It is unnecessary to find out a reason why the testatrix should gift property to the temple and appoint someone else to manage that property - but there could be a variety of reasons. One probable reason could be that knowing as she did that the person who would ordinarily manage the affairs of the temple would be a priest, she thought that such a person (with his time taken up by devotion to religious duties and management of the temple at Kelaniya) would be quite unsuited for efficiently managing a propery situated in the North Central Province.

"The testatrix therefore placed the management of the 250 acres in the hands of three lay trustees. She had no intention, in my opinion, of placing the management of the income in their hands.

"If that was her intention, as Mr. Herat argued, she would have had no difficulty whatsoever in making it clear. This very Will shows that she had that intention in regard to the management of certain other properties and that in respect of them she created a charitable trust as she wished. The relevant parts of Clause 7 of the Last Will read as follows :-

> '7. I give all that property situated at Deans Road, Colombo....and all the estate Nagenehenakande....and all the property situated at Nagalingam Street....unto the said Don Richard Wijewardena, Don Edmund Wijewardena and Don Walter Wijewardena in trust to use the net income thereof....for the following charitable purposes:

(a) To continue gradually the restoration work now being carried on by me at the Kelaniya Temple.

(b) To aid....my relatives who are or may become poor....

(c) To support in such manner and to such extent as my trustees think fit such Buddhist charitable institutions and temples.....the trust shall be known as the Wijewardena Charitable Trust".

"The three persons named are the same trustees referred to in Clause 5, and (a) above refers to restoration work at this very Temple.

"I find it impossible to accede to the argument that the intention of the testatrix in regard to the 250 acres and the property referred to in Clause 7 was exactly the same.

"The testatrix did create a charitable trust but not in regard to the 250 acres referred to in Clause 5.

"I am also unable to agree with the contention put forward for the Plaintiff that because these 250 acres would be 'property belonging to the temple' the Viharadapathi must necessarily have possession of it under Section 20 of Chapter 222, I see no objection to laymen managing such property even if it is called Sanghika property, particularly so if that was the grantor's wish.

"The executors executed the deed P3 referred to above. Mr. Wikramanayake Counsel for the Plaintiff (Appellant) argues that they thereby conveyed the legal title to the Viharadapathi. It will be remembered that the executors were directed to select 250 acres. They had done so. It is customary for executors or administrators to execute deeds of this nature at the termination of testamentary proceedings. I do not think that any legal consequences tending to defeat the intentions of the testatrix could flow from such a conveyance.

Record

"I am of opinion that the Plaintiff as Viharadapathi of the Raja Maha Vihare is entitled to receive the income derived from the 250 acres - the management and consequently the possession of which would be with the trustees."

13. The learned trial Judge then decided that the Appellant was entitled to an accounting in respect of the income from the said lands, and to be paid such income; that the said Will did not create a charitable trust in respect of the said lands; that power to use the income of the said property for the benefit of the Temple was not vested in the Respondents; but that the Temple was not entitled to actual possession of the said lands.

14. Section 20 of the Buddhist Temporalities Ordinance (Chapter 222 of the Legislative Enactments of Ceylon) to which the learned trial Judge referred in his Judgment cited above (paragraph 12) so far as is material provides :-

> "20. All property, movable and immovable, belonging to or in anywise appertaining to or appropriated to the use of any temple.... shall vest in the trustee or the controlling viharadapathi for the time being of such temple, ...".

It is to be noted also that section 4 of the said Ordinance contains provisions for the "the management of the property belonging to every temple." There are likewise references in section 23 and 26 to the ownership of property by a temple. In section 23 the words used are -

> ".....the property of the temple....."

And in section 26 the words used are -

> ".....immovable property belonging to any temple....."

"Temple" is defined in section 2 as follows :-

> "'temple' means Vihare.....or any place of Buddhist worship....."

pp.28-31. 15. The Respondents appealed from the said judgment of the District Court of Colombo to the Supreme Court by Petition of Appeal dated the 16th July, 1955.

16. The Appellant did not cross-appeal against the decision of the District Court on Issue No. 4, to the effect that the Appellant is not entitled to have possession of the said lands, but accepted and accepts the said decision.

17. By its Judgment and decree the Supreme Court (Basnayake C.J., and Pulle J.) set aside the Judgment of the District Court and allowed the appeal with costs both in the Supreme Court and the District Court. It held that a Buddhist Vihare is not a juristic person and cannot receive or hold property, and that property cannot validly be given to a temple unless it is given to the Sangha (Buddhist Clergy) and dedicated in the manner prescribed in the Buddhist Ecclesiastical rules of Vinaya. pp.34-42. pp.20-25.

18. The Appellant humbly submits that the judgment of the District Court is right and the judgment and decree of the Supreme Court are wrong for the following amongst other pp.20-25. pp.34-42.

REASONS

1. BECAUSE a Vihare is a juristic person, and as such is entitled to accept and to own property.

2. BECAUSE whether or not a Vihare is a juristic person the right of a Vihare validly to accept and to own property is clearly given to it by the provisions of the Buddhist Temporalities Ordinance.

3. BECAUSE by the terms of the said Will it was clearly intended by the Testatrix that the Temple should receive the said land bequeathed to it thereunder and the income therefrom.

4. BECAUSE the judgment of the Supreme Court is wrong.

5. BECAUSE for the reasons stated therein and for other good and sufficient reasons the Judgment of the District Court is right and should be upheld.

D. N. PRITT
S. N. BERNSTEIN

No.10 of 1959.

IN THE PRIVY COUNCIL.

O N A P P E A L

FROM THE SUPREME COURT OF CEYLON

BETWEEN

REV. MAPITIGAMA BUDDHARAKKITA THERO, TRUSTEE OF THE KELANIYA RAJAMAHA VIHARE, KELANIYA (Plaintiff) Appellant

- and -

1. DON EDMUND WIJEWARDENA
2. DON ALBERT TARRANT WIJEWARDENA
3. PHILLIP SEVALI WIJEWARDENA

(Defendants) Respondents

CASE FOR THE APPELLANT

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