

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC

OF SRI LANKA.

CA 869/96 (F)

D.C.Colombo Case No. 4916/ZL

Idandukitha Anomadassi Thero, Sri Piyarathana  
Pirivena, Bope, Galle.

Appearing by his lawful Attorney Mapalagama  
Jinanada Thero,

No.07, Buddhist Centre, Buddhist Centre Road,  
Colombo 10

Petitioner.

Vs.

Ven. Padiyapalalle Seevali Thero, No. 10, Buddhist  
Centre Road, Colombo 10.

Defendant-Appellant-Respondent

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BEFORE  
A.W.A. SALAM, J.

COUNSEL  
Anura Ranawaka with Dilip Obeysekara and Mrs. Nayana Athukorala for the  
Petitioner. Kuvera de Zoysa with Asiri Dissanayake for the Substituted  
Plaintiff-Respondent. J.C. Boange for the Defendant-Respondent.

DECIDED ON  
12.07.2012.

A W ABDUS SALAM, J

**T**his order relates to an application for revocation of an order substituting Ven Hiddikivule Pangnasara, as the substituted-plaintiff-respondent for the purpose of the present appeal for and on behalf the plaintiff-respondent (Ven Hegoda Vajira Thero) presently deceased. The necessity to substitute Ven Hiddikivule Pangnasara, arose in this manner. The plaintiff-respondent instituted action against the defendant-appellant in the district court of Colombo praying *inter alia* for a declaration that he is the lawful Viharadhipathy of the temple called "Buddhist Centre" more fully described in the schedule to the plaint. By way of incidental relief, he also moved for an order for the ejection of the defendant-respondent (Hiriwaddala Jinaratna Sthaweera) from the "Buddhist Centre". At the conclusion of

CA 869/96 F order re-cancellation of the appointment of the subst. plaintiff respondent

the trial, the learned district judge held inter alia as follows.

1. That in terms of agreement bearing No 10673 dated 25.8.1961 the plaintiff-respondent has succeeded to the Viharadhipathiship of the "Buddhist Centre".
2. The said Viharadhipathiship concerning the plaintiff-respondent has received the approval of the Sangha Sabawa on 5 October 1975.
3. The defendant-respondent continues to be in the unlawful occupation of the "Buddhist Centre" disputing the rights of the plaintiff-respondent.
4. The plaintiff-respondent is entitled to a declaration that he is the Viharadhipathy of the "Buddhist Centre".
5. The plaintiff-respondent is entitled to have the defendant-appellant and all those holding under him ejected from the "Buddhist Centre" and to obtain peaceful possession of the same.
6. The plaintiff-respondent is entitled to damages from the defendant-appellant in a sum of Rs.27,300/- as damages accrued and Rs.300/-from the date of the plaint until possession of the said premises is fully recovered by the plaintiff-respondent along with costs of action.

The present appeal has been preferred by the defendant-appellant against the said judgement of the learned district judge. Pending the determination of the appeal the demise of the plaintiff-respondent occurred, resulting in steps

having to be taken by person/persons interested to substitute a fit and proper person in the shoes of the deceased monk in order to render the caption regularised.

Accordingly, the substituted-plaintiff-respondent was substituted in place of the said deceased monk on 6 October 2010. Thereafter, the appeal preferred by the defendant-appellant was taken for argument and judgement reserved for 1 September 2011. Afterward, Ven Idanthukitha Anomadssi Thero (petitioner) by his attorney Ven Mapalagama Jinanada Thero made an application by way of motion stating that he is the proper person to be substituted in place of the deceased plaintiff-respondent. By this motion the petitioner sought a fresh inquiry to ascertain who should be substituted as the plaintiff-respondent and a cancellation of the order dated 6 October 2010 effecting substitution in place of the plaintiff-respondent followed by an order appointing the petitioner as the substituted-plaintiff-respondent in place of the deceased Ven Hegoda Vajira Thero.

For purpose of completeness it is necessary to refer to the

relevant provisions of the law and the regulation applicable to substitution pending the determination of the appeal by reason of the record becoming defective due to death of a party. Section 760A of the Civil Procedure Code provides inter alia that after the lodging of an appeal the Supreme Court may determine under article 136 of the Constitution who in the opinion of the court, is the proper person to be substituted or entered on the record in place of, the party who had died. The rule applicable to such a situation has been published in the Gazette (extraordinary) No 665/32 dated 7 June 1991. The applicable rule in this context (leaving out the inapplicable words) reads as follows.

**Rule 38.**

Where at any time after the lodging of a notice of appeal the record becomes defective by reason of the death of a party to the proceedings the supreme court may, on application in that behalf made by any person interested to place before the court sufficient material to establish who is the proper person to be substituted who has died.

As far as the present controversy is concerned the substituted plaintiff respondent made application as far back as in October 2010 and established that he is a fit and proper person to be substituted in the room of the deceased plaintiff respondent, in as much as he is the most senior pupil of the deceased plaintiff- respondent. As such, he claimed that he is entitled to succeed to Viharadhipathiship of the temple and/or temples of which the diseased plaintiff- respondent was the Viharadhipathy.

It has to be observed at this stage that the question whether the substituted plaintiff-respondent should succeed to the Viharadhipathiship of the diseased plaintiff-respondent cannot be adjudicated in this case. The reason is that any such adjudication is only possible in a separate case. Whether someone has succeeded the deceased plaintiff respondent in the office of Viharadhipathiship cannot be decided in this case as the court is concerned only to the extent of the dispute that arose in the lower court and the judgement pronounced on it.

The question as to the mode of succession to the office of Viharadhipathiship applicable to the temple in question is not a matter that can be investigated in an incidental application of this nature. All what the court is concerned with regard to the application for substitution is whether the person who proposes to be substituted in the place of the deceased is a fit and proper person. This can be ascertained by examining as to whether he has any conflict of interest with the deceased person, for his duty is to safeguard the judgement, the deceased plaintiff-respondent has obtained in his favour. If any dispute arises beyond the point of the judgement that has already been pronounced in this case, that will be a separate dispute giving rise to separate cause of action to be adjudicated in a properly constituted case.

In this appeal the petitioner has made his application for the cancellation or revocation of the appointment, 10 months after the order substituting the plaintiff-respondent. He has not explained the delay in making the application. The petitioner maintains that there has been a suppression of material facts on the part of the substituted

plaintiff-respondent and for that reason the appointment made has been done *per incuriam*. I am not inclined to accept the submission, as the question that arose at the time when the appointment was made was not whether the senior pupil should succeed to Viharadhipathyship in place of the deceased plaintiff respondent but whether the substituted plaintiff-respondent is a fit and proper person who would safeguard the interest of the deceased plaintiff-respondent. If the judgement obtained by the deceased plaintiff-respondent in his favour is not safeguarded the substituted plaintiff-respondent is not benefitted by the judgement at all. Therefore it is hardly possible to subscribe to the view that the substituted plaintiff respondent is not a fit and proper person to represent the deceased.

By this order, the court has not adjudicated as to who should succeed on the demise of the plaintiff-respondent to the office of Viharadhipathiship. The substitution has been made only for the limited purpose of continuing with the appeal of the defendant appellant so as to protect and safeguard the interests of the deceased plaintiff-respondent. Taking into



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consideration all these matters it is my considered view that the belated application made by the petitioner to have the appointment already made cancelled and a reappointment considered in that place is without merits. As such, I make order refusing the application of the petitioner subject to costs.

Judge of the Court of Appeal.

N.B

As the argument with regard to the main appeal is now concluded, it is noted to set down this matter for judgement.

Jmr/-