

**IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

C.A. Case No. 656/1999 (F)
D.C. Kegalle Case No. 4257/L

Ven. Gammulle Sumangala Thero,
The Viharadhipathi/Trustee,
Wattarama Rajamaha Viharaya,
Imbulgasdeniya.
Residing at Galmaduwa Rajamaha Viharaya,
Kandy.

PETITIONER

-Vs-

- 1A. Nissanka Arachchillage Dharmasena,
Endurapotha, Dewalegema.
- 1B. Nissanka Arachchillage Gunadasa,
Kurunduwatta, Imbulgasdeniya.
- 1C. Nissanka Arachchillage Karunaratne,
Wattarama, Imbulgasdeniya.
- 1D. Nissanka Arachchillage Dayalatha,
Endurapotha, Dewalegama.
- 1E. Nissanka Arachchillage Sumanawathie,
Godapola, Dewalegam.

Substituted 1st DEFENDANT-RESPONDENT-
RESPONDENTS

- 2. Nissanka Arachchillage Karunaratne,
Wattarama, Imbulgasdeniya.
2nd DEFENDANT-RESPONDENT-
RESPONDENT

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Hemasiri Withanarachchi with Shantha Karunadara instructed by Gaithri de Silva for the Petitioner
Wickrama Jayathilake for the Defendant-Respondent

Decided on : 09.01.2018

A.H.M.D. Nawaz, J.

The Substituted Appellant-Petitioner has made this application to have his Appeal bearing No. C.A. 656/1999 (F) relisted/or reinstated, as it was dismissed on 06.02.2011 on account of the failure on the part of the Appellant to deposit the brief fees despite having been notified to do so.

It has to be recited at the beginning that it was Ven. Undugoda Jinawansha Thero who was the original Plaintiff-Appellant. At an initial stage the present Petitioner was substituted in the place of the original Plaintiff-Appellant (hereinafter referred to as "the original Plaintiff"), upon the original Plaintiff ceasing to be the Viharadhipathi of the Wattarama Sri Arahatha Rajamaha Viharaya.

Factual Matrix

The original Plaintiff, in his capacity as the Viharadhipathi/Trustee of the said Viharaya had instituted this action on 28.03.1989 against the original 1st Defendant and the 2nd Defendant praying *inter alia* for a declaration that the land described in the Schedules to the plaint, was the property of the said Viharaya. (Vide: "P1" at page 53 of the Exhibit "P").

The Defendants in their answer (P2 - page 60 of the Exhibit "P") took up the position that the property in question was not a property belonging to the temple and that they had acquired a prescriptive title thereof by adverse possession for over 50 years.

After trial, the District Court delivered the judgment on 07.07.1999 dismissing the case. (Vide: P4 at page 137).

The original Plaintiff appealed to this Court and the Appeal was assigned CA Appeal No. 656/1999(F).

According to the Journal Entries made in the Docket pertaining to the case, the following matters are apparent.

- i. The Registrar of this Court had made a minute to the effect that the case on would be called on 01.09.011 to fix a date for hearing,
- ii. The Registry had made a minute on 29.08.2011 that due to lack of funds no notices could be dispatched to the parties,
- iii. On 01.09.2011, the case had been called before His Lordship Salam J. whodirected the Registrar to notify the Appellant to pay the brief fees interms of Rule 13(b) on or before 01.12.2011 and notice the parties to appear in Court on 06.12.2011.
- iv. The notices directed by this Court had been dispatched on the 08th and 23rd of September, 2011 and in the meantime on 02.12.2011 a new proxy had been tendered on behalf of the Respondents.
- v. On 05.12.2011 the Registry had made a minute for the information of the Court that "Notice sent to the Plaintiff-Appellant has been returned undelivered with an endorsement "refused to accept the notice due to owner of the notice has left the temple (sic)".
- vi. When the case was called on 06.12.2011, this Court proceeded to make the order of dismissing the Appeal for the non-compliance with the direction of the Court (Vide: P6 at page 15 of the Exhibit P)

The Application for reinstatement has been made by the present Viharadhipathi/ Trustee of the Wattarama Raja Maha Viharaya (Vide: XI)

Reasons for the Alleged Default

Upon a perusal of the written submissions filed by the petitioner it is revealed that the original Plaintiff, Undugoda Jinawansha Thero's eligibility to function as Viharadhipathi was in contention in another Case No. 2620/L in the District Court of Kegalle.

The District Court by its judgment dated 18.12.1986 decided that the Plaintiff in that case was entitled to be the Viharadhipathi and the Defendant namely, Unudugoda Jinawansha Thero's claim for Chief incumbency was not maintainable. (Vide: Annexe X5(a) and X5(b))

The said Jinawasha Thero (the original Appellant in this case) appealed against the said judgment and this Court by judgment dated 15.06.2011 (Reported 2002(2) Sri L.R. page 141 as *Undugoda Jinawansha Thero v. Gammulle Sumanasara Thero*) dismissed the said appeal.

The said Jinawansha Thero, having lost his capacity as the Viharadhipathi/Trustee, had disrobed himself with effect from 06.06.2002 and had left the said Rajamaha Viharaya (Vide: the certificate X4 issued by the Registrar of the Committee of the Asgiriya Maha Viharay).

The present Petitioner who had succeeded to the Chief Incumbency of Gammulle Sumanasara Thero, had nominated in November 2001 Makadawara Ananda Thero as the Trustee of Wattaramarajamaha Viharaya as the petitioner was resident at Galmaduwa Rajamaha Viharaya, Kandy as Viharadhipathi. (Vide: X6)

The said Ananda Thero as the Trustee, was entitled to manage the properties belonging to the Viharaya but it is brought to the notice of this Court that due to ill health occasioned by a Chronic Liver failure he could not attend to his duties properly. Eventually the said Thero passed away on 12.07.2012. (Vide: Death Certificate X7)

This is proffered as the reason as to why the notice sent in September, 2011 by the Registry of this Court, addressed to "Undugoda Jinawansha Thero" has elicited the response-*"refused to accept the notice due to owner of the notice has left the temple"* (sic).

I would straightaway make an observation at this stage. When this Court dismissed this appeal on 6.12.2011 on the basis that the appellant was absent and unrepresented, the Court had failed to take into account the entry made by the Registry on 05.12.2011 regarding the return of notices sent to the original Appellant namely the owner of the notice (sic-this must however refer to the original plaintiff) had left the temple.

In these circumstances it is obvious that the notice could not have been served as he had left the Wattarama Rajamaha Viharaya possibly after disrobing himself.

When the case record was sent to the District Court after the dismissal of the Appeal, on 21.05.2012, the District Court had directed the notices on the parties in order to pronounce the judgment made in the Appeal.

The Journal Entry No. 44 on 29.06.2012 (page 45 of Exhibit P6 and D1 annexed to the objections of the Respondents) indicates that the Fiscal was informed that the Plaintiff-Appellant had been hospitalized and this appears to be a reference to the then Trustee, Ananda Thero.

The next Journal Entry on 24.08.2012 reads as follows:

“1. පැමිණිල්ලේ හා 4 වත්ති නොතිසි කැගල්ල පිස්කල් මගින් නිකුත් කර ඇත වාර්තා ලැබී නැත.

2. අභියාචනා තීන්දුව කියවාදීම සඳහා පසුව:

(1) 4 වත්තිකරුවා සිතාසි අතටම ඔරොත් ඔව කැගල්ල පිස්කල් වාර්තාකර ඇත.

(2) පැමිණිල්ලකාර/අභියාචක වැඩවසන විහාරස්ථානයට ගිය ඔව එහි සිටි විහාරස්ථානය හැර ගොස් (සිවුරහැර) ඇති ඔවත් සිටි ස්වාමිත්වහන්සේ පැවසූ ඔවත් ඔරොත් නොහැකි ඔවත් වාර්තාකර ඇත.”

This it is seen that the notices sent by this Court and later by the District Court addressed to the original Plaintiff-Appellant could not be served and the Trustee-in-charge was not available for service due to hospitalization. Mr Hemasiri Vithanchchi in his written submission to reinstate the appeal has set out the effect of disrobing of the original plaintiff in the case.

The Effect of Disrobing

The argument advanced is that the original Plaintiff had instituted the case as the Viharadhipathi/Trustee to vindicate the right in a temporality and the disrobing denuded him of that capacity.

The pertinent case to take note of is the case of *Punnananda v. Welivitiye Soratha* 51 N.L.R. 372 wherein the effect of disrobing by a Buddhist Priest has been described as follows:

"The abandonment by a priest of his rights to the incumbency of a Buddhist temple does not require any notarial deed or other prescribed formality, but is a question of fact, and the intention to abandon may be inferred from the circumstances. The abandonment of an incumbency by a priest operates to deprive his pupils of their rights of pupillary succession."

Although the disrobed priest may have been alive as a layman, he does not have the legal capacity or status to continue to act on behalf of the temple properties.

So it is abundantly clear that since the said Jinawansha Thero was declared by the Courts not qualified to be the Viharadhipathi, even a pupil of his could not have succeeded to such office.

Proxy given by the original Plaintiff

The Respondents in their objections to the Re-listing takes up the stance that since the proxy given to the Registered Attorney-at-Law in Kegalle by the original Plaintiff was in force, another Attorney-at-Law could not have filed the application for re-listing,

However this contention does not factor into consideration that with the disrobing of the original Plaintiff, the proxy given by him becomes inoperative and the Registered Attorney-at-Law in the District Court is not competent and/or does not have authority to represent either the disrobed priest or the succeeding priest.

In the circumstances, the Petitioner who has now been substituted as the Plaintiff, can lawfully retain any Attorney-at-Law to make this application for re-listing.

No doubt this Court had occasion to hold in *Senasundara v. K.K.G. Dyanesius* (CA Appeal No. 1423/99 (F) Minutes of 24.06.2016) following the juridical approach in *Meerasaibo Mohamed Haniffa v. Athamabawa Mohamed Idroos* (2015 BAL Journal Reports page 24) that the same Attorney-at-law who had been on record from the beginning must file the relisting application, this *ratio* would not apply in a situation when the original plaintiff had disrobed himself. The act of disrobing extinguished the legal capacity of the original Plaintiff-Appellant. This act has been equated to an ecclesiastical death and the proxy given by him to the original Registered Attorney ceases to be in force as in the case of a death of a litigant. That represents the correct position in law and therefore the proxy given to a new Attorney-at-law to initiate the relisting application was properly done in law.

The Respondents in their objections further advance the argument that the default occurred due to the negligence of both the Appellant and his Registered Attorney inasmuch as the original Appellant was alive even with a change of status and the registered Attorney was in active practice.

In my view this contention is emblematic of a misappreciation and misapprehension with regard to the status of a disrobed priest and his ability to continue with the litigation commenced by him as the Viharadhipathi of a temple in respect of "Sanghika" property.

It would be too much of a sanguine hope that having regard to the circumstances in which that the original Plaintiff disrobed and left the temple he would have volunteered to brief the succeeding priest with regard to the pending cases and appeals.

Conceived in the above perspective I take the view that the dismissal of the Appeal on 06.12.2011 had come about owing to the aforesaid circumstances and the dismissal cannot be attributed to any deliberate, willful and / or contumacious default by the temple authorities in the prosecution of this appeal. I would therefore allow this application to re-instate this appeal. This case would now be set down for argument.