

(1909) 09 BOM CK 0015
In the Bombay High Court

Haroon Haji Vahedina and Others

APPELLANT

Vs

Haji Adam Haji Oosman Nurani and Another

RESPONDENT

Date of Decision : 16-09-1909

Acts Referred:

Citation : 4 Ind. Cas. 569

Hon'ble Judges : Davar, J

Bench : Single Bench

Judgement

Davar, J.—While the cases was at; hearing before me, the Appeal Court consisting of my learned brothers Batchelor and Macleod, was also hearing arguments in Jethabhoy Nursey v. Champsey Cooverji 11 Bom. L.R. 1014; 4 Ind Cas. 108 in which was involved a question of the right to inspection of certain documents between two members of the Cutchi Dassa Oswal caste. On the 13th of August the Appeal Court pronounced judgment wherein differing from the learned Judge who heard the suit originally the Court held amongst other things that the questions involved in the suit were purely caste-questions and that, therefore, the Court had no jurisdiction to entertain the suit. Mr. Setalvad has placed strong reliance on the judgment and I hasten to say I have always felt and feel now that, I would be bound to follow both the reasoning and the conclusions of the Appeal Court if I could find that there was any similarity between the facts of that case and of this one, I have more than once perused that judgment with both care and attention and the learned Counsel for the defendant has read and commented on all important parts of it. I find that that judgment is wholly based on the facts of that particular case and that the facts of that case and the facts in this case are widely and materially different and dissimilar. The question raised in this suit is not difficult to decide because the earlier cases of our Court which were all cited and elaborately discussed before me have laid down in clear and definite terms what are questions which the Court must regard as purely caste-questions and refuse to entertain suits in respect of them as being suits not of a civil nature. Before I enter into a discussion of the merits of the other questions involved in the suit, I think, it will

be convenient here to deal with and dispose of this question raised by the learned Counsel for the defendants.

2. The first consideration that presses upon my mind is, ought I to allow the defendants' counsel to raise this question in this suit? I am clearly of opinion that I ought not. Questions which go to the very root of a suit ought as a rule to be raised in the pleadings. The defendants' written statement is drawn by counsel who seems to be instructed to raise every possible contention against the plaintiffs' suit and although he has raised all sorts of contentions in the written statement there is not the remotest suggestion in it that one of the grounds on which the defendants resisted the suit was that it was not cognizable by the Court, the questions raised being merely caste questions. The question is not raised specifically in any one of the ten issues raised by the learned Counsel for the defendants at the first hearing of the suit. Mr. Setalvad said the question was in his mind and he intended to raise the same by his first issue. If it was it was very unfortunate that he allowed it to incubate in his mind till the plaintiffs had completed their evidence and closed their case. Even when at the first hearing I disallowed the greater number of issues raised and ruled that the suit should be confined to the questions involved in the two issues raised by the Court and although at that time Mr. Setalvad asked me to allow his first issue to stand he never took the Court into his confidence and never stated that that issue was intended to cover the contention that the Court was not competent to entertain the suit by reason of its being merely confined to caste-questions. It was not till the suit had reached its ninth hearing and the plaintiffs had closed their case that the question was for the first time clearly and definitely enunciated to the Court. That at all events, was the first time when I realized that the defendants intended to raise this question. Now although as an abstract proposition it may be correct to say that the contention which raises a question of the jurisdiction of the Court is a question of law which may be raised at the hearing of a suit and at any stage of it and even though it may not be specifically raised in the pleadings. I am of opinion that in practice such a proposition must be subject to some limitations. If a defendant is to be permitted to raise a question of jurisdiction not specifically pleaded he must raise it at the earliest possible opportunity and I do not think he ought in any event to be allowed to raise it after the plaintiff has closed his case. In the present case it is quite conceivable that the plaintiffs may have desired to give some evidence on the question whether the relief sought in the suit involved merely caste-questions. In fact that was one of Mr. Bahadurji's complaints when he argued that the defendants ought not to be allowed to raise the question in this suit.

3. Mr. Bahadurji for the plaintiffs contended, and I think rightly, that the first issue as originally framed had distinct reference to two of the main contentions of the defendants and was never in the first instance intended to raise the question which was subsequently raised. The first part of the proposed issue "whether the plaintiffs have a right to sue" was, Mr. Bahadurji argued, intended to raise the question whether the plaintiffs or any of them were entitled to claim

inspection unless they had a special interest in any particular question which necessitated inspection, a contention based on the authority of the decision of the Privy Council in the *Bank of Bombay v. Sulleman Somji* 10 Bom. L.R. 636; 32 B. 466; 12 C.W.N. 825; 8 C.L.J. 103; 5 A.L.J. 463; 4 M.L.T. 16. The latter part of the issue whether the plaint discloses a cause of action was," Mr. Bahadurji said, raised in support of the defendants" contentions that none of the plaintiffs ever asked for inspection by one or more of themselves and that such a demand not having been refused the plaintiffs had no cause of action. The impression on my mind is that although in a vague sort of way the question may have been present in the mind of the learned Counsel himself it was the appearance of the appeal in *Cutchi Dassa Oswal caste case* and the arguments therein that brought this question to the minds of the defendants" legal advisers more prominently and the subsequent delivery of judgment encouraged their hopes in a very marked degree that this Court may be induced to take the same view in this case as the Appeal Court had done in the other case. I quite accept Mr. Setalvad's assurance to the Court that the question was in his mind from the very beginning--I have no doubt it was but as I have said before it was incubating from the 23rd of July till the 5th of August and although it took definite shape on the latter date it acquired considerable strength and showed signs of great animation after the 12th of August, when the Appeal Court delivered its judgment. I permitted the defendants" counsel to argue this question and the question has been most fully and elaborately argued, before me by both sides, but while permitting the question to be raised and argued I specifically intimated to the learned Counsel that that was subject to the question whether the defendants were in this suit entitled to raise this contention. This question I reserved for further consideration and having anxiously considered it have come to the conclusion that having regard to all the circumstances of the case the defendants are not entitled to raise in this suit the contention that the plaintiffs; are not entitled to maintain this suit as it involves no question other than mere caste-questions. Having, however, heard argument at considerable length I think it is desirable that I should record my findings on this question. In my opinion the, questions involved in this suit are not caste-questions involving a claim merely to caste privileges. The questions involved in this suit do not in the remotest manner "affect either the internal autonomy of the caste or its social relations" *Appiya v. Padappa* 23 B. 122. The right to inspect account books kept in connection with caste funds and properties is not in any sense a caste privilege. It is a legal right. It is preliminary to a right to assert a claim to property and is incidental to the right to recover property which may be lost to the caste by misuse or misappropriation. Whether the plaintiffs have the right of the inspection they claim is a matter for consideration. For purposes of the question I am now discussing it is sufficient to point out that the plaintiffs on behalf of themselves and others as members of the *Cutchi Memon Jamat* claim that they are entitled to have full and free inspection of the books of account kept by the defendants in their capacity as trustees of caste funds and properties. This is the exertion of a pure legal right. They may or may not be entitled to that right but that is the

right they claim to establish in this suit. The assertion of such a right in no way affects the internal autonomy of the caste or its social relations."

4. In order to get over this obvious difficulty in his way the learned Counsel for the defendants was driven to contend. that the defendants were no really the trustees of the caste. They were, he said, managers or custodians they were unpaid servants of the caste--they were never formally appointed--and, therefore, it would be a mistake to regard them as ordinary trustees of property. This contention is wholly untenable and is not open to the defendants to adopt.

5. In the first paragraph of their plaint the plaintiffs say:

The defendants are the only trustees appointed by the Jamat for collecting and managing the funds of the said Jamat and expending the same for such purposes as may be necessary.

The first defendants has acted as such, trustee for the last nine years or thereabouts and the second defendant for the last thirty years or thereabouts.

6. The defendants accept the position. In para. 3 of their written statement they say:

The second defendant has been a trustee of the Jamat funds for about thirty years. Up to Samvat 1956 (1899 to 1900) the second defendant was sole trustee and he wished to resign but was prevailed upon by the Jamat to continue--the first defendant's father being appointed trustee with him to assist him. On the 28th of February 1903 the first defendant's father died and the first defendant was appointed a trustee in his place.

7. In the face of this specific and unequivocal acceptance of the position by the defendants themselves in their written statement it was not open to their counsel to contend that they were not trustees but occupied some other position but what that other position was has never been clearly defined.

8. Then it was urged with great insistence that I should follow the decision of the Appeal Court in *Jetha Nursey v. Chapsey Coovarji* 11 Bom. L.R. 1014; 4 I C. 108. As I have observed before, I am bound to follow that judgment if the facts in that case had any resemblance to the, facts in the present case. The Cutchi Dassa. Oswal Caste appears to have framed rules and regulations relating, amongst other things, to inspection of books and files of papers relating to the affairs of the caste. The Cutchi Memon Jamat have no rules and regulations to begin with. The main question in that suit was the right to inspect minute books of the sub-committee of the caste and a correspondence file. This is quite clear from what their lordships constituting the Appeal Court say in their judgment Setting forth the contentions of the appellants' counsel they say:

He contends first that the plaintiff has no right to inspect the minute books of the sub-committee or the correspondence file, these being the two documents about which alone there is any controversy.

9. Now presumably the minute book and correspondence file, the subject of controversy in that suit, could not relate to account of caste properties and there is a vast difference between the right of a member of a caste to inspect minute books and correspondence file and the right of a member of the caste to inspect books of account relating to caste funds and properties. The defendant in that suit was not sued in his capacity as trustee of caste properties and the considerations which induced the Appeal Court to hold that the questions in the suit before them were caste questions do not arise in this suit. When I come latter on to discuss the facts proved in this case it will be shown that the plaintiffs in this case occupy the position of beneficiaries Who are seeking discovery of accounts of the management of properties, the result of contributions levied from the caste and intended for charitable uses; and that such discovery is sought from people who are in possession and management of such funds and properties entrusted to them by the caste to be by them expended for certain well understood charitable purposes in their capacity as trustees. As I read the judgment of the Appeal Court I feel that, if the facts of this case were before them, judging by the reasoning in that judgment, they would have no difficulty in saying that the questions involved in this suit are not caste questions. One of the tests suggested by Mr. Setalvad to ascertain whether the question in the suit is or is not a caste question was this assume that the Court holds that the plaintiffs are entitled to inspection they ask for, there is nothing to prevent the caste passing a resolution the next day by a majority that the plaintiffs are not to have inspection.

10. The test, I think, will not stand much scrutiny. The Court will only pronounce a decree in favour of the plaintiffs if it is satisfied that the plaintiffs have a legal right to such inspection and the caste has no power to deprive individual members of their legal rights by passing resolutions by a majority. Such a resolution would be a nullity and the Court would be quite ready to enforce its decree in spite of any such resolution. The words of Mr. Justice Farran in *Lalji Shamji v. Walji Wardhman* 19 B. 507 in dealing with a caste case should always be present to the minds of people who think the vote of a bare majority of the caste is sufficient to deprive the minority of their legal rights. He says:

The Court would not, I apprehend, assist the majority by its decree to deprive without cause the minority of their right...it would not I apprehend give effect to a resolution passed in violation of the rules of natural Justice.

11. I find that the questions involved in this suit are questions of a civil nature involving legal rights of individual members of the caste as beneficiaries to claim discovery of accounts from trustees of their property with a view to see if the funds are properly applied and expended and if such discovery shows any misuse or misappropriation then to take steps against the trustees to compel them to make good any moneys that may have been lost to the caste by reason of such misuse or misappropriation. I am clearly of opinion that this suit does not involve any caste question and that it is one which the Court is bound to entertain and

decide.

12. I think it would be convenient here to dispose of another question raised by the learned Counsel for the defendants. He contended that if the plaintiffs or any of them had a right of inspection it must be a limited right and only such as a member of a corporation can claim.

13. Such rights were, according to his contention, defined by the Privy Council in the appeal of the Bank of Bombay v. Sulleman Somji 10 Bom. L.R. 636; 32 B. 466; 12 C.W.N. 825; 8 C.L.J. 103; 5 A.L.J. 463; 4 M.L.T. 16. This contention is based on the language used by some of the Judges in the earlier cases decided by the Bombay High Court when discussing whether the particular question before the Court was or was not a caste question. For instance in Pragji Kalian v. Govind Gopal 11 B. 534. Mr. Justice West says:

The cases under the English law of clubs and congregation afford useful analogies.

14. And again in Appaya v. Padappa 23 B. 122. Mr. Justice Ranade observes:

The fact is that in such matters the Courts treat caste corporations like any other voluntary societies or clubs.

15. On these and similar expressions used by Judges in cases where the Court had to deal with questions connected with caste matters, Mr. Setalvad, has addressed most elaborate arguments contending that at the very highest a member has no greater right to inspection of books, papers and accounts, relating to the management of caste properties than a member of a Corporation; that if anything a member of the caste has more limited rights, if he has any, than a member of a Corporation; and that a member of a caste can only claim inspection if he can show that he has in view some definite right or object of his own" and that the documents sought to be inspected would "tend to illustrate such right or object." Much time of the Court was occupied in cross-examining plaintiffs as to whether they had any "special interest" in any existing dispute etc. with a view to bring the present case within the Privy Council ruling in Bank of Bombay v. Sulleman Somji 10 Bom. L.R. 636; 32 B. 466; 12 C.W.N. 825; 8 C.L.J. 103; 5 A.L.J. 463; 4 M.L.T. 16. That suit was by the Judicial Committee of the Privy Council "treated according to the principles regulating an application for a writ of Mandamus" and I am asked to follow the decision in that case in a suit relating to the rights of the members of an Indian caste.

16. The futility of the contention that the same law which applies to members of a corporation should apply to members of an Indian caste would, I think, be obvious the moment one clearly realises what a Corporation is. The best definition of a Corporation is, I think, to be found in Halsbury's Laws of England, Vol. VIII, page 301, and is as under:

A Corporation aggregate has been defined as a collection of many individuals existed in one body under a special denomination, having perpetual succession

under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations and of suing and being sued, of enjoying privileges and immunities in common and of exercising a variety of political rights, more or less extensive, according to the designs of its institution or the powers conferred on it, either at the time of its creation or at any subsequent period of its existence.

17. Such being a Corporation, and the rights of members thereof as to inspection of its documents being governed according to the principles regulating an application for a high prerogative writ, what is there in common between a Corporation and a caste and how can the principles which govern the right of a member of this artificial creation of the law be similar to the principles which must govern the rights of a member of a caste who desires to inspect the account of property belonging to the whole caste collected purely for charitable purposes for the benefit of himself and all the other members of the caste and entrusted By him and them to individuals who hold the same as any other ordinary trustees. I cannot bring myself to believe that the learned Judges whose words are relied upon and quoted by me ever intended seriously to suggest that any analogy really existed between members of a caste and members of a Corporation as regards their rights in respect of caste properties. The same question arose in the appeal of *Jethabhoy Nursey v. Champsey Cooverji* 11 Bom. L.R. 1014; 4 I C. 108 and the Appeal Court deals with the arguments addressed to them in these words:

We do not think that right to inspection existing in any person by virtue of his being a member of the caste or of its Managing Committee could be evolved by a reference to English Law. That unique aggregation of the Hindu caste is so wholly unknown to the English Law that, as it seems to us, English decisions concerning English Corporations and partnerships tend rather to confusion than guidance upon such a question as that now in hand. A Hindu caste may have points of resemblance to English Corporations and partnerships, but its points of difference appear to us even more numerous and more radical.

18. This view of the Appeal Court, expressed in such clear and explicit terms, is to my mind the only possible view on this question, and I have no doubt in my mind that their Lordships of the Privy Council would be considerably startled if they learn that the principles they laid down as regulating rights of inspection of the documents of a Corporation by its members were sought to be made applicable to Suits filed by members of an Indian caste seeking inspection of the accounts of the management of caste properties from the trustees thereof. I am of opinion that there is no analogy whatever between a Corporation as known to English law and an Indian caste and the principles governing the rights of members of caste to inspection of accounts of caste properties must be governed by considerations very different from those governing the rights of members of Corporation seeking inspection of the documents of such Corporation.

19. Having now dealt with the two main contentions of the defendants in this suit, I will now turn to the considerations of the other and the real questions which arise in the suit. Are the plaintiffs, as members of the Cutchi Memmon Jamat of Bombay and the other members of the Jamat, entitled to demand and obtain inspection of books of account relating to the defendant's management of Jamat funds and properties? (His Lordship after discussing the evidence continued.)

20. It follows, therefore, that before suit no accounts were examined or passed for very nearly twenty years and that is on the assumption that they were really passed in 1888. I do not propose to enter into a discussion of the authorities on the subject of a cestue que trust's right to examine his trustee's accounts. In Lewin's Law of Trusts, at p. 866, as a result of the authorities, it is said:

It is, therefore, the bounden duty of the Trustee to keep clear accounts of the property he administered and he exposes himself to great risks by the omission. It is the first duty, observed Sir T. Plumer, of an accounting party whether an agent--a Trustee, a Receiver or an Executor (for in this respect they all shared in the same situation)--to be constantly ready with his accounts.

21. And this doctrine is carried further and it is said:

A legatee (though his interest be contingent or reversionary) as being a quasi cestue que trust is entitled to have a satisfactory explanation of the state of the testator's assets and an inspection of the accounts. (Lewin's Law of Trusts page 867).

22. There seems to be authority for the contention that trustees are not justified in refusing to allow solicitor of the cestue que trust to inspect their accounts. See Godefroi's Law of Trusts, page 769. It is not, however, necessary to discuss this as the plaintiffs do not contend that they asked that inspection should be given to their solicitor. And not only must the trustee account but he must account unconditionally: Underwood v. Trower (1867) W.N. 83.

23. It is a noteworthy fact that although at the hearing the learned Counsel for the defendants addressed very elaborate arguments contending that the plaintiffs had only a very limited right of inspection and that they must show special interest in a particular existing dispute or controversy before they could get inspection, the defendants themselves in their written statement concede unconditionally the plaintiffs' right to inspect their accounts. They say there that at a meeting of the Jamat held on the 25th of November 1907, the first and second plaintiffs:

Were told that if they came by themselves or attended by ten persons of good character within a week they could have inspection of the accounts.

24. In another place they say:

The Jamat does not wish inspection of their accounts to be taken by a

Portuguese or any Solicitor but inspection thereof is open to any member who bona fide desires the same in accordance with Jamat custom.

25. The reference to Jamat custom is perfectly meaningless. No inspection has ever been given or taken for the last twenty years at least. None was ever proved, spoken of, or referred to before me and if there has been no inspection there could hardly exist a custom in respect of it. Not only do the defendants concede the plaintiffs' right to inspection but they have themselves given evidence and called witnesses to prove that "inspection was offered to the first two plaintiffs but they did not avail themselves of the offer."

26. Under these circumstances I feel no difficulty in holding that the plaintiffs and every member of the caste are at all reasonable times and on proper demand entitled to full and free inspection of all account-books, papers and vouchers relating to the defendants' management of the Jamat properties in the defendants possession and under their management.

27. * * * * *

28. The plaintiffs instead of testing whether the defendants were prepared to carry out their offers and gave full and free inspection of their accounts, by claiming the inspection they offered, appear to have ignored this offer altogether and never took it into their consideration, and on the 19th of December following the meeting they file this suit. The answer to the last question in the suit whether inspection was refused must under the circumstances be answered in the negative. The result is disastrous for the plaintiffs for I am bound to follow the judgment of the Privy Council where they dismissed Sulleman Somji's 10 Bom. L.R. 636; 32 B. 466; 12 C.W.N. 825; 8 C.L.J. 103; 5 A.L.J. 463; suit against the Bank of Bombay on the ground that the limited and qualified right of inspection contended for at the trial was never put forward before action brought or any claim based upon it ever refused. Here I have held that the plaintiffs were entitled to claim the inspection they did before action brought but I am driven to the conclusion that such right was not refused before the institution of the suit. I find that, though most reluctantly, the defendants did on the 25th of November recognise the right of the plaintiffs to the inspection they asked for and offered to give it to them.

29. Under the circumstances the plaintiffs' suit must fail. This conclusion I have come to with much regret. The "plaintiffs in their plaint pray for a declaration of their right to inspection and follow that up by only a prayer for a decree ordering such inspection. There is no other prayer. I am not sure that if the plaintiffs had prayed that the defendants might be ordered to account for their management of trust property since 1888 or 1899, that under the circumstances proved in this Case, I would not have been disposed to give the plaintiffs a decree in terms of such prayer notwithstanding my finding that the plaintiffs were offered inspection and failed to avail themselves of it. Having regard to the fact that the defendants had not for many years rendered any accounts and that this was a suit filed in

respect of charity-property with the consent of the Advocate General many considerations would have arisen in favour of a decree referring the suit to the Commissioner to take the accounts of defendants' management of charity properties as trustees thereof. It is, however, useless to speculate on what might have been. The plaint does not pray for such a decree nor was any application made to me at any time to amend the plaint by adding prayer for accounts. On the questions argued before me, my findings are:

(1) That the questions involved in the suit are not caste questions.

(2) That the suit is of a civil nature and, therefore, cognisable by the Court and maintainable by the plaintiffs.

(3) That the English, law relating to inspection of documents of a Corporation has no applicability to the right of the plaintiffs to inspect the account-books kept by the defendants relating to their management of the properties and funds of the caste.

30. On the first issue I find that the members of the Cutchi Memon Community are entitled in law to have reasonable inspection of the books of account kept by the defendants in respect of their management of the caste properties and funds.

31. On the second issue I find that the first and second plaintiffs did orally demand inspection and that the third, fourth, fifth, sixth, and seventh plaintiffs by their attorney's letter of the 25th of November 1907 (Ex. F.) did make a demand for inspection. On the latter part of the same issue I find that, although the demand for inspection was all along resisted by the defendants and inspection refused, the defendants on the 25th of November 1907, a date prior to the filing of this suit, did offer to give the inspection demanded by the plaintiffs.

32. The plaintiffs' suit must, therefore, be dismissed. The question of costs remains and it is one that has caused me much anxious consideration. This has been a personal fight between the plaintiffs and their partisans and the defendants. The charity funds are funds intended to be used for the benefit of the poor of the community. These poor have taken no part in the fight and the funds ought not to suffer because the plaintiffs and the defendants have chosen to embark on a bitter and prolonged litigation.

33. The plaintiffs in this fight have all along been successful on all the questions raised in the suit except one. They have lost on very narrow ground. The defendants although they succeed they come out of the fight with no credit. If I could have seen my way to passing any decree in favour of the plaintiffs I would have ordered the defendants to pay 4/5th of the plaintiffs' costs leaving the plaintiffs to bear the remaining 1/5th themselves.

34. I can, however, find no precedent where the defendants are ordered to pay any of the costs of a plaintiff whose suit is dismissed against them.

35. Under the circumstances the only order I can make is that parties do bear their own costs. I regret that the defendants should escape so lightly in the suit and I am conscious that the order as to costs is so far as the plaintiffs are concerned one of hardship but I have no alternative.

36. The suit will stand dismissed parties bearing their own costs.