
(1925) 10 BOM CK 0009
In the Bombay High Court

Saklat

APPELLANT

Vs

Bella

RESPONDENT

Date of Decision : 22-10-1925

Acts Referred:

Citation : (1926) 28 BOMLR 161

Hon'ble Judges : Phillimore, J;John Edge, J;Blanesburgh, J

Bench : Full Bench

Final Decision : Allowed

Judgement

Phillimore, J.—The circumstances of this case are as follows:

Some time in 1899 a Goanese Christian named Jones with his wife arrived in Rangoon. They were in humble circumstances, and the wife applied for assistance to a Parsi of good position at Rangoon, Bomanji Cowasji, stating that she too was a Parsi. He befriended her till he went to England in 1900 and then asked his brother Shapurji Cowasji to look after her and the child to which she had just given birth, the respondent Bella. The father died and when her mother died shortly afterwards Shapurji, who was a defendant in this suit, but died pending the appeal, took Bella into his own house, and he and his wife treated her as their own child.

2. When Bella was nearly fourteen it was desired that the initiation ceremony into the Zoroastrian religion called Navjot should be performed for her, but the local Head Priest at Rangoon refused, chiefly because-as it appears from his evidence-he thought it would be unpopular with the Parsi community. Advantage was then taken of the temporary presence of some other priest, who performed the ceremony; and after that invitations were sent by the Head Priest to Bella to come with Shapurji and his wife to the temple on festival days. Three such invitations were sent, the High Priest said, with the expectation that they would not be accepted; but on third occasion, being March 21, 1915, Shapurji brought her and put her within the sacred precincts facing the sacred fire, and in such a

position that she went through all the ceremonies like other worshippers.

3. This proceeding gave great offence to a number of members of the Parsi community in Rangoon, and on March 31, this suit was brought by three members of the Parsi community, who stated that they brought it not only on their own behalf but on behalf of a large number of members of the Parsi community at Rangoon, against Bella and against Shapurji, stating that the temple was held on trust for the free and unrestricted use of the Parsi inhabitants in Rangoon professing the Zoroastrian faith, further stating that it was alleged that the mother of Bella was a Parsi, and that Bella had been validly converted or initiated into the Zoroastrian religion, but denying that this was so or indeed could be so, and averring that the defendants had by their acts "not only wounded the religious feelings entertained by religiously inclined Parsis, but also caused the desecration of the said sacred temple.

4. In another paragraph of the plaint, they stated that only members of the Parsi community professing the Zoroastrian religion were entitled to the use of the temple, to the access of the sacred precincts, and to attend, witness or take part in any religious ceremonies held therein, and that it was never the intention of the Parsi community that the children of non-Parsi fathers should be allowed the use of the temple. They further said that even assuming that Bella could be duly admitted into the Zoroastrian religion, and assuming that her mother was a Parsi, even then she could not be considered a Parsi or a member of the Parsi population. They prayed for a declaration that Bella was not entitled to use the temple or to attend or to participate in any of the religious ceremonies performed therein and for injunctions to restrain her from entering the temple and Shapurji from taking her there.

5. Shapurji, in his own name and as guardian for Bella, put in their written statement. In this it was contended that the plaint disclosed no cause of action, that the defendant Bella was entitled to attend the temple and the ceremonies and caused no desecration by her presence; and it was stated that her mother was a Parsi, that she had been brought up from early infancy as a Parsi and in the Zoroastrian faith, and that she came within the terms of the trust of the temple.

6. The following issues were then settled :

1. Whether the plaint discloses any cause of action ?
2. Whether this suit is maintainable.
3. Who are entitled to the benefit of the Eire Temple Trust?
4. Is the first defendant the daughter of a Parsi mother ?
5. Is it possible for the first defendant, being a daughter of a non-Parsi father, to be initiated (a) into the Zoroastrian Religion (b) into the Parsi community.
6. If it was possible, whether the ceremonies adopted for the purpose were

defective (the second defendant to give particulars of the ceremonies performed at the initiation of the first defendant within one week, and the plaintiffs to state within one week thereafter whether, and if so, in what respects, they contend that these ceremonies were inefficacious):

and the case was set down for a preliminary hearing on the first and second issues.

7. The Judge decided these points in favour of the plaintiffs; and thereupon some oral evidence was taken before the Judge at Rangoon, and a mass of evidence covering 664 pages of the record was taken on commission at Bombay.

8. It appears that this was not the first occasion in modern times in which the question of the admissibility of a person who was not a racial Parsi, but who had become a convert to the Zoroastrian religion, to participate in the religious services and enter the temples of the Parsis had arisen.

9. In 1903 a French woman had declared that she had become a convert to the Zoroastrian religion and had married a Parsi gentleman of position at Bombay. Her claim to participate in religious worship had given rise to much excitement in the Parsi community, and seven Parsis, one of whom was the French woman's husband, had brought a suit in the High Court of Bombay against the trustees of the Parsi endowments, first making a general case of some misfeasances requiring the intervention of the Court, and, secondly, claiming a declaration that the trust deeds ought to be construed as admitting to their benefits any person professing the Zoroastrian religion whether a racial Parsi or not.

10. After a prolonged litigation, this suit, except in so far as it prayed for a correction of the general misfeasances, was dismissed; and the Judges, for reasons which will have to be more minutely entered into, held that the various endowments were limited to the use of people who as well as being Zoroastrian were also racial Parsis. But the controversy had not been forgotten, and its echoes are to be heard in the evidence given on commission in the present case.

11. Young J., in the preliminary judgment given in the present case, held that the plaintiffs could not sue for trespass on land or in the temple, but that they might have a third cause of action which he described as an interference with their right to exclusive worship. He thought that they had sufficiently alleged this right and its infringement, that the right was one which had been often upheld by the Courts, and that the suit could be brought without joining the trustee or without obtaining the consent of the Advocate-General. When he came to his later decision upon the whole case, he described the injury as "an injury to the plaintiffs' individual right to worship undisturbed by the intrusion of a person not belonging to their faith," and applying his mind to the fifth and sixth issues, he held that Bella could be initiated into the Zoroastrian religion and into the Parsi community; that the ceremonies adopted for the purpose were sufficient, and that, therefore, there was no intrusion of a person not belonging to the plaintiffs' faith, and it became immaterial to decide issues three and four. Accordingly he

dismissed the suit.

12. When the matter came before the Chief Court, on appeal, the Judges, though apparently they heard one continuous argument, gave two judgments: the first in respect of the preliminary issues. In this they confirmed the actual decision of Young J. but enlarged the plaintiffs' cause of action, saying that they might treat it as an injury to themselves, that Bella, even though she were a Zoroastrian, yet not being a Parsi, came to the temple worship.

13. This made it necessary for the Judges in the Chief Court to determine the third issue, viz., who are entitled to the benefits of the Fire Temple Trust; and they held that it was a trust for a religion and not for a race. They then held, in agreement with Young J., that Bella could be and was converted or initiated into the Zoroastrian religion, and therefore they concurred with him in dismissing the suit.

14. The Judges in the Chief Court took the view that the fourth issue might also have been decided in favour of Bella, i.e., that her mother was a Parsi, but that this fact was unimportant, except as leading up to her conversion or initiation. Their lordships agree with this. In their view it is settled that as regards the racial claim, maternity is of no importance.

15. The appeal to their lordships' board has raised among other questions the actuality and validity of Bella's conversion and initiation; but on this point their lordships see no reason for differing from the judgment of the Chief Court.

16. In the great controversy in the Bombay case, *Sir Dinshaw Maneckji Petit v. Sir Jamshetji Jijibhai* ILR (1908)33 Bom. 509 : 11 Bom. L.R. 85 the two learned Judges (one of whom was himself a Parsi), came to the following conclusions thus expressed by the Parsi Judge, Davar J. (p. 534) :-

I. That the Zoroastrian religion not only permits but enjoins the conversion of a person born in another religion and of non-Zoroastrian parents.

II. That, although such conversion was permissible, the Zoroastrians, ever since their advent into India 1200 years ago, have never attempted to convert anyone into their religion.

III. That there is not a single instance proved before the Court of a person born of both non-Zoroastrian parents ever having been admitted into the Zoroastrian religion professed by the Parsis in India.

17. It is true that as regards the quantum of the necessary ceremonial on initiation, Davar J. expressed an opinion that a piece of ritual called *Burushnun* was an essential part; but in this matter he was travelling outside anything necessary for the case before him; and their lordships do not find that Beaman J. the other Judge, concurred with him as to this, and they think that the evidence given in the present case warranted the decision to which the Chief Court came that this additional ceremonial was not necessary.

18. It follows, therefore, that the points which their lordships have now to determine are, whether the trusts of the temple are for the benefit of all persons professing the Zoroastrian religion or limited to those who, professing that religion, are also racial Parsis in the sense in which that word is understood in the Parsi community; and, secondly, whether if Bella, not being a racial Parsi, is not a person within the benefits of the temple trust, this fact gives the plaintiffs any right of direct action against her and against her guardian.

19. The contention on behalf of the plaintiffs was the same as that of the contention of the defendants in the Bombay case, namely, that all these trusts were intended for Parsis in the limited sense, i, e.:-

First. The descendants of the original emigrants into India from Persia who profesa the Zoroastrian religion.

Secondly. The descendants of the Zoroastriane in Persia who were not amongst the original emigrants, but who are of the same stock and have since that date, from time to time, come to India and have settled here, either permanently or temporarily, and who profess the Zoroaatrian religion.

Thirdly, The children of a Parai father by an alien mother, if such children are admitted into the religioa of their fathers and profess the Zoroastrian religion.

20. Now the origin of the temple, the right to worship at which is in dispute in the present case, is as follows :-

On November 24, 1868, the Deputy Commissioner at Rangoon, on behalf of Her Majesty's Government, granted to Bejunji Cowasji and Shapurji Hirji a parcel of land in the town of Rangoon of a certain size "upon trust to build and maintain upon the said parcel of land a temple for the use of Parsi population.

21. It was provided that the Deputy Commissioner might nominate new trustees, and that if a temple was not erected within a year, he might revoke the grant.

22. On August 14, 1882-probably because there had been delay in building the temple-a re-grant was made to new trustees upon trust for the same intents and purposes as the old grant, with like powers to appoint new trustees and a similar power of revocation if no temple was built within a year.

23. Previously on January 11, 1859, the then Deputy-Commissioner had granted to two Parsi gentlemen another piece of land upon trust to maintain it "as a cemetery and to the free use of persona of the Parsi denomination." There was a similar power given to the Deputy-Commissioner to appoint new trustees and a power of revocation in case the land was applied to other uses This grant was again renewed also on August 14, 1882.

24. Some disputes having arisen as to the temple, a suit was brought to have a new trustee appointed, and scheme of management framed; and on March 20, 1889, the Recorder appointed Bejunji Cowasji sole trustee and ordered a scheme to be framed.

25. About the same time, a similar suit had been brought in respect of the burial ground, and by an order of the same date the Same person was appointed trustee and a similar order to frame a scheme was made. The scheme in respect of the temple gave the trustee charge of the temple and its appurtenances with duty to manage and improve as funds permitted and power to build a range of shops on parts of the trust lands, borrowing money for the purpose. After repayment of monies borrowed the rest was to be applied for the current expenses of the Fire Temple and the Parsi Burial Ground. In this way and to this extent the two properties were brought together.

26. When the scheme for the burial ground was to be framed, there was a serious dispute with regard to children of Parsi fathers who died without having gone through the ceremonies of initiation, and eventually the scheme was framed in the following words:-

1. The Burial ground shall be used for burying persona who shall at his or her death be actually professing the Zoroastrian religion and no other.

EXPLANATION.-No one shall be taken to be actually professing the Zoroastrian religion who has not been duly invested with the Sudra and Kusti, in accordance with the rites prescribed by that religion, provided, nevertheless, that children born of fathers following the Zoroastrian religion, and brought up in that faith, and dying before the age of 14 years and three months, without having been invested with the Sudra and Kusti, may be taken to be actually professing the Zoroastrian religion, but children dying after having attained that age without having been invested with the Sudra and Kusti shall not be taken to have professed the Zoroastrian religion unless his or her investiture was prevented by unforeseen and unavoidable circumstances.

27. It is suggested for the defendants that this document shows that the stress of the matter was laid upon the religion and not upon the race.

28. One other document must be mentioned. Apparently it took a long time before the temple or at any rate the present temple was built, and on August 20, 1904, Bejunji Cowasji executed a deed of declaration of trust reciting that he and his brother had built at their charge a fire temple upon the trust lands so that the same might form part of the said trusts and be for the use of the Parsi inhabitants of Rangoon, and purporting to declare for himself and his successors in office that he held the fire temple "for the use of the Parsi inhabitants of Rangoon free and unrestricted but subject notwithstanding to the tenets of the pure Zoroastrian religion and to the scheme prescribed by the Court,

29. The defendants at their lordships" bar contended that this was an attempt to alter the trust and as such should be rejected, but in their written statement they accepted it as a valid document. So far as it goes, it rather makes in the plaintiffs" favour, but their lordships are not disposed to attach grave importance to it.

30. The Chief Court-as already stated-considered that the effect of these documents was to impose a trust for the benefit of persons professing the Zoroastrian religion and no others.

31. Their lordships agree with the latter part of this proposition. Parsis who cease to be Zoroastrians have, in their lordships' view, no claim. But upon the whole and after much consideration they think that the benefits are confined to persons who possess the double qualification of Zoroastrians and racial Parsis.

32. The judgment in the Bombay case travelled over much ground-indeed, in their lordships' opinion, much unnecessary ground-but both Judges came to the conclusion that the various trusts in that case must be construed as being confined to persons who were of the Zoroastrian religion and racial Parsis. There were several trusts, and the expressions in the deeds were different; but the word Parsi never appeared in them, and the word Zoroastrian or some equivalent religious word was used. Sometimes the trusts were for the members of the Zoroastrian community of Bombay; other phrases were similar. Nevertheless, both Judges came to the conclusion that they must be read as has been already stated.

33. Davar J. thus expressed himself (p. 548):-

A Juddin [that is a Gentile] may become a Zoroastrian, but how he ever could possibly become a member of "the Holy Zoroastrian Anjuman of Bombay" or be one of the members of "the Zoroastrian Community of Bombay" or become one of the Anjuman of the Mazdiasni faith," passes my comprehension. A Juddin converted to Zoroastrianism had never come into existence. Such a person could not possibly have been within the contemplation of the donors and founders : the possibility of such a being coming into existence would be so new and novel that if the donor ever conceived such an idea and intended to include him in his benefaction, he would certainly designate him separately and specially, and not include him in the general description of the community of his then existing co-religionists and their descendants.

34. Beaman J. said (p. 580):-

That question is not, whether the Zoroastrian religion permits conversion, but whether, when these Trusts were founded, the Founders contemplated and intended that Converts should be admitted to participate in them.

35. In their lordships' view the same line of reasoning applies to the present case, The Parsi community had grown up to be such a distinct body, and admissions into it from outside had been so very rare, that at the time when these grants at Rangoon were made the Government must have intended that the temple should be for the benefit of professing members of the Parsi community, i.e., racial Parsis or people deemed after a long lapse of ages to" be racial Parsis.

36. But this does not exhaust the matters to be determined on the present

appeal. It determines that the respondent Bella has no right of entering into the temple and may therefore be excluded or extruded from the temple by the trustees. They can treat her as a trespasser. But it does not follow that they are bound so to treat her. Still less does it follow that in an action to which the trustees are not parties, and in which therefore no indirect remedy can be obtained, a direct claim can be supported as if for a tort committed by Bella or her guardian.

37. When property is set apart for public or charitable uses, it will be a malversation to apply any of the funds for persons who are not objects of the trust. These who are objects of the trust must have all the benefits they require; and if there is a surplus, it must be left to the Courts to make a cy-pres application of it. But when the subject matter of such a trust or charity is the rendering of some convenience or service of such a nature that it will not hurt the lawful recipients if others share with them, their lordships are aware of no case in which it has been held that the trustees are bound to exclude persons who have no legal title to share. They may do so; they may treat all such persons as trespassers and say : *Sic volo sic jubeo, stet pro ratione voluntas*. But if they choose to admit to the benefit of some park or garden established for a particular district some persons from over the border or to admit to a public library destined for a particular municipality persons from outside, or what is perhaps a nearer analogy, admit to the hearing of a lecture by a University professor persons not members of the University, this of itself furnishes no ground of complaint. If the numbers admitted are too large or the persons are disorderly or unpleasant in their habits or in any way substantially interfere with the convenience or benefit of those for whom the endowment was created, the trustees may be required to exclude them. But the mere claim of A that B shall not share in such a benefit because B is not within the terms of the foundation is not one that Courts would encourage.

38. Many illustrations of this doctrine could be drawn from the history of English institutions. The great schools of Westminster, Eton and Winchester arose from small nuclei, namely, a fixed number of endowed and privileged scholars taught by appointed masters. They have become what they are because unprivileged boys in greater numbers have been allowed to benefit by the services of the appointed masters, and to use the school class-room and playgrounds.

39. The statutes of the colleges in Oxford and Cambridge make provision for the education of a fixed number of students or scholars privileged and endowed. Many, if not most, of them make no provision for the admission of other members in statu pupillari. But "commoners," so called, though their legal position is merely that of boarders (*Rex v. Grundon, Ex parte Davison* (1775) C. R 315) have been for several centuries admitted equally with the privileged scholars to the benefits of the colleges, particularly to the use of hall, library and chapel.

40. The intrusion of an unbeliever into a place of religious worship might well be

a case of substantial interference with the devotions of worshippers. But the plaintiffs have failed to make out that Bella was not a Zoroastrian. They suggested indeed that her conversion was impossible, or at any rate that it had not been completed by due initiation; but their lordships agree with the Judge of first instance that this suggestion was not established; while, except in the evidence of one unsatisfactory witness, there was nothing to show that Bella's presence would be thought to cause desecration, if once it was accepted that she was a Zoroastrian.

41. Also, if it were a question of caste and worshippers of a higher caste would be defiled by the presence of a lower caste, as in *Anandrav Bhikaji Phalke v. Shankar Daji Charya* I.I.R(1883) . 7 Bom. 323 this would be a serious disturbance. As was said in that case (p. 329):-

This right is one which the Courts must guard, as otherwise all high caste Hindus would hold their sanctuaries, and perform their worship, only so far as those of the lower castes chose to allow them

42. But this claim is again not established. Indeed, what may be called the quasi-caste claim is not even suggested in the pleadings. It was the wounding of religious feelings and the desecration of the temple which are put forward.

43. Their lordships have now to consider the Belief which the plaintiffs have sought in this suit. They have not sought for a general declaration as to the persons who are objects of the trust. They have not sought for a construction of the scheme, or for any order to be made upon the trustee, nor have they made the trustee a party. For this they would probably have required the consent of the Advocate General. They pray in the plaint "for a declaration that the defendant Bella is not entitled to the use and benefits of the Parsi Fire Temple in Dalhousie Street known as "Captain"s Agiary or Dhurraymair" or to the use and benefits of the buildings standing on the said trust land or to attend at or participate in any of the religious ceremonies performed therein.

44. Then they claim an injunction to restrain the defendant Bella from entering and the other defendant, now dead, from bringing her into the temple to attend the religious ceremonies, This is a claim for an injunction to prevent the repetition of an alleged trespass. It must, therefore, first be established that there was a trespass and one for which damages, though possible only nominal, could be recovered. But for trespass upon land the only person to bring the action is the person in possession of the land, that is, the trustee. That a beneficiary or two or three beneficiaries of a trust for public purposes may bring a suit for trespass against an intruder is a novel principle of jurisprudence; and the case is not made stronger by the suggestion that several other beneficiaries agree with them.

45. It may be that in India it would be convenient in some cases to allow such a suit, and judgment in *Anandrav Bhikaji Phadke v. Shankar Daji Charya* may form a precedent. But, if so, the circumstances must be as powerful as in that case. It

must be established that the juxtaposition of the two sets of persons is so repugnant to their habits of mind that the entrance of one set into the temple entails the departure of the other, so that it is as it were trespass to the person.

46. As already stated, no such case has been established, and therefore it is not necessary to discuss the principle on which the judgment in *Anandrav Bhikaji Phadke v. Shankar Daji Charya* is founded and which was indeed accepted by the Judge of first instance in the present case. The facts do not warrant the claim, if it be a sound one, and no injunction can be granted.

47. With regard to costs, the learned Judge of first instance, while giving the defendants the general costs of the action, thought that both sides were to blame for the inordinate length of the Bombay commission and made the plaintiffs pay two-thirds only of the defendants' costs of the commission.

48. If any costs of the action were to be given, some similar provision should be applied. But, upon the whole, their lordships feel that the plaintiffs have failed in the greater part of their suit, and that the giving to them of a declaration is an indulgence. They were given the costs of the preliminary issues before Young J. and the costs of so much of the appeal as related to those issues. These they keep, and the orders against them in respect of other costs in the Courts below will be discharged and there will be no costs of this appeal. Their lordships will humbly recommend His Majesty that this appeal be allowed, that the judgment of the Chief Court be varied, and that a declaration be made, namely, that Bella was not entitled, as of right, to use the temple, or to attend or to participate in any of the religious ceremonies performed therein, that except as to the costs awarded to the plaintiffs in the Court of first instance, and in the Chief Court, there be no costs in the Courts below, and there be no costs of this appeal.