1951

VISHWAMBHAR HARIHAR v. PARASU KUSHAPPA

Vyas J.

of the order of the First Class Subordinate Judge, Kolhapur, the word "Darekars" should be substituted. There will be no order as to costs of this appeal.

Order accordingly.

K. B. S.

APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Gajendragadkar.

1951

July 24

BHAICHAND TARACHAND GANDHI AND OTHERS, APPLICANTS *v.* STATE OF BOMBAY.*

The Bombay Harijan Temple Entry Act (XXXV of 1947) ss. 2, 3—Object of—Entry in Jain temples—Right of Harijans under the Act.

Though it is true that according to judicial decisions, in the absence of proof of custom or usage to the contrary, Hindu law applies to the Jains, even so, their distinct and separate entity as a class by themselves governed by their own religious tenets and beliefs cannot be disputed.

Bhagwandas Tejmal v. *Rajmal*,[1] referred to.

The Bombay Harijan Temple Entry Act, 1947 has a limited objective viz. to raise the Harijans in status and to bring them up to the same position as high class Hindus in respect of temple entry. The object of the said legislation is not to do away with distinction between Hindus and Jains or the distinction between Hindu and Jain temples.

The position in law is that in a Jain temple the Hindus are only allowed to worship provided they have acquired that right by law or custom or usage. It is only where Hindus have such a right to worship in a Jain temple that the Harijans have been conferred a similar right under the aforesaid Act.

Application under Art. 226 of the Constitution.

On November 27, 1950 some members of the public accompanied by Harijans wanted to effect an entry into a Digambar Jain temple at Akluj, in Sholapur District. Some members of the Digambar Jain community who blocked their entrance were arrested by the police for an offence under s. 4 of the

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* Civil Application No. 91 of 1951.

[1] (1873) 10 B. H. C. R. 241.

Bombay Harijan Temple Entry Act, 1947. On the next day, i.e., November 28, 1950 the Collector and the District Superintendent of Police, Sholapur visited Akluj and tried to bring about a compromise but the Jains were not prepared to allow the Harijans inside the temple. As the Harijans were intent on exercising their supposed right to enter the temple and were obstructed by the Jains from entering the temple by locking the door of the temple, the Collector of Sholapur ordered the removal of the lock placed on the door of the temple by the Jains. The Harijans then effected an entry in the temple accompanied by the Collector, the police officers and some members of the public.

The Applicants, members of the Jain Community at Akluj, made an application to the High Court under Art. 226 of the Constitution for a Writ of Mandamus.

The application was heard.

P. R. Das and *N. A. Palkhiwala* with *Nandlal & Co.*, for the petitioners.

M. P. Amin, Advocate-General, and *G. N. Joshi* with *Little & Co.*, for the respondents.

CHAGLA C. J. This is a petition filed by certain members of the Digambar Jain community of Akluj in the Sholapur District. At Akluj there is a Jain Temple, and the question that is raised by this petition is whether the Harijans are entitled to enter this temple by reason of the Bombay Harijan Temple Entry Act, 1947. That Act was placed on the statute book in order to remove certain disabilities from which the Harijans suffered, and one of the most glaring disabilities was that Harijans were not allowed to worship along with other Hindus in Hindu temples. The contention of Mr. Das is that on a true construction of this Act, if Hindus had a right by law or custom to worship in this particular temple, then the Harijans would have a similar right. But if Hindus themselves have no right to enter into this temple, then no right has been conferred upon the Harijans by this Act. The contention, on the other hand, put forward on behalf of the State by the Advocate General is that this Act throws open all Jain temples to all the Hindus, and inasmuch as Jain temples are thrown open to all the Hindus, the right that the Hindus have by virtue of this Act can also be exercised by the Harijans.

In order to decide which of these two contentions is sound, it is necessary to look both at the purpose and object of the Act and also to the language used by the Legislature in order to

1951

BHAICHAND TARACHAND v. STATE OF BOMBAY

Chagla C. J.

effectuate that object and purpose. Section 2 is the definition section and the material definition we have to consider is the definition of "Hindus" and of "Temple". "Hindus" is defined as including Jains, and "temple" is defined as a place, by whatever name known and to whomsoever belonging, which is used as a place of religious worship, by custom, usage or otherwise by the members of the Hindu community or any section thereof and includes all land appurtenant thereto and subsidiary shrines attached to any such place. Section 3 is the material section which confers certain rights upon Harijans, and that is in the following terms:

> "Notwithstanding anything contained in the terms of any instrument of trust, the terms of dedication, the terms of a sanad, or a decree or order of a competent court, or any custom usage or law, for the time being in force to the contrary, every temple shall be open to Harijans for worship in the same manner and to the same extent as to any member of the Hindu community or any section thereof and Harijans shall be entitled to bathe in, or use the waters of, any sacred tank, well, spring or water-course in the same manner and to the same extent as any member of the Hindu community or any section thereof."

The Advocate General's contention is that we must import the definition of "Hindus" given in the Act into this section, and having imported that definition, we must read the section as meaning that every temple, whether it is a temple of Hindus or of Jains, is open to every member of the Hindu community, which means member of the Jain community or the Hindu community. It is impossible to accept this contention. If this contention were to prevail, it would result in our holding that the Legislature by this legislation has completely wiped off and obliterated all distinction between Hindus and Jains and that the object of this legislation was to do away with such distinction and difference. As I said before, this Act has a narrow and limited objective, however laudable that objective might be, and the limited objective is to raise the Harijans in status and to bring them up to the same position as high class Hindus in respect of temple entry. The object of this legislation is not to do away with the distinction between Hindus and Jains or the distinction between Hindu and Jain temples. It is well known that Jains are Hindu dissenters and in their religious beliefs they differ from the Hindus on some material points. They do not recognise the authority of the Vedas and do not subscribe to the view that there is any religious merit in the performance of ritual and sacrifices. The Jains also differ from the Hindus in assigning the highest place of respect to their saints known as Teerthankars who according to the

Jains have "successively become superior Gods" (vide *Bhagvandas Tejmal* v. *Rajmal.*[1] It is true that according to judicial decisions in the absence of proof of custom or usage to the contrary Hindu law applies to the Jains. Even so, their distinct and separate entity as a class by themselves governed by their religious tenets and beliefs cannot be disputed. Therefore, though as the Advocate General assumes it may be possible or perhaps even desirable to treat the Jains as Hindus for all legal and special purposes, that clearly was not the object of the State Legislature in passing the present Act. We must, therefore, refuse to accept the contention of the Advocate General that the main object of the Act is to remove all the distinctions between Jains and Hindus.

The other consequence of the Advocate General's argument being accepted would be that this Act confers rights upon high class Hindus which they did not possess before the passing of this Act, because according to the Advocate General after this Act was passed every Hindu became entitled to enter a Jain temple even though he did not have such a right before the passing of this statute. That construction also, in our opinion, is totally opposed to the object and purpose of this legislation. This legislation was not passed in order to confer any rights upon high class Hindus. It was passed solely for the purpose of removing disabilities of Harijans. The definition of "temple" also lends support to the construction we are placing upon the statute, because a temple is defined as a place of religious worship which is so by custom, usage or otherwise. That means that if a temple is permitted by Jains to be used by the Hindus, then undoubtedly it would fall in the definition of "temple" as used in this Act. Mr. Das concedes that if in this particular Jain temple Hindus are permitted to worship by reason of custom or usage, then the Harijans would be equally entitled to worship in this temple. But the Advocate General is asking for a higher right for Hindus, and that right is that although by law or by custom a Hindu was not entitled to worship in a Jain temple, by reason of this Act he became so entitled. That contention we are not prepared to accept.

Therefore, in our opinion, on a true construction of this Act the position in law is that in a Jain temple Hindus are only allowed to worship provided they have acquired that right by law or by custom. If Hindus have a right to worship in a Jain

[1] (1873) 10 B. H. C. R. 241, 251

1951

BHAICHAND TARACHAND v. STATE OF BOMBAY

Chagla C. J.

temple, then by reason of that right a similar right must be conferred upon the Harijans. So that the rights of the Harijans have been made to approximate with the rights of the Hindus, but the right that a Hindu has is a right which was subsisting in him before the Act was passed; no new right has been conferred upon him by this Act. Therefore, if a Hindu can establish his right to worship in a Jain temple as having existed prior to the passing of this Act, then a Harijan can equally well claim the same right. We should also like to point out that if there are any Harijans among the Jains—we are told there are none— then the Harijan Jains would have the same right to worship as the Jains have, even though they did not possess that right before this Act was placed on the statute book.

Therefore, in our opinion, the contention of the petitioners must prevail that as far as this particular Jain temple at Sholapur is concerned, the Harijans have no right of entry in this temple if Hindus have not that right established either by law or custom or usage.

There is one other point that arises on this petition and that is the action taken by the Collector of Sholapur in this matter. We are quite prepared to concede that the Collector acted out of the best of motives and in the interest of a cause which is a very worthy and deserving cause, but it seems to us that the action taken by him was not fully justified by law. What he did was that at the instance of the Harijans who insisted upon their right to enter this temple, he ordered the removal of the lock placed on the door of the temple by the Jains. It seems to us that the only right that he has got in law is the right conferred upon him by s. 4 of the Act. That section provides that whoever prevents a Harijan from exercising any right conferred by this Act, or molests or obstructs or causes or attempts to cause obstruction to a Harijan in the exercise of any such rights, shall, on conviction, be punishable in a particular way. Therefore, if the Collector of Sholapur is satisfied, in the light of our judgment and in the light of the interpretation and construction we have put upon this Act, that Hindus had the right by law or custom to enter this Jain temple at Akluj, then it would be perfectly competent to him to order a prosecution of any Jain who is depriving the Harijans of the right conferred upon them under the Act. But apart from the right to prosecute the Jains under s. 4, it seems to us that the Collector had no right to compel the Jains to break open the

lock or to assist the Harijans in entering the temple. If the view of the Collector is that there is a custom which entitled Hindus to enter this temple, if the view of the Jains is that there is no such custom, the proper forum for determining this disputed question of fact would be a Court of law, and if the Collector prosecutes the Jains, then this issue will come up before the Court and the Court on the taking of evidence will determine whether there is such a custom in existence or not. Apart from expressing this opinion, we do not think that any order is called for at our hands on this petition.

No order as to costs of the petition.

Order accordingly.

K. B. S.

APPELLATE CIVIL

Before Mr. Justice Bhagwati and Mr. Justice Vyas.

1951

July 27

SHANKAR NATHU HALWAI (ORIGINAL DEFENDANT NO. 1), APPELLANT *v.* NARAYANIBAI GANGARAM NATHU HALWAI (ORIGINAL PLAINTIFF'S HEIR), RESPONDENT.*

Hindu law—Suit for partition by coparcener—Coparcener dying pending suit—Whether widow entitled to continue suit as heir—Hindu Women's Right to Property Act (XVIII of 1937)—Right to partition, whether personal right—Civil Procedure Code (Act V of 1908), O. XXII r. 1.

G and S, two brothers were members of a joint Hindu family. In 1944 G filed a suit for partition and possession of his half share in the joint family properties. Pending the suit G died and his widow N was brought on record to continue the suit. S contended, *inter alia,* that N was not entitled to be brought on record as the heir and legal representative of her deceased husband and that the right to claim partition, being a personal right, did not survive after the death of G.

Held, (1) that by filing a suit for partition, G unequivocally expressed his intention to effect a severance of joint status and acquired merely on the institution of the suit an absolute right as owner in the properties which would fall to his share on partition. On the death of G, without leaving him surviving any son, N was entitled to inherit the separate property of G under the ordinary Hindu law, irrespective of the provisions of the Hindu Women's Right to Property Act, 1937, and enjoyed a Hindu Woman's estate therein;

* First Appeal No. 237 of 1949.