

(1933) 05 BOM CK 0001

Bombay High Court

Case No: None

Sir Hukum Chand

APPELLANT

Vs

Maharaj Bahadur Singh

RESPONDENT

Date of Decision: May 12, 1933**Acts Referred:**

- Limitation Act, 1908 - Article 120, 23
- Specific Relief Act, 1877 - Section 56

Citation: (1933) 35 BOMLR 990 : (1933) 38 LW 307**Hon'ble Judges:** Thankerton, J; Lancelot Sanderson, J; John Wallis, J**Bench:** Full Bench

Judgement

John Wallis, J.

This case is the result of further disputes between the two sects of Jain as to their rights of worship on Parasnath hill. As so much turns on the beliefs now entertained by the whole Jain community with reference to the sacred character of this hill, their Lordships will begin by citing the opening paragraphs of the judgment delivered by Lord Phillimore a few years ago in Maharaj Bahadur Singh v. Seth Hukum Chand (1925) 24 A.L.J. 100 in which this subject is most felicitously dealt with (p. 100) :-

The Jains recognise 24 highly saintly personages-men who have attained salvation or Nirvana, who are called Tirthankars (finders of the ford, across the river of death). These four and twenty are counted in many respects as higher than the gods or some of the gods in the Hindu Pantheon.

Twenty of them are believed to have attained Nirvana in the present cycle of the world's history upon the Hill Parasnath in the district of Hazaribagh in Bengal, with the result that the hill is held in reverence by Jains. The hill itself has some remarkable natural features, and rises into several peaks. Twenty spots apparently marked out by natural features, are believed to be places from which the 20 Tirthankars quitted earth ; and at each of these

spots, a footprint of the Saint is worshipped. There is a small enclosure covered with a cupola, which at the present moment is made of white marble. These spots have been set apart from remote antiquity. The four remaining Tirthankars quitted earth in other parts of India. In respect of them conventional spots have been since the year 1868 set apart and treated in a similar way.

Upon the hill there are also a shrine to a lesser Saint called Gautama Swami, an important temple in one of the highest parts of the mountain-called Jalmandil, certain platforms set apart for religious contemplation and two Dharamsalas or rest-houses for pilgrims. The hill is much frequented by pilgrims, who take the 24 shrines or tonks in regular order, worshipping at each.

According to the tenets of the Digambara, this worship must be performed fasting, and the whole hill is so sacred that from the moment they set foot on it, they must abstain from any office of nature, even spitting.

2. These practices are observed on their pilgrimages by the Svetambaris as well, but the Digambaris in the present case go much further and take up the position that any course of action inconsistent with their due observance, such as the regular and continuous employment of human beings on the hill or the building thereon of dwellings for them, necessarily involves a sacrilegious pollution and desecration of the sacred hill which they have a right to restrain. These are matters for the Jains themselves, and the civil Courts are only concerned with them in so far as they are relevant to questions of civil right such as an alleged interference with the plaintiffs' rights of worship on the hill, and in that case the issue must be, not whether the acts complained of are in accordance with orthodoxy or with previous practice, but whether they do in fact interfere with the plaintiffs' rights of worship.

3. In 1918 the Svetambaris, who have all along been in management of the shrines, acquired by purchase the proprietary rights of the Raja of Palgunj in the hill, and in 1920, not long before the institution of the present suit, they availed themselves of the greater freedom of action so acquired by posting sentries and night watchmen on the top of the hill and by beginning to erect dwellings there for them and for the pujaris and other temple servants in daily employment on the hill, and also dharmasalas or rest houses for the accommodation of the pilgrims. They also proposed to erect a gate at the top of the winding pilgrim way, which, starting from the village of Madhuban at the foot of the hill, provides a six miles ascent to the hill top. This gate the Digambaris alleged was intended to obstruct the Digambaris' access to the hill. These are some of the acts complained of in the present suit, which is a representative one instituted on behalf of the Digambaris against the Svetambaris pursuant to Order I, Rule 8, of the Code of Civil Procedure, and their Lordships will dispose of them in the first instance.

4. In paragraphs 5 and 9 of the plaint the plaintiffs alleged that the entire hill and every stone of it is held sacred and is an object of adoration and worship for both sects of the

Jain community, and that on account of its special sanctity no building for human habitation can be erected on it, and the very idea of such a thing is considered sacrilegious.

5. Defendant No. 1, in paragraph 10 of his written statement, did not admit that the Digambaris regarded every part and parcel of the hill as sacred, and denied that they had any rights in the hill, except as thereafter stated. The ideas of sanctity conveyed in the plaint were highly exaggerated, and the Jain tenets were not opposed to buildings for human habitation on the hill, nor were they regarded as sacrilegious, provided that they were not unconnected with religious purposes. The Subordinate Judge at Ranchi, to which Court the case had been transferred from Hazaribagh, acting mainly on the large body of oral evidence as to the sanctity attached by Jains to the hill, held that it was the endowed or debutter property of the Jain deities thereon, and that the plaintiff Digambaris were entitled to see that the hill-their most sacred Tirth-was kept immaculate and not defiled or desecrated; and he accordingly granted an injunction, with corresponding declaration:), restraining the defendants from posting sentries and night watchmen on the hill or proceeding with the building of the proposed dwellings and dharmasalas, and also from erecting the gate which he found was intended to obstruct the Digambaris' access to the hill.

6. On appeal to the High Court, both the learned Judges, in separate but concurring judgments, reversed this part of the lower Court's decree, holding that the hill was not the debutter property of the Jain deities thereon, but was the property of the Raja of Palgunj, whose title, it is now finally settled by the recent decision of this Board, passed to the Swetambaris by the sale-deed of March 9, 1918. They further held that the acts complained of were not shown to have interfered with the Digambaris' rights of worship of the twenty-one ancient shrines as confirmed to them by the judgment of Lord Phillimore in the case already mentioned, and that the proposed gate was not shown to be intended to obstruct their access to the hill.

7. As regards the question of the hill being debutter property, as pointed out in the High Court judgments, it cannot be said that this issue was very clearly raised in the pleadings, but it has been dealt with by both the lower courts on all available evidence, and, in their Lordships' opinion, it is desirable that it should now be finally decided, so as not to give occasion for further litigation between the two sects. Their Lordships will, therefore, proceed to consider it.

8. The Jain shrines on Parasnath hill are undoubtedly of great antiquity, but very little is known of their past history or as to the time when the now prevailing views as to the sanctity of the whole hill first obtained acceptance. The early work referred to in the argument for the appellants merely extols the superior efficiency of the abishekam or ablution ceremony when performed at the shrines as compared with the same ceremony when performed in ordinary temples. From the 16th to the 18th century, the Jagat Seths, a wealthy and powerful family of bankers at Murshidabad, who belonged to the

Swetambari sect, appear to have maintained the shrines, but on the cession to the East India Company in 1765 they removed to Calcutta.

9. At the decennial settlement in 1790, and afterwards at the permanent settlement, the hill was included in the zemindari of the Raja of Palgunj, which raises a legal presumption that it was his property. During the greater part of last century, the Raja of Palgunj, failing anyone better qualified, bore the expenses of the shrines, and recouped himself by taking a share of the pilgrims' offerings.

10. The hill itself is twenty-five square miles in extent, and rises to a height of nearly 4500 ft. at top of the highest peak. According to the report of Lieut. Beadle, who visited it in 1846, it was covered, except at the very top, by forest trees and by dense jungle infested by wild beasts and was uninhabited by man, the few Santhal hamlets on the lower ranges being apparently overlooked. Since the coming of the British Raj, he said the number of pilgrims had been increasing annually, They were mostly of a wealthier class as compared with the Hindu pilgrims to Jagarnath, but owing to the construction of the Grand Trunk Road, which passes underneath the hill at a distance of 200 miles from Calcutta, he thought it bade fair to become a very popular shrine. The advent of the railway and the construction of sixteen miles of metalled road from the nearest railway station to Madhuban, now make access easy, and pilgrims visit the hill in thousands every year. Otherwise the conditions are not much altered. In 1861, a military sanatorium was opened near the top of the hill, not far from some of the shrines, on a site acquired from the Raja, but was discontinued four years later, A dak bungalow and a branch of the Dublin Mission now occupy the site. In 1876 the Raja granted a permanent lease of 2,000 acres more than half-way up the hill, and abutting on the pilgrims' way, to an English planter named Boddam, who opened a tea plantation there, and there is now another plantation in the same neighbourhood. At the beginning of this century, the Swetambaris began the construction of a large white marble temple over the Parasnath shrine at the top of the highest peak. The Digambaris were strongly opposed to this as affecting the unique and most impressive characteristics of the place, and so it is said to have been the beginning of the quarrel between the two sects about the hill.

11. Their Lordships will now refer as briefly as possible to the evidence which shows, in their opinion, that the Raja's title, which has now passed to the Swetambaris, is unassailable. In the first place, the fact that the Jains are not shown to have taken any objection to the military sanatorium and the tea plantation, both of which, in the light of the evidence in this case, must have been most distasteful to them, tells strongly against their present claim. In a suit filed by the Raja in 1867 against a member of the Swetambari sect, to establish his title to the hill and a share of the offerings, the lower Court found that he was the proprietor of the whole hill except the shrines themselves, but the decree was reversed by the High Court on the ground that the plaintiff had not established any cause of action against the defendant. In 1872, these disputes were settled by an ekrarnama between the Raja and the Swetambari sect by which he undertook, among other things, to grant them land, stones, and timber for any new shrines. This stipulation involved a

clear admission of the Raja's title to the hill.

12. In 1888, in consequence of the action of the lessee of the tea plantation in starting a lard factory which involved the slaughtering of pigs, a thing peculiarly offensive to the Jain religion, the Svetambaris filed a suit against the Raja and the lessee alleging that they were trespassers, and also that the lessee's action was a breach of one of the Raja's covenants in the ekrarnama, of which the lessee had notice when he entered into the lease. In the plaint they claimed title under an alleged ancient grant from the Emperor at "Delhi which has always been rejected whenever put forward, but the case of debutter now set up was distinctly raised by additional issues as to whether the hill was dedicated to the religious purposes of the Jain religion, and as such Vested in, and the property of, the Jain community. These claims of title were examined and rejected in elaborate judgments by the lower Court and the High Court, which held that the property was in the Raja, but that the acts complained of were a breach of an implied restrictive covenant by the Raja in the ekrarnama of which the lessee had notice.

13. In 1900, the Digambaris are found joining with the Raja in successfully suing the Svetambaris for removing certain stairs which they had erected under licence from the Raja. In that suit the Svetambaris merely denied that the hill was the exclusive property of the Raja, and alleged that the plaintiffs had no right to interfere with the pilgrim way, but it was held that the defendants were not entitled to remove the stairs which had become annexed to the soil and were vested in the Raja as owner.

14. In 1903 the Digambaris filed another suit about the new temple which, however, was discontinued. In the plaint it was admitted that the hill was the property of the Raja, subject to the Jains' rights of worship.

15. For the last twenty years the two sects have been engaged in a struggle to acquire the Raja's title for their own sect which has now been finally determined by the judgment of the Board in favour of the Svetambaris.

16. The Subordinate Judge has discounted much of this evidence on the ground that one or other sect was not a party to the particular suit, but it is not a question of res judicata, but of repeated admissions and of the successful assertion of the Raja's title whenever challenged. Nor is there, in their Lordships' opinion, any foundation for the further suggestion that the Jains were not in a position to assert their rights. They are a wealthy community and must have incurred enormous costs in the litigation already mentioned, and in the twenty years' further litigation arising out of their efforts to acquire the Raja's title, whereas in 1903 the Raja was driven to seek relief under the Chota Nagpur Encumbered Estates Act largely owing to the heavy expenses he had already incurred in litigation with them about the hill.

17. The Subordinate Judge has based his finding that the whole hill is the debutter property of the Jains deities on the belief in its sanctity now entertained by both sects. As

observed by Ross J., that evidence undoubtedly establishes beyond a doubt that in the belief of the Jain community a spiritual quality in some way attaches to the hill, but this is a matter of faith and cannot in itself determine the physical ownership of the hill. On this part of the case their Lordships agree with the learned Judges of the High Court that the hill was not, the debutter property of the Jain deities but the property of the Raja.

18. On this basis, the learned Judges rightly proceeded to consider whether the acts complained of interfered with the Digambaris' rights of ownership on the hill. Now eating and drinking, spitting and the offices of nature, and many other things, which are unseemly and irreverent acts in a place of worship, are naturally and properly prohibited in the ancient "Ashatana of Jin temples"; but, as observed by Ross J., \ these rules can only be applied by analogy to a vast expanse like Parasnath hill, and must be subject to reasonable modifications in practice, and this is what is shown by the evidence to have happened.

19. No serious objection seems to have been taken to the military sanatorium while it existed, or to the plantations with their cooly lines lower down, though they involved a complete disregard of these rules. Further, writing in 1846, Lieut. Beadle says that a religious meeting or mela was held on the hill every year for a fortnight in January, and that shopkeepers ascended with grain and other provisions for the wants of the worshippers, and there is evidence that a Hindu mela is still held on the hill every year.

20. In a suit in 1910 it was proved that by immemorial custom the primitive and backward Santhals in the neighbourhood are entitled to hold a hunt on the hill enjoined on them by their religion on one particular day in the year. Eight to sixteen thousand Santhals take part in the hunt, working round the hill and across the pilgrim way, and the day ends with sacrifices to their gods and their annual caste meeting.

21. None of these things, however distasteful, appear to have interfered with the Jains' worship on the hill.

22. The objection to the erection of buildings on the hill seems to have been put forward prominently for the first time by the Digambari pundits in opposition to the erection of the Parasnath temple. According to their teaching as deposed to by some of the witnesses it is an act of ashatana to build a temple on the sacred hill, and it is also an act of ashatana to pull it down or to leave it standing, in the latter case because it involves the daily presence of pujaris on the hill to worship the images in the temple. Even so, it was not attempted to stop the building on this ground in the suit filed in 1903 and afterwards discontinued.

23. Coming now to the acts complained of-Owing to the increase in the number of pilgrims, pujaris and other temple servants have for some time been employed in daily attendance on the hill without objection being taken. Whether spending the night there was allowed or tolerated is a matter of controversy. All that is now proposed is to erect

dwelling for them on the top of the hill instead of requiring them to make the long ascent and descent every day, to build dharmasalas or rest houses for pilgrims, and to station sentries and night watchmen on the hill. Their Lordships agree with the learned Judges that it is not proved that any of these acts will interfere with the Digambaris' rights of worship. As to the proposed gateway, the Courts cannot assume that it will be used to obstruct the Digambaris' rights of access to the hill; if it should be, they will have their remedy. For these reasons their Lordships are of opinion that as to this part of the case the appeal fails.

24. The remaining question as to the alterations in three of the shrines may be dealt with more briefly, as both the lower Courts are in substantial agreement about the facts and have only differed on the question of limitation. The charans in the old shrines were impressions of the footprints of the Saints, each bearing a lotus mark. The Svetambaris, who prefer to worship the feet themselves, have evolved another form of charan not very easy to describe accurately in the absence of models or photographs, which shows toe nails, and must be taken to be a representation of part of the foot. This the Digambaris refuse to worship as being a representation of a detached part of the human body. Both the lower Courts have held that the action of the Svetambaris in placing charans of the description in three of the shrines is a wrong of which the Digambaris are entitled to complain.

25. As regards limitation the Subordinate Judge held on rather insufficient grounds that the acts complained of took place within six years of suit so that this part of the claim could not be barred by Article 120, but he also held that it could not be barred under that Article as it was a continuing wrong, as to which u/s 23 of the Indian Limitation Act a fresh period begins to run at every moment of the day on which the wrong continues. The High Court on the other hand were of opinion that it was not a continuing wrong and that the claim was barred under Article 120. In their Lordships' opinion the Subordinate Judge was right in holding that the acts complained of were a continuing wrong and consequently that this part of the claim is not barred. This question is covered by the decision of this Board in (1881) ILR 6 394 (Privy Council) a case of diverting an artificial water course and cutting off the water supply of the plaintiff's lower lying lands.

26. The fact that there is no period of limitation in suits arising out of continuing wrongs, except as regards actions for compensation which are governed by Article 36, does not, however, conclude the question, because under the law of India declarations and injunctions are discretionary forms of specific relief, and u/s 56 of the Specific Relief Act, the Court may refuse to grant an injunction if the plaintiff by acquiescence or other conduct has disentitled himself to such relief. No such case, however, was made in the lower Courts, and no sufficient cause has been shown for refusing to grant the reliefs prayed for as to this part of the case.

27. Lastly, it is not disputed that, in so far it strikes out declaration (iv) in the Subordinate Judge's decree and the direction as to the form of charan to be placed in two other

shrines, the High Court's decree is not in accordance with their judgment.

28. In the result their Lordships will humbly advise His Majesty that this appeal ought to be allowed in part, and the decree of the High Court varied, (a) by deleting therefrom the directions which strike out from the decree of the Subordinate Judge (1) declaration (iv), and (2) his direction requiring the defendants to remove from the tonks of Padam Prabhu, Sri Abhinandan Nathji and Dharam Nath the new charans placed by them therein and to put in these three tonks as well as the tonks of Sri Subudhinath and Sri Chandra Prabhu footprints as had originally been there, and (b) by setting aside the direction as to costs. In other respects the decree of the High Court ought to be affirmed. As regards costs, their Lordships think that justice will be done by ordering the appellants to pay two-thirds of the respondents' costs incurred in both Courts below and two-thirds of their costs of this appeal. For this purpose the direction as to costs of the Subordinate Judge should also be set aside, and any costs already paid under the orders of the Courts below will have to be adjusted to bring about the result arrived at.