BOMBAY HIGH COURT

Syedna Taher Saifuddin

Vs.

Tyebbhai Moosaji Koicha

O.C.J. Appeal No. 43 of 1952

(Chagla, C.J. and Bhagwati J)

20.08.1952

JUDGMENT

Chagla, C.J.

1. This appeal arises ou1 of a suit filed by the plaintiff for a declaration that two orders of excommunication passed by defendant 1, who is the Head Priest of the Dawoodi Bohra Community, on 28-2-1934, and 28-4-1948, were void, illegal and of no effect, and also claiming damages from defendant 1.

2. The matter came before Shah, J. who raised two preliminary issues. The plaintiff's contention was that the excommunication was bad in view of the Bombay Prevention of Excommunication Act (Bom Act 42 of 1949), having come into operation on 1-11-1949. The contention of defendant 1 on that was that inasmuch as the orders of excommunication were passed prior to 1-11-1949, the Act had no application, and also that the Act was ultra vires inasmuch as it contravened certain provisions of the Constitution. The learned Judge, therefore, raised two issues, whether the Act was ultra vires and the other was whether the Act was retrospective. The learned Judge's findings on both the issues were against defendant 1. He held that the Act applied and also that the Act was not ultra vires. It is from these two findings that this appeal is preferred, and the first question that arises is as to the operation of the Act.

3. In order to understand the contention of defendant 1, it is necessary to consider the object of the Legislature in passing this legislation and the language used by the Legislature in giving effect to its intention and object. The Act is described as an Act to prohibit excommunication in the Province of Bombay, and in the Preamble it draws attention to the practice prevailing in certain communities of excommunicating its members, and it points out that the practice of excommunication results in the deprivation of legitimate right and privileges of the members of the communities. Then the Preamble emphasizes the spirit of changing times and points out that

it is expedient to stop the practice of excommunication in the public interest. Therefore, this is the object as set out by the Legislature itself with which this legislation was passed.

4. Section 2 is the defining section, and it defines "community" as a group, the members of which are connected together by reason of the fact that by birth, conversion or the performance of any religious rite they belong to the same religion or religious creed and includes a caste or sub-caste. "Excommunication" is defined as the expulsion of a person from any community of which he is a member depriving him of rights and privileges which are legally enforceable by a suit of civil nature by him or on his behalf as such member, and the Explanation states what are the rights and privileges to which reference is made in the definition of "excommunication" and the rights and privileges are those which are legally enforceable by a suit of civil nature, and the Explanation points out what rights will be included in this expression "rights and privileges", and some of the rights mentioned are the right to office or property or to worship in any religious place or a right of burial or cremation; and Section 3 provides that notwithstanding anything contained in any law, custom or usage for the time being", in force, to the contrary, no excommunication of a member of any community shall be valid and shall be of any effect. Then Section 4 is the penal section, and that section penalizes any person who does any act which amounts to or is in furtherance of the excommunication of any member of a community.

5. Now, the contention of Mr. Banaji on behalf of defendant 1 is that, looking to the language of the Act, it is clear that the mischief aimed at by the Legislature was orders of excommunication or acts of expelling a member from a community and the Legislature wanted to suppress this particular mischief and therefore it provided that after the Act came into force no order of excommunication or no act of expulsion shall be passed or done by any person whatsoever. Mr. Banaji says that it was not the intention of the Legislature in any way to affect orders of excommunication which had already been passed prior to 1-11-1949. Mr. Banaji emphasizes the language used in the Act in the various parts. He points out that the very title of the Act is to prohibit excommunication and the very word "prohibit" implies that what is aimed at is something to be done in the future; and for that purpose reliance is placed on a decision of the Privy Council in Punjab Province y. Daulat Singh, AIR 1946 PC 66 (a). In that case the Privy Council was considering the expression "prohibit" used in sub-S.(2) (a) of Section 298, Government of India Act, 1935, and their Lordships construed "prohibit" as meaning the forbidding of a transaction, and expressed the opinion that such a direction was appropriate only in respect of transactions to take place subsequently to the date of the direction, and that the expression could not include an attempt to reopen or set aside transactions already completed or to vacate titles already acquired. Mr. Banaji is quite right that if the intention of the Legislature was to prevent a particular act or a particular transaction, then the very language used by the Legislature could only apply to acts or transactions in the future. It could not possibly apply to acts or transactions in the past. But, as we shall presently point out, it was not the intention of the Legislature merely to prevent a particular act or transaction.

6. Mr. Banaji has also relied on Maxwell at P.222, where the learned author emphasises the fact that no rule of construction is more firmly established than this: that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment.

7. Then Mr. Banaji also emphasizes the fact that in the definition of the expression "excommunication" the Legislature had advisedly used the present tense when it refers to the expulsion of a person from any community of which he is a member, and Mr. Banaji says that this could not apply to a case of a person who was a member of the community prior to his expulsion or excommunication and ceased to be a member thereafter. Emphasis is also placed on the language of Section 3, and Mr. Banaji says that the Legislature does not invalidate the excommunications which had already taken place, but by Section 3 all excommunications which might take place after 1-11-1949, were made invalid and of no effect. In short, Mr. Banaji says that this is not an Act to declare excommunications which had already taken place as void or invalid but this is an Act to prohibit excommunications which may take place in the future. Section 4 is also pointed out as making it clear that penalty is imposed upon any act done which amounts to or is in furtherance of the excommunication of any member of a community, and it is said that such an act can only be committed in the future in order to attract the penalty laid down in Section 4.

8. In our opinion, the whole approach of Mr. Banaji to this piece of legislation is not correct. This is not a case of considering whether the Act is retrospective or not. This is a case where the-only question that arises is a proper construction of the language used by the Legislature.

9. Mr. Khandalawala who appears for defendant 1 does not contend that the Act is retrospective. He accepts the contention of Mr. Banaji that we should construe the Act by the normal canons of construction and hold that it is prospective. But even so, according to Mr. Khandalawala, the rights of the plaintiff are amply protected under the Act and even without invalidating the two-orders of excommunication which were passed prior to 1-11-1949, the Legislature has taken pains to protect the legal rights of the plaintiff as a member of the community of Dawoodi Bohras.

10. The real question that we have to consider, is what was the mischief that the Legislature intended to suppress, because it is clear that the Act we are considering is a remedial measure, and it is well settled that the Courts should give full effect to a remedial measure to the extent that the language used by the Legislature is capable of extending the remedy to the mischief which the Legislature had in mind. The Federal Court cited with approval the observations in Gover's case, (1875) 1 Ch.D. 182 (B)), (p.198):

> "... if the enactment be manifestly intended to be remedial, it must be so construed as to

give the most complete remedy which the phraseology will permit." (See *In re The Hindu Women's Rights to Property Act*[1],

It is clear that the mischief that the Legislature wanted to suppress was the mischief of a member of a community being deprived of his legitimate rights and privileges by the act of excommunication or expulsion. 'Community" as has been; pointed out, has been very widely defined in the Act. Birth, conversion or the performance of any religious rite are all factors which go to constitute a community, and, therefore, when a member belongs to a community, he does not cease to be a member of that community merely by the act of expulsion or excommunication, but what the act of expulsion or excommunication does is to deprive him of certain rights and privileges, and the Legislature felt that in the spirit of

[1] AIR 1941 FC 72 (77)

changing times it was not proper that any member of any community should be deprived of his rights and privileges. Further, it is an error to read the expression "excommunication" used in the Act as the act of turning out a person from a community or society, or the decision regarding excommunication. The expression "excommunication" has a much wider implication, and the implication a that excommunication does not merely refer to the point of time when the person is expelled from a community but it refers to a continuing state during which the member of a community is deprived of his rights and privileges. Therefore, in the context of this Act, "excommunication" means the condition of being expelled, and "in reference to a member of a community" means the continuing state during which he is deprived of his rights and privileges.

11. If this be the true meaning of the expression "excommunication", then it is clear that although the Act may be prospective, it still protects the rights of members of the community although by an order of excommunication or by decision with regard to excommunication they might have been expelled from the community long before the Act came into force. Therefore, in this context, the Act to prohibit excommunication means an Act to prohibit the deprivation of the rights and privileges of a member of a community, and when the Preamble talks of it being expedient to stop the practice, the practice which is referred to is not the practice of the act of expulsion or the order of excommunication, but the practice by which a member of a community is deprived of his rights and privileges; and when we turn to the definition of "excommunication" itself, the present tense is used, and the expression "excommunication" means the expulsion of a person from any community of which he is a member, because the Legislature did not contemplate that the person who was expelled or excommunicated ceased to be a member of a community within the meaning of the expression used in the Act.

12. In this light, Section 3 also becomes perfectly clear. No excommunication shall be valid and shall be of any effect in the sense that after 1-11-1949, the consequences of excommunication or expulsion, which consequences are the deprivation of the rights and privileges, will no longer have any effect. In considering the consequences in this way, we are not giving any retrospective

effect to Section 3, because the Legislalure does not declare invalid the act of excommunication or the act of expulsion when it was made. What it renders invalid and what it makes of no effect are the consequences of excommunication or expulsion which continue after 1-11-1949. Therefore, , although in law a member of a community might have been validly excommunicated prior to 1-11-1949, as soon as the Act came into force he could no longer be deprived of his rights and privileges of being a member of a particular community and he can claim these rights and privileges; notwithstanding the fact that he had, some time in the past, been excommunicated or expelled.

13. There is an instructive case to which reference is made in Craies on Statute, at p.365, and that is a case of The *Queen v. Vine*[2]*, (d).* There 33 and 34 vic. C.29, Section 14 (e), came for interpretation and that section enacted that "every person convicted of felony shall be for ever disqualified from selling spirits by retail." The Court held that that section applied to a person who, after having been so convicted had obtained a license to

[2](1875) 10 QB 195

sell spirits, and was actually holding it at the time when the Act came into force, and the Court came to that conclusion on the ground that the intention of the Act was construed to be to protect the public from having inns kept by persons of bad character although this might have a retrospective effect. Now, it is clear that the conclusion of the English Court can also be justified on the ground that the person who had obtained a licence continued to sell liquor after the passing of the Act and thereby contravened the penal section, inasmuch as the Legislature intended that inns should not be allowed to be kept by persons of bad character, and therefore from one point of view of the matter the Act may be looked at as having a retrospective effect, but in another view, it can be stated that the Act had a prospective effect inasmuch as the Act was applied to a set of circumstances which prevailed after the Act came into force.

14. There is also another judgment on which Mr. Khandalawala has relied which is also very instructive, and that is The *Queen v. Inhabitants of St. Mary Whitechapel*[3]*,* In that case a pauper was residing in certain parish with her husband and the husband died before the passing of Statute 9 A 10 Vic. c. 66. The parish obtained an order for her removal. The Court held that by reason of the Statute she was irremovable till she had resided for the period laid down in the Statute, because by the section in question though it was prospective as to the removal contemplated, it might be construed retrospectively as to the conditions under which removal should or should not be lawful. Lord Denman, C.J. in his judgment points out (p.127) :

> "... It was said that the operation of the statute was confined to persons who had become widows after the Act passed, and that the presumption against a retrospective statute being intended supported this construction: but we have before shown that the statute is in its direct operation prospective, as it relates to future removals only, and that it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing."

Similarly here, merely because a part of the requisite for the operation of the statute is drawn from an act that happened antecedent to the passing of the Act, it does not lead to the conclusion that the Act is retrospective. In its direct operation, to use the language of Lord Denman, C.J., it is prospective and its direct operation is to safeguard the rights and privileges of a member of a community against an act of excommunication or expulsion.

15. Mr. Banaji says that the Legislature only wished to deal with acts of expulsion or excommunication which took place after the passing of the Act and it did not wish to interfere with the rights which had accrued or liabilities which had been incurred prior to the passing of the Act. Therefore, Mr. Banaji asks us not to read the Act in a manner which would affect the rights and liabilities which had already been crystallized. It is difficult for us to believe that the Legislature functioning in the year 1949 merely thought of safeguarding the rights and privileges of members of communities who would be expelled or excommunicated after the date on which the Act came into force, and that the Legislature was oblivious of the hardship of those who bad already been excommunicated or expelled. It is difficult to understand the principle why the Legislature should protect the rights and privileges only of those who would be expelled or excommunicated in the

[3](1848) 12 QB. 120 (e)

future and not the rights and privileges of those who had already been expelled or excommunicated and who continued to be expelled or excommunicated and continued to be deprived of their rights and privileges. As we said before, it is the duty of the Court to give full scope to a remedial legislation. In our opinion, we will not be giving full scope to this legislation if we confined its operation to the case of only those persons who might be excommunicated or expelled after the Act came into force. If in patting this interpretation we are making this Act retrospective, we would certainly not do so. But, as we pointed out, we are not giving retrospective effect to the Act but we are giving it only prospective effect and even so, the result of giving that interpretation is that rights and privileges of members of communities who have been expelled or excommunicated before the Act came into force are saved and safeguarded.

16. Therefore with respect, while we agree with the learned Judge below in the final decision at which he has arrived, we have come to the same conclusion by a different process of reasoning. We do not agree with him that the Act is retrospective, but we agree with him on the construction of the Act that it does apply to the case of the plaintiff inasmuch as he complains of being deprived of his rights and privileges after 1-11-1949.

17. The other question raised in this appeal is the constitutionality of this Act. The first contention is that the Act is ultra vires because the Provincial Legislature was not competent to enact it. This contention is based on the argument that under the Government of India Act in the Lists appended to sch.7 the subject of excommunication is not mentioned either in the Provincial

or in the Concurrent List. This question is directly covered by an authority of this Court in *Emperor v. Kalidas Amtharavi*[4] In that case a Division Bench of this Court was considering the validity of the Bombay Harijan (Removal of Social Disabilities) Act, and we held that it was valid and that the Legislature was competent to enact it because the impugned legislation fell clearly in item 1 of List in which is the Concurrent List, and at p.102 it was observed in the judgment:

> "... Now, reading this statute as a whole, it is clear that it was the view of the Legislature that social disabilities from which the Harijans suffer should be removed. According to the Legislature, anyone who was privy to the continuance of these social disabilities should be punished, and the Legislature also took the view that the only way that the Harijans' status and position could be improved was by punishing those who continued to inflict disabilities upon Harijaus."

Therefore, in passing that Act what the Legislature has done is for the removal of the disabilities of the Harijans it has created a new offence. Similarly here the object that the Legislature had was social reform and the social reform contemplated was to prevent the practice of throwing people out- of their community and depriving them of their rights and privileges; and here, as in the Harijan Act, the Legislature lias created a new offence by Section 4 by penalizing all those who do any act which amounts to, or in furtherance of, excommunication of any member of a community. The Legislature thought, as it thought in the case of the Harijan Act, that it was difficult to bring about this social reform without punishing those who came in the way of that reform. Therefore, on the same line of reasoning, it is clear that Act 42 of 1949 is valid and that the Legislature,

[4] AIR 1949 Bom 168(f)

under the Government of India Act, was competent to enact this legislation.

18. Then it is contended that the Act is ultra vires because it contravenes ArtS.25 and 26 of the Constitution. With regard to Article 25, we had to consider a similar question in *State of Bombay v. Narasu Appa Mali*[5]*, (g).* What was challenged in that case was the Bombay Prevention of Hindu Bigamous Marriages Act, and Article 25 was also relied upon in that case. We held in that case that in considering Article 25 a sharp distinction must be drawn between religious faith and belief and religious practices .What the State protects is religious faith and belief. If religious practices run counter to public order, morality, health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole. Here also, our view is that the right to excommunicate a member of a community is not part of religious faith and belief. At best, it can only be a religious practice, and if in the opinion of the Legislature such a religious practice runs counter to public order, morality, health or a policy of social welfare upon which the State has embarked, then the religious practice must give way and the legislation must prevail against the practice. Mr. Banaji says that in that case Article 26 was not relied upon, and according to him, even though we may be bound

by that decision, he is in a position to distinguish this case because the present case falls under Article 2G and that article was not before us when we delivered the judgment in that case. Now, turning to Article 26, it provides :

> "Subject to public order, morality and health, every religious denomination or any section thereof shall have the right - (and what is relied upon is Sub-Clause (b) which states) - to manage its own affairs in matters of religion . . ."

Mr. Banaji says that this right of a religious denomination is not made subject to social reform. It is only subject to public order, morality and health, and therefore so long as a religious denomination manages its own affairs in matters of religion, and that management is not interfering with public order, morality and health, the Legislature cannot interfere with the rights of the religious denomination. Now, the question is what exactly is the meaning of the expression "managing its own affairs in matters of religion." Does it mean that the religious denomination can manage its own affairs in such a manner as to deprive a member of that denomination of his legal rights and privileges? Surely, that cannot be the meaning to be given to the language used in the Constitution. To manage its own affairs in matters of religion can only mean that in domestic matters of a religious denomination, where those matters are concerned with questions of religion, the Legislature cannot interfere unless the denomination is managing its affairs in such a way as to interfere with public order, morality and health. But when a religious denomination seeks to deprive a member of his legal rights and privileges, it is doing much more than managing its own affairs. It is interfering with the rights of its members, and the Constitution has not protected a religious denomination and has not given its imprimatur to the acts of a religious denomination which deprives its members of their legal rights and privileges. Farther, it does not seem to us that when a religious denomination claims a right to expel or excommunicate a member, it is managing its own affairs in matters of religion. Religion has nothing whatever to do with the right of excommunication or expulsion. As we have said earlier while referring to Article 25, it is more a question of religious practice than a matter of religious faith or belief, and the distinction between

[5] AIR 1952 Bom 81

religious practice and religion is sharp and clear. Religion is a matter of a man's faith and belief. It is a matter concerning a man's contact with his creator. It has nothing whatever to do with the manner in which a practice is accepted or adopted as forming part of a particular religion or faith. Therefore, in our opinion, the defendant cannot claim the right conferred upon a religious denomination under Article 26 to manage its own affairs in matters of religion in order to put forward the claim of excommunicating or expelling its members and; thus depriving them of the rights and privileges which attach to the membership of that denomination.

19. Mr. Banaji has relied upon a decision of the Privy Council in *Hasanali v. Mansoorali*[6], in order to draw our attention to what the Privy Council thought of the rights of Dai-ul-Mutlaq to excommunicate members of the Dawoodi Bohra community. Now, the Privy Council was

considering the powers of excommunication that the Dai-ul-Mutlaq possessed, and it was also considering how and under what circumstances that power can be exercised. We are not concerned with that question at all. We will assume that Dai-ul-Mutlaq has the power to excommunicate. But the question is whether he can claim the exercise of that power against a legislation validly passed on the ground that the Constitution protects his power of excommunication. The Privy Council were not called upon, as obviously they could not, to consider that question. Therefore, the Privy Council decision in no way prevents us from coming to the conclusion that we have come to on this head of Mr. Banaji's argument.

20. There is one thing which we should like to mention, and that is that in the judgment of the learned Judge there'is a reference to the possible defense that Mr. Banaji might take to the plaintiff's action, and the defense suggested is the apostasy of the plaintiff. It may be argued that if the plaintiff has become an apostate, then no question arises of his being in the community and no question can also arise of his rights and privileges being protected. Mr. Banaji states at the bar that he has never suggested that the plaintiff is an apostate and therefore he does not want to take up that point when the matter goes down to the learned Judge for final disposal of this suit.

21. The result, therefore, will be that the appeal fails and must be dismissed with costs.

22. Mr. Banaji says that ho wants to consider whether he should apply for leave to appeal to the Supreme Court and, therefore, ho does not want the suit to be placed on the board of the learned Judge for disposal for a fortnight. Suit not to be placed on the learned Judge's board for a fortnight.

23. Per Curiam. - The learned Judge has not dealt with the costs of these two preliminary issues. We direct that these costs should be dealt with by the learned Judge below.
Appeal dismissed.
[6] AIR 1948 PC 66 (h)