31,1971

No. 10 of 1971

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF CEYLON

BETWEEN

C. SUNTHARALINGAM — Appellant

AND

THE INSPECTOR OF POLICE
KANKESANTURAL — Respondent

RESPONDENTS CASE

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal, by Special Leave, from a Judgment of the Supreme Court of Ceylon (H.N.G. Fernando C.J.,), dated the 13th May, 1969, dismissing an appeal against the Judgment of the Magistrate's Court of Mallakam, dated the 19th October, 1968, whereby the Appellant was convicted of an offence under Section 2 of the Prevention of Social Disabilities Act No. 21 of 1957 read with Section 3 (b) of the same Act and sentenced to pay a fine of Rs.50/-. pp.35-39 pp.23-31

The offence of the Appellant (a Hindu by religion) consisted in his preventing one Murugesu Sinniah (also a Hindu by religion but, socially, of a lower caste) from entering the inner court-yard of the Maviddapuram Temple (hereinafter called "the Temple") for the purpose of worshipping in the manner of those Hindus who, being of a higher caste, are normally admitted to the said inner court-yard.

2. The principal questions for determination on this appeal are :-

RECORD

(A) Whether or not Section 2 of the Prevention of Social Disabilities Act No. 21 of 1957 (hereinafter referred to as "the 1957 Act") read with Section 3 (b) of the same Act contravenes Section 29 (2) (a) and (d) of the Ceylon (Constitution) Order in Council (C.379) (hereinafter referred to as "the Constitution") and is therefore, to the extent of any such contravention, void

(B) Whether or not Section 4 of the Tesawalamai Regulation (C.63) (hereinafter called "the Regulation"), which provides for the decision of questions relating to the customary rights and privileges of the higher castes, can be so interpreted and applied as to defeat the provisions of Section 2 read with Section 3 (b) of the 1957 Act which were enacted expressly for the prevention of the imposition of social disabilities on any persons by reason of their caste.

3. Statutory provisions relevant to the subject matter of this appeal are as follows :-

" THE CEYLON (CONSTITUTION) ORDER IN COUNCIL

(C. 379) (" the Constitution")

"29. (1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island.

(2) No such law shall -

Not argued below

(a) prohibit or restrict the free exercise of any religion or ....

(d) alter the constitution of any religious body except with the consent of the governing authority of that body, so, however, that in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body .

.....

(3) Any law made in contravention of Sub-section (2) of this Section shall, to the extent of such contravention, be void"

THE PREVENTION OF SOCIAL DISABILITIES ACT No. 21 OF 1957 ("the 1957 Act").

"An Act to prevent the imposition of Social disabilities on any persons by reason of their caste.

"2. Any person who imposes any social disability on any other person by reason of such other person's caste shall be guilty of an offence and shall, on conviction after summary trial before a Magistrate, be liable to imprisonment of either description for a term not exceeding six months or to a fine not exceeding one hundred rupees.

"3. For the purpose of Section 2, a person shall be deemed to impose a social disability on any other person -

"(a) if he prevents or obstructs such other person from or in -

"(i) being admitted as a student to, or being employed as a teacher in, any educational institution .....

"(b) if he prevents or obstructs such person, being the follower of any religion, from or in entering, being present at or worshipping at any place of worship to which followers of that religion have access ....."

THE TESAWALAMAI REGULATION (C.63)

"2. The Tesawalamai, or customs of the Malabar inhabitants of the province of Jaffna, as collected by order of Governor Simmons, in 1706, shall be considered to be in full force.

RECORD

"4. All questions that relate to those rights and privileges which subsist in the said province between the higher castes, particularly the Vellales, on the one hand, and the lower castes, particularly the Covias, Nalluas and Palluas, on the other, shall be decided according to the said customs and the ancient usages of the province."

4. On the 2nd October, 1968, the Appellant was charged in the Magistrate's Court of Mallakam, under Sections 2 and 3 (b) of the 1957 Act (see paragraph 3 hereof), as follows :-

pp. 3-4

"You are hereby charged that you did within the jurisdiction of the Court at MAWIDDAPURAM KANDASAMY TEMPLE on the 1st July, 1968, prevent or obstruct by reason of the caste of a certain MURUGESU SINNIAH of MADDUVIL NORTH CHAVAKACHCHERI a follower of the Hindu Religion from entering the inner court-yard of the above Temple, which inner court-yard is a place of worship to which the followers of the Hindu Religion have access, and have thus imposed a Social Disability on the said MURUGESU SINNIAH and have thus committed an offence punishable under Section 2 of the Prevention of Social Disabilities Act No. 21 of 1957 read with Section 3 (b) of the said Act."

The Appellant pleaded Not Guilty.

5. At the trial both sides produced evidence on questions of fact. There is now no subatantial dispute as to the occurrence of these facts.

pp.16-21
pp.19-20
p.24, l.31

The Appellant gave evidence on his own behalf. He admitted that he had prevented the said Murugesu Sinniah from entering the inner court-yard of the said Temple because of his caste.

Ex. D6
pp. 52-53

He produced a written authority from the High Priest of the Temple (Ex. D6) which empowered him to do so. The High Priest, in his testimony, as to the said authority, supported the Appellant. The Appellant, while admitting that he had prevented the said Murugesu Sinniah from entering the inner court-yard, said that in doing so he had not used any force and the learned Magistrate found that this was so.

p. 31
ll. 6-29

RECORD

6. By his Judgment, dated the 19th October, 1968, the learned Magistrate found that the charge against the Appellant had been proved. As stated in paragraph 1 hereof, he convicted the Appellant and sentenced him to pay a fine of Rs.50/-. pp.23-31

7. Against the Judgment of the learned Magistrate and his conviction and sentence thereby the Appellant appealed to the Supreme Court of Ceylon on the various grounds stated in his Petition of Appeal, dated the 19th October, 1968. pp.32-34

8. The appeal in the Supreme Court was heard by H.N.G. Fernando C.J. who, by his Judgment, dated the 13th May, 1969, dismissed the appeal pp.35-39

9. At his trial before the Magistrate, at the hearing of his appeal in the Supreme Court, and at the ex parte hearing of his Petition for Special Leave before the Board the Appellant's main arguments were to the following effect :- Petition for Special Leave paras 8 to 13

(A) The provisions of the 1957 Act are not, in the circumstances of this case, applicable. Those circumstances call only for the application of Section 4 of the Regulation which, on a true interpretation, must be regarded as having preserved the customary rights and privileges of the higher castes of those who professed the Hindu religion, inclusive of their right to prohibit Hindus of the lower castes (to one of which the said Murugesu Sinniah belonged) from entering places of worship in a temple open only to Hindus of the higher castes. pp.27,28 pp.37,38

(B) The Regulation is a special law inasmuch as it is restricted in the area of its operation (the Northern Province of Ceylon) is applicable only to certain specified sections of the inhabitants therein, and because it relates to "custom and ancient usage". pp.37-39

The 1957 Act, on the other hand, is, in its scope, aims and area of application, a general law, and it follows, therefore,

RECORD

that it cannot affect the Regulation for generalia specialibus non derogant

p.30
p.36

(C) If Section 3 (b) of the 1957 Act can be so construed and applied as to enable interference with the authority of the governing body of a temple, without the consent of that body, as to places in the temple allocated to certain castes for purposes of worship then this should be regarded as being an authority to alter the constitution of a religious body and the said Section 3 (b) is therefore void under Section 29 (3) of the Constitution being a contravention of Section 29 (2) (d) thereof.

p.36

(D) If Section 3 (b) of the 1957 Act can be so construed, and applied, as to compel the governing authority of the Temple to permit the entry of persons of the lower castes of those who follow the Hindu religion into the Temple's inner court-yard for purposes of worship notwithstanding custom and usage to the contrary then, because of the changes in worship it would cause, it would contravene Section 29 (2) (a) (d) of the Constitution. There would be an interference with the free exercise of the Hindu religion as practised by those who, by reason of custom and ancient usage, were normally permitted within the inner court-yard of the Temple for purposes of worship, might lead to a possible stoppage of religious worship and ceremonies, and might even lead to a closing down of the Temple itself. This point - as to the free exercise of the Hindu religion - although included in the Petition for Special Leave does not appear to have been taken in the Courts below.

pp. 37-38

(E) In Sevvanthinathan v. Nagalingam (1960) 69 N.L.R. 419, T.S. Fernando J. had rightly said that Sections 2 and 3 of the 1957 Act do not confer on the followers of any religion any new rights of entering a

place of worship but only penalise the prevention or obstruction of existing rights and no offence therefore could have been committed in the present case.

10. The learned Magistrate, in his Reasoned Judgment, dated the 19th October, 1968, reviewed the facts before him and stated his findings thereon. As mentioned already there is now no serious dispute as to these findings. His views on the questions of law raised before him by the Appellant (see paragraph 9 hereof) are however in serious dispute, and on these questions he expressed himself thus :-

"It is quite clear that by ancient usage recognised and validated by the Tesawalamai Regulation the people of the lower castes had no right of entry into a Hindu temple and had to content themselves by worshipping from outside. This, to my mind, was the law before the promulgation of the Prevention of Disabilities Act No. 21 of 1957 ..... p.27, ll.16-23

"The Prevention of Social Disabilities Act has not repealed expressly the customs and ancient usages, which have the force of law, referred to in Section 4 of the Tesawalamai Regulation. p.27, l.33 to p.28, l.5

"The only question that has now to be decided is whether the Prevention of Social Disabilities had repealed the said custom and ancient usage by implication, or whether both can exist side by side."

For reasons that he gave the learned Magistrate was clear that under section 3 (b) of the 1957 Act it was now an offence to prevent or obstruct, on the ground of caste, a follower of any religion from having access to any place of worship to which followers of that religion of a higher caste have access. p.28 l.24 to p.29, l.4

11. Continuing, the learned Magistrate said :-

"I also find that this Act No. 21 of 1957, p.29, ll.15-17.

RECORD

had been enacted to prevent the imposition of social disability on any persons by reason of their caste. Hence it would indeed be unreasonable to presume that the legislature intended to re-affirm the custom of an imposition of a social disability on persons by reason of their caste, in the very Act that was specially enacted to prevent the imposition of such social disability. The least one would have expected was for the legislation to have been silent on the customs as regards temples and not deal with it at all in that Act.

p.29, ll.17 -22 "I therefore hold that the words 'worshipping at any place of worship to which followers of that religion have access' mean uninterrupted ingress to the normal places of worship permitted to all votaries alike irrespective of any distinction of caste."

12. On the subject of the implied repeal of Section 4 of the Regulation by the 1957 Act,

p.29, ll. 38-45 the learned Magistrate, said that the 1957 Act had "replaced by necessary implication Section 4 ..... which recognised as law, the customs of the people of the lower caste worshipping in Hindu temples from outside the temple and not entering into the inner court-yard of the temple for the purpose of worshipping". He held,

p.30 ll. 1-6 therefore, that "so much of the custom and ancient usage which had the force of law and which prohibited a person by reason of his caste from entering the inner court-yard of the Hindu Temple, was repealed by the provisions of the Prevention of Social Disabilities Act." The learned Magistrate referred to, but did not accept, the Appellant's argument that Section

p.30 ll. 13-26 3 (b) of the 1957 Act, under which he was prosecuted, could, if necessary, be so applied as to alter the constitution of a religious body without that body's consent and must therefore be regarded as invalid being in contravention of Section 29 (2) (d) of the Constitution (see paragraph 3 hereof). The learned Magistrate held that the 1957 Act "does not seek to alter the constitution of any religious body" and there could be no contravention, therefore, of

Section 29 (2) (d) of the Constitution.

13. In dismissing the appeal from the Magistrate's Court the learned Chief Justice of the Supreme Court (H.N.G. Fernando C.J.) expressed views similar to those of the learned Magistrate. In his Judgment, dated the 13th May, 1969, he referred to, but rejected, the Appellant's argument that "the Act of 1957 in purporting to penalise the prevention of the entry of persons of low caste into this Temple, has the consequence that its operation can prevent the High Priest from performing poojahs" /religious worship/ "in this Temple, and that it is thus a law which alters the constitution of a religious body; not having been passed with the consent of the governing body, this law offended the provisions of Section 29 (2) (d) of the Constitution of Ceylon and was therefore void" p.36 ll. 21-33

The learned Chief Justice said :-

> "I agree with the learned Magistrate in rejecting this argument. Even if all the 'facts' on which the Appellant's argument is based be correct, the question whether some person may or may not enter, or be prevented from entering, premises controlled by a religious body, is not one which relates to the 'constitution' of that body. Section 29 (2) (d) of the Constitution of Ceylon would, in my opinion, apply only to a law which purports to alter the mode by which a religious body is elected, appointed or otherwise set up, or to commit any power or function of such a body to some other person, or to change the principles governing the relationship inter se of members of the body." p.36, l.33 to p.37, l.1

14. The learned Chief Justice rejected also the Appellant's arguments based on Section 4 of the Regulation (see paragraph 9 (B) hereof). He referred to the Appellant's argument that the custom or ancient usage in the Northern Province that certain lower caste followers of the Hindu religion were not permitted entry p.37, ll. 17-23

into or beyond the inner court-yards of certain temples (including the Temple in the present case) was a "special law" relating to temple entry and this "special law" was not superseded by the 1957 Act - for *generalia specialibus non derogant*. In rejecting this argument the learned Chief Justice said :-

p.37 ll.23-34

> "The simple answer to this argument is that the Act contains several provisions directly intended to afford to persons of all castes the freedom to enter places of several specified descriptions; these provisions thus constitute a special law which prohibits the obstruction of the entry of persons into such places on the ground of their caste. Even therefore if Section 4 of the Tesawalamai can be regarded as a special law regulating Temple entry, the later special law contained in the Act must prevail over the former."

15. As to the *obiter dictum* of T.S. Fernando J. in his Judgment in *Servvanthinathan v. Nagalingam* (1960) 69 N.L.R. 419 (to the effect that Sections 2 and 3 of the 1957 Act do not confer on the followers of any religion any new right to enter, or be present in, or worship, at any place of worship, but merely penalise the prevention or obstruction of the exercise of a right which was an existing right at the time when the Act became law) the learned Chief Justice said:

p.38; ll.20-37

> "I am unable to agree with the very narrow construction which was given to the Act in the cited case. Let me consider the first of the 'rights' in respect of which the Act prohibits discrimination on the ground of caste, namely the admission of a student to a school" /see paragraph 3 hereof/. "If admission is refused on the ground of the student's caste, there is nothing whatsoever in the Act which even by implication can permit the school management to plead, as a defence to a charge under the Act, that students of that caste were excluded from that school before the Act was passed. Nor is there anything in the Act from which

it may be implied that in such a case the prosecution must establish that students of the complainant's caste had prior to the Act enjoyed a right of admission to the School .....

"The judgment in the 69 N.L.R. case appears to regard the Act of 1957 as having been intended merely to prevent the imposition of 'new' social disabilities; if that be the intention, then the Act has achieved nothing in practice, for, in my understanding, the social evil arising from distinctions of caste in this country at the present time is only that undemocratic and anti-social forms of discrimination still persist in some areas and communities despite popular opposition to such discrimination. I must prefer the construction, plainly appearing from the Act, that Parliament did intend to prevent forms of discrimination which prevailed in the past". p.39 ll. 8-21

16. Against the said Judgment of the Supreme Court this appeal to Her Majesty in Council is now preferred, Special Leave to Appeal having been granted to the Appellant by Order in Council dated the 5th April, 1971. pp.39-41

The Respondent respectfully submits that the appeal should be dismissed, with costs, for the following among other

R E A S O N S

1. BECAUSE the Appellant having, admittedly, on the ground of caste, prevented or obstructed the said Sinniah Murugesu from entering the inner court-yard of the said Temple for the purpose of worshipping, was rightly charged, found guilty, convicted and sentenced under Section 2 read with Section 3 (b) of the 1957 Act no part of which can reasonably be said to be invalid.

2. BECAUSE if Section 4 of the Regulation can be so interpreted and applied as to enable, on the ground of caste, the obstruction or prevention of a follower of the Hindu religion

from worshipping in a place in a Hindu temple reserved for Hindus belonging to the higher castes (e.g. the inner court-yard in the present case) then it must be considered to be ineffective, having been impliedly repealed by the 1957 Act.

3. BECAUSE caste among followers of the Hindu religion is merely an ancient social institution prepetuating social disabilities without the express sanction or approval of the Hindu religion or of modern Hindu thought which social institution it was the express and legitimate object of the 1957 Act to suppress.

4. BECAUSE both the Regulation and the 1957 Act are special laws and if they are in conflict with each other then the Act - enacted nearly 250 years later - must supersede the Regulation.

5. BECAUSE the maxim generalia specialibus non derogant does not apply in the circumstances of this case.

6. BECAUSE it cannot, on any reasonable interpretation of Sections 2 and 3 of the 1957 Act and of Section 29 of the Constitution, be said that the said Sections 2 and 3 of the Act contravene the Constitution and are, therefore, invalid.

7. BECAUSE the 1957 Act cannot, on any reasonable interpretation thereof, be said to prohibit or restrict the free exercise of the Hindu religion, or, expressly or impliedly, alter the constitution of any Hindu religious body.

8. BECAUSE in any event the Appellant cannot now for the first time take the point that the impugned 1957 Act contravenes Section 29 (2) (a) of the Constitution on the allegation that it prohibits or restricts the free exercise of the Hindu religion on which point the Board has not the advantage of being acquainted with the views of the Courts below.

9. BECAUSE for reasons stated therein the Judgments of Both Courts below are right and ought to be affirmed.

R.K. HANDOO

No. 10 of 1971

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ON APPEAL

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BETWEEN: -

C. SUNTHARALINGAM Appellant

AND

THE INSPECTOR OF POLICE,
KANKESANTURAL Respondent

CASE FOR THE RESPONDENT

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