

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.**

APPEAL NO.256 OF 2010
IN
ORIGINATING SUMMONS NO.1909 OF 2009
IN
SUIT NO.3091 OF 2009
WITH
CHAMBER SUMMONS NO.854 & 1728 OF 2010

Jamsheed Kanga & Anr.

...Appellants.

Versus

Parsi Panchayat Funds and
Properties and Ors.

...Respondents.

.....

Mr. I.M.Chagla, Senior Advocate with Mr.F.E.Devitre, Senior Advocate with Mr.Jimmy Avasia and Ms.Yugandhara Khanwilkar i/b. M/s.Dastur Dadhich & Kalambi for the Appellants.

Mr.R.A.Dada, Senior Advocate with Mr.Percy Ghandy i/b. M/s.Try Legal for the Respondents.

Mr.E.P.Bharucha, Senior Advocate with Mr.Karl Tamboly i/b. Kartikeya & Asso. for Intervenor.

Mr.N.G.Thakkar, Senior Advocate with Mr.R.G.Seth i/b. R.G.Seth & Co. for Intervenor.

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**CORAM : DR. D.Y. CHANDRACHUD AND
ANOOP V.MOHTA, JJ.**

March 11, 2011.

JUDGMENT (PER DR. D.Y. CHANDRACHUD, J.) :

The genesis of the dispute:

The Appellants, who are members of the Parsi Zoroastrian community residing in Mumbai moved the Court in an

Originating Summons for the determination of questions relating to the powers/authority of the trustees of the Parsi Panchayat's funds and properties; the rights of the beneficiaries under a Deed of Trust of 1884; and for the proper administration of the Trust. The cause for instituting the proceedings is a ban imposed by the present trustees on two Parsi Zoroastrian Priests, Mr.Framroze Mirza and Mr.Khushroo Madon, from performing prayers or religious ceremonies at Doongerwadi (the Towers of Silence) and at two Agiaries (Fire Temples) which are vested in the Trust. The Agiaries in question are the Godavara Agiary at Fort and the S.F Jokhi Agiary at Godrej Baug, Malabar Hill, Mumbai. The ban has been imposed on the two priests, as a result of certain ceremonies conducted by them, which according to the trustees, are "irreligious", these being (i) praying for the dead who were cremated; (ii) performing Navjote ceremonies of children of Parsi women married to non-Parsi spouses; and (iii) performing marriage ceremonies according to Zoroastrian rituals of any Parsi marrying a non-Parsi. The ceremonies have not been conducted either within the premises of the Towers of Silence or the two Fire Temples. The Trust is impleaded as the First Defendant, while the

trustees are Defendant Nos.2 to 8.

2. On 9 June 2009, a resolution was passed by the trustees.

The text of the resolution is as follows:

“Consideration to prevent renegade Priest from performing religious prayers at Doongerwadi, and, also in two Fire Temples under our control, namely Godavara Agiary and Godrej Baug Agiary.

Trustee Mr.Khojeste Mistree informed the Board that recently, Mr.Framroze Mirza and Mr.Khushroo Madon, who perform unreligious ceremonies like praying for the dead, who were cremated, and perform Navjote ceremonies of children of Parsi girls married to non-Parsi Husbands, and perform marriage ceremonies as per Zoroastrian rituals of any one Parsi marrying a non-Parsi spouse were found to be performing Paldast Ceremonies at our Doongerwadi premises. He further reminded the Board that High Priest Dasturji Dr.Kaikhushru M.Jamasp Asa had earlier informed the Trustees of all Religious Institutions like Agiarys, Atash Behrams and Doongerwadi to boycott the services of these two renegade mobeds, who also advertise their services in the Parsi Press. Ch.Exec. Mr.M.P. Colah, informed the Board of Trustees that such instructions were issued to the Panthaki of Godavara Agiary and Godrej Baug Agiary, which were under our control and also the Manager of Doongerwadi, in late 1990. However, with the passage of time, the said instructions must have been diluted, and hence, such a lapse may have occurred at our Doongerwadi premises.

The Board instructed the Administration to once again remind the staff at the Doongerwadi that no

prayers should be undertaken by Mr.Framroze Mirza and Mr.Khushroo Madon. The said instructions should also be given to Panthakis of both the Agiarys under our control."

3. On 11 September 2009, a notice was put up that the two priests should at no point of time be permitted to perform obsequial ceremonies at Doongerwadi. Moreover, if any other priests were found to follow in the footsteps of the two priests, it was stated that similar action would be taken against them as well.

4. The Second Plaintiff protested against the ban imposed on the two priests and made an impassioned plea for harmony, in place of dissension, in the community:

"All persons, including Dasturjis, can have beliefs of their own. In this case, Dasturji Madon's personal beliefs are in fact shared by many like-minded Zoroastrians today, including many residing abroad. Can we not agree to disagree on certain beliefs and lie in peace and harmony with each other? Do we, as an enlightened community, wish to be accused of functioning through "fatwas" and edicts?

The time has come to encourage our youngsters to practice the faith. Many of our youth today think for themselves and are not as easily influenced by our elders

as we were when we were children. They are in fact being turned away from the religion by the dogmas and prejudices that they see around them.”

5. On 27 August 2009, a letter was addressed by five High Priests to the trustees commending the decision which was taken by the trustees in the following terms :

“We are pleased to learn that the new BPP Board has recently issued a directive in conformity with our earlier guidelines, whereby we have repeatedly said, that our good and upright mobed sahebs should not become hamsharik with renegade priests who encourage wrong religious practices such as cremation, and/or do the conversions of non-Zoroastrians. The imposition of a ban therefore, on Ervads Khushroo Madan and Faramroze Mirza (who continue to offer their services for performing after-death ceremonies for those who opt for cremation, in Mumbai, and who facilitate the conversion of non-Zoroastrians by performing Navjotes of juddins), should be strictly implemented by the BPP board. The BPP trustees have taken the right steps in preventing them from performing any priestly rituals/prayers at our sacred Doongerwadi complex, including any ceremonies at the sagdi.

The apex body of our community, in our opinion, should under no circumstances be seen to be giving any form of legitimacy or acceptance to these renegade priests, whose actions are impacting our religion and community negatively. This timely action taken by the BPP board will strengthen the religion, as it will also serve as a deterrent to other priests, who may also seek to break away from our time-tested traditions.”

The letter states that once initiated to priesthood every priest must follow the custom and tradition of the faith. Priests who perform ceremonies for those “who have wrongly chosen the cremation route where *dokhmenishini* is available, are by their very actions”, it is stated, weakening the religious traditions of the faith.

The Originating Summons : Issues for determination:

6. The foundation on which the Appellants moved an Originating Summons was their contention that the trustees do not have the authority or power under the Deed of Trust or otherwise in law to prevent a Parsi Zoroastrian Priest from performing Zoroastrian rites and ceremonies in the premises of the Trust on the ground that the trustees believe that the two priests had performed ceremonies which were regarded as irreligious. According to the Appellants, the trustees are not vested with the power or authority under the Deed of Trust to dictate on religious matters and are not competent to declare the ceremonies which were performed by the two priests as irreligious. Their powers, according to the Appellants, are restricted by the Deed of Trust to

financial and administrative management of the properties held in trust. Every Parsi Zoroastrian has – in the submission of the Appellants - an absolute right to choose any duly ordained Parsi Zoroastrian priest to perform prayers, rites and ceremonies for them at Doongerwadi and at the two Agiaries and the trustees have no power to fetter the freedom and choice of the members of the community who are beneficiaries under the Deed of Trust. A duly ordained Parsi Zoroastrian priest cannot, it is contended, be restrained from performing religious prayers or ceremonies at Doongerwadi or at the two Agiaries and the personal views of certain priests on the purported ban imposed by the trustees is extraneous to the construction of the Deed of Trust. The Appellants have relied on the circumstance that obsequial ceremonies performed for Parsi Zoroastrians who have died in places other than Mumbai and whose corpses are disposed of other than under the *dokhma* system are not considered irreligious. The ceremonies performed in Mumbai, including at Doongerwadi, for such Parsi Zoroastrians are not considered irreligious, nor are the priests who perform those ceremonies either in Mumbai or elsewhere banned.

7. On this foundation, the Appellants sought a determination of the following questions as a matter of interpretation of the Deed of Trust of 1884:

“(a) Whether under the Trust Deed the Trustees are entitled to prevent any duly ordained Parsi Zoroastrian Priest from performing Zoroastrian religious rites and ceremonies in the premises of the Doongerwadi and the said two Agiaries?

(b) Whether the Trust Deed empowers the Trustees to restrict Parsi Zoroastrians in their choice of a duly ordained Parsi Zoroastrian Priest to conduct Zoroastrian religious prayers and ceremonies at the Doongerwadi and the said two Agiaries?

(c) Whether the purported ban on the said Framroze Mirza and the said Khushroo Madon, was within the power and authority of the Trustees under the Trust Deed?

(d) Whether the Plaintiffs are entitled to an order and direction of this Hon'ble Court that the Trustees of Defendant No.1 forthwith abstain from any action pursuant to the said purported ban or in the implementation thereof, and to forthwith remove all notices, and withdraw all instructions, in relation to the said purported ban?”

The defence of the Trustees:

8. In the Written Statement filed by the Respondents, the

maintainability of the Originating Summons was questioned on the ground that it raises issues which are purely of a religious nature relating to the religious tenets, customs, traditions and beliefs of the Parsi Zoroastrian community. The resolution of the trustees is, according to the Respondents, valid because the two priests were found to be engaging in activities which militate against the tenets of the Parsi Zoroastrian religion which have been observed over the millenia. Besides these activities, it has been highlighted that in a recent incident, six High Priests (Vada Dastoorjis) have regarded as heresy, the conduct of Mr. Khushroo Madon, who had sought to initiate a Russian National into the Zoroastrian priesthood by performing the Barashnum Navar ceremony. The Respondents contend that as the Apex body of the Parsi Zoroastrian Community in the World and as the custodians of a 3500 year old religion, traditions, customs and beliefs, they cannot stand by while the tenets of the faith are undermined by the two priests who perform "irreligious rites and ceremonies" which militate against the tenets of the Zoroastrian religion. The Settlers of the Trust donated the property at Doongerwadi for the purposes of establishing the *dokhmenishini* system of the disposal of the dead in Mumbai. The

Settlers, it is submitted, could never have intended that priests who perform religious ceremonies for persons who have chosen a method of disposal other than the traditional or who seek to convert persons to Zoroastrianism should be allowed to perform religious ceremonies at Doongerwadi or at the Agiaries. The two priests, it is urged, have not chosen to challenge the action of the Trust. By setting up the belief in cremation as an efficacious mode of disposal of the dead, the priests are alleged to have acted contrary to the basic tenets of the faith. The maintainability of the Originating Summons is questioned on the ground that complicated issues of fact or law cannot be adjudicated by the Court in those proceedings. The Written Statement emphasized the sacred position ascribed in the tenets of the faith to the *dokhmenishini* system. The properties at Doongerwadi and at the Agiaries were settled, it is urged, specifically for the disposal of the dead bodies in the traditional form. Fire in the Zoroastrian faith is the seventh creation of Ahura Mazda and is worshipped and venerated. That according to the Respondents, is the reason why cremation is contrary to the basic religious tenets of the faith. The importance of the traditional system is emphasized in the judgment

of a Division Bench of this Court in **Sir Dinsha Manekji Petit vs. Sir Jamsetji Jijibhai**.¹ According to the Respondents, the governing body of Parsi Zoroastrian Priests, namely, Athornan Mandal has consistently over last hundred years reiterated that no Parsi Zoroastrian Priests should convert a person who is not a Parsi Zoroastrian and that no Parsi Zoroastrian Priest should take part in any funeral ceremony of a Parsi Zoroastrian who adopts any other method for the disposal of a dead body in a city or town where the *Dokhma* is available. The two priests in question, are alleged to have been defrocked by their respective dioceses or panths.

The decision of the Single Judge:

9. The Learned Single Judge by a judgment dated 5 March 2010 held that the issues before the Court would involve an interpretation of what are the religious ceremonies which are required to be performed in the properties of the Trust. The Learned Single Judge noted that according to the Appellants, on the one hand, the two priests had not performed any irreligious ceremony, firstly because cremation is not completely banned by

¹ (1909) 33 ILR Bom.509

the faith and secondly because conversion also was not an irreligious practice. According to the Plaintiffs, the trustees were only custodians of the property and did not have any authority to take a decision in ecclesiastical matters. On the other hand, the trustees claim that it is their bounden duty to maintain the property of the Trust and that religious practices are performed in a form and manner that is acceptable to the faith. According to the trustees, the high priests declared that the actions of the two priests were not religious. The Learned Single Judge came to the conclusion that it was not possible for the Court to decide the issue merely on an interpretation of the Deed of Trust, particularly having regard to the context and circumstances in which a decision on the questions formulated in the Originating Summons would arise. Sufficient material, according to the Court, was brought on record by the Defendants to indicate that the high priests had deprecated the practice followed by the two priests and the claim of the Plaintiffs that the conduct was not irreligious has been challenged. The Originating Summons was accordingly dismissed, but liberty has been granted to the Appellants to institute appropriate proceedings for the relief claimed.

Submissions:

10. Counsel appearing on behalf of the Appellants submits that the only question which arises in the Originating Summons relates to the interpretation of the Trust Deed. The Appellants are Parsi Zoroastrians and the priests, who have been excluded are Parsi Zoroastrians who have been duly ordained. The Appellants assert that every Parsi Zoroastrian who is a beneficiary has the right to get the rites and rituals of the Parsi Zoroastrian faith performed at the Towers of Silence. The submission of the Appellants is that: (i) Under the Deed of Trust of 1884, secular powers have been given to the trustees as custodians of the funds and immovable properties belonging to the Trust; (ii) Though prior to the execution of the Deed of Trust in 1884 the trustees could decide social, religious and matrimonial disputes, upon the execution of the Trust the trustees are only custodians of the funds and immovable properties belonging to the Trust; (iii) An absolute right is conferred upon every member of the Parsi Community to perform religious rites and ceremonies himself if he is able to do so or to have those ceremonies performed by a duly ordained Parsi

Zoroastrian priest of his choice; (iv) A duly ordained Parsi Zoroastrian Priest has an absolute right to perform religious rites and ceremonies at the Towers of Silence and such a Priest cannot be obstructed from entering upon the Towers of Silence. The Trust Deed postulates that the Towers of Silence are to be utilized for the exposure of the dead according to the religious rites and ceremonies of the Zoroastrian faith. The use of the expression "permit and suffer" in the Trust deed contemplates a duty on the part of the trustees and a corresponding right in every member of the community; (v) The administration of a religious trust is a secular activity. The Trust Deed alone controls the powers and duties of the trustees. The trustees have only secular duties, but no religious functions and they have no right to exclude a priest for acts done outside the premises of the Towers of Silence.

11. On the other hand, it has been urged on behalf of the Respondents that; (i) The appeal is not maintainable under Clause 15 of the Letters Patent against the judgment of the Learned Single Judge dismissing the Originating Summons since the order has not determined any right claimed by the Appellants; (ii) Relief in

Originating Summons is not a remedy of right; (iii) Complicated questions of law or seriously disputed questions of fact cannot be resolved in an Originating Summons. The issues which are required to be decided are: (a) Whether the dispute raised by the Appellants is of a civil nature or of a religious nature; (b) Whether the Appellants can insist on the admission of any priest into the Fire Temple or Towers of Silence; (c) Whether the Appellants can insist on bringing in two priests who have been declared as unfit for conducting prayers by the orders to which they belong; (d) Whether the two priests had performed any irreligious ceremony; (e) Whether the Appellants are correct in asserting that the high priests have no authority to declare the two priests as being unfit to perform their prayers; (iv) The properties are vested in the trustees for a religious purpose, namely, the exposure of dead in accordance with the tenets of the Parsi Zoroastrian faith. In the course of the administration of the Trust, the trustees are bound in law to act in accordance with the Parsi Zoroastrian religion and the right to regulate and control the entry of a priest vests with the trustees since the Trust relates to the Agiaries and the Towers of Silence. The trustees are entitled to rely on authoritative interpretation of

the Zoroastrian religious tenets given by high priests whose views are being traditionally accepted by the Parsi Zoroastrians; (v) The discretionary order of the Learned Single Judge directing the Appellants to a suit, should not be interfered in an appeal; (vi) The Appellants are against the system of *dokhmenishini* which is regarded as sacred to the Zoroastrian faith and an overwhelming majority of the community favoured the system which the trustees are seeking to protect; (vii) The Appellants do not have a right to bring a priest of their choice to conduct prayers at the Towers of Silence or the two Agiaries; (viii) Neither of the two priests had taken any steps to challenge the resolution. One of them, Mr. Mirza, had stated on affidavit that he does not intend to challenge the resolution of the Trustees. The other Priest has also not challenged the decision in any legal forum; (ix) The two priests have defied the oath which was taken by them at the time of the initiation ceremony. In sum and substance, it has been urged that the Trustees have a sacred duty to protect the sanctity of the Towers of Silence and the Agiaries and not to allow any person who is regarded as unfit to conduct prayers. The Settlers could never have intended that the priests who are carrying on irreligious

ceremonies should be allowed to perform religious rites and ceremonies at the Towers of Silence or at the two Agiaries.

12. Counsel appearing on behalf of the Intervenor on both sides have supported the submissions which have been urged, as the case may be, by the Appellants or on behalf of the trustees. Submissions have been advanced before the Court by the Learned Senior Counsel on both the sides not only on the question of the maintainability of the Originating Summons, but also on the merits of the issues which fell for determination in the proceedings. Since the Learned Counsel have urged arguments on both the aspects, we have proceeded in this judgment to deal with the matter comprehensively. Both the Learned Counsel have addressed the Court at length on the merits of the rival cases with a view to enabling the Court to answer the issues which have arisen.

Originating Summons under the High Court Rules:

13. Chapter XVII of the Bombay High Court (Original Side) Rules, provides for Originating Summons. In so far as it is material to the controversy in this case, Rule 238 postulates that

the trustees under any deed or instrument and any person claiming to be interested in the relief sought as beneficiary under the trusts of any deed or instrument, may apply for the issue of an Originating Summons for such relief of the nature or kind specified and as the circumstances of the case may require, involving the determination inter alia of one of the following questions or matters: (i) Any question affecting the rights or interest of the person claiming to be beneficiary (clause (a)); (ii) The ascertainment of any class of beneficiaries (clause (b)); (iii) The furnishing of accounts by the trustees (clause c)); (iv) The payment into Court of any moneys in the hands of trustees (clause (d)); (v) Directing the trustees to do or abstain from doing any particular act in their character as such trustees (clause e)); (vi) The approval of any sale, purchase, compromise or other transaction (clause f)); and (vii) The determination of any question arising in the administration of the trust (clause g)).

14. Under Rule 246, the Court is not bound to determine any such question of construction if in its opinion, it ought not to be determined on an Originating Summons. Rule 249 postulates that

the person entitled to apply for an Originating Summons has to present to the Prothonotary a plaint without a prayer setting forth concisely the facts upon which the relief sought by the Summons is founded. The Originating Summons has to be in Form 23. It has to specify the relief and must be signed by the Prothonotary before being issued. Under Rule 253, a Written Statement or affidavit may be made in answer to the Plaint, but there is no obligation to do so until the Court otherwise directs. Under Rule 254, the Judge is empowered to order the summons to be supported by such evidence as he thinks necessary and to give directions as he may think just for the trial of any questions arising therefrom. Under Rule 255, the Judge is empowered if he considers the matter in which relief is sought cannot conveniently and properly be disposed of on an Originating Summons to refuse to pass any order on the summons, to dismiss the same and to refer the parties to a suit in the ordinary course. Rule 258 provides that if the Judge is of the opinion that the matter is fit to be dealt with on an Originating Summons, "he may pronounce such judgment as the nature of the case shall require", and any order made by him shall be drawn up as a decree of the Court. The Judge is empowered by

Rule 259 to give any directions touching the carriage or execution of such decree or the service thereof upon the persons not parties, as he may think fit.

15. A beneficiary under a Deed of Trust is entitled in law to institute an Originating Summons for the determination of any question affecting the rights or interests of persons claiming to be beneficiaries. In the action which emanates from an Originating Summons, the applicant may seek a direction to the trustees to do or abstain from doing any particular act in their character as trustees. The jurisdiction of the Court is discretionary, for if the Court is of the view that the matter in respect of which relief is sought cannot conveniently and properly be disposed of on an Originating Summons, the Judge may decline to pass an order on the summons and refer parties to a suit. Where the Court is of the view that the matter is fit to be dealt with on an Originating Summons, it is vested with a broad jurisdiction to pronounce such judgment as the nature of the case shall require. The order made by the Judge is drawn up as a decree and the Court is empowered to issue directions touching the carriage or the execution of the

decree.

Precedent:

16. In **Vithaldas Cursondas vs. Dulsukhbhai Vadilal**,² Mr. Justice Pratt, speaking for this Court held that “the Rules do not forbid questions of fact being determined on an Originating Summons and this form of action is not always inappropriate whenever there is a question of fact in dispute”. But, ruled the Court, the procedure of an Originating Summons should not be applied “where the disputed facts are of such complexity as to involve a considerable amount of oral evidence”. In **Rama Aziz vs. Balkrishna K. Mehta**,³ Mr. Justice B.N. Srikrishna (as the Learned Judge then was) held that the Court while exercising power in an Originating Summons, “is not determining a lis”. The Court does not adjudicate upon the rights and liabilities of parties. In **Lyla Darius Jehangir vs. Bakhtawar Lentin**,⁴ a Division Bench of this Court presided over by Mr. Justice R.M. Lodha (as the Learned Judge then was) affirmed the principles which were formulated in the judgments of the Learned Single Judges both in

² 1919 (21) BLR 972

³ 1993 (1) Bom.C.R. 267

⁴ 2007 (1) Bom.C.R. 915

Vithaldas Cursondas and in **Rama Aziz Parpia**. The basic principle which must guide the Court in such cases has been explained with felicity in the judgment of Chief Justice M.C. Chagla, speaking for a Division Bench in **Mazda Theatres Ltd. vs. Gordhandas Tribhuvandas Mangaldas**.⁵ The Learned Chief Justice held that the only two questions which are required are that there must be a written instrument and what should be required to be done by the Court is the declaration of the rights of the person interested under the written instrument. Holding that the rules providing for the issuance of an Originating Summons must be “very broadly and liberally interpreted”, Chagla, C.J. held as follows :

“The right contemplated by that rule is any right, and the whole object of that rule is to make a procedure available to parties which is both cheap and expeditious for determination of disputes as to construction of a written instrument, which dispute could be settled by the Court interpreting the instrument and determining what the rights of the parties are. One would have thought that r. 241 was precisely intended to cover a case like this where a lessor and a lessee are disputing their mutual rights and the question of those rights can be determined effectively and finally by the Court construing the relevant provision of the lease and deciding what the rights of the parties are. It is perhaps not necessary to point out that our rule is based on the English r.1 of

5 1954 B.L.R. 1080

O.LIVA, and the view consistently taken by the English Courts that the word "instrument" used in the rule was meant to receive a wide construction and applied to any written document under which any right or liability whether legal or equitable, existed; and there are innumerable cases in the books where a lease has been construed and the rights of the lessor and the lessee determined."

The view of the Learned Single Judge that he had no jurisdiction to entertain the Originating Summons was consequently reversed.

The Trust Deed of 1884:

17. The Appellants before the Court seek a determination in an Originating Summons, of a question affecting the rights or interests of the beneficiaries of the Trust. The Appellants are Parsi Zoroastrians residing in Mumbai and as beneficiaries of the Deed or instrument of Trust, they seek a determination of such a question. The Court in an Originating Summons is called upon to interpret the Deed of Trust. The General Trust Deed of 25 September 1884 governs inter alia the immovable property of the Parsi Panchayat. The recitals show that prior to the execution of the Deed, the Parsi Panchayat was vested with the function to

decide social, religious and matrimonial disputes between members of the community:

“WHEREAS for very many years the management of the social and religious affairs and the settlement of religious, matrimonial and other social disputes of, and between, Parsees in Bombay were entrusted by the Community to a Panchayet or Committee selected from amongst the most influential or leading members of the said community.”

The next recital provides that the Panchayat also acted and was recognized as the custodian and manager of the property given from time to time for religious, benevolent and other purposes. The Deed then states that on 28 November 1823, four members of the Panchayat came to be elected as trustees or custodians of all the funds and immovable properties given for religious and benevolent purposes. The trustees thereupon were constituted as such as trustees for the funds and immovable properties of the Panchayat:

“WHEREAS the said four Trustees were and their successors have been usually styled or known as the “Trustees of the Parsee Panchayet” but are more correctly styled “the Trustees of the Funds and immovable property of the Parsee Panchayet.”

The recital records that since 1823 movable and immovable property of a considerable value had been given by the members of the Parsi community for religious, benevolent and other purposes and objects. Together with the property which was purchased by the trustees, these properties have been duly vested in the custody and under the management of the trustees of the funds and immovable properties of the Parsi Panchayat. Consequently, the Trust Deed states that :

“WHEREAS the said Trustees (parties hereto of the Fifth part) are now the Trustees of all the funds and immovable property of the said Parsee Panchayet and all the monies, securities, lands and other movable and immovable property so from time to time given and purchased and placed under the management of the Trustees of the Parsee Panchayet in manner last aforesaid, or the investments of the same, are now in their joint possession or under their joint control.”

The recitals of the Trust Deed make a reference to the land which was dedicated for the purpose of the Towers of Silence from time to time and for the use upon dedication at the *dokhma*:

“WHEREAS the said lands so from time to time enclosed within the said wall as aforesaid are now and for many years past have been commonly called or known in Bombay as the “Parsee Towers of Silence” or the “compound of the Parsee Towers of Silence” AND

WHEREAS that portion of the said compound which was enclosed by the said Mody Heerjibhoy Vachangandhee in manner aforesaid has been in the uninterrupted and undisputed possession of the Member or Trustees of the said Parsee Punchayet as the custodians and managers thereof for a period the precise duration of which cannot now be ascertained but which at any rate exceeds two hundred years AND WHEREAS the remaining portions of the said compound have in the uninterrupted and undisputed possession of the Members or Trustees of the said Parsee Punchayet as the custodians or managers thereof ever since the dates of their respective enclosure hereinbefore mentioned and from the several dates aforesaid the said lands have been and are now used by the whole Parsee community of Bombay as a place for the exposure of their dead and for the performance of other rites and ceremonies."

Under the Deed of Trust, the lands and buildings, more particularly described in the First Schedule and the right, title and interest therein is vested in the trustees :

"For the trusts intents and purposes and with under and subject to the powers provisos conditions and agreements hereinafter expressed and declared of and concerning the same respectively."

The Second Schedule to the Trust Deed enunciated the powers, provisos, conditions and declaration subject to which the properties have been so dedicated to the Trust. Among them, the most

significant is the following :

“First upon trust from time to time and at all times for ever hereafter to permit and suffer the said piece or parcel of land and the several Towers buildings and erections thereon standing and being first described in the said first Schedule hereto to be used and frequented as heretofore by every member of the Parsee Community professing the Zoroastrian religion as a place for exposure of the dead and for the performance of religious rites and ceremonies.”

The Second Schedule to the Deed of Trust, therefore, mandates that the properties settled in Trust must be permitted and suffered to be used and frequented as before by every member of the Parsi Community professing the Zoroastrian religion as a place for exposure of the dead and for the performance of religious rites and ceremonies.

18. The Trust Deed plainly makes three things abundantly clear. Firstly, prior to the execution of the Deed of Trust, the trustees of the Parsi Panchayat were endowed with the authority of managing social and religious affairs and/or settling religious, matrimonial and other social disputes between the members of the Parsi Community in Mumbai. Secondly, the position of the trustees

of the Parsi Panchayat underwent a transformation upon the execution of the Deed of Trust. At any rate, upon the execution of the Deed of Trust on 25 September 1884, the trustees of the Panchayat became trustees of the funds and immovable properties of the Panchayat. The role of the trustees became divorced from the resolution of religious, social and matrimonial disputes. The trustees assumed a secular character. Thirdly, the purpose of the dedication of the properties for the Towers of Silence was that those properties be used as a matter of right by every member of the Parsi Community professing the Zoroastrian religion as a place for the exposure of the dead and for the purpose of religious rites and ceremonies. An obligation was cast upon the trustees to permit and suffer the use of the properties for that purpose. The expression "permit and suffer" recognizes a right in the beneficiaries of the Trust, who are members of the Parsi Zoroastrian Community to utilize the properties for the purpose for which they were dedicated. The right finds a corresponding obligation in the Trustees to permit and suffer the use of the dedicated properties. Enabling provisions are thereupon made, empowering the trustees to keep the properties in good repair. In

contrast, the dedication of the properties for the Towers of Silence is mandatory and imperative. A right is recognized in absolute terms in every member of the Parsi Community, who professes the Zoroastrian religion to be able to utilize the Towers of Silence as a place for exposure of the dead and for the purpose of religious rites and ceremonies. The Deed of Trust is couched in language of width and amplitude. The Towers of Silence constitute a sacred element in Zoroastrian faith. The Settlers of the Trust, therefore, contemplated the dedication of the Towers of Silence as a facility for the exposure of the dead of every member of the Parsi Community professing the Zoroastrian faith. The trustees have not been conferred with the power to exclude. Advisedly, the Settlers conferred an entitlement upon every member of the Parsi community professing the Zoroastrian faith as a matter of an important religious purpose. The lack of an exclusionary provision is, in fact, emphasized elsewhere in the Deed of Trust as well. The Deed recognizes that a particular Chotra is used for the exposure of dead bodies of persons alleged but not satisfactorily proved to have professed the Parsi religion; as well as for the exposure of the dead bodies of Parsis, who had suffered capital punishment and for

the exposure of the dead bodies of Parsi female prostitutes and their children. Exclusion is not something which the Settlers contemplated in the Deed of Trust.

The judgments of 1908 and 1925:

19. This case requires on analysis of two seminal judgments one which emanates from a Division Bench of this Court in 1908 and the other from the Privy Council in 1925. In **Sir Dinsha Manekji Petit vs. Sir Jamsetji Jijibhai**,⁶ the issue which fell for determination before the Division Bench was, whether a person born in another faith and subsequently converted to Zoroastrianism and admitted into that religion is entitled to the benefit of the religious institutions and funds and in the possession of the trustees of the Parsi Panchayat. The facts of the case are lucidly summed up in the following passage of the judgment of the Privy Council subsequently in **Saklat vs. Bella**:⁷

“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

⁶ I.L.R. 33 Bombay 509 (equal to 11 Bom.L.R. 85)

⁷ 1925 (28) BLR 161

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."

Two judgments were delivered by the Judges constituting the Division Bench – Mr. Justice Davar and Mr. Justice Beaman. The litigation as Justice Davar noted was for the French wife of the Sixth Plaintiff with whom was "brought in another Rajput lady". Evidence was adduced in the suit. Justice Davar observed that the Zoroastrian religion permits the conversion of persons belonging to other faiths to the Zoroastrian faith. However, Zoroastrians since their advent into India had not attempted to convert others to the faith. Davar, J. held thus :

"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 1,200 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.

.....

V. - That, although conversion is permissible by the religion, there are certain conditions which the candidate must fulfill before becoming eligible for admission. The conditions are that it must first be satisfactorily established that he or she, in applying for admission, is animated by a good object and actuated by pure intentions, in other words, that he or she seeks admission from religious convictions and not from other considerations ; and further, that the candidate is in all other respects fit to be admitted to the Zoroastrian faith."

The Learned Judge held that while "a Juddin may become a Zoroastrian such a person could not possibly have been within the contemplation of the donors and founders who established the Trust in 1884". Consequently, where a person who professes any religion is converted to the Zoroastrian faith, she or he would not be entitled to the benefit of the funds and institutions which were endowed only for the Parsi community:

"For the reasons I have recorded above, I come to the conclusion that even if an entire alien – a Juddin – is duly admitted into the Zoroastrian religion after satisfying all conditions and undergoing all necessary

ceremonies he or she would not, as a matter of right, be entitled to the use and benefits of the Funds and Institutions now under the defendants' management and control; that these were founded and endowed only for the members of the Parsi community; and that the Parsi community consists of Parsis who are descended from the original Persian emigrants, and who are born of both Zoroastrian parents, and who profess the Zoroastrian religion, the Iranies from Persia professing the Zoroastrian religion, who come to India, either temporarily or permanently, and the children of Parsi fathers by alien mothers who have been duly and properly admitted into the religion."

Both Mr. Justice Davar and Mr. Justice Beaman in his concurring opinion acknowledged that the Zoroastrian religion does permit proselytisation. Justice Beaman, however, spoke of a "negative custom" which developed in India not to convert persons belonging to other faiths to the Zoroastrian faith. Evidence was adduced before the Division Bench on the issues which arose for adjudication. Justice Beaman adverted at length to the Ravayats which were answers sent by the heads of the Zoroastrian community in Persia to questions put to them on points of religious dogma, ritual and so forth by Bombay Parsis. As Justice Beaman observed:

"Both questions and answers show, with unmistakable

clearness, that the question of making converts, - both in the abstract, as a general question, and, more concretely, as to why were fit and proper to be made converts and how they ought to be made - was very much alive over the whole period to which we need confine our investigations. It is true that the Ravayats may not command much respect. That is not the point. The point is that questions were put by pious men about conversion, and answers were received from the heads of the official hierarchy in Persia, which most certainly did not deny that conversions could or ought to be made. ... But it is undeniable that, rightly or wrongly, they, as well as the recipients of the Ravayats, were fully alive to the possibility of conversions; and, with certain reservations of a secular rather than a religious kind, were quite ready to sanction and approve them. In the face of all this evidence, it is idle for the defendants to contend today that the idea of conversion, although an integral part of their revealed and accepted religion, had fallen so completely into disuse, that no member of the Bombay Parsi or Zoroastrian community could ever have dreamed of regarding it as a practical and living question."

Justice Beaman concurred with Justice Davar in holding that "it was not the intention of the founders of these Trusts to extend their benefits to any one who was not in the most rigid caste sense a Parsi, that is, born into the community of the Indian Zoroastrians and born of an Indian Zoroastrian father."

20. The importance of the judgment of the Division Bench

principally lies in the fact that a detailed consideration came to be devoted by the Court both upon the question as to whether the Zoroastrian religion does permit proselytisation (which was answered in the affirmative), and to the question why as a matter of custom, conversion had not taken place since the advent of the Zoroastrians into India and the basis of holding that the funds and properties which were bestowed and endowed for the benefits of the Parsi Zoroastrians could be availed of only by Parsis who are descended from the original Persian emigrants and who are born of both Zoroastrian parents and the children of Parsi fathers by alien mothers who had been duly and properly admitted into the religion.

21. While reading the judgment of the Division Bench, it is necessary to understand that the decision came in the context of a milieu which prevailed in 1908. The judges of the Division Bench wrote before the advent of the Constitution. The impact of constitutional rights including in particular, the right to the free exercise of religion under Article 25 could not have been in contemplation of the Learned Judges who wrote their judgments

over four decades prior to the advent of the Constitution. Some of the prevailing social considerations then may well be an anathema to modern India, founded as it is on a constitutional order which professes adherence to basic human rights and individual dignity. For instance, Justice Davar had the following observations of why perhaps there was a reluctance to admit converts into the religion:

“We were told by the learned counsel for the defendants that the Parsis were proud of the fact that there were no street beggars and professional prostitutes amongst the Parsi community and the community took care of its own paupers and cripples. If the plaintiffs’ contentions prevailed, the community would very soon have no reason to boast of these characteristics of their race, and the Parsis would soon cease to exist as a community by reason of the rapid invasion of all pauper Sweepers and Dubras of Gujarat, who would, no doubt, be attracted to the Holy Mazdiasni religion by reason of the fifty-three lacs of rupees in the possession of the defendants, and the other advantages of belonging to the Anjuman of the Holy Zoroastrians of Bombay. It must be remembered that the question must not be judged from the standpoint that, in the present instance, the plaintiffs are fighting for the admission of an educated and cultured lady, belonging to one of the most civilized nations of Europe. That is a mere accident. If the Court had to take into consideration “cogent reasons of convenience”, it would necessarily have to consider what would be the immediate and natural result of reading the documents in a way which would throw open the door to general and promiscuous admissions of converts.”

Similar observations emanate from the judgment of Justice

Beaman :

“The defendants, expressing as we now know the orthodox Parsi view, are prepared to overlook immorality, bastardy – anything but alienage. They are ready to admit any and every Irani Zoroastrian about whose antecedents they cannot possibly know anything. But they will not admit the purest, most blameless foreigner, of whose character and conduct they may have the completest assurance. They will admit all the illegitimate children of Parsi parents, begotten of prostitutes or kept mistresses, but they will not admit the noblest, most exemplary foreigner. Why? Because a foreigner is outside the caste, and caste is an institution into which you must be born. Of the modern Parsi they say emphatically *nasitur non fit*. This is not religion, it has nothing to do with religion: it is essentially distinctly irreligious : but it is pure unadulterated oriental caste.”

22. We have adverted to these passages from the judgments of the Division Bench to emphasize the principle which succeeding generations of Judges must bear in mind when they consider a decision rendered prior to independence before the enforcement of the Constitution. We respect and have great deference for the learning wisdom and erudition that went into the judgment of the Division Bench in **Sir Dinsha Manekji Petit's** case. But we must hasten to add that the judgment must be understood in the context

of the social milieu of the age in which it was written. The guarantees of equality, liberty, freedom and dignity which the Constitution has enacted have over the last sixty years and more changed in fundamental ways the face of Indian Society and the polity. As Judges of the Constitutional Court that the High Court is, we must straddle a careful path – a path which is deferential to precedent but conscious of the Constitutional ethos and the evolving face of Indian Society.

23. The judgment of the Division Bench came up for consideration before the Privy Council in **Saklat vs. Bella**.⁸ In that case, a Goanese Christian came to Rangoon with his wife. The wife applied for assistance to a Parsi of good position at Rangoon stating that she too was a Parsi. He befriended her until he went to England and then asked his brother Shapurji who was a Parsi to look after her and the child to which she had just given birth. Both the father and mother died and the young child Bella was reared by Shapurji. When the child was fourteen, a Navjote in accordance with Zoroastrian rites were performed for her. The child was

⁸ 1925 (28) BLR 161

brought within the precincts of the sacred Fire Temple to which Parsi community in Rangoon objected. A suit was brought by three members of the Parsi Community on behalf of the Community stating that the temple was held in Trust for free and unrestricted use of Parsi inhabitants of the City professing the Zoroastrian faith. Bela, it was contended, could never have been converted into the Zoroastrian religion. The suit was dismissed initially. Lord Phillimore speaking for the Privy Council held that the benefit to properties which were endowed for persons professing the Zoroastrian religion had to "confine to persons who possess the double qualification of Zoroastrians and racial Parsis". Lord Phillimore, however, carved out an exception and held that the trustees were not bound to exclude such persons and if it was felt that admission would not hurt others, the law did not mandate that such persons should be excluded if they were not otherwise disorderly or unpleasant in their habit:

"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.

... But if they choose to admit to the benefit ... some persons from over the borders ... 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."

As regards Bella, Lord Phillimore observed as follows:

"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."

24. The judgments of the Division Bench in **Sir Dinsha Manekji Petit** and of the Privy Council in **Saklat vs Bella** emphasize the following cardinal principles:

-(i) The Zoroastrian religion has, as a matter of religious precept, contemplated and permitted conversion; (ii) The fact that conversions were not the order of the day, since the advent of the Parsis into India is attributable to peculiar circumstances of the social milieu. Justice Davar has adverted to the need felt not to antagonise other communities amidst which the Zoroastrians from Persia had migrated. Justice Beaman regarded it as a matter of caste; (iii) Conversion even within India to the Zoroastrian faith was by no means an anathema; (iv) The funds and properties endowed and dedicated to the use of those professing the Zoroastrian faith were confined to those who are Parsi Zoroastrians in the strict and rigid sense that is born to parents both of whom profess the Zoroastrian faith or to a Zoroastrian father, though the mother were an alien; (v) The Privy Council tempered the strictness of the doctrine by enunciating that though the trustees had the power to exclude a convert from the funds and properties endowed for the benefit of the Parsi Zoroastrians, the trustees were not bound to do so. As the Privy Council stated, 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.

Towers of Silence:

25. The Towers of Silence which are the last resting place of the Parsis are, as this Court observed in **Sir Dinsha Manekji Petit**, “regarded by them with sentiment of the utmost reverence”. The Dokhmas are “places of the greatest sanctity” and are consecrated with elaborate religious ceremony. The Trust properties having a religious significance under the Deed of Trust were consecrated between 1669 and 1873. Counsel for the Respondents submitted a chart containing a reference to these places in the Deed of Trust and the time period when they came to be dedicated. Consistent with the reverence in which the Towers of Silence are held and the sanctity which is ascribed to them, the Deed of Trust mandates that the property shall be held upon trust at all times for ever and the trustees shall permit and suffer the land, towers and structures to be used by every member of the Parsi community professing the Zoroastrian religion as a place for the exposure of the dead and for the performance of religious rites and ceremonies. Every member of the Parsi community professing the Zoroastrian religion is

entitled as a beneficiary to the use of the property for the purpose indicated in the Second Schedule to the Deed of Trust. The connotation of the expression "every member of the Parsi community professing the Zoroastrian religion" is what is ascribed to it in the judgment of the Division Bench and in the decision of the Privy Council. As long as the person in question fulfills that description, it is not open to the trustees to exclude or to deny the use of the property by a beneficiary for a purpose for which it is intended, namely, for the exposure of the dead and for the performance of religious rites and ceremonies. The Trust Deed controls the powers and duties of the trustees. The trustees have secular duties as distinguished from functions of a religious nature under the Deed of Trust. The Deed of Trust sets out the background in which the trustees were earlier vested with the management of social and religious affairs and settlement of religious, matrimonial and other social disputes of and between Parsis in Mumbai. Those functions were entrusted by the community to a Panchayat selected "from amongst the most influential or leading members" of the Parsi Community. The Trust Deed of 25 September 1884 is significant in confining the functions

of the trustees as trustees of the funds and the immovable property of the Parsi Panchayat. Under the Deed of Trust a significant change has been brought about in the position and powers of the trustees.

Administration of an endowment is a secular activity:

26. The position in law is well settled. The administration of a religious institution or an endowment made for religious purposes is a secular activity. Hence, it has been held, for instance, that the Legislature is competent to enact a law regulating the administration and governance of a religious or charitable institution or endowment. The administration of an endowment does not constitute a part of religious practice or custom. Reference may be made in this context to the judgments of the Supreme Court in **Raja Bira Kishore Deb vs. The State of Orissa**,⁹ (paragraph 9 at page 1510); **Pannalal Bansilal Pitti vs. State of Andhra Pradesh**,¹⁰ (paragraph 26 pages 516 and 517) and **A.S. Narayana Deekshitulu Vs. State of Andhra Pradesh**,¹¹ (paragraph 119 page 604). The Supreme Court held that though

⁹ AIR 1964 SC 1501

¹⁰ (1996) 2 SCC 498

¹¹ (1996) 9 SCC 548

after appointment, a Priest may perform worship, that is no ground to hold that the appointment is either religious practice or a matter of religion. The performance of religious service, according to the tenets of the faith, is an integral part of religious faith and belief. But the service of the Priest is a secular part. A Priest who performs religious rites and ceremonies at the Towers of Silence must of necessity be a duly ordained Zoroastrian Priest. The actual performance of the religious rites and ceremonies has to be carried out by the Priest in accordance with the tenets of the faith. The beneficiary of the Trust who professes the Parsi Zoroastrian religion, engages the services of an ordained Zoroastrian Priest, it being common ground before this Court that the Trust does not by itself require the engagement of a particular Priest. The Court has been informed by Counsel appearing on behalf of the Respondents that in certain cases, such as for instance, where the family is indigent, the Trust may provide the services of an ordained Priest where it is sought. However, a beneficiary of the Trust for whom the endowment has been created and who may utilize the Towers of Silence for the exposure of the dead in accordance with the religious rites and ceremonies of the faith is entitled to engage the

services of a duly ordained Zoroastrian Priest. Having carefully analysed the Deed of Trust, we do not find that there is any provision therein that would empower the trustees to prevent a duly ordained Zoroastrian Priest from performing the obsequial rites so long as the rights are rendered for a member of the Parsi Community professing the Zoroastrian religion and the rites and ceremonies accord with the tenets of the faith. The trustees cannot exert a power to exclude where these conditions are fulfilled.

27. The Court would not be justified in conferring upon the trustees a power to exclude a duly ordained Zoroastrian Priest from performing obsequial ceremonies for a Parsi Zoroastrian in accordance with the religious rites and ceremonies of the faith. Such a power has not been conferred upon them by the Deed of Trust. Reading any such power into the Deed of Trust in the absence of explicit provision or, at any rate one which arises by necessary implication, would be impermissible. Worse still it is likely to be subject to grave abuse.

28. Counsel appearing on behalf of the Respondents submitted, while relying on the judgment of the Supreme Court in **Sri Sinha Ramanuja Jeer vs. Sri Ranga Ramanuja Jeer**,¹² that the Court cannot entertain a suit which is not of a civil nature and relied on the observation of the Supreme Court that “prima facie suits raising questions of religious rites and ceremonies only are not maintainable in a civil court, for they do not deal with legal rights of parties”. This line of submission would not carry the defence of the Respondents any further. That is because in the Originating Summons, the Appellants have sought an interpretation of the Deed of Trust. The Court is not indeed called upon to decide a lis raising questions of religious rites and ceremonies. It is the interpretation of the Deed of Trust which the Court is called upon to determine. And it is that question which the Court has determined in these proceedings. The judgment of the Supreme Court in **Ratilal Panachand Gandhi vs. State of Bombay**,¹³ was rendered on a challenge to the constitutional validity of the Bombay Public Trusts Act, 1950. The Supreme Court observed that “religious practices or performances of acts in

12 AIR 1961 SC 1720

13 AIR 1954 SC 388

pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines". The Supreme Court observed that if the tenets of the Jain or the Parsi religion lay down that certain rites and ceremonies are to be performed in a particular time and in a particular manner, it cannot be said that these are secular activities partaking of commercial or economic character simply because they involve expenditure of money or employment of priests or the use of marketable commodities. No outside authority has any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate. The observations of the Supreme Court indicate, therefore, that a religion is not merely a system of belief and doctrine and the outward expression of the tenets of the faith in the form of ritual ceremonies is a part of religion.

-29. In the present case, there can be no gainsaying the fact that the rites and ceremonies which have to be observed at the Towers of Silence are indeed a constituent element of the Zoroastrian faith. As a matter of fact, the Appellants assert that

they are. Hence, as we have stated, a priest who performs the rites and ceremonies must be a duly ordained Zoroastrian Priest who would observe and fulfill the tenets of the faith as the ceremonies are performed. This is not an area of dispute at all. The bone of contention is that the trustees of the Panchayat have asserted a right to prohibit a duly ordained Zoroastrian Priest from rendering obsequial rites at the Towers of Silence, even though such a priest would render those rites and ceremonies strictly in accordance with the faith. The trustees claim to do so on the basis that the priest has outside the Towers of Silence ministered religious rites for a Parsi Zoroastrian whose body was disposed of by cremation. Similarly, the trustees seek to prohibit a duly ordained Parsi Zoroastrian Priest on the ground that he has performed a Navjote ceremony for a child born to a Parsi mother who has married a non-Zoroastrian spouse. The Appellants before the Court and the Intervenors who have supported them have submitted before the Court that persons who opt for cremation or for other forms of disposal of dead bodies have a perspective based upon contemporary needs and concerns. They do not forsake the faith by laying bare a view point. To place a perspective is not to destroy a

faith. The cohesiveness of a faith is maintained by dialogue not division. The impassioned plea of the Appellants even before this Court for a recourse to reason has only been met with reprisals – reprisals against the Appellants, the intervenors and their Counsel. No vultures, it has been submitted by the Appellants, are available any more at the Towers of Silence and the bodies lie putrified until eventually they are disposed of in a mass grave. The trustees, while fairly accepting the absence of predators in an urban environment, state that they have taken steps by bringing in solar panels to hasten the process of decomposition. To this the Appellants submit that despite the solar panels, it is only the bodily fluids that evaporate while the flesh and the organs are left in tact in a charred state. According to the Appellants, in areas of the country where there are no Towers of Silence, dead bodies of Zoroastrians are consigned either by cremation or burial. Hence, it is urged that there is no anathema in the religion itself to a priest rendering religious services in aid of a dead Zoroastrian whose body has been consigned to the process of cremation. Counsel for the Trustees submits that it is true that the Towers of Silence are not available at every place, but submits that alternate forms of

disposal of dead bodies are accepted as a matter of necessity. While we have indicated these areas of dispute which were urged before the Court, as a matter of record, we clarify that our decision is not based on adopting one or the other of these perspectives. The Court has been concerned in these proceedings with construing the Deed of Trust and it is the Deed of Trust that we have construed. Before concluding this aspect of the discussion, we may advert to the decision of the Supreme Court in **Saifuddin Saheb vs. State of Bombay**.¹⁴ The Supreme Court in that decision held that the power of the Die-ul-Mutlaq is an essential part of the creed of the Dawoodi Bohra sect. The Court held that the power of excommunication is vested in him for the purpose of enforcing discipline and to keep the denomination together as an entity. The purity of the fellowship, the Court ruled, is secured by the removal of persons who had rendered themselves unfit and unsuitable for membership of the sect. Hence, a legislation which penalises the power of excommunication could not be sustained as a measure of social welfare or reform under Article 25(1) of the Constitution. There is no dispute before the Court in these

¹⁴ AIR 1962 SC 853

proceedings that no such power of excommunication exists in the Zoroastrian faith, in a manner similar to what was before the Supreme Court in **Saifuddin Saheb**.

-30. A Parsi Zoroastrian priest, upon being ordained, is empowered to perform the rites and ceremonies of the Zoroastrian faith. The trustees cannot by their decision over ride the religious authority of the priest conferred upon him by the supreme religious faith. The empowerment of the priest to perform religious rites and ceremonies is as a person duly ordained in the tenets of the religion. The trustees have no power either to ordain a priest or to divest the priest of the entitlement which follows upon being ordained.

31. The fact that the two priests have chosen not to file proceedings of their own to challenge the ban cannot, by any means, be regarded as precluding the Appellants as beneficiaries of the Trust from seeking an interpretation of the Deed or a determination of the rights of the beneficiaries. The ban undoubtedly penalizes the two priests by subjecting them to an

exclusion from administering religious rites and ceremonies at the Towers of Silence. Implicit in it is a veiled threat to others against the reprisals that may follow, if they were to adopt a course of conduct which the trustees do not countenance. The beneficiaries are aggrieved because the clear consequence of the ban which has been imposed by the trustees, is to deprive them of the choice of a priest in whom they have faith, ostensibly because of the conduct of the priests outside the Towers of Silence. The consequence of allowing the action of the trustees to pass muster would be to confer upon them an arbitrary power to exclude; a power which may well be wielded to exercise control over the beneficiaries themselves. This is more than exemplified by the distressing developments that took place during the pendency of these proceedings.

32. The Appellants are citizens of the State and Parsi Zoroastrians with an impeccable record of service which is set out in paragraph 1 of the Plaint as follows :

“Plaintiff No.1 is a retired officer of the Indian Administrative Service (I.A.S.). He was the Municipal Commissioner of Mumbai and was also a Trustee of

Defendant No.1 for 15 years. He also served as the Secretary of State (Government of Maharashtra) in the departments of Agriculture, Industry, Energy and Revenue. In Government of India he held the rank of Secretary in the Commerce Ministry and Chairman and Managing Director of the Export Credit Guarantee Corporation of India. Plaintiff No.2 is a Fellow of the Institute of Chartered Accountants of India and a M.Sc. (Econ.) from the London School of Economics and Political Science. He has been the Managing Director of Companies such as Glaxo and Wellcome India, Tata Tea Ltd., and Tata Chemicals Ltd. He was appointed as a Special Advisor to the Government appointed Board of Satyam Computer Services Ltd. to assist with the turn-around of the company and the induction of a new strategic investor. He now serves on the Boards of several companies in a non-executive or advisory capacity and is a member of the Board of the Cathedral School and the B.D.Petit Parsee General Hospital. Both the Plaintiffs have worked actively for the benefit and advancement of the Parsi Zoroastrian Community.”

The Appellants have been supported in the appeal by five

Intervenors:

1. Dr.Keki Byramji Grant.
2. Mr.Tehmtan R.Andhyarujina.
3. Dr.Rustom P.Soonawala.
4. Mrs.Dilnavaz Variava.
5. Mrs.Anu Aga.

Each of them has a distinguished record of service to the nation in the walks of life that their paths have travelled. The Respondents have launched upon an unfortunate tirade against these members

of the Parsi Zoroastrian community. Even the Counsel appearing on behalf of the Appellants and the Intervenor have not been spared. We record our disapproval to the innuendos levelled against a distinguished former Judge of this Court and the Supreme Court. Besides being unfounded, they have been levelled without a sense of responsibility. Out of a concern for judicial propriety, we have considered it proper not to advert to all the details of the unseemly attacks on the Appellants, the intervenors and Senior Counsel in this judgment. Conferring upon the trustees such broad powers of exclusion (even though they have no such power in the Deed of Trust) would result in a grave affront to basic human rights and individual dignity. Life and death, we believe often lie beyond human choice. The trustees must be left to govern in the secular province that the Trust Deed has created for them. The trustees cannot arrogate powers to themselves in a mistaken belief that they are custodians of the religion. Religion and faith reside in the hearts of the multitude for whom devotion to the faith is a matter of conscience protected by Article 25 of the Constitution. That sense of faith and commitment to a religion as profound in its philosophy as the Zoroastrian faith cannot be

subverted by the trustees. At least the Court cannot be a party to encouraging religious obscurantism.

The judgment appealed against:

33. The Learned Single Judge has in our view, with respect, erred in coming to the conclusion that “the issue would involve interpretation of what are religious ceremonies which are to be performed in the properties of the Trust”. With great respect, this was not an issue which fell for determination at all. The religious ceremonies which have to be rendered in the Towers of Silence indeed have to be the religious ceremonies which are prescribed by the tenets of the Zoroastrian faith. Similarly, the Learned Judge, with respect, was in error in holding that the Appellants had called upon this Court to indirectly decide upon the cause espoused by them, namely, the cremation of the dead and seeking a declaration that such a practice would not be irreligious. The question as to whether the cremation of a dead body is or is not acceptable to the Zoroastrian faith and the circumstances in which it is acceptable or otherwise does not fall for determination in the Originating Summons. The question simply is whether the Deed of Trust

empowers the trustees to prevent a duly ordained Zoroastrian Priest from performing Zoroastrian religious rites and ceremonies in the premises of Doongerwadi and the two Agiaries. The question before the Court was whether the Trust Deed empowers the Trustees to restrict Parsi Zoroastrians in their choice of a duly ordained Zoroastrian Priest to conduct Zoroastrian religious rites and ceremonies at Doongerwadi and the two Agiaries. For the reasons that we have indicated earlier, we have come to the conclusion that the answer to these questions must be in the negative. Conscious as we are of the parameters of the jurisdiction of the Court on an Originating Summons, we are of the view that the case of the Appellants fell within those parameters and not outside. As Chief Justice M.C.Chagla observed in the **Mazda Theatres** case, the right contemplated by the procedure for an Originating Summons is founded on the object of making "a procedure available to parties which is both cheap and expeditious for determination of disputes as to construction of a written instrument, which dispute could be settled by the Court interpreting the instrument and determining what the rights of the parties are."

The maintainability of the appeal:

34. Finally, before concluding we reject the submission urged on behalf of the Respondents that an appeal against the order of the Learned Single Judge in this case is not maintainable under Clause 15 of the Letters Patent. It is a well settled principle of law that if an order results in a termination of proceedings in that Court, it is a judgment under Clause 15. The Originating Summons has been finally disposed of. In **Shah Babulal Khimji vs. Jayaben D.Kania**,¹⁵ this was emphasized by the Supreme Court. In paragraph 84 of the judgment, the Supreme Court cited with approval, the judgment of Sir Asutosh Mookerjee in **Chandi Charan Saha vs. Jnanendra Nath Bhattacharjee**.¹⁶ The Learned Judge held that the test is, not what the form of the adjudication is, but what is its effect in the suit or proceedings in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, the adjudication is a judgment.

15 AIR 1981 SC 1786

16 AIR 1919 Cal 667

The same view has been reiterated in an earlier judgment of the Supreme Court in **Asumati Debi v. Kumar Rupendra Deb Raikot**,¹⁷ where the Supreme Court held that where an order brings a proceeding completely to an end, it would constitute a judgment and it is immaterial that another suit could be filed in the same or another Court after removing the defects which led to the order or rejection.

Our conclusion:

35. For the reasons that we have indicated, the appeal would have to be allowed and is accordingly allowed. We accordingly dispose of the Originating Summons in terms of the following interpretation and determination :

(a) Under the Deed of Trust of 1884, the trustees are not entitled to prevent any duly ordained Parsi Zoroastrian Priest from performing Zoroastrian religious rites and ceremonies in the premises of the Towers of Silence (Doongerwadi) and the two Agiaries;

¹⁷ AIR 1953 SC 198

(b) The Trust deed does not empower the trustees to restrain Parsi Zoroastrians in their choice of a duly ordained Parsi Zoroastrian Priest to conduct Zoroastrian religious prayers and ceremonies at the Towers of Silence (Doongerwadi) and the two Agiaries;

(c) The purported ban imposed by the trustees on Mr.Framroze Mirza and Khurshroo Madon was not within the power and authority of the trustees under the Deed of Trust;

(d) The trustees are accordingly directed to forthwith abstain from taking any action in pursuance of the purported ban or in the implementation thereof and to remove all notices and withdraw all instructions to that effect.

36. The judgment of the Learned Single Judge is set aside. The appeal is allowed in these terms. There shall be no order as to costs.

(Dr.D.Y.Chandrachud, J.)

(Anoop V. Mohta, J.)

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See Annot 82
11/03/2011

Section Officer

High Court, Appellate Side
Bombay