

63, 1918

No. 90 of 1916.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF THE
ISLAND OF CEYLON.

BETWEEN

10 WICKRAMASINGHE NAWARATNE
PANDITTA WASALA ABEYKOON
GANWILA HERAT MUDIANSSELAGE
TIKIRI BANDARA ELLEKEWALA,
Basnayake Nilame and Trustee of Wallahagoda
Temple, Gampola, - - - - - (Plaintiff).
Appellant.

and

THE HONOURABLE THE ATTORNEY
GENERAL, COLOMBO, - - - - - (Defendant).
Respondent.

CASE FOR THE RESPONDENT.

1. This is an Appeal from a judgment of the Supreme Court
20 of Ceylon dated the 2nd February, 1915, which reversed a judgment
of the Court of the District Judge of Kandy dated the 4th June, 1914.

2. The Appellant was Plaintiff and the Respondent was
Defendant in the Action.

3. In the District Court judgment was entered for the Appellant
but this judgment was reversed on Appeal to the Supreme Court
and judgment was entered for the Respondent.

4. The main questions for determination in the present Appeal
relate to the right of the Appellant to enforce by action an alleged
right to conduct a religious procession accompanied by the passage
30 of elephants and the beating of tom-toms and other music without
restriction.

5. The Appellant was the Basnayake Nilame of the Kataragam
Dewale at Wallahagoda, situate a mile from the town of Gampola
in the District of Kandy.

RESPONDENT'S CASE.

6. A dewale is a temple dedicated to a divinity of the Hindu Pantheon, Kataragam to whom the dewale in the present case was dedicated being the god of war.

7. The Basnayake Nilame is the chief lay officer of a dewale, and trustee of the property of the dewale. The Appellant was appointed to his office in the year 1912 and his appointment was duly confirmed under the Buddhist Temporalities Ordinance, 1905.

Documents
No. 1, P. 1,
p. 4.

8. The Appellant alleges that:—

(a) The dewale in the present case was of great antiquity and in connection with it, it had been the custom since time long past to hold annually peraheras or religious processions in the month of September. 10

Record p. 13,
line 28.

(b) That these are held on fifteen days, that during the first fourteen days the peraheras are held within or around the dewale, and that on the fifteenth day, the culminating procession—the Esala perahera—took place.

Record p. 13,
line 28.

Record p. 15,
line 21.

(c) That this procession proceeded with elephants and to the accompaniment of music and in particular of tom-toms from the Dewale to the river for the performance there of a ceremony known as the cutting of the waters. 20

Record p. 13,
line 32.

(d) That a part of the route ordinarily followed lay along a street in Gampola known as Ambagamuwa Street. In this street were situate certain Muhammadan mosques and in particular one built by Indian Muhammadans known as “Coast Moors.”

Record p. 14,
line 39.

9. Provisions are contained in the Ordinances regulating public processions through, the playing of tom-toms in, or the train of elephants through streets in Ceylon and Providing for licences to be granted for these purposes. Section 69 of Ordinance No. 16 of 1865 contains powers of regulating processions. Section 90 deals with tom-toms, and Section 84 with the passage of elephants. Section 64 of Ordinance No. 13 of 1898 further provides for the regulation and restriction of religious processions. Such last mentioned Ordinance was assented to by the Sovereign on the 21st October, 1898. The said sections are set out in the Appendix hereto. 30

Appendix B.

10. For some years before 1907, applications had been made for licences to conduct the Esala perahera through the streets and these were granted subject to Police Supervision.

Record p. 39,
line 31.
Documents
No. 45, D. 14,
p. 43.

11. In the year 1907, a disturbance occurred during the progress of another Buddhist Procession along Ambagamuwa Street, between the Buddhists and the members of the Muhammadan Mosque previously referred to in consequence of the objection of the worshippers of the latter to the playing of tom-toms past their mosque. Record p. 39,
line 36.
Record p. 14,
line 39.
12. In consequence of this disturbance two posts were fixed at a distance of fifty yards on each side from the mosque and the licences to hold the Esala Perahera were subsequently granted Record p. 39,
line 42.
10 subject to the condition that the music should cease within fifty yards of the mosque. Record p. 39,
line 19.
13. After the election of the Appellant to his office in 1912, a letter was written to the Government Agent at Kandy on behalf of the Appellant, dated the 17th August, 1912, by P. B. Nugawela, President of the Buddhist Temporalities Office, asking that this condition to the licence should not in future be imposed. Record p. 14,
line 26.
Documents
No. 32, D1
p. 36.
14. In answer the Government Agent wrote a letter, dated the 27th August, 1912, stating that the condition would still be retained.
- 20 15. The said P. B. Nugawela, again wrote on the 2nd September, 1912, urging the removal of the restriction and on the 13th September, 1912, the Government Agent answered declining to depart from his previous decision. On the 14th September, the said P. B. Nugawela wrote, suggesting that the procession should take another route not passing along Ambagamuwa Street and on the 23rd September, 1912, the Appellant applied for a licence to pass along this other route. In answer the Government Agent issued a licence for this new route but subject to the restrictions that music must be stopped on the near approach of horses or within one hundred Documents
No. 32, D2
p. 36.
Documents
No. 33, D3,
p. 38.
Documents
No 36, D5a,
p. 39.
Documents
No. 34, D4,
p. 38.
30 yards of any place of worship.
16. The procession, however, was not held. Record p. 15,
lines 5-10.
17. On the 30th September, 1913, the Appellant filed his Record p. 7.
plaint against the Respondent in the District Court of Kandy.
18. By this he alleged :—
- (1) Under paragraph 2 that the Dewale had from time immemorial amongst its other rights and privileges enjoyed and exercised the right of holding and conducting a perahera ceremony or procession by which the Basnayake Nilame of the Temple with the retainers and tenants had

the right and privilege of marching to and from and through all the streets of the town of Gampola, including Ambagamuwa Street with elephants to the accompaniment of tom-toms, drums and other musical instruments.

(2) Under paragraph 3 that their rights and privileges were acknowledged, recognised and confirmed to the said Temple when all the inhabitants of the Kingdom of Kandy, were, by the Crown, on the cession of the said Kingdom to the British Government under the Kandyan Convention of 1815, confirmed in and allowed to enjoy the rights and privileges which they had enjoyed under the Kandyan Government and that their rights were after the Kandyan Provinces came under the British Government enjoyed and exercised by the said Temple through its various Basnayake Nilames and were necessary for its proper dignity and prestige and for the proper conducting and carrying out the ceremonies to be performed by the said Temple and that the said Temple had acquired a right by prescription to the performance of the said rights and privileges. 10

(3) Under paragraph 4 that the Government Agent, on the 27th August, 1912, wrongfully and in breach of the said Kandyan Convention and agreement and of the rights and privileges enjoyed by the said Temple refused to allow the Plaintiff permission to proceed in procession through that part of Ambagamuwa Street, within a hundred yards of either side of the Muhammadan Mosque to the accompaniment of tom-toms, drums and other musical instruments and still refused to do so. 20

The Plaintiff claimed damages by way of relief.

Record p. 8.

19. The Respondent, by his answer, amongst other pleas :—

(1) Under paragraph 1 objected (a) that the plaint disclosed no cause of action. (b) that the right claimed was not known to or recognised by law. (c) that assuming such a right to exist the action was not maintainable against the Defendant. 30

(2) Under paragraph 4 that all assemblies and processions in the public roads, streets or thoroughfares of the town of Gampola are governed by the provisions of section 69 of The Police Ordinance No. 16 of 1865 and section 64 of The Local Boards Ordinance No. 13 of 1898 and that the right (if any) of any person to hold and conduct the procession in question and to beat tom-toms in the streets of Gampola, was subject to such provisions however ancient that right might be and that the licences referred to in the 40

Government Agent's letter of 27th August, 1912, were the licences referred to in such Ordinances.

(3) Under paragraphs 5 and 6 the Defendant alleged that in so far as the Plaintiff claimed by prescription his right had been interrupted and lost.

20. The District Judge framed a number of issues on the pleadings which are set out at pages 10 and 11 of the Record and the case came on for hearing on the 20th March 1914. Record pp. 10-11.

21. The Appellant at the trial relied on the fifth provision of the Kandyan Convention, viz. :—

“ The Religion of Boodho professed by the Chiefs and Inhabitants of these Provinces is declared inviolable and its Rites Ministers and Places of Worship are to be maintained and protected.”

The said Convention is printed in the Appendix hereto.

Appendix A.

22. Evidence was given by the Appellant and a number of witnesses, mainly tenants of the dewale who had taken part in the processions. This evidence was mainly directed to showing but it is denied that it proved that the procedure at Buddhist processions was unchanging and unalterable, that the playing of tom-toms throughout the procession continuously was a necessary part of the religious ceremony and that any change in the processions in any way and in particular any cessation of the playing of tom-toms would be a cause of anger to the Deity in whose honour it was held and would result in disease and disaster in the district. Record pp. 13-38.

23. It was admitted by some of the witnesses that there had been changes introduced in some of the Buddhist peraheras. In particular it was admitted that in the case of the peraheras at Kandy since about the year 1878 the processions instead of being held on continuous days were not now held on Sundays. It was also admitted that in the case of the Shrines of Anuradhapura arrangements had been made between the Government and the Buddhist Priests which provided that in case of processions having to pass any place of public worship in which service was proceeding the beating of tom-toms and all music likely to disturb the service must cease within one hundred yards of such building during the hours of public worship. Record p. 31, line 46.
Record p. 32, lines 1-22.
Record p. 37, line 36.
Record p. 34, line 14.
Documents No. 41, D10, pp. 41-42.

24. Evidence was given by witnesses on behalf of the Respondent. This evidence was directed to showing and it is submitted it proved that the procession had at any rate since 1902 been held Record pp. 38-43.

under permits issued by the Government, that the beating of tom-toms had on certain occasions been discontinued within fifty yards of the Mosque in question and that in the year 1909 the procession had gone by another route.

Record
pp. 46-60.

25. On the 4th June, 1914, the learned District Judge delivered Judgment. He held that the Appellant was not entitled to damages but was entitled to a declaration of right in the terms of the right alleged in paragraph 2 of the plaint and ordered judgment to be entered for such declaration with costs. The reasons for the learned Judge's Judgment are set out at pages 46 to 60 of the Record. 10

Record p. 60.

26. A decree was made accordingly.

27. The Respondent appealed to the Supreme Court and the Appeal came on for hearing on the 18th January, 1915, before the Hon. Mr. Walter Sidney Shaw and the Hon. Mr. Thomas Edward de Sampayo, Justices of the Supreme Court.

Record
pp. 67-83.

28. On the 2nd February, 1915, the learned Judges delivered Judgment allowing the Appeal and ordering Judgment to be entered for the Respondent. The reasons of the learned Judges are set out at pages 67-83 of the Record.

Record p. 66.

29. A decree was made accordingly. 20

30. Against the said decree the present Appeal has been preferred.

31. The Respondent humbly submits that the said Appeal should be dismissed with costs for the following (amongst other)

REASONS.

1. BECAUSE the provisions of the Kandyan Convention on which the Appellant relies are not matters enforceable by civil action.
2. BECAUSE the matters alleged or proved constituted no breach of such provisions or showed any cause of action. 36
3. BECAUSE the provisions of such Convention were subject to any subsequent legislative enactment by the Crown.

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4. BECAUSE the Ordinances in question relating to licences regulating religious processions were legislative enactments duly made.
 5. BECAUSE such Ordinances were Ordinances providing for matters of public peace and order and were not any breach of the provisions of such Convention or of any right enjoyed by the Appellant.
 6. BECAUSE the matters of grievance alleged by the Appellant were the enforcement or administration of such Ordinances.
 7. BECAUSE the said Ordinances having been duly passed it was not competent for the Court to question the validity of such Ordinances.
 8. BECAUSE the right alleged by the Appellant was not a matter in respect of which any action lies.
 9. BECAUSE the evidence adduced by the Appellant failed to establish that the continuous playing of tom-toms during the procession was an essential part of such procession.
 10. BECAUSE the playing of music during such processions was liable to be suspended if occasion required.
 11. BECAUSE in the interests of law and order it was expedient that such playing should be suspended as provided in the said licences.
 12. BECAUSE if the contention of the Appellant is correct no license was necessary and the alleged matters of grievance were immaterial.
 13. BECAUSE the Judgments in the Court below were correct in so far as they determined the questions raised on Appeal in favour of the Respondent.
 14. BECAUSE there is no ground on which Judgment can properly be entered for the Appellant or for granting a new trial.

W. H. UPJOHN.

H. M. GIVEEN.

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WICKRAMASINGHE NAWARATNE
PANDITTA WASALA ABEYKOON
GANWILA HERAT MUDIANS-
LAGE TIKIRI BANDARA ELLE-
KEWALA, Basnayake Nilame and
Trustee of the Wallahagoda Temple,
Gampola (Plaintif) *Appellant*

AND

THE HONOURABLE THE ATTORNEY
GENERAL, COLOMBO (Defendant) *Respondent*

CASE FOR THE RESPONDENT.

BURCHELLS,

5, The Sanctuary

Westminster,

Solicitors for the Respondent.