Present: Wood Renton C.J. and Ennis J. 1914.

PITCHE TAMBY *et al. v.* CASSIM MARIKAR *et al.*

197—D. C. Puttalam, 2,356.

Controversies between rival religious sects as to points of doctrine or ceremonial—Power of Court to interfere—Action against trustees of a mosque to restrain them by injunction from allowing a pagoda procession in mosque premises.

No secular tribunal will take cognizance of, or adjudicate upon, controversies between rival religious sects as to points of doctrine or ceremonial where nothing else is at issue.

No secular tribunal will refuse to take cognizance of, and to adjudicate upon, such controversies where civil rights are at stake, or hesitate, in that event, to consider and to pronounce an opinion upon what would otherwise be purely ecclesiastical questions.

The evidence in this case showed that pagoda processions have been in vogue in connection with the mosque at Puttalam for a period extending far beyond living memory; that the plaintiffs and the defendants in their time have taken part in it with all its attendant ceremonies on numerous occasions; and that until within a quite recent period it has never been considered as involving either a breach of Muhammadan law, or any hindrance or obstruction to the prayers of the faithful. The plaintiffs' contention was, *inter alia*, that during recent years there has been growing up among the Muhammadans in Puttalam who frequent this mosque a belief that the ceremony itself was a direct violation of the precepts of the Koran and the sacred commentators, and that in these circumstances its continuance was an outrage to their religious feelings. They prayed for an injunction against the trustees of the mosque to restrain them from allowing a pagoda from being housed in a certain building, and from allowing the pagoda procession from passing through a covered way.

The Supreme Court refused to grant the injunction, as no civil right was involved in this case.

THE facts appear from the judgment.

Bawa, K.C. (with him *Drieberg* and *Hayley*), for the plaintiffs, appellants.—The location of the pagoda within the mosque premises and the noisy processions over the verandah, which is part of the mosque, are a breach of the Muhammadan law, and is a hindrance to the prayers of the congregation. The fact that the plaintiffs have tolerated this state of things for so many years is not a bar to this action. No one can acquire a prescriptive right to commit a nuisance. *Forrest v. Leefe;*[1] see also *(1893) 2 Ch. 437.*

[1] *(1910) 13 N. L. R. 119.*

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The procession causes defilement of the mosque, and worshippers cannot go from the tank room to the mosque without being polluted. The Koran makes no mention of pagodas. That shows that the pagoda procession has no religious sanction. On the question of pollution counsel cited *Vandenberg, vol. 1., pp. 128, 22, 139, 140; Hamilton's Hedyya xxxvi; Wilson's Digest of Anglo-Muhammadan Law 368, 372; 12 Allahabad 494.*

Courts of law will interfere where a right of property is invaded. The second defendant committed a breach of trust, and the Courts can therefore interfere. If the plaintiffs had been defendants, and had thrown the pagoda out, will not the Courts intervene in such a case? See *3 Allahabad 636, 3 Bom. 27, 30 Madras 15, 7 Bom. 323, 7 Allahabad 178, 13 Allahabad 419, 18 Cal. 448, Marshall's Judgments, 656, Creasy 155, Ramanathan (1863-68) 240, 1 S. C. R. 354, 1 N. L. R. 351, 16 N. L. R. 94, 2 C. L. R. 22, 5 N. L. R. 353.* Where it is a purely ecclesiastical question the Courts will not intervene, as in *5 Bom. 80, 20 Bom. 784, 28 Mad. 23.* Counsel further cited *Mulla's Principles of Muhammadan Law, p. 11, s. 25; 25 Cal. 18; 11 Moore's Indian Appeals 551; Amir Ali's Muhammadan Law, vol. 1., pp. 9, 10, 18, 19, 22, 23, 24; 15 N. L. R. 316.*

Defendants have not proved any custom which establishes the right to take the pagoda in procession over the mosque premises. To establish custom the defendants must show that the procession is allowed in other mosques as well. It is not enough to show that the procession was tolerated in this mosque for several years.

Counsel argued on the facts.

A. St. V. Jayewardene (with him *Bartholomeusz*), for the first defendant, respondent (first trustee).—The first defendant was not a party to the acts complained of by the plaintiffs.

F. M. de Saram (with him *Elliott, Samarawickrame*, and *C. Z. H. Fernando*), for the second defendant, respondent, not called upon.

Cur. adv. vult.

October 2, 1914. Wood Renton C.J.—

The learned District Judge has fully and correctly stated the effect of the pleadings and the issues on which the parties went to trial in this case, and there is no need to repeat what he has said. It is, in my opinion, unnecessary to consider the questions whether the action is a *bona fide* one or not, and whether the pagoda ceremony, which forms its subject-matter, is or is not in accordance with the principles of Muhammadan law. Two propositions of law, as to which there is no controversy, are involved in this appeal. In the first place, no secular tribunal will take cognizance of, or adjudicate upon, controversies between rival religious sects as to points of doctrine or ceremonial where nothing else is at issue. In the second

place, no secular tribunal will refuse to take cognizance of, and to adjudicate upon, such controversies where civil rights are at stake, or hesitate, in that event, to consider and to pronounce an opinion upon what would otherwise be purely ecclesiatical questions. These two propositions are clearly established by the Indian and local cases cited in the course of the argument. (*Jawahra v. Akbar Husain*,[1] *Jangu v. Ahamad Ullah*,[2] *Venkatachalapati v. Subbarayadu*,[3] *Fazal Karim v. Maula Baksh*,[4] *Vasudev v. Vamnaji*,[5] *Subbaraya Mudaliar v. Vedantachariar*,[6] *Aysa Oemma v. Sago Abdul Lebbe*.[7]) Nor are they confined to questions of Hindu or Muhammadan law. They are equally applicable to other religious systems (see *Free Church of Scotland, General Assembly of, v. Overtoun*[8]). The application of these principles to the facts of the present case does not, to my mind, present any serious difficulty. I entirely agree with the view taken of them by the learned District Judge. The evidence shows that the pagoda procession has been in vogue in connection with the mosque at Puttalam for a period extending far beyond living memory; that the plaintiffs and the defendants in their time have taken part in it, with all its attendant ceremonies, on numerous occasions; and that until within a quite recent period it has never been considered as involving either a breach of Muhammadan law or any hindrance or obstruction to the prayers of the faithful. I am assuming, for the purpose of this judgment, that the plaintiffs and the first defendant, who associates himself with them in their present opposition to the pagoda ceremony, are acting in good faith. Their contention is that during recent years there has been growing up among the Muhammadans in Puttalam who frequent this mosque a belief that the ceremony itself is a direct violation of the precepts of the Koran and the sacred commentators, and that in these circumstances its continuance is an outrage to their religious feelings. They object to the ceremony, because the noise and clamour which accompany it disturb the prayers of worshippers in the mosque, because the pagoda is housed in a room which is an integral part of the mosque premises, and because the process of removing it from and returning it into that room for the purposes of the ceremony—a process in which persons who are not Muhammadans take part—defiles the front verandah of the mosque, which, like the pagoda room itself, is part of the sacred edifice. The second defendant, who is one of the trustees of the mosque, maintains, on the other hand, that the pagoda ceremony is in no sense repugnant to Muhammadan law; that it does not disturb the prayers of worshippers; that neither the pagoda nor the verandah, to which the plaintiffs and the first defendant refer, forms part of the mosque

[1] (1884) *I. L. R. 7 All. 178.*
[2] (1889) *I. L. R. 13 All. 419.*
[3] (1889) *I. L. R. Mad. 293.*
[4] (1891) *I. L. R. Cal. 448.*
[5] (1860) *I. L. R. Bom. 80.*
[6] (1904) *I. L. R. Mad. 23.*
[7] (1863-68) *Ram. 240.*
[8] (1904) *A. C. 515.*

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proper; and that steps are taken, while the pagoda ceremony is being carried out, which prevent worshippers who have performed their ablutions in the washing place outside the mosque from contracting any defilement in the course of their passage into the mosque itself.

The learned District Judge has held upon the evidence, and I am disposed to agree with his finding on the point, that neither the pagoda room nor the verandah in question has been shown to form part of the mosque proper. But, apart from considerations of that kind, the plaintiffs have failed entirely to show that any civil right is involved in the controversy. The second defendant in his answer claims Rs. 5,000 damages from the plaintiffs and the first defendant on the ground of expenses incurred by him in connection with the proposed pagoda procession in March, 1913, which they had induced the Assistant Government Agent to refuse to license. But nothing was said as to that claim at the hearing of the appeal, and it is not a point of which the plaintiffs and the first defendant could make any use for the purpose of establishing the existence of a civil right in themselves. They do not say that they were being disturbed in the exercise of any office in connection with the mosque, or that the continuance of the pagoda ceremony is involving them in the loss of any emoluments. It was argued before us that the evidence was sufficient to establish a nuisance which would entitle a secular Court to interfere. It is quite true that there are incidental statements in the evidence of various witnesses called in support of the action to the effect that the noise accompanying the procession disturbs worshippers who are praying inside the mosque. But equally good evidence to the contrary was adduced on behalf of the second defendant. It would require much stronger evidence than anything that I can find in the record to justify us in holding that a practice, in which the Muhammadans of Puttalam have acquiesced for several centuries, and which has been participated in by the plaintiffs and the first defendant for a long period, without any suggestion that it interfered with religious devotions, has suddenly develcped into a nuisance which the law ought to abate. The whole trend of the evidence of the plaintiffs and of the first defendant shows that their real objection to the pagoda ceremony is based upon the assumption that it involves sacrilege. I may refer in support of this statement to the following passages:—

> "This noise," says Nalla Ibrahim, "of tom-toms and stick dancers, and the fact of people of strange religions entering without washing their feet, are all objectionable and wrong; such people defile the mosque—many of us are anxious that these practices be stopped as contrary to our religion. The Alims preach that it is bad."

Again—

> "I object," says Mohamadu Cassim Marikar, "to these pagoda processions traversing this verandah, as they interfere

with the worship. Stick-dancing, tom-toming, cracker-firing, and other enjoyments take place in this verandah as well as in the compound; non-Muhammadans take part in these ceremonies and enter the mosque with unwashed feet; this is very improper and against the rules of our religion. The Koran so lays it down."

There are numerous other passages to the same effect. This case appears to me to be directly covered by the judgment of Mr. Justice Norris in No. 12,348, Kalutara, June 28, 1835.[1]

The plaintiffs in that case were the priests and officials of a mosque at Marandahn, in the village of Barberyn. They sought to recover damages from the defendants, the priests of a rival mosque in the same village, for having celebrated for several years certain festivals, which it was contended that only priests of the Marandahn Mosque had the right to conduct, and having thereby diverted the offerings of devotees to the defendants' mosque. The learned Judge considered the case, because it involved a pecuniary claim, which, however, he held, in the event to be unfounded, as the offerings were voluntary. But he clearly indicated that, had it not been for the pecuniary claim, he would not have entertained the case at all.

"Had the question," he says "simply related to the plaintiffs' right to celebrate these festivals at their own mosque, without molestation or interruption, there could have been no room for doubt upon the subject; for the evidence is abundantly sufficient to show that, from time immemorial, the Marandahn Mosque has enjoyed this privilege, and we are bound by law to protect all classes of the people in the free and undisturbed exercise of their religious rites and ceremonies. Again, had the inquiry been of a purely ecclesiastical nature, as, for example, whether these festivals could, consistently with the Muhammadan religion and the precepts of the Koran, be celebrated in more than one consecrated mosque of the same village, and whether the favoured mosque at Barberyn was not that of the plaintiffs, the evidence might, perhaps, be considered sufficient (supposing it were the business—but it certainly is not—of this or of any court of justice to decide such matters) to warrant a decision of the former question in the negative, and of the latter in the affirmative. These, however, are questions which we are neither called upon, nor will consent, to decide. It is very possible that the Muhammadan worship may have been scandalized, and the religious veneration due to the ancient mosque at Marandahn abated, by the irregular practices and arrogant assumption of the priests officiating at the rival

[1] *Marshall's Judgments, 657.*

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mosque. But the law does not recognize these as civil injuries for which compensation can be claimed in a court of justice. These are matters purely ecclesiastical, and a remedy for the abuses complained of, if obtainable at all, must be sought for in ecclesiastical censure or penance."

I would dismiss the appeal with costs.

ENNIS J.—

The cases cited during the argument show that it is a firmly established principle that secular courts of law will protect all religions but interfere in none. In pursuance of this principle Courts decline to go into a purely religious question unless some civil right is involved. A worshipper in a mosque which is open to all Muhammadans is entitled to perform his worship with the ceremonies which prevail in his sect, provided he does not thereby disturb the other worshippers.

In the present case it appears that the carrying of a pagoda in procession has been for centuries prevalent in Ceylon among certain Muhammadans, but in recent years a feeling has been growing that it is idolatrous, and therefore contrary to the principles of the Islamic law. The defendants are the trustees of a mosque which is open to all Muhammadans, whatever their sect. The plaintiffs and the first defendant have embraced the new opinion, and seek an injunction against the trustees of the mosque to restrain them from allowing a pagoda from being housed in a building, which they assert is part of the mosque, and from allowing the pagoda procession from passing through a covered way, which they also assert is part of the mosque, on the ground that its presence in the mosque premises and carrying it through the mosque premises with music and clamour is (1) repugnant to the principles of the Islamic faith; (2) interferes with the devotions of the plaintiffs; (3) is a misuse of the mosque; (4) is a nuisance to the plaintiffs; and (5) is calculated to deter orthodox Muhammadans from worshipping in the mosque and from supporting and maintaining it.

The witnesses seem to concur that if the pagoda procession passed through the mosque it would be improper, and it was urged that the passage way through which it passed was part of the mosque. The learned District Judge has found to the contrary, and in this I agree with him. It is in evidence that the covered way is "madapam," or open court. The pagoda room was in this court as far back as 1853, as shown by the document 2 D 23, where the ridge wall, the pagoda room, is described as on the southern side wall of the mosque. When the mosque is full, this open court is used by the worshippers who cannot find room in the mosque. This does not, in my opinion, make the covered way part of the mosque.

I am unable to see in what way any civil right is involved in this case. The only question then remaining is whether the pagoda procession is a nuisance. The evidence as to this is extremely weak and contradictory, but the main ground for considering it a nuisance appears to be that it is against the rules of the Muhammadan religion. and this is a purely religious question, which it would not be proper for a secular court to consider.

I would dismiss the appeal with costs.

Appeal dismissed.