

63.1918

No. 90 of 1916.

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF THE ISLAND OF
CEYLON.

Between WICKRAMSINGHE NAWARATNE
PANDITTA WASALA ABEYKOON
GANWILA HERAT MUDIANS-
LAGE TIKIRI BANDARA ELLEKE-
WALA, BASNAYAKE NILAME AND
TRUSTEE OF WALLAHAGODA
TEMPLE, GAMPOLA (Plaintiff) - *Appellant,*

AND

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

Case

FOR THE APPELLANT.

1. This is an Appeal by the plaintiff in the original action (hereinafter called "the appellant") against a Judgment of the Supreme Court of the Island of Ceylon, dated February 2nd, 1915, which set aside a Judgment delivered in the appellant's favour by the District Court of Kandy, dated June 4th, 1914.

RECORD.

p. 66.

p. 60.

2. The appellant is the trustee under the Ceylon Buddhist Temporalities Ordinance No. 8 of 1905 of the Wallahagoda Dewale, of which he is the Basnayake Nilame or principal lay officer. A Dewale is a temple dedicated to one of the Hindu deities. The Buddhist religion teaches the worship of certain of the Hindu deities as Samyadrusti (i.e. orthodox) gods inasmuch as these Hindu deities are regarded as themselves followers of Buddha. The

p. 29, l. 44.

p. 34, l. 36.

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Buddhists of Ceylon number about $2\frac{1}{2}$ millions and the worship of the Hindu deity in question is taught as a part of their orthodox faith. To every important Dewale is attached a Vihare (Temple of Buddha) the incumbent priest of which performs the Buddhist ceremony of Pirit at the Dewale. The Kingdom of Lanka (i.e. Ceylon) and the religion of Buddha are recorded in the Mahavansa as having been placed under the protection of the Hindu High God Vishnu at the request of Gautama Buddha himself. The Mahavansa is a history of Ceylon contemporaneously compiled from time to time by the Buddhist priesthood, commencing with the sixth century B.C., when 10 the Island was colonized by the Aryan Sinhalese.

3. In the fourteenth century A.D. the capital of Ceylon was the ancient city of Gampola, which lies upon the river Mahaveliganga and on the outskirts of Gampola lies the village of Wallahagoda. The Wallahagoda Dewale, dedicated to the War God Kattragam (Kartikeyer of the Aryans) was built 800 years ago, and is held in great sanctity among followers of the Buddhist religion. It has about 120 Nilakarayas or service tenants who occupy and cultivate the lands belonging to the Dewale on a tenure requiring services to be performed for the purposes of the Dewale and its religious ceremonies. 20

4. The Esala Perahera is a Buddhist religious commemorative ceremony held in connection with every Dewale. This ceremony has been regularly held from time immemorial. It commemorates the victory of the god incarnate Kattragam over the evil spirit Dewatawa. It is a matter of solemn belief among Buddhists that this Dewatawa carried off inhabitants of Lanka and devoured them on board his ship; and that the god Kattragam, taking compassion on mortals who prayed for succour, obtained permission from the great god Vishnu of the Hindu Trinity, took on human form, struck off the head of Dewatawa in a hand-to-hand combat on the deck of his own 30 vessel, plunged a golden pitcher in the water and regained the skies carrying the demon's head and the pitcher with him.

5. Buddhists attach great religious significance to the ceremony commemorating this event. After Pirit (sacred Buddhist text) has been recited by the priest of the neighbouring Vihare, the ritual commences on the eighth day of the rising moon, and continues for fifteen days. Both Kapurale (priest of the Dewale) and Basnayake Nilame have to undergo rigorous purification with abstinence from animal food. The God (emblems of the God) enclosed in an ark are taken out of the inner sanctuary of the Dewale, which none but the 40 priest might enter, and for fourteen days are carried in procession along a traditional sacred route within the temple precincts accompanied by music of trumpets, chanks and tom-toms. On the fifteenth day the procession emerges for the culminating diyakapana (or water cutting) sacrament. The procession again follows an invariable

traditional route to the river Mahaveliganga accompanied by elephants, music and dancers. There the Kapurala (priest), screened from all eyes, with his mouth bound, grasping the holy sword with its hilt carefully swathed in many wrappings covered by the symbolical betel leaf, strikes the water and gathers some in a sacred vessel, and the procession returns to the Dewale bearing back all the sacred vessels and symbols. It is the belief of faithful Buddhists that even the slightest divergence from this rigid ritual would incur the wrath of the Gods and be punished by death and disaster.

RECORD.

10 6. The Esala Perahera is not to be confounded with "Pinkama" and other processions, which are of daily occurrence among Buddhists. The Esala Perahera is of very ancient foundation and very special sanctity and religious importance, as is borne out by the Mahavansa and other historical works.

R.p. 28, l. 23, l. 48.
et seq. : p. 21, l. 25

7. The Esala Perahera of the Wallahagoda Dewale followed from time immemorial a route to the river, which embraced a portion of the Ambagamuwa Road in Gampola. The Mahavansa establishes that for centuries back this route was inflexibly followed. The appellant's witness, the Unnanse (priest of the Vihare), spoke from twenty-five years' unbroken experience. The Trumpeter Pinna, who gave similar evidence, had accompanied the procession for thirty-five years.

R.p. 47, l. 40.
R.p. 26, l. 14.
p. 27, l. 35.

8. On the line of route are six places of religious worship, viz. : two Christian Churches and four Mahomedan Mosques. One of these mosques, formerly a thatched shed, was built in its present position about twenty-five years ago. It is a mosque used by a congregation of South Indian "Moormen," who are not indigenous Mahomedans of Ceylon. The congregation of this one mosque in May, 1907, objected to the passage of a minor Buddhist procession, called a Pinkama, and a disturbance followed. Thereupon two posts were erected at the instance of the Local Board fifty yards on either side of the mosque and the music of all Buddhist processions, Pinkamas as well as Peraheras, was required to stop while the procession passed this one objecting mosque. Another Pinkama was held in 1907 which was accompanied by Government officials and which conformed to the police restrictions. But as found by the District Judge, although police pressure was brought to bear upon the Buddhists, the right to conduct the much more important Esala Perahera with continuous music was not abandoned. The temple tenants refused to partake in or conduct the ceremony of Esala Perahera with an interruption of the music, and eventually the ceremony was properly held, in spite of objection by the police magistrate—the Ratemahatmaya (Chief Headman of the district) and leading Mahomedans accompanying the procession.

p. 39, l. 36.

p. 40, l. 7.

p. 58, l. 5.

p. 40, l. 15.

RECORD.
Vol. II., p. 36.
p. 58, l. 45.
Vol. II., p. 5, No. P3.

Vol. II., p. 36.
Vol. II., p. 38.

9. On August 17th, 1912, the President of the Kandy District Committee under the Buddhist Temporalities Ordinance, wrote a letter to the Government Agent of the Central Province, protesting against the obstruction caused by the posts and requesting their removal on the occasion of the Perahera. The Government Agent replied insisting on the obnoxious condition. This letter has been found by the District Judge to mean that any attempt to pass the mosque with music would be stopped by the police and the responsible parties prosecuted. The President on September 2nd, 1912, replied firmly protesting. As the date of the Perahera 10
approached, the appellant wrote to the Government Agent on September 23rd, 1912, asking for a licence and offering to avoid that portion of Amabgamuwa Street which lay past the mosque, and when the licence did arrive, it was found to contain further obnoxious conditions. The Perahera was then abandoned because priests, tenants and worshippers agreed it would be sacrilegious to submit to these conditions.

10. The District Judge held that the Government Agent's letter was a sufficient interruption of the rights of the appellant to form a cause of action in the present suit. 20

p. 54, l. 16.

11. Thereupon the appellant on September 30th, 1913, brought this action to establish the right of the Dewale to hold the procession free of the restriction sought to be imposed—the action being for declaration of a right against the Crown to traverse in procession the route in question by right of prescriptive user, such right having been acknowledged and guaranteed by the Crown by solemn treaty, the Kandyan Convention of 1815.

p. 7.

12. By his plaint the appellant alleged that he was the Basnayake Nilame (paragraph 1); that the Dewale was founded 800 years ago and enjoyed from time immemorial rights and privileges 30
among which was the right of conducting a Perahera with the right and privilege of marching through Ambagamuwa Street with elephants to the accompaniment of tom-toms, drums and other musical instruments; that these rights and privileges were acknowledged, recognised and confirmed on the cession of the Kandyan Kingdom to the British under the Kandyan Convention of 1815; and were enjoyed and exercised by the Dewale and were necessary for its proper dignity and for carrying out the ceremonies of the Dewale, and that the Dewale has acquired a right by prescription to the performance of these ceremonies and the enjoyment of these 40
rights and privileges (paragraph 3); and that the Government Agent for the Central Province of Ceylon on August 27th, 1912, wrongfully and in breach of the Kandyan Convention refused to allow the appellant permission to proceed in procession within 100 yards of

either side of the mosque mentioned above to the accompaniment of tom-toms, drums and other musical instruments.

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13. The appellant valued the right at 10,000 rupees, pleaded notice given under section 461 of the Civil Procedure Code, and prayed that he as Basnayake Nilame of the said Wallahagoda Temple be declared entitled to the right and privilege claimed with damages and further damages and costs.

14. By his answer the Attorney-General of Ceylon as matter of law pleaded: That the plaint disclosed no cause of action; that the Attorney-General was not liable to be sued even if the Government Agent was guilty of any wrongful act; that the right claimed was one not recognised by law; that the right was not vested in the appellant, and that, assuming the right, the action was not maintainable against the Attorney-General. p. 8.

15. In his answer the Attorney-General further denied that the appellant was the Basnayake Nilame or that the temple had the right claimed, and denied the allegations in paragraphs 2 and 3 of the plaint; pleaded that assemblies and processions in the town of Gampola were governed by section 69 of the Police Ordinance 16 of 1865, and section 64 of the Local Boards Ordinance 13 of 1898; and further pleaded (paragraph 4) that for many years past licenses had been issued for processions subject to music being stopped when passing the mosque; and (paragraph 5) that the reply of the Government Agent for the Central Province did not itself constitute an interference with any right as the appellant himself had not exercised for many years the right now claimed, and had lost such rights in terms of Ordinance 22 of 1871; and (paragraph 6) that the notice pleaded under section 461 of the Civil Procedure Code was bad in law, and prayed for a dismissal of the action. 20

16. On these pleadings issues were suggested by both appellant and respondent, and after argument the District Judge accepted all such issues adding certain others, which will be found in the record. pp. 10-12.

17. After argument on the hearing of the Appeal to the Supreme Court, the Crown abandoned all its contentions save four, which are set out by Mr. Justice Sampayo in his Judgment, which is summarized in paragraph 31 hereof. p. 68, l. 1-17.

18. The appellant gave evidence himself proving his appointment. There were called in support of his case the Kapurales (priests of the Dewale) four Nila Karayas or hereditary service tenants of the lands of the Dewale; the hereditary Kapurale (priest) of the Pahale (lower) Dewale; the Unnanse (ordained Buddhist p. 13.
p. 16.
pp. 20 *et seq.*
p. 26.

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priest) of the neighbouring Niyangampaye Vihare (Buddhist Temple proper); the Diyawadana Nilame, the custodian of the Tooth—Relic—the most sacred relic of the Buddhist world) and is lay head of the chief Buddhist temple of the world, the Dalada Maligawa. He holds in respect of the Maligawa at Kandy a position similar to that held by the appellant with respect to the Wallahagoda Dewale. The appellant also called Mr. Dissanayake, honorary secretary of the Kandy District Committee under the Buddhist Temporalities Ordinance.

19. The appellant gave evidence that the Esala Perahera was an important and very sacred rite of the Buddhist Established Religion; that the rite had been celebrated from very ancient times; that it was an essential part of the Esala Perahera that it should follow rigidly the prescribed route; that from very ancient times and long before the objecting mosque existed, the Esala Perahera had followed the same route that this route now passed the objecting mosque and the other five places of worship; that none of the frequenters of the other mosques and places of worship had objected to the procession or music; and that the objection of the mosque in question was unreasonable. 10
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20. The District Judge, who had heard the evidence, held that the above allegations were all proved by the oral evidence and the historical works cited. Section 57 of the Ceylon Evidence Ordinance No. 14 of 1895, authorizes the Court to have resort for its aid to appropriate books of reference on all matters of public history and literature.

21. The appellant relied upon the Kandyan Convention of 1815 recording a solemn treaty at a conference between His Excellency the Governor on behalf of His Majesty and His Royal Highness the Prince Regent of the one part and the principal chiefs of the Kandyan Provinces on the other part on behalf of the people, which was on March 2nd, 1815, publicly read and unanimously assented to, which declared that led by the invitation of the chiefs and welcomed by the acclamations of the people the British forces had entered the Kandyan Territory. After deposing the Kandyan King the British Authorities assumed the Government of the Island upon certain terms agreed upon, one of which was as follows :— 30

5. The Religion of Buddhoo 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. 40

22. The appellant urged that the correspondence hereinafter referred to with the Government Agent for the Central Province and

the circumstances of Police and Government interference, constituted a breach of the religious rights and privileges of the Buddhist community contrary to the Kandyan Convention of 1815, and the subsequent proclamation of May 31st, 1816, and the District Judge so held.

RECORD.

23. The Crown relied on the following contentions :—

10 That processions in Ceylon must be licensed under the provisions of the Police Ordinance 16 of 1885 and the Local Board Ordinance 13 of 1898. That such licenses applied to Buddhist processions as well. That such licenses had been issued in Gampola for Esala Perahera. That a disturbance occurred over a Pinkama in 1907 and the Local Board put up the posts hereinbefore referred to. That though the license (P.29 of 1909) imposed no conditions, still in the opinion of the witness (de Livera) music would have to be stopped on request by the police. That a permit of September, 1908, imposed certain hours during which the procession could not pass the mosque with music; that the music was stopped in the procession of 1910 and went by a different route in 1911. That in another town Anuradhapura certain arrangements had been come to between the Government and the Buddhists as to processions and beating of tom-toms; that the Kandyan Convention of 1815 was not a contract. If a contract, the appellant had no right to sue thereon; that the acts complained of by the Government were in the nature of a wrong for which no remedy existed.

p. 39, l. 30.
Vol. II., p. 35.
p. 41, l. 10.

24. On June 4th, 1914, Judgment was delivered by the District Judge Mr. Paul Pieris. p. 46.

25. He found :—

30 (1) That the appellant was the Basnayake Nilame of the Dewale;

(2) That Gampola was the ancient capital of Ceylon and that the Buddhist Religion was the State or Established Religion of the Kandyan Sinhalese monarchy;

(3) That Dewales were appendages of the Court and a part of the Buddhist Religious Establishment;

(4) That the appellant's Dewale was of great antiquity;

40 (5) That among the ancient privileges of this Dewale was the right of conducting the Esala Perahera in which the Basnayake Nilame, with the retainers and tenants of the temple, had the right and privilege of marching to and from and through all the streets of the town of Gampola, including that portion of

p. 47, l. 20'

RECORD.

Ambagamuwa Street with which this action was concerned, with elephants to the accompaniment of tom-toms, drums and other musical instruments;

(6) That the Esala Perahera is a ceremony such as is described in paragraph 5 hereof;

(7) That the Esala Perahera as proved by oral evidence and historical writings passed the route claimed by the appellant for centuries, and that such route was an essential part of the ceremony;

p. 50. (8) That continuous music was an essential and customary part of the ceremony; 10

p. 50. (9) That the interruptions relied on by the respondent (made under protest) had no significance;

(10) That the ceremony in its entirety was one of great sanctity and religious importance.

26. The District Judge found that an arrangement relied on by the respondents come to in Amuradhapura, a city nearly 100 miles away, had nothing to do with the Esala Perahera of the Dewales, and that the alterations made in the management of the Kandy Perahera did not affect the question whether, once the Esala Perahera had started on the fifteenth day with all appropriate rites and emblems and accompanied by music, that music can be stopped. 20

27. As to the Kandyan Convention of 1815, the District Judge held that the rights claimed by the plaintiff were thereby recognised and the continued enjoyment thereof guaranteed under paragraph 5, and that the Proclamation of September 18th, 1819, and May 20th, 1822, had the same effect.

p 53. As to the Proclamation of November 21st, 1818, the District Judge held that it did not modify section 5 of the previous proclamation, but was merely framed to remove some possible misunderstanding which the wide wording of section 5 was likely to give rise to—as was explained in Lord Bathurst's despatch of August 30th, 1815. 30

28. As to the contention of the respondent that the Kandyan Convention of 1815 was modified by subsequent legislation in sections 69, 84 and 90 of the Police Ordinance 16 of 1865, and section 64 of Local Boards Ordinance No. 13 of 1898, the District Judge held that this Convention ratified by the Sovereign by Proclamation of May 31st, 1816, recorded the terms of a contract of the most solemn kind, which could not be altered by one party. 40

29. As to the issues regarding prescription, the District Judge held that non-user of the right by a Basnayake Nilame could not

deprive a Dewale of this right, and that the facts alleged by the respondent as to interruption of the rights were too trivial to amount to a loss of rights by non-user.

30. The District Judge held that the action and attitude of the respondents as shewn by the correspondence with the Government Agent between August 27th and September 14th, 1912, amounted to a violation of the right of the appellant, and that while the appellant was not entitled to recover damages he was entitled to a declaration as to his rights and privileges as set out in the second paragraph of the plaint, and delivered Judgment accordingly with costs to the appellant.

31. On June 16th, 1914, the respondent appealed against this Judgment, and the Appeal was argued on January 18th, 1915, and subsequent dates, when the Supreme Court (Shaw, J., and Sampayo, A.J.) set aside the District Judge's Judgment and dismissed the appellant's action with costs.

At a late stage of the argument on Appeal, the Attorney-General abandoned his contentions (1) that the action being one of a tort did not lie against the Crown; (2) that the appellant had no right to sue on the alleged cause of action; and (3) that no cause of action had arisen, and rested his contentions upon the remaining points, namely : (1) whether the evidence satisfactorily shewed the rite in question to extend to the use of an unvarying route and continuous music; (2) whether such privilege can be said to have been secured by Article 5 of the Kandyan Convention; (3) whether on the footing that the Kandyan Convention is a treaty the appellant is not bound by subsequent legislation; and (4) whether the rights under the treaty can be enforced in a Municipal Court.

32. Dealing with the express findings of fact by the District Judge, De Sampayo, J., considered that the District Judge had made no statement that any particular route or the unceasing beating of tom-toms was essential to the ceremony. The learned Acting Justice is mistaken. There are distinct findings by the District Judge on these points of route and incessant music, as follows :—

On p. 47 at line 43 :—

“ This taken with the mass of parole evidence on the subject makes it clear that for centuries the Esala Perahera had proceeded along Ambagamuwa Road to Poruthota ”
l. 39 “ The Ambagamuwa Road was a *via sacra*.”

40 On p. 49 at line 40 :—

“ The Ritual of an oriental religion is adamantine.”

RECORD.

As to the music : p. 51, l. 32 :—

“ I think the plaintiff is right and that the continuous
 “ performance of the music till the Perahera is back again
 “ in the Dewale is an essential part of the Perahera.”

p. 50, l. 49.

The learned Acting Justice refused to believe that failure to carry out the ritual is followed by disaster. It is respectfully submitted that this was not a contention of fact ever raised by the appellant. What the appellant contended and proved and what the District Judge found as a fact was that this was the belief of devout Buddhists. “ Fortunately there is available,” says the District Judge, “ unquestionable evidence which goes to prove that the extreme punctiliousness displayed by these tenants is not artificial and a pretence, but a stern reality and an article of fervent faith.” 10

Sampayo, J., held that Article 5 of the Kandyan Convention was alterable by subsequent legislation and that it was so altered; that the Courts could not enforce a treaty against the subsequent acts of the Legislature.

p. 77.

Shaw, J., delivered a similar Judgment, and a Decree was entered by the Supreme Court dismissing the appellant’s action with costs.

The appellant submits that the Judgments and Decree of the Supreme Court of Ceylon are wrong and ought to be set aside, and that the Judgment of the District Judge ought to be restored for the following among other 20

REASONS.

- (1) Because the appellant proved, and the District Court found as a fact that the right of conducting the Esala Perahera with continuous music and along the route claimed, were essential parts of the religious ceremony and therefore rites of the religion of Buddha. 30
- (2) Because the appellant proved user of such rights and the uninterrupted carrying out of such rights from time immemorial.
- (3) Because such rites are “ rites ” contemplated by Article 5 of the Kandyan Convention of 1815.
- (4) Because the Kandyan Convention as therein expressed was a solemn Treaty of Cession between the British Crown and the Kandyan Sinhalese, which could not be varied by subsequent legislation.

- 10
- (5) Because if the terms of the Kandyan Convention could be so varied or abrogated, the subsequent legislation purporting to make the variation must expressly so state, and the Police and Local Boards Ordinances do not apply to cases falling within the terms of the Kandyan Convention.
- (6) Because assuming that the Police Ordinance and the Local Boards Ordinance applied, such legislation cannot deprive the Wallahagoda Dewale of rights guaranteed by the solemn Treaty of Cession contained in the Kandyan Convention.
- (7) Because the provisions of the Police Ordinance and Local Boards Ordinance are intended and directed to enable the Police to facilitate and protect the religious processions themselves by regulating the traffic and the orderliness of the public, and do not confer authority to prevent the due performance of religious rites.
- 20
- (8) Because apart from all other title the appellant is entitled to the right of public processions which cannot be curtailed or taken away from them on the ground of possible law breaking by others, and the appellant is entitled to protection at the hands of the authorities in the exercise of such right.
- (9) Because apart from religious grounds the appellants are seeking protection in the enjoyment of a right acquired by them by long user and not merely by presumed but by actual grant.

JOHN SIMON.

EDWARD W. PERERA.

J. H. C. SPROULE.

D. B. JAYATILAKA.

In the Privy Council.

ON APPEAL
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BETWEEN
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WILA HERAT MUDIANSSELAGE
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(Plaintiff) *Appellant*
AND
THE HONOURABLE THE ATTORNEY-
GENERAL, COLOMBO (Defendant)
Respondent

Case
FOR THE APPELLANT.

EDWARD DALGADO,
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GRAY'S INN, W.C.,
Solicitor for the Appellant.