

BEFORE: LORD JUSTICES NOURSE, SWINTON THOMAS and MUMMERY : CA ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT (His Honour Judge Medawar QC)

LORD JUSTICE NOURSE: Lord Justice Mummery will deliver the first judgment.

LORD JUSTICE MUMMERY: This is an appeal, with the leave of this court granted on 10th February 1999, from an order of His Honour Judge Medawar in the Central London County Court on 19th August 1998. After legal argument and without hearing any evidence or making any findings of fact, he dismissed the proceedings for possession of premises at 84 Dacre Road, Plaistow, London E13.

The premises are used as a vihara or Buddhist temple by the charity called the Ambedkar International Mission. That charity has been registered since 1978. It was established for the advancement of religion. The particular purposes are identified in a constitutional document made by way of scheme in the Chancery Division. Clause 3 of the constitution headed "Aims of the Charity" is in these terms:

"Insofar as they are charitable under the law of England and Wales, the aims of the Charity are:

- (1) To advance the teachings of Buddhism as revived by the late Dr B R Ambedkar and in furtherance thereof:
 - (a) to support and maintain Buddhist Monks doing Dhamma-Dutta work
 - (b) to provide and maintain a place or places of worship firstly in London and elsewhere thereafter
- (2) To advance public education by the following means:
 - (a) by promoting the socio-religious and cultural teachings of the late Dr Ambedkar
 - (b) by promoting research into the history and problems of the Untouchables and their descendants and by publishing the results of such research
 - (c) by providing or assisting in the provision of classes in English and Indian languages
 - (d) by providing facilities for the education of Indian women who are in need of education to enable them to take their place in Society and to improve their conditions of life.
- (3) To relieve poverty."

The vihara at 84 Dacre Road contains living quarters for two to three monks.

The claimants contend that they are the governing council and trustees of the charity and as such are entitled to possession of the property. The defendant, Mr Bhikku Nagesena, claims to be the patron of the charity. He is in actual occupation of the property. He contends on a number of grounds that the claimants are not entitled to an order for possession against him. Indeed, he counterclaims for a declaration that:

- (1) he is a statutory tenant of that part of the property that he occupies; and
- (2) the claimants are not entitled to an order for possession.

It is necessary to summarise the factual background to these unfortunate proceedings. There has been a long history of internal dispute in this charity. At one time there were at least three sets of legal proceedings arising solely out of the issue of the occupation of the vihara. The documents indicate that the costs incurred in those proceedings are in excess of £90,000. The background to those proceedings is explained in the judgment given by Mr Martin Mann QC, sitting as a judge of the High Court, in the Chancery Division on 7th November 1995.

The Scheme : It was hoped that these disputes would be settled by a scheme for the administration of the charity which was made in the Chancery Division on 27th March 1996. The scheme contains a constitution, from which I had already quoted the aims of the charity. It is also necessary to refer to clauses 5, 7, 9 and 10.

Clause 5 provides for a governing council in whom the management of the charity is vested. That council consists of the patron and not more than seven other persons who are full members of the charity and who can read and write in the English language. Provision is made for the first governing council of the charity. Thereafter it is provided that the members of the governing council (other than the patron) shall be elected annually at the annual general meeting of the charity.

Clause 7 provides for a patron. The charity at all times shall have a patron. Clause 7(2) provides that the first patron is the defendant, Bhikku Nagesena. He is the patron

"... unless and until at the first General Meeting of the Charity the full members of the Charity by simple majority elect to be the Patron some other specified person who is willing and eligible to be the Patron."

Clause 7(3) provides that thereafter the patron shall remain the patron of the charity until certain events take place: (a) his retirement; (b) his death; (c) he ceases to be a member of the Theravada Sangha; (d) he becomes incapable of exercising his functions by reason of ill health; and (e): "the full members of the Charity in General Meeting by a two-thirds majority elect to be the Patron some other specified person who is willing and eligible to be the Patron."

Clause 9 sets out the procedure for general meetings of the members. There is provision for an annual general meeting of the members of the charity to be held in April of each year or as soon as possible afterwards. The principal business of such a meeting will be not only to receive reports and accounts but also to elect the members of the governing council. There is provision in clause 9(2) for the holding of an extraordinary general meeting of the members of the charity to be called at any time by the patron, by the secretary at the direction of the governing council or by at least 30 full members. It is provided that all categories of member are entitled to attend an extraordinary general meeting but only full members and the patron are entitled to vote. Clause 9(3) provides that the quorum at a general meeting shall be one-third of the number of full members of the charity or 30 full members, whichever is the less. There is then provision within clause 9(3) that:

"All questions other than the removal of the Patron pursuant to clause 7(3)(e) above, the alteration of the provisions of this Constitution and the dissolution of the Charity shall be decided by a simple majority of the full members present in person and voting at the meeting..."

Clause 10 deals with land and buildings. It provides that:

"All land and buildings belonging to the Charity shall be vested in the Official Custodian for Charities."

The Issues : There is no dispute that (a) the defendant was appointed as the first patron or resident monk of this charity and (b) the claimants were appointed as the first members of the governing council and charity trustees. Very little else is agreed. It is alleged by the claimants that an extraordinary general meeting of the charity was convened and held on 27th October 1996; that 81 members were present and that 80 of them elected a Dr Siri Sumana as patron by a simple majority. This fact is pleaded and relied on in the particulars of claim setting out the grounds on which an order for possession is claimed against the defendant. It is alleged in paragraph 3 of the particulars of claim that the defendant had only a service occupancy of part of the residential accommodation of the vihara. It is alleged in paragraph 4 that on 27th October 1996 at an extraordinary general meeting of the members of the charity the defendant was deselected as patron and another patron was elected.

Following that resolution, in fact on the same day, a letter was sent to the patron terminating his licence to occupy the residential accommodation in the vihara and requiring him to vacate within 24 hours. He refused to vacate. He changed the locks and thus denied access to the other members and brought the life of the mission to a standstill.

In the defence and counterclaim various grounds are set out resisting the claim for possession. One of those grounds is that the defendant has not been lawfully deselected as the patron. A point is taken that the procedure which should have been followed for the deselection of the defendant as patron was not followed. The contention is that he could only be deselected by a resolution for which not less than two-thirds of the full members of the mission voted at a properly convened meeting. So an issue was raised as to whether the defendant is still or has ceased to be the patron of the charity.

A second question is raised in the defence and counterclaim. It is that, although the claimants were the governing council and trustees of the charity when the proceedings were commenced, they have ceased to be by reason of an extraordinary general meeting held on 9th November 1997. It is contended that a resolution was passed by members of the mission present voting unanimously to replace the claimants as the governing council and trustees of the mission. So it is alleged that the claimants are not entitled to possession on that ground. It is asserted in later documents that there was also an annual general meeting on 5th July 1998 at which a decision was made to replace the claimants as charity trustees. So a point is raised that the claimants who started the proceedings are no longer entitled to the order which they claim, even if they were originally so entitled, because they are no longer the charity trustees.

A third point is raised in the defence. It is that the legal title to 84 Dacre Road is registered with Her Majesty's Land Registry and is vested in the name of the Official Custodian for Charities. It is alleged that, if it is vested

in the Official Custodian, the claimants are not entitled to an order for possession in proceedings in which the Official Custodian is not the claimant or a co-claimant.

The pleadings were served after the originating summons, which had been issued in the Chancery Division on 21st January 1997, had been transferred to the County Court on 9th May 1997 and directions were given for the service of pleadings. Unfortunately, after the pleadings were closed there were serious delays. These were due to court papers being mislaid and to an adjournment of the hearing because of pressure on court time.

The Judgment : The proceedings ultimately came on for hearing on 19th August 1998 before His Honour Judge Medawar. They were listed for a three-day trial, but were briefly disposed of on a preliminary point. In his judgment the judge dismissed the action on the following grounds. He said that to be entitled to possession the claimants had to establish either that the property was vested in them or that they had powers to act on behalf of the person in whom the property was vested. It was not disputed that the property was vested in the Official Custodian for Charities. The Official Custodian was not a party. He should have been a party.

He then considered the position of the defendant. He held that the deselection of the defendant as patron of the charity was ineffective. He came to that conclusion without hearing any evidence, but simply on the basis of the construction of the procedural provisions of the constitution. He held, in view of the conclusion he had reached on the construction of the constitution, that no proper patron had been elected in place of the defendant. He concluded that there was no proper basis for the claimants' claim for possession against him. He refused to decide the further questions raised before him in argument as to the effectiveness of the resolutions at the later general meetings in which it was claimed that new charity trustees had been appointed in place of the original claimants. He said that that was a matter which should be referred to the Charity Commissioners.

The Official Custodian Point : This is an appeal by the claimants against the dismissal of their action for possession. It is possible to dispose of the appeal briefly on the ground of the Official Custodian point. The point is misconceived. The vesting of a legal estate of charity property in the Official Custodian for Charities is done to avoid the necessity of periodical transfers of charity property upon the successive appointments of new trustees of the charity. But it is clear from section 22 of the Charities Act 1993 that the Official Custodian is not entitled to exercise any powers of management over the property and affairs of the charity. It is provided in section 22:

- "(1) Subject to the provisions of this Act, where property is vested in the official custodian in trust for a charity, he shall not exercise any powers of management, but he shall as trustee of any property have all the same powers, duties and liabilities, and be entitled to the same rights and immunities, and be subject to the control and orders of the court, as a corporation appointed custodian trustee under section 4 of the Public Trustee Act 1906 except that he shall have no power to charge fees.
- (2) Subject to subsection (3) below, where any land is vested in the official custodian in trust for a charity, the charity trustees shall have power in his name and on his behalf to execute and do all assurances and things which they could properly execute or do in their own name and on their own behalf if the land were vested in them.

Section 97(1) of the 1993 Act contains a definition of "charity trustees". Section 97 is a general interpretation section and provides that in this Act, except insofar as the context otherwise requires, "charity trustees" means: "... the persons having the general control and management of the administration of a charity."

In my judgment, the charity trustees are entitled to the possession of the property of the charity subject only to any claims that the defendant may have. They may enter into transactions granting possession. They may bring proceedings in their own name to recover possession for the purposes of the charity without the need to obtain the permission of or to join in the proceedings the Official Custodian for Charities. The judge was wrong to hold that the proceedings were not properly constituted in the absence of the Official Custodian for Charities as a claimant or co-claimant. On that ground alone I would allow the appeal.

Order : There remains a further question as to what order this court should make. I would propose the following order. The appeal is allowed to the extent of:

- (1) rescinding the judge's order dismissing the action; and

- (2) declaring that an action for possession of the property may be brought by the charity trustees, whoever they may be, without the need to join the Official Custodian for Charities as a claimant.
- (3) I would remit the action and the counterclaim for trial at the County Court. It was said by Miss Calder on behalf of the appellant claimants that they would prefer the matter not to come before the same judge who dismissed their action. I would not make a direction to that effect. That is a matter which can be dealt with when the matter is restored for hearing before the County Court.
- (4) I would make an order staying the proceedings and the counterclaim pending an application by the claimants and the defendant for authorisation. Although the action was started as what appears to be a simple claim for possession, it is now clear from the pleadings that these are "charity proceedings" both as regards the claim and as regards the counterclaim.

Section 33 of the 1993 Act deals with charity proceedings. "Charity proceedings" are defined in section 33(8) as meaning proceedings in any court (so that includes the County Court) in England or Wales brought under the court's jurisdiction with respect to charities or brought under the court's jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes. This, for the reasons explained, is a trust for charitable purposes, and it is clear that there are now issues in the possession proceedings which relate to the administration of those trusts, namely: (i) who are the trustees of the charity; and (ii) who is the patron of the charity. There is a possible third issue as to who are the members. Those are matters of internal or domestic dispute and are not a dispute with an outsider to the charity. These are charity proceedings within section 33(8). That means that they cannot be continued without the authorisation either of the order of the Charity Commissioners or of a judge of the High Court of Justice, Chancery Division. No such authorisation has been obtained. To allow the proceedings to continue without authorisation would be to offend the whole purpose of requiring authorisation for the charity proceedings. That is to prevent charities from frittering away money subject to charitable trusts in pursuing litigation relating to internal disputes.

- (5) I would also direct that the stay on the proceedings should not be lifted until after an attempt has been made by both parties to resolve this dispute by mediation. This point is quite separate from the requirement of authorisation under section 33 of the Charities Act. The position is that a combined mediation service for charities has been established by the Centre for Dispute Resolution jointly with the National Council for Voluntary Organisations. It has received a grant from the Home Office, which is the government department responsible for the Charity Commission. The purpose of that grant is to subsidise the costs of mediating charity disputes. The purpose of the scheme is to achieve, by voluntary action confidentially conducted, a healing process under which disputes within a charity can be resolved at a modest fee and without diminishing the funds which have been raised for charitable purposes. The details of this scheme can be obtained from:

The National Council for Voluntary Organisations Mediation Help Desk

Regent's Wharf, 8 All Saints Street London N1 9RL, Telephone 020-7713-6161.

In this case very substantial sums of money have been spent on litigation without achieving a resolution. The spending of money on this kind of litigation does not promote the religious purposes of this charity. It is time for mediation. No more money should be spent from the assets of this charity until:

- (1) the Charity Commissioners have authorised the proceedings and counterclaim; and
- (2) all efforts have been made to secure a mediation of this dispute in the manner suggested.

I would allow this appeal and make the order indicated.

LORD JUSTICE SWINTON THOMAS: I agree.

LORD JUSTICE NOURSE: I also agree.

Order: appeal allowed to the extent indicated in (1) to (5) above; appellant claimants to have half their costs of the appeal, not to be enforced without the leave of the court (the view being expressed that this is not a suitable case to make an order against the Legal Aid Board); taxation of the respondent defendant's costs pursuant to the Legal Aid and Advice Act.