Sardar Syedna Taher Saifuddin Saheb vs The State Of Bombay on 9 January, 1962

Equivalent citations: 1962 AIR 853, 1962 SCR SUPL. (2) 496, AIR 1962 SUPREME COURT 853

Author: Bhuvneshwar P. Sinha

Bench: Bhuvneshwar P. Sinha, A.K. Sarkar, K.C. Das Gupta, N. Rajagopala Ayyangar, J.R. Mudholkar

PETITIONER:
SARDAR SYEDNA TAHER SAIFUDDIN SAHEB

Vs.

RESPONDENT:
THE STATE OF BOMBAY

DATE OF JUDGMENT:
09/01/1962

BENCH:
SINHA, BHUVNESHWAR P.(CJ)
BENCH:
SINHA, BHUVNESHWAR P.(CJ)
SARKAR, A.K.
GUPTA, K.C. DAS
AYYANGAR, N. RAJAGOPALA
MUDHOLKAR, J.R.

CITATION:
1962 AIR 853 1962 SCR Supl. (2) 496
CITATOR INFO :
F 1972 SC1586 (12)

ACT:
Excommunication, Prevention of-Enactment-Constitutional validity-Fundamental rights of members of Dawoodi Bohra community and its religious Head, if infringed-Bombay Prevention of Excommunication Act, 1949 (Bom. 42 of 1949), ss. 2, 3-Constitution of India, Arts. 25,26,17.

HEADNOTE:
By. s. 3 of the Bombay Prevention of

Excommunication Act, 1949 (Bom. 42 of 1949), it is provided that "Notwithstanding anything contained in any law, custom or usage for the time being in force, to the contrary, no excommunication of member of any community shall be valid and shall be of any effect." The preamble to the Act state, inter alia, that in keeping with the changing times and in the public interest, it was expedient to stop the practice of excommunication prevalent in certain communities and the definition of the word "community" contained in s. 2of the Act included the included the religious denomination of Dawoodi Bohras. The petitioner, who was the religious head of the Dawoodi Bohra community and trustee of its property, challenged the constitutional validity of the Act on the ground that it violated its fundamental rights guaranteed by Arts. 25 and 26 of the Constitution. Reliance was placed on behalf of the petitioner on the decision of Judicial Committee of the Privy Council in Hasan Ali v. Mansoor Ali, (1947) L. R. 75 I.A. 1, to which he was a party, as recognising his right as the 51st Dai-ul-Mutlaq of the community to excommunicate any of its members under prescribed limits.

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Held, (Per Sarkar, Das Gupta and Mudholkar, JJ., Sinha, C. J., dissenting), that the impugned Act violated Arts. 25 and 26 of the Constitution and was, therefore, void.

It was evident from the religious faith and tenets of the Dawoodi Bohra community that the exercise of the power of excommunication by its religious head on religious grounds formed part of the management of its affairs in matters of religion and the impugned Act in making even such excommunication invalid infringed the right of the community under Art. 26(b) of the Constitution.

Hasan Ali v. Mansoorali, (1947) L. R. 75 I. A. 1, referred to.

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It is well settled that that Arts. 25 and 26 of the Constitution protect not merely religious doctrines and beliefs but also acts done in pursuance of religion and thus guarantee rituals and observances, ceremonies and modes of worship which are integral parts of religion. What is essential part of a religion or what its religious practice has to be judged in the light of its doctrine and such practices as are regarded by the community as a part of its religion must also be included in them.

Commissioner of Hindu Religious Endowments,

Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shrur Mutt, [1954] S. C. R. 1005, Mahant Jagannath Ramanuj Das v. The State of Orissa, [1954] S.C.R. 1046, Sri Venkataramana Devaru v. State of Mysore, [1958] S.C.R. 895 and Durgah Committee, Ajmer v. Syed Hussain Ali, [1962] 1 S.C.R, 383, relied on.

The fundamental right under Art. 26(b) is not subjected to preservation of civil rights and its only limitations are those expressly mentioned by the Article itself i.e. public order, morality and health and those mentioned by cl. 2 of Art. 25 as has been held by this court. The fact that in the instant case civil rights of an excommunicated person would be affected by the exercise of the fundamental right under Art. 26(b) can, therefore, be of no consequence nor could it be said that excommunication was prejudicial to public order, morality and health.

The impugned Act did not fall within Art. 25(2)(a) nor could it be said to be a law "providing for social welfare and reform" within the meaning of Art. 25(2)(b) of the Constitution. It barred excommunication even on religious grounds and could not be said to promote social welfare and reform even though it sought to prevent consequent loss of civil rights.

Sri Venkataramana Devaru v. State of Mysore, [1958] S.C.R. 895, referred to.

Taher Saifuddin v. Tyebbhai Moosaji, A. I. R. 1953 Bom. 183, disapproved.

Per Sinha, C. J.-It was not correct to say that the Privy Council in Hasanali v. Mansoorali, held that the right of the Dai-ul-Mutlaq to excommunicate a member of the community was a purely religious matter. The Dai was not merely the head of a religious community but also the trustee of its property. While his actions in the purely religious aspect could be no concern of the Courts, those touching the civil rights of the members of the community were justiciable and liable to interference by the legislature and the judiciary.

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The impugned Act, therefore, in seeking to protect the civil rights of the members of the community was within the saving provisions of Art. 25(2) (b) of the constitution since the right of a religious denomination under Art. 26(b) was subject to legislation under Art. 25(2)(b) of the Constitution.

Sri Venkataramana Devaru v. State of Mysore, [1958] S.C.R. 895, relied on.

The Commissioner of Hindu Religious

Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shrur Mutt, [1954] S.C.R. 1005, considered.

The Durgah Committee, Ajmer v. Syed Hussain Ali, [1962] 1 S.C.R. 383, referred to.

Case-law discussed.

The Act had for its purpose the fulfilment of individual liberty of conscience guaranteed by Art 25(1) and sought to implement Art. 17 of the Constitution in attempting to save an excommunicated person from virtually becoming an untouchable in his community and its constitutional validity could not, therefore, be questioned.

Held, further, that the Act in pith and substance fell within Entries 1 and 2 of List III of the Legislative Lists of the Constitution Act of 1935, and there could be no doubt as to the competency of the Legislature in enacting it.

Per Ayyangar, J.-The right of Dai-ul-Mutlaq to exercise the right of excommunication against a member of the denomination as recognised by the Privy Council in Hasanali v. Mansoorali, could not be in doubt.

A denomination under Art. 26 and its members under Art. 25 have the right to ensure its existence by maintaining discipline and ensuring adherence to its tenets and practices by such suitable action as excommunication of those who denied the fundamental bases of the religion. The consequence of such action must necessarily involve the exclusion of an excommunicated person from participation in the religious life of the denomination including the use of places of worship or burial grounds dedicated for the use of the members and vested in the religious head as trustee for the denomination.

Dill v. Watson, (1836) 3 Jones Rep. (Ir. Ex.) 48 and Free Church of Scotland v. Overtoun, [1904] A. C. 515, referred to.

It was not correct to say, in view of the definition of the word 'excommunication' contained in the Act., that it merely sought to save the civil rights of an excommunicated person and had no concern with excommunication on religious
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grounds entailing, under the laws of the denomination, deprivation of civil rights.

The impugned Act by depriving the Dai of the right to excommunicate and making its exercise a penal offence struck at the very life of the denomination and rendered it impotent to protect itself against dissidents and schismatics and

thereby contravened Art. 25 and 26 of the Constitution.

The impugned Act cannot also to sustained as a measure of social welfare and reform under Art. 25(2)(b) or under Art. 17 of the Constitution.

Venkatarama Devaru v. State of Mysore, [1958] S.C.R. 895, distinguished.

The expression "laws providing for social welfare and reform" in Art. 25(2)(1) of the Constitution was not intended to enable the legislature to "reform" a religion out of existence or identity. The activities referred to in Art. 25(2)(a) are obviously not of the essence of the religion nor was Art. 25(2)(b) intended to cover the essentials of a religion which are protected by Art. 25(1).

Faith in the Dai-ul-Mutlaq being an essential part of the creed of the denomination that held it together, the impugned Act clearly contravened Art. 25(1) of the Constitution by taking away his power of excommunicate by which he kept the denomination together and maintained the purity of its fellowship.

JUDGMENT:

ORIGINAL JURISDICTION: Petition No. 128 of 1958.

Petition under Art. 32 of the Constitution of India for enforcement of Fundamental Rights.

K.M. Munshi, R. J. Joshi, G.K. Munshi, T.S.N. Diwanji, J.B. Dadachanji, S.N. Andley, Rameshwar Nath and P. L. Vohra, for the petitioner.

M. C. Setalvad, Attorney General of India, C.K. Daphtary, Solicitor-General of India, H.N. Sanyal, Additional Solictor General of India, B. Sen and R. H. Dhebar, for the respondent.

I N. Shroff, for the intervener.

1962. January 9-Sinha. C.J., delivered his own Judgment. The Judgment of Sarkar, Das Gupta and Mudholkar, JJ., was delivered by Das Gupta, J. Ayyangar J. delivered a separate Judgment.

SINHA, C. J.-By this petition under Art. 32 of the Constitution, the petitioner, who is the 51st Dai-ul-Mutlaq and head of the Dawoodi Bohra Community challenges the constitutionality of the Bombay Prevention of Excommunication Act, 1949 (Bombay Act XLII of 1949) (hereinafter referred to as the Act) on the ground that the provisions of the Act infringe Arts. 25 and 26 of the Constitution. The sole respondent in this case is the State of Bombay.

The petition is founded on the following allegations. The Dawoodi Bohra Community consist of Muslims of the Shia sect, holding in common with all members of that sect the belief that there is one God, that Mohammed is His Prophet to whom He revealed the Holy Koran; that Ali, the son-in-law of Mohammed, was the Wasi (executor) of the Prophet, and that the said Ali succeeded the Prophet by Nas-e-Jali. The Dawoodi Bohras believe that the said Ali was succeeded by a line of Imams, each of whom in turn was appointed by Nas- e-Jali by his immediate predecessor. The Shia sect itself became divided into two sub-sects, known respectively as Ismailis and Isna Asharia. The Dawoodi Bohras belong to the former sect, and believe that owing to persecution Imam Type (the 21st Imam) went into seclusion and that an Iman from his line appear, it being their belief that an Iman always exists although at times he may be invisible to his believers, while in seclusion; that owing to the impending seclusion of the 21st Imam (Imam Tyeb) his predecessor, the 20th Imam, directed his Hujjat (a dignitary ranking next to an Imam), one Hurra-tul-Malaka, to appoint a Dai, a Mazoon (a dignitary next to a Dai) and a Mukasir (a dignitary ranking next to a Mazoon) to carry on the Dawal (mission) of the Imam so long as the Imam should remain in seclusion, and to take and receive from the faithful an oath of allegiance. The Dais are known as Dai-ul-Mutlaq. The petitioner, as the Head Priest of the community of Dawoodi Bohras, is the vice gerent of Imam on Earth in seclusion. The petitioner is a citizen of India. As Dai-ul-Mutlaq and the vicegerent of Imam on Earth in seclusion, the Dai has not only civil powers as head of the sect and as trustee of the property, but also ecclesiastical powers as religious leader of the community. It is the right and privilege of the petitioner as Dai-ul-Muntlaq to regulate the exercise of religious rights in places where such rights and ceremonies are carried out and in which religious exercises are performed. In his capacity as the Dai-ul-Mutlaq, that is to say, as religious leader as well as trustee of the property of the community, one of his duties is to manage the properties which are all under his directions and control. He has also the power of excommunication. This power of excommunication is not an absolute, arbitrary and untrammelled power, but has to be exercised according to the usage and tenets of the community. Save in exceptional circumstances, expulsion from the community can be effected only at a meeting of the Jamat, after the person concerned has given due warning of the fault complained of and an opportunity of mending, and after a public statement of the grounds of expulsion. The result of excommunication properly and legally effected involves exclusion from the exercise of religious rights in places under the trusteeship of the Dai-ul-Mustlaq. The petitioner claims that as the head of the Dawoodi Bohra community and as Dai-ul-Mutlaq, he has the right and power, in a proper case and subject to the conditions of legal exercise of that power, to excommunicate a member of the Dawoodi Bohra community, and this power of excommunication is an integral part of the religious faith and belief of the Dawoodi Bohra community. The petitioner further affirms that the exercise of the right of excommunication is a matter of religion, and that, in any event, the right is an incident of the management of the affairs of the Dawoodi Bohra community in matters of religion. He also asserts that the Dawoodi Bohra community constitutes a religious denomination within the meaning of Art. 26 of the Constitution; the said right of the petitioner to excommunicate a member of the community, for reasons of which the petitioner is the sole judge in the exercise of his position as the religious head, is a guaranteed right under Arts. 25 and 26 of the Constitution.

The Bombay Legislature enacted the Act, which came into force on November 1, 1949. The petitioner asserts that the Act violates his right and power, as Dai-ul-Mutlaq and religious leader of the Dawoodi Bohra community, to excommunicate such members of the community as he may think fit

and proper to do; the said right of excommunication and the exercise of that right by the petitioner in the manner aforesaid are matters of religion within the meaning of Art. 26(b) of the Constitution. It is submitted by the petitioner that the said Act violates or infringes both the Arts. 25 and 26 of the Constitution, and to that extent, after the coming into force of the Constitution, has become void under Art. 13 of the Constitution. The petitioner claims that notwithstanding the provisions of the Act, he, as the religious leader and Dai-ul-Mutlaq of the community, is entitled to excommunicate any member of the Dawoodi Bohra community for an offence, which according to his religious sense justifies expulsion; and insofar as the Act interferes with the said right of the petitioner, it is ultra vires the Legislature. The Act is also challenged on the ground of legislative incompetence of the then Legislature of Bombay, inasmuch as it is contended that such a power is not contained in any of the entries in the Seventh Schedule of the Government of India Act, 1935.

One Tayebhai Moosaji Koicha (Mandivala) instituted a suit, being suit No. 1262 of 1949, in the High Court of Judicature at Bombay, praying inter alia, for a declaration that certain orders of excommunication passed by the petitioner against him prior to the enactment of the Act were void and illegal and of no effect, and that the plaintiff continued to remain a member of the Dawoodi Bohra community. The said suit was heard by J.C. Shah, J., who, by his judgment dated February 21, 1952, held that the Act was not inconsistent with Art. 26 of the Constitution, and was not ultra vires the Legislature of the Province of Bombay. The petitioner, being dissatisfied with the judgment of the learned Judge, preferred an appeal that came up for hearing before the Court of Appeal, composed of Chagla, C. J., and Bhagwati J. By its judgment dated August 26, 1952, the Court of Appeal upheld the judgment of the learned single Judge, though on different grounds. The petitioner obtained leave from the High Court to appeal to this Court, and ultimately filed the appeal, being Civil Appeal No. 99 of 1954. During the pendency of the appeal, the plaintiff-respondent aforesaid died and an application made on behalf of his heirs for being brought on the record was not granted by the High Court of Bombay. This Court dismissed the said appeal on the ground that the plaintiff having died, the cause of action did not survive.

The petitioner further alleges that parties inimical to him and to the Dawoodi Community have written scurrilous articles challenging and defying the position, power or authority of the petitioner as the religious head of the community; the challenge to the petitioner's position and his power to excommunicate as the head of the Dawoodi Bohra community is violative of the petitioner's guaranteed rights under Arts. 25 and 26 of the Constitution. It is, therefore, claimed that it is incumbent upon the respondent, in its public character, to forbear from enforcing the provisions of the Act against the petitioner. By the petitioner's attorney's letter, annexure B to the petition, dated July 18, 1958, the petitioner pointed out to the respondent the unconstitutionality of the Act and requested the latter to desist from enforcing the provisions of the Act against the petitioner or against the Dawoodi Bohra community. In the premises, a writ of Mandamus or a writ in the nature of Mandamus or other appropriate writ, direction or order under Art. 32 of the Constitution was prayed for against the respondent restraining it, its officers, servants and agents from enforcing the provisions of the Act.

The answer of the State of Bombay, the sole respondent, is contained in the affidavit sworn to by Shri V.N. Kalghatgi, Assistant Secretary to the Government of Bombay, Home Department, to the

effect that the petitioner not having taken any proceedings to excommunicate any member of the community had no cause of action or right to institute the proceedings under Art. 32 of the Constitution; that it was not admitted that the Dai-ul-Mutlaq, as the head of the community, has civil powers, including the power to excommunicate any member of the community; that, alternatively, such power is not in conformity with the policy of the State, as defined in the Constitution; that the petitioner, as the head of the community may have the right to regulate religious rights at appropriate places and occasions, but those rights do not include the right to excommunicate any person and to deprive him of his civil rights and privileges; and that, in any event, after the coming into effect of the impugned Act, the petitioner has no such rights of excommunication; that it was denied that the right to excommunicate springs from or has its foundation in religion and religious doctrines, tenets and faith of the Dawoodi Bohra community that, at any rate, it was denied that the right to excommunicate was an essential part of the religion of the community; that, alternatively, assuming that it was part of a religious practice, it runs counter to public order, morality and health. It was also asserted that the impugned Act was a valid piece of legislation enacted by a competent legislature and within the limits of Art. 25 and 26 of the Constitution; and that the right to manage its own affairs vested in a religious community is not an absolute or untrammelled right but subject to a regulation in the interest of public order, morality and health. It was denied that the alleged right of the petitioner to excommunicate a member of the community is guaranteed by Arts. 25 and 26 of the Constitution. In the premises, it was denied that the petitioner had any right to the declaration sought or the relief claimed that the provisions of the Act should not be enforced.

At a very late stage of the pendency of the proceedings in this Court, in April 1961, one Kurbanhusein Sanchawala of Bombay, made an application either for being added as a party to the Writ Petition or, alternatively, for being granted leave to intervene in the proceedings. In his petition for intervention, he stated that he was a citizen of India and was by birth a member of the Dawoodi Bohra community and as such had been taking an active part in social activities for bettering the conditions of the members of the community. He asserted that members of the community accepted that up to the 46th Dai-ul- Mutlaq there was no controversy, that each one of them had been properly nominated and appointed, but that a controversy arose as regards the propriety and validity of the appointment of the 47th Dia-ul-Mutlaq, which controversy continued all along until the present time so that opinion is divided amongst the members of the Dawoodi Bohra community as to the validity of appointments and existence of Dai-ul-Mutlaq, from the 47th to the 51st Dai-ul-Mutlaq, including the present petitioner. The intervener also alleged that but for the impugned Act, the petitioner would have lost no time in excommunicating him. In the premises, he claims that he is not only a proper but necessary party to the writ Petition. He, therefore, prayed to be added as a party- respondent, or, at any rate, granted leave to intervene at the hearing of the Writ Petition. We have to dispose of this petition because no orders have been passed until the hearing of the main case before us. In answer to the petitioner's claims, the intervener has raised the following grounds, namely, that the Holy Koran does not permit excommunication, which is against the spirit of Islam; that, in any event, the Dai-ul- Mutlaq had no right or power to excommunicate any member of the community, and alternatively, that such a right, assuming that it was there, was wholly "out of date in modern times and deserves to be abrogated and was rightly abrogated by the said Act." It was further asserted that the alleged right of excommunication was opposed to the

universally accepted fundamentals of human rights as embodied in the "Universal Declaration of Human Rights." It was also asserted that the Act was passed by a competent legislature and was in consonance with the provisions of Arts. 25 and 26 of the Constitution. The intervener further claims that the rights to belief, faith and worship and the right to a decent burial were basic human rights and were wholly inconsistent with the right of excommunication claimed by the petitioner, and that the practice of excommunication is opposed to public order and morality; that the practice of excommunication was a secular activity associated with religious practice and that the abolition of the said practice is within the saving cl. 2(a) of Art. 25 of the Constitution. It was also asserted that, under the Mohamadan Law, properties attached to institutions for religious and charitable purposes vested in the Almighty God and not in the petitioner, and that all the members of the Dawoodi Bohra community had the right to establish and maintain such institutions, in consonance with Art. 26 of the Constitution; that is to say that Art. 26 guarantees the right of the denomination as a whole and not an individual like the petitioner. It was also asserted that the provisions of the Act prohibiting excommunication was in furtherance of public order and morality and was just and reasonable restriction on a secular aspect of a religious practice. The petitioner challenged the right of the intervener either to intervene or to be added as the party respondent. In his rejoinder to the petition for intervention, the petitioner further alleged that the practice of excommunication was essential to the purity of religious denominations because it could be secured only by removal of persons who were unsuitable for membership of the community. It was, therefore, asserted that those who did not accept the headship of the Dal-ul-Mutlaq, including the petitioner, must go out of the community and anyone openly defying the authority of the Dai-ul-Mutlaq was liable to be excommunicated from the membership of the community, entailing loss of rights and privileges belonging to such members. It was, therefore, claimed that the practice of excommunication was, and is, an essential and integral part of the religion and religious belief, faith and tenets of Dawoodi Bohra community, which have been guaranteed by Art. 26 of the Constitution.

It has been urged on behalf of the petitioner, in support of the petition, that the Dawoodi Bohra community, of which the petitioner is the religious head, as also a trustee in respect of the property belonging to the community, is a religious denomination within the meaning of Art. 26 of the Constitution; that as such a religious denomination it is entitled to ensure its continuity by maintaining the bond of religious unity and discipline, which would secure the continued acceptance by its adherents of certain essential tenets, doctrines and practices; the right to such continuity involves the right to enforce discipline, if necessary by taking the extreme step of excommunication; that the petitioner as the religious head of the denomination is invested with certain powers, including the right to excommunicate dissidents, which power is a matter of religion within the meaning of Art. 26(b) of the Constitution that the impugned Act, insofar as it takes away the power to enforce religious discipline and thus compels the denomination to accept dissidents as having full rights as a member of the community, including the right to use the properties and funds of the community dedicated to religious use, violates the fundamental rights of the petitioner guaranteed under Art. 26. In this connection, reliance was placed on the decision of this Court in The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (1), which, it is contended, has laid down that the guarantee under the Constitution not only protects the freedom of opinion, but also acts done in pursuance of such religious opinion, and that it is the denomination itself which has a right to determine what are essential parts of its

religion, as protected by the provisions of Arts. 25 and 26 of the Constitution. It was further contended that the right to worship in the mosque belonging to the community and of burial in the graveyard dedicated to the community were religious rights which could not be enjoyed by a person who had been rightly excommunicated. Insofar as the Act took away the right of the petitioner as the head of the community to excommunicate a particular member of the community and thus to deprive him of the use of the funds and property belonging to the commu-

nity for religious purposes, had the effect of depriving the petitioner of his right as the religious head to regulate the right to the use of funds and property dedicated to religious uses of the community. It has also been contended that religious reform, if that is the intention of the impugned Act, is outside the ambit of Art. 25(2)

(b) of the Constitution.

The learned Attorney-General for the respondent contended on the other hand, that the right to excommunicate, which has been rendered invalid by the impugned Act, was not a matter of religion within the meaning of Art. 26(b) of the Constitution; that what the Act really intended was to put a stop to the practice indulged in by a caste or a denomination to deprive its members of their civil rights as such members, as distinguished from matters of religion, which were within the protection of Art. 25 and 26. Alternatively, it was also argued that even assuming that excommunication was concerned with matters of religion, the Act would not be void because it was a matter of reform in the interest of public welfare. It was also argued that there was no evidence on the record to show, that excommunication was an essential matter of religion. The right to worship at a particular place or the right of burial in a particular burial ground were questions of civil nature, a dispute in respect of which was within the cognizance of the Civil Courts. The legislation in question, in its real aspects, was a matter of social welfare and social reform and not within the prohibitions of Art. 25(1) or Art. 26. Excommunication involving deprivation of rights of worship or burial and the like were not matters of religion within the meaning of Art. 26(b), and finally, Art. 26(b) was controlled by Art. 25(2)

(b) of the Constitution, and, therefore, even if excommunication touched certain religious matters, the Act, insofar as it had abolished it, was in consonance with modern notions of human dignity and individual liberty of action even in matters of religious opinion and faith and practice.

Shri Shroff, appearing for the intervener, attempted to reopen the question whether the petitioner as Dai-ul-Mutlaq, assuming that he had been properly elected as such, had the power to excommunicate, in spite of the decision of their Lordships of the Judicial Committee of the Privy Council in Hasan Ali v. Mansoor Ali (1). He also supported the provisions of the impugned Act on the ground that they were in furtherance of public order. As we are not here directly concerned with the question whether or not the petitioner as the head of the religious community had the power to excommunicate, we did not hear Mr. Shroff at any length with reference to that question. We shall proceed to determine the controversy in this case on the assumption that the petitioner had that power. We are only directly concerned with the questions whether the provisions of the Act, insofar as they have rendered invalid the practice of excommunication, are unconstitutional as infringing

Art. 26(b), and enacted by a legislature which was not competent to do so, as contended on behalf of the petitioner. We will, therefore, confine our attention to those questions. Keeping in view the limited scope of the controversy, we have first to determine the ambit and effect of the impugned Act. The Bombay Prevention of Excommunication Act (Bombay Act XLII of 1949) is an Act to prohibit excommunication in the province of Bombay. Its preamble, which shortly states the background of the legislation, is in these terms:

> "Whereas it has come to the notice of Government that the practice prevailing in certain communities of excommunicating its members is often followed in a manner which results in the deprivation of legitimate rights and privileges of its members;
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> And whereas in keeping with the spirit of changing times and in the public interest it is expedient to stop the practice; it is hereby enacted is follows".

The definition of "Community" as given in s. 2(a) would include the Dawoodi Bohra community, because admittedly its members are knit together by reason of certain common religious doctrines. and admittedly its members belong to the same religion or religious creed of a section of the Shia community of Muslims. The term 'community"

> includes a caste or a sub-caste also. "Excommunication" has been defined by s. 2 (b) as meaning "the expulsion of a person from any community of which he is member depriving him of rights and privileges which are legally enforceable by a suit of civil nature.. ", and the explanation to the definition makes it clear that the rights and privileges within the meaning of the definition include the right to office or property or to worship in any religious place or a right of burial or cremation, notwithstanding the fact that the determination of such right depends entirely on the decision of the question as to any religious rites or ceremonies or rule or usage of a community. By s. 3, excommunication of a member of a community has been declared to be invalid and of no effect, notwithstanding any law, custom or usage to the contrary. Any act of excommunication, or any act in furtherance of excommunication, of any member of a community has been made a penal offence liable to a punishment, on conviction, of fine which may extend to one thousand rupees. The explanation has made it clear that any person who has voted in favour of a decision of excommunication at a meeting of a body or an association of a particular denomination is deemed to have committed the offence made punishable by s. 4, as aforesaid. Sections 5 and 6 lay down the procedure for the trial of an offence under the Act, the limit of time within which the prosecution must be launched and the necessity of previous sanction of the authority indicated therein.
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> These, in short, are the provisions of the impugned Act. It will be noticed that the Act is a culmination of the history of social reform which began more than a century ago with the enactment of s. 9 of Regulation VII of 1832 of the Bengal Code, which provided, inter alia, that the laws of Hindus and Muslims shall not be permitted to operate to deprive the parties of any property to which, but for the operation of such

> laws, they would have been entitled. Those provisions were subsequently incorporated in the India Act (XXI of 1850)-known as the Caste Disabilities Removal Act-

which provided that a person shall not be deprived of his rights or property by reason of his or her renouncing or exclusion from the communion of any religion or being deprived of caste, and that any such forfeiture shall not be enforced as the law in the Courts. The impugned Act, thus, has given full effect to modern notions of individual freedom to choose one's way of life and to do away with all those undue and outmoded interferences with liberty of conscience, faith and belief. It is also aimed at ensuring human dignity and removing all those restrictions which prevent a person from living his own life so long as he did not interfere with similar rights of others. The legislature had to take the logical final step of creating a new offence by laying down that nobody had the right to deprive others of their civil rights simply because the latter did not conform to a particular pattern of conduct. The Act, in substance, has added a new offence to the penal law of the country by penalising any action which has the effect of depriving a person of his human dignity and rights appurtenant thereto. It also adds to the provisions of the Criminal Procedure Code and has insisted upon the previous sanction of the prescribed authority as a condition precedent to launching a prosecution for an alleged offence against the provisions of the Act. In my opinion, therefore, the enactment, in pith and substance, would come within Entries 1 & 2 of List III of the Concurrent Legislative List of the Constitution Act of 1935. It is true that "excommunication" does not, in terms, figure as one of the entries in any one of the three lists. The legislative competence of the Bombay Legislature to enact the Act has not been seriously challenged before us, and, therefore, no particular argument was addressed to us to show that the legislation in question could not be within the purview of Entries 1 & 2 of List III aforesaid. What was seriously challenged before us was the constitutionality of the Act, in the light of the Constitution with particular reference to Arts. 25 & 26, and I shall presently deal with that aspect of the controversy. But before I do that, it is convenient to set out the background of the litigation culminating in the present proceedings.

The first reported case in relation to some aspects of Shia Imami Ismailis is that of the Advocate General ex relation Dave Muhammad v. Muhammad v. Husen Huseni (1). That was a suit commenced before the coming into existence of the Bombay High Court, on the Equity Side of the late Supreme Court, instituted by an information and bill, filed by the relators and plaintiffs, representing a minority of the Khoja community, against the defendants representing the majority of that community. The prayer in the action was that an account be taken of all property belonging to or held in trust for the Khoja community of Bombay in the hands of the treasurer and the accountant, respectively called Mukhi and Kamaria, and other cognate reliefs not relevant to the present controversy. In that case, which was heard on the Original side by Arnould J., judgment was delivered in November 1866, after a prolonged hearing. In that case, the learned Judge went into a detailed history of the several sects amongst Muslims, including the Shia Imami Ismailis, with particular reference to the Aga Khan and his relation with the Jamat of the Khojas of Bombay. In that case it was laid down that there was no public property impressed with a trust, either express or implied, for the benefit of the whole Khoja community and that Aga Khan, as the spiritual head of the Khojas was entitled to determine on religious grounds who shall or shall not remain members of the Khoja community. In that case, the learned Judge, with reference to authoritative texts, went

into the detailed history of the two sects of the Sunnis and Shias. He discussed the origin of the Ismailis as an offshoot of the Shias, and traced the hereditary succession of the unrevealed Imams in unbroken line down to Agha Khan. Except for its historical aspect, the case does not deal with any matter relevant to the present controversy.

The next reported case which was brought to our notice is the case of the Advocate General of Bombay v. Yusufalli Ebrahim (1). That was a case directly in relation to the Dawoodi Bohra community, with which we are concerned in this case. In that case, there was a dispute as regards a mosque and a tomb, and was heard by Marten J., on the Original side in 1921. We are not concerned with the details of the controversy in that case. But the learned Judge has noticed the history of this community, with particular reference to the position of the Dai-ul-Mutlaq, and how the differences between the majority of the community and the minority arose on the question of the regularity of the succession of the 47th Dai in 1840. The learned Judge has pointed out that the powers of the Dai are at least thrice delegated, namely, by God to Prophet Mohammad, by the latter to the Imam, and by the Imam to the Dai-ul-Mutlaq.

The more directly in point is the litigation which was concluded by the judgment of their Lordships of the Judicial Committee of the privy Council in the case of Hasanali v. Mansoorali (1). In that case, the powers of the Dai-ul-Mutlaq to excommunicate were directly in controversy. The petitioner was the first defendant in that action, which had been commenced in October, 1925, and was decided by the judgment of the Subordinate Judge of Burhanpur, dated January 2, 1931. That decision was reversed by the Judicial Commissioner of Central Provinces & Berar (later the High Court at Nagpur) by his judgment dated October 25, 1934. That judgment was taken on appeal to the Privy Council and the judgment of the Privy Council very succinctly traces the history of the Dawoodi Bohra community until we come to the 51st Dai, who was the first defendant in that action, and is the petitioner before us. In that case, certain orders of excommunication were under challenge. As a result of those orders of excommunication, the plaintiffs had been obstructed in, and prevented from, entering the property in suit for the purposes of worship, burial and resting in the rest house. In that case, their Lordships did not uphold the claim of the Dai-ul-Mutlaq that he had unrestricted power of excommunication, though they found that he could be regarded as Dai-ul-Mutlaq. As regards the power to excommunicate, it was held that though the power was there, it was not absolute, arbitrary and untrammelled; and then their Lordships laid down the conditions for the valid exercise of that power. The effect of a valid excommunication in their Lordships' view, was exclusion from the exercise of religious rights in places under the trusteeship of the head of the community, because the Dai was not only a religious leader but also a trustee of the property of the community. After examining the evidence in that case, their Lordships held that the persons alleged to have been excommunicated had not been validly expelled from the community.

The judgment of the Privy Council was given on December 1, 1947. Within two years of that judgment the impugned Act was passed, and soon after a suit on the Original side of the Bombay High Court was commenced (being suit No. 1262 of 1949). That was a suit by a member of the Dawoodi Bohra community, who had been excommunicated by the petitioner, functioning as the Dai-ul-Mutlaq, by two orders of excommunication, one passed in 1934 and the other in 1948, soon after the judgment of the Privy Council. The suit was, inter alia, for a declaration that the orders of

excommunication were void in view of the Act. A number of issues were raised at the trial, which was heard by Shah J. Two questions, by way of preliminary issues, with which we are immediately concerned in the present proceedings, were raised before the learned Judge of the Bombay High Court, namely:

> (1) Was the Act within the legislative competence of the Legislature of the Province of Bombay ?
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> (2) Whether after the coming into force of the Constitution, the Act was invalid in view of Arts. 25 and 26 of the Constitution?

The learned Judge, after an elaborate examination of the Constitution Act of 1935, came to the conclusion that the Bombay Legislature was competent to enact the Act, and that it was not unconstitutional even after the coming into effect of the Constitution because it was not inconsistent with the provisions of Arts. 25 and

26. An appeal was taken to the Court of Appeal, which was heard by Chagla C. J. and Bhagwati J. The Court of Appeal upheld the decision of Shah J. The matter was brought up on appeal to this Court in Civil Appeal 99 of 1954. During the pendency of the appeal in this Court, the plaintiff died and it was held, without deciding the merits of the controversy, that the suit giving rise to the appeal in this Court had abated by reason of the fact that the plaintiff had died and the cause of action being personal to him was also dead. The Order of this Court dismissing the appeal as not maintainable is dated November 27, 1957.

This Writ Petition was filed on August 18, 1958 by the petitioner as the 51st Dai-ul-Mutlaq and head of the Dawoodi Bohra community, for a declaration that the Act was void so far as the petitioner and the Dawoodi Bohra community were concerned, and that a writ of mandamus or a writ in the nature of mandamus or other appropriate write direction or order under Art. 32 of the Constitution be issued restraining the respondent, its officers, servants and agents from enforcing the provisions of the Act, against the petitioner or the Dawoodi Bohra community, or in any manner interfering with the right of the petitioner, as the religious leader and Dai-ul-Mutlaq of the Dawoodi Bohra community, to excommunicate any member of the community for an offence which the petitioner, in the exercise of his religious sense as the religious head of the community may determine as justifying such as expulsion.

It is not disputed that the petitioner is the head of the Dawoodi Bohra community or that the Dawoodi Bohra community is a religious denomination within the meaning of Art. 26 of the Constitution. It is not even disputed by the State, the only respondent in the case, that the petitioner as the head of the community had the right, as found by the Privy Council in the case of Hasanali v. Mansoorali(1), to excommunicate a particular member of the community for reasons and in the manner indicated in the judgment of their Lordships of the Privy Council. But what is contended is that, as a result of the enactment in question, excommunication has been completely banned by the Legislature, which was competent to do so, and that the ban in no way infringes Arts. 25 and 26 of the Constitution. I have already indicated my considered opinion that the Bombay Legislature was

competent to enact the Act. It now remains to consider the main point in controversy, which was, as a matter of fact, the only point urged in support of the petition, namely, that the Act is void in so far as it is repugnant to the guaranteed rights under Arts. 25 and 26 of the Constitution. Art. 25 guarantees the right to every person, whether citizen or non-citizen, the freedom of conscience and the right freely to profess, practise and propagate religion. But this guaranteed right is not an absolute one. It is subject to (1) public order, morality and health, (2) the other provisions of Part III of the Constitution, (3) any existing law regulating or restricting an economic, financial, political or other secular activity which may be associated with religious practice, (4) a law providing for social welfare and reform, and (5) any law that may be made by the State regulating or restricting the activities aforesaid or providing for social welfare and reform. I have omitted reference to the provisions of Explanations I and II and other parts of Art. 25 which are not material to our present purpose. It is noteworthy that the right guaranteed by Art. 25 is an individual right as distinguished from the right of an organised body like a religious denomination or any section thereof, dealt with by Art. 26. Hence, every member of the community has the right, so long as he does not in any way interfere with the corresponding rights of others, to profess, practise and propagate his religion, and everyone is guaranteed his freedom of conscience. The question naturally arises: Can an individual be compelled to have a particular belief on pain of a penalty, like excommunication? One is entitled to believe or not to believe a particular tenet or to follow or not to follow a particular practice in the matters of religion. No one can, therefore, be compelled, against his own judgment and belief, to hold any particular creed or follow a set of religious practices. The Constitution has left every person free in the matter of his relation to his Creator, if he believes in one. It is, thus, clear that a person is left completely free to worship God according to the dictates of his conscience, and that his right to worship as he pleased is unfettered so long as it does not come into conflict with any restraints, as aforesaid, imposed by the State in the interest of public order, etc. A person is not liable to answer for the verity of his religious views, and he cannot be questioned as to his religious beliefs, by the State or by any other person. Thus, though his religious beliefs are entirely his own and his freedom to hold those beliefs is absolute, he has not the absolute right to act in any way he pleased in exercise of his religious beliefs. He has been guaranteed the right to practise and propagate his religion subject to the limitations aforesaid. His right to practise his religion must also be subject to the criminal laws of the country, validly passed with reference to actions which the Legislature has declared to be of a penal character. Laws made by a competent legislature in the interest of public order and the like, restricting religious practices, would come within the regulating power of the State. For example, there may be religious practices of sacrifice of human beings, or sacrifice of animals in a way deleterious to the well being of the community at large. It is open to the State to intervene, by legislation, to restrict or to regulate to the extent of completely stopping such deleterious practices. It must, therefore, be held that though the freedom of conscience is guaranteed to every individual so that he may hold any beliefs he likes, his actions in pursuance of those beliefs may be liable to restrictions in the interest of the community at large, as may be determined by common consent, that is to say, by a competent legislature. It was on such humanitarian grounds, and for the purpose of social reform, that so called religious practices like immolating a widow at the pyre of her deceased husband, or of dedicating a virgin girl of tender years to a god to function as a devadasi, or of ostracising a person from all social contacts and religious communion on account of his having eaten forbidden food or taboo, were stopped by legislation.

But it has been contended on behalf of the petitioner that the right guaranteed, under Art. 25, to freedom of conscience and the freedom to profess, practise and propagate religion is available not only to an individual but to the community at large, acting through its religious head; the petitioner, as such a religious head has, therefore, the right to excommunicate, according to the tenets of his religion, any person who goes against the beliefs and practice connected with those beliefs. The right of the petitioner to excommunicate is, therefore, a fundamental right, which cannot be affected by the impugned Act. In this connection, reference was made to the following observations in the leading judgment of this Court, bearing upon the interpretations of Arts. 25 and 26 (vide The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt) (1):

> "A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extent even to matters of food and dress.
>
> The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression 'practice of religion' in Article 25."

On the strength of those observations, it is contended on behalf of the petitioner that this practice of ex-communication is a part of the religion of the community with which we are concerned in the present controversy, Art. 26, in no uncertain terms, has guaranteed the right to every religious denomination or a section thereof "to manage its own affairs in matters of religion"

> (Art. 26(b)). Now what are matters of religion and what are not is not an easy question to decide. It must vary in each individual case according to the tenets of the religious denomination concerned. The expression "matters of religion" in Art 26(b) and "activities associated with religious practice" do not cover exactly the same ground. What are exactly matters of religion are completely outside State interference, subject of course to public order, morality and health. But activities associated with religious practices may have many ramifications and varieties-economic, financial, political and other-as recognised by Art. 25(2)(a). Such activities, as are contemplated by the clause aforesaid cover a field much wider than that covered by either Art. 25(1) or Art. 26(b). Those provisions have, therefore, to be so construed as to create no conflict between them. We have, therefore, to classify practices into such as are essentially and purely of a religious character, and those which are not essentially such. But it has been contended on behalf of the petitioner that it is for the religious denomination itself to determine what are essentially reli-
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> gious practices and what are not. In this connection, reliance is placed on the following observations of this Court in the leading case, aforesaid, of The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (1):

> "As we have already indicated, freedom of religion in our Constitution is not confined to religious beliefs only; it extends to religious practices as well subject to the restrictions which the Constitution itself has laid down. Under Art. 26(b), therefore, a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters."

It should be noted that the complete autonomy which a religious denomination enjoys under Art. 26(b) is in 'matters of religion', which has been interpreted as including rites and ceremonies which are essential according to the tenets of the religion. Now, Art. 26(b) itself would seem to indicate that a religious denomination has to deal not only with matters of religion, but other matters connected with religion, like laying down rules and regulations for the conduct of its members and the penalties attached to infringement of those rules, managing property owned and possessed by the religious community, etc., etc. We have therefore, to draw a line of demarcation between practices consisting of rites and ceremonies connected with the particular kind of worship, which is the tenet of the religious community, and practices in other matters which may touch the religious institutions at several points, but which are not intimately concerned with rites and ceremonies the performance of which is an essential part of the religion. In this connection, the following observations of this Court in The Durgah Committee, Ajmer v. Syed Hussain Ali (1) which were made with reference to the earlier decisions of this Court in The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (2) and in Sri Venkataramana Devaru v. The State of Mysore (3), that "matters of religion" in Art. 26(b) include even practices which are regarded by the community as part of its religion, may be noted:

> "Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art. 26. Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Art. 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other."

But then it is contended that a religious denomination is a quasi-personality, which has to ensure its continuity and has, therefore, to lay down rules for observance by members of its community, and, in order to maintain proper and strict discipline, has to lay down sanctions; the right to excommunicate a recusant member is an illustration of that sanction. In this connection, it was contended that the Privy Council had laid down in the case of Hasanali v. Mansoorali (1) that the power of excommunication was a religious power exercisable by the Dai. In my opinion, those

passages in the judgment of the Privy Council do not establish the proposition that the right which the Privy Council found inhered in the Dai was a purely religious right. That it was not a purely religious right becomes clear from the judgment of the Judicial Committee of the Privy Council, which laid down the appropriate procedure and the manner of expulsion, which had to be according to justice, equity and good conscience, and that it was justiciable. A matter which is purely religious could not come within the purview of the Courts. That conclusion is further strengthened by the consideration that the effect of the excommunication or expulsion from the community is that the expelled person is excluded from the exercise of rights in connection not only with places of worship but also from burying the dead in the community burial ground and other rights to property belonging to the community, which are all disputes of a civil nature and are not purely religious matters. In the case before their Lordships of the Privy Council, their Lordships enquired into the regularity of the proceedings resulting in the excommunication challenged in that case, and they held that the plaintiff had not been validly expelled. It cannot, therefore, be asserted that the Privy Council held the matter of excommunication as a purely religious one. If it were so, the Courts would be out of the controversy.

The same argument was advanced in another form by contending that excommunication is not a social question and that, therefore, Art. 25(2)(b) could not be invoked in aid of holding the Act to be constitutional. In this connection, it has to be borne in mind that the Dai-ul-Mutlaq is not only the head of the religious community but also the trustee of the property of the community in which the community as a whole is interested. Even a theological head has got to perform acts which are not wholly religious but may be said to be quasi religious or matters which are connected with religious practices, though not purely religious. Actions of the Dai-ul-Mutlaq in the purely religious aspect are not a concern of the courts, but his actions touching the civil rights of the members of the community are justiciable and not outside the pale of interference by the legislature or the judiciary. I am not called upon to decide, nor am I competent to do so, as to what are the religious matters in which the Dai-ul- Mutlaq functions according to his religious sense. I am only concerned with the civil aspect of the controversy relating to the constitutionality of the Act, and I have to determine only that controversy.

It has further been argued on behalf of the petitioner that an excommunicated person has not the right to say his prayers in the mosque or to bury his dead in the community burial ground or to the use of other communal property. Those may be the result of excommunication, but I am concerned with the question whether the Legislature was competent and constitutionally justified in enacting the law declaring excommunication to be void. As already indicated, I am not concerned in this case with the purely religious aspect of excommunication. I am only concerned with the civil rights of the members of the community, which rights they will continue to enjoy as such members if excommunication was held to be invalid in accordance with the provision of the Act. Hence, though the Act may have its repercussions on the religious aspect of excommunication, in so far as it protects the civil rights of the members of the community it has not gone beyond the provisions of Art. 25(2)(b) of the constitution.

Then it is argued that the guaranteed right of a religious denomination to manage its own affairs in matters of religion (Art. 26(b) is subject only to public order, morality and health and is not subject

to legislation contemplated by Art. 25(2)(b). This very argument was advanced in the case of Shri Venkataramana Devaru v. The State of Mysore(1). At page 916 this argument has been specifically dealt with and negatived. This Court observed as follows:

> "The answer to this contention is that it is impossible to read any such limitation into the language of Art.25(2)(b). It applies in terms to all religious institutions of a public character without qualification or reserve. As already stated, public institutions would mean not merely temples dedicated to the public as a whole but also those founded for the benefit of sections thereof, and denominational temples would be comprised therein. The language of the Article being plain and unambiguous, it is not open to us to read into it limitations which are not there, based on a priori reasoning as to the probable intention of the Legislature. Such intention can be gathered only from the words actually used in the statute; and in a Court of law, what is unexpressed has the same value as what is unintended. We must therefore hold that denominational institutions are within Art. 25(2)(b)."

In that case also, as in the present case, reference was made to the earlier decision of this Court in The Commissioner, Hindu Religious endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (1), but the latter decision had explained the legal position with reference to the earlier decision, and after examining the arguments for and against the proposition at pages 916-918, it has been distinctly laid down that Art. 26 (b) must be read subject to Art. 25 (2)

(b) of the Constitution.

It has further been contended that a person who has been excommunicated as a result of his non-conformity to religious practices is not entitled to use the communal mosque or the communal burial ground or other communal property, thus showing that for all practical purposes he was no more to be treated as a member of the community, and is thus an outcast. Another result of excommunication is that no other member of the community can have any contacts, social or religious, with the person who has been excommunicated. All that is true. But the Act is intended to do away with all that mischief of treating a human being as a pariah, and of depriving him of his human dignity and of his sight to follow the dictates of his own conscience. The Act is, thus, aimed at fulfilment of the individual liberty of conscience guaranteed by Art. 25 (1) of the Constitution, and not in derogation of it. In so far as the Act has any repercussions on the right of the petitioner, as trustee of communal property, to deal with such property, the Act could come under the protection of Art. 26 (d), in the sense that his right to administer the property is not questioned, but he has to administer the property in accordance with law. The law, in the present instance, tells the petitioner not to withhold the civil rights of a member of the community to a communal property. But as against this it is argued on behalf of the petitioner that his right to excommunicate is so bound up with religion that it is protected by cl.

(b) of Art. 26, and is thus completely out of the regulation of law, in accordance with the provisions of cl. (d) of that Article. But, I am not satisfied on the pleadings and on the evidence placed before us that the right of excommunication is a purely religious matter. As already pointed out, the

indications are all to the contrary, particularly the judgment to the Privy Council in the case of Hasanali v. Mansoorali (1) on which great reliance was placed on behalf of the petitioner.

On the social aspect of excommunication, one is inclined to think that the position of an excommunicated person becomes that of an untouchable in his community, and if that is so, the Act in declaring such practices to be void has only carried out the strict injunction of Art. 17 of the Constitution, by which untouchability has been abolished and its practice in any form forbidden. The Article further provides that the enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law. The Act, in this sense, is its logical corollary and must, therefore, be upheld.

In my opinion, it has not been established that the Act has been passed by a legislature which was not competent to legislate on the subject, or that it infringes any of the provisions of the Constitution. This petition must, therefore, fail.

DAS GUPTA, J.-In our opinion this petition should succeed.

The petitioner is the head of the Dawoodi Bohras who form one of the several sub-sects of the Shia sect of Musalmans. Dawoodi Bohras believe that, since the 21st Imam went to seclusion, the rights, power and authority of the Imam have been rightfully exercised by the Dai-ul-Imam as the vice-regent of the Imam in seclusion. One of such rights is the exercise of disciplinary powers including the right to excommunicate any member of the Dawoodi Bohra community. The existence of such a right in the Dai-ul-Mutlaq who is for the sake of convenience often mentioned as the Dai was questioned before the courts in a case which went up to the Privy Council. But since the decision of the Privy Council in that case, viz., Hasanali v. Mansoorali (1) that question may be taken to have been finally settled, and it is no longer open to dispute that the Dai, as the head of the Dawoodi Bohra community has the right to excommunicate any member of the community. The claim of the present petitioner to be the 51st Dai-ul-Mutlaq of the community was also upheld in that case and is no longer in dispute. The Privy Council had also to consider in that case the question whether this power to excommunicate could be exercised by the Dai in any manner he liked and held after consideration of the previous cases of excommunication and also a document composed about 1200 A.D. that normally members of the community can be expelled "only at a meeting of the Jamat after being given due warning of the fault complained of and an opportunity of amendment, and after a public statement of the grounds of expulsion." Speaking about the effect of excommunication their Lordships said:-

> "Excommunication.....necessarily involve exclusion from the exercise of religious rights in places under the trusteeship of the head of the community in which religious exercises are performed." The present petitioner, it may be mentioned, was a party to that litigation.
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> This decision was given on December, 1, 1947; shortly after that, the Bombay Legislature-it may be mentioned that there is a large concentration of Dawoodi Bohras in the State of Bombay-stepped in to prevent, as mentioned in the preamble,

the practice of excommunication "which results in the deprivation of legitimate rights and privileges of" members of certain religious communities and enacted the Bombay Act No. XLII of 1949.

It is a short Act of six sections. Section 3- the main operative section-invalidates all excommunication of members of any religious community. Excommunication is defined in section 2 to mean "the expulsion of a person from any community of which he is a member depriving him of rights and privileges which are legally enforceable by a suit of a civil nature by him or on his behalf as such member". The explanation to the definition to this section makes it clear that a right to office or property or to worship in any religious place or a right to burial or cremation is included as a right legally enforceable by suit even though the determination of such right may depend entirely on the decision of the question as to any religious rites or ceremonies or rule or usage of a community. Section 4 makes a person who does any act which amounts to excommunication or is in furtherance of the excommunication liable to punishment which may extend to one thousand rupees.

Faced with the position that the legislation wholly destroys his right of excommunicating any member of the Dawoodi Bohra community, the Dai has presented this petition under Art. 32 of the Constitution. He contends that the Act violates the fundamental right of the Dawoodi Bohras, including himself, freely to practise religion according to their own faith and practice-a right guaranteed by Art. 25 of the Constitution, and further that it violates the right of the Dawoodi Bohra community to manage its own affairs in matters of religion guaranteed by Art. 26. Therefore, says he, the Act is void and prays for a declaration that the Act is void and the issue of an appropriate writ restraining the respondent, the State of Bombay, its officers, servants and agents from enforcing the provisions of the Act against the petitioner and/or any other member of the Dawoodi Bohra community.

It may be mentioned that in the petition the legislative competence of the Bombay legislature to enact the Bombay Prevention of excommunication 1949 was also challenged. This, however was not pressed at the time of the hearing.

The respondent contends that neither the right guaranteed under Art. 25 nor that under Art. 26(b) is contravened by the impugned Act. Briefly stated, the respondent's case is that the right and privilege of the petitioner as Dai-ul-Mutlaq to regulate the exercise of religious rights do not include the right to excommunicate any person so as to deprive him of his civil rights and privileges. It was denied that the petitioner's power to excommunicate was an essential part of the religion of the Dawoodi Bohra community and that the right has its foundation in religion and religious doctrines, tenets and faith of the Dawoodi Bohra community. It was also denied that the right to excommunicate is the religious practice and it was further pleaded that assuming that it was a religious practice, it was certainly not a part of religion of the Dawoodi Bohra community.

The same points were urged on behalf of the intervener, except that the learned counsel for the intervener wanted to reopen the question whether the petitioner as the head of the Dawoodi Bohra community had the power to excommunicate. As already stated, however, this question is hardly open to dispute in the face of the decision of the Privy Council in Hasanali v. Mansoorali (1) and the point was not pressed.

The content of Arts. 25 and 26 of the Constitution came up for consideration before this Court in the Commissioner, Hindu Religious Endowments Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Matt (1); Mahant Jagannath Ramanuj Das v. The State of Orissa (2); Sri Venkatamana Devaru v. The State of Mysore (3); Durgah Committee, Ajmer v. Syed Hussain Ali (4) and several other cases and the main principles underlying these provisions have by these decisions been placed beyond controversy. The first is that the protection of these articles is not limited to matters of doctrine or belief they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religious or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.

Before however we can give a proper answer to the two questions raised, viz., (i) Has the impugned Act interfered with a right freely to practise religion and (ii) Has it interfered with the right of the Dawoodi Bohra Community to manage its own affairs in matters of religion; it is necessary to examine first the place of excommunication in the life of a religious community. Much valuable information about this is furnished by an article in the Encyclopaedia of the Social Sciences from the pen of Prof. Hazeltine. "Excommunication", says Prof. Hazeltine, in one or another of the several different meanings of the term has always and in all civilizations been one of the principal means of maintaining discipline within religious organizations and hence of preserving and strengthening their solidarity." Druids in old Britain are said to have claimed the power to exclude offenders from sacrifice. The early Chiristian Church exercised this power very largely and expelled and excluded from the Christian association, those members who proved to be unworthy of its aims or infringed its rules of governance. During the middle ages the Pope used this power frequently to secure the observance of what was considered the proper religious rights and practices of Christianity by excommunicating even the kings of some European countries when they introduced or tried to introduce different forms of divine worship. The power was often used not perhaps always fairly and justly, as a weapon in the struggle for the principle that the Church was above the State. Impartial historians have recognised, however, that many of the instances of excommunication were for the purpose of securing the adherence to the orthodox creed and doctrine of Christianity as pronounced by the Catholic Church. (Vide The Catholic Encyclopedia, Vol. V, articles on England and Excommunication).

Turning to the Canon law we find that excommunication may be inflicted as a punishment for a number of crimes, the most serious of these being, heresy, apostasy or schism. Canon 1325, section 2 defines a heretic to be a man who while remaining nominally a Christian, pertinaciously denies or doubts any one of the truths which must be believed de fide divina et catholica; if he falls away entirely from the Christian faith, he is an apostate; finally if he rejects the authority of the Supreme Pontiff or refuses communion with the members of the Church who are subject to him, he is a schismatic. (Vide Canon Law by Bouscaren and Ellis).

Among the Muslims also the right of excommunication appears to have been practised from the earliest times. The Prophet and the Imam, had this right; and it is not disputed that the Dais have also in the past exercised it on a number of occasions. There can be little doubt that heresy or apostasy was a crime for which excommunication was in force among the Dawoodi Bohras also. It may be pointed out in this connection that excommunication in the case of Hasanali v. Mansoorali (1) which was upheld by the Privy Council) was based on the failure to comply with the tenets and traditions of the Dawoodi Bohra community and certain other faults.

According to the petitioner it is "an integral part of the religion and religious faith and belief of the Dawoodi Bohra community" that excommunication should be pronounced by him in suitable cases. It was urged that even if this right to excommunicate is considered to be a religious practice as distinct from religious faith such religious practice is also a part of the religion of the Dawoodi Bohra community. It does appear to be a fact that unquestioning faith in the Dai as the head of community is part of the creed of the Dawoodi Bohras. It is unnecessary to trace the historical reason for this extraordinary position of the Dai as it does not appear to be seriously disputed that the Dai is considered to be the vice-regent of Imam so long as the rightful Imam continues in seclusion.

Mention must be made in this connection of the Mishak which every Dawoodi Bohra takes at the time of his initiation, This includes among other things, an oath of unquestioning faith in and loyalty to the Dai. It is urged therefore that faith in the existence of the disciplinary power of the Dai including his power to excommunicate forms one of the religious tenets of this community. The argument that Art. 25 has been contravened by the impugned Act is based mainly on this contention and the further contention that in any case excommunication is a religious practice in this community. As regards Art. 26(b) the argument is that excommunication among the Dawoodi Bohras forms such an integral part of the management of the community by the religious head that interference with that right cannot but amount to an interference with the right of the community to the manage its own affairs in matters of religion.

Let us consider first whether the impugned Act contravenes the provisions of Art. 26 (b). It is unnecessary for the purpose of the present case to enter into the difficult

question whether every case of excommunication by the Dai on whatever grounds inflicted is a matter of religion. What appears however to be clear is that where an excommunication is itself based on religious grounds such as lapse from the orthodox religious creed or doctrine (similar to what is considered heresy, apostasy or schism under the Canon Law) or breach of some practice considered as an essential part of the religion by the Dawoodi Bohras in general, excommunication cannot but be held to be for the purpose of maintaining the strength of the religion. It necessarily follows that the exercise of this power of excommunication on religious grounds forms part of the management by the community, through its religious head, "of its own affairs in matters of religion." The impugned Act makes even such excommunications invalid and takes away the power of the Dai as the head of the community to excommunicate even on religious grounds. It therefore, clearly interferes with the right of the Dawoodi Bohra community under cl. (b) of Art. 26 of the Constitution.

That excommunication of a member of a community will affect many of his civil rights is undoubtedly true. This particular religious denomination is possessed of properties and the necessary consequence of excommunication will be that the excommunicated member will lose his rights of enjoyment of such property. It might be thought undesirable that the head of a religious community would have the power to take away in this manner the civil rights of any person. The right given under Art. 26 (b) has not however been made subject to preservation of civil rights. The express limitation in Art. 26 itself is that this right under the several clauses of the article will exist subject to public order, morality and health. It has been held by this Court in Sri Venkataramana Devaru v. The State of Mysore (1) that the right under Art. 26(b) is subject further to cl. 2 of Art. 25 of the Constitution.

We shall presently consider whether these limitations on the rights of a religious community to manage its own affairs in matters of religion can come to the help of the impugned Act. It is clear however that apart from these limitations the Constitution has not imposed any limit on the right of a religious community to manage its own affairs in matters of religion. The fact that civil rights of a person are affected by the exercise of this fundamental right under Art. 26(b) is therefore of no consequence. Nor is it possible to say that excommunication is prejudicial to public order, morality and health.

Though there was a statement in paragraph 10 of the respondent's counter affidavit that "the religious practice, which runs counter to the public order, morality and health must give way before the good of the people of the State", the learned Attorney-General did not advance any argument in support of this plea.

It remains to consider whether the impugned Act comes within the saving provisions embodied in cl. 2 of Art. 25. The clause is in these words:-

> "Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law-
>
> (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
>
> (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."

Quite clearly, the impugned Act cannot be regarded as a law regulating or restricting any economic, financial, political or other secular activity. Indeed that was not even suggested on behalf of the respondent State. It was faintly suggested however that the Act should be considered to be a law "providing for social welfare and reform." The mere fact that certain civil rights which might be lost by members of the Dawoodi Bohra community as a result of excommunication even though made on religious grounds and that the Act prevents such loss, does not offer sufficient basis for a conclusion that it is a law "providing for social welfare and reform." The barring of excommunication on grounds other than religious grounds, say on the breach of some obnoxious social rule or practice might be a measure of social reform and a law which bars such excommunication merely might conceivably come within the saving provisions of cl. 2(b) of Art.

25. But barring of excommunication on religious grounds pure and simple, cannot however be considered to promote social welfare and reform and consequently the law in so far as it invalidates excommunication on religious grounds and takes away the Dai's power to impose such excommunication cannot reasonably be considered to be a measure of social welfare and reform. As the Act invalidates excommunication on any ground whatsoever, including religious grounds, it must be held to be in clear violation of the right of the Dawoodi Bohra community under Art. 26(b) of the Constitution.

It is unnecessary to consider the other attack on the basis of Art. 25 of the Constitution.

Our conclusion is that the Act is void being in violation of Art. 26 of the Constitution. The contrary view taken by the Bombay High Court in Taher Saifuddin v. Tyebbhai Moosaji (1) is not correct.

We would, therefore, allow the petition, declare the Act to be void and direct the issue of a writ in the nature of mandamus on the respondent, the State of Bombay, not to enforce the provisions of the Act. The petitioner will get his costs.

AYYANGAR, J.-I agree that the petition should succeed and I generally concur in the reasoning of Das Gupta J., by which he has reached this conclusion. In view, however, of the importance of the case I consider it proper to state in my own words the grounds for my concurrence.

It was not in dispute that the Dawoodi Bohras who form a sub-sect of the Shia sect of Muslims is a "religious denomination" within the opening words of Art. 26 of the Constitution. There are a few further matters which were not in controversy on the basis of which the contentions urged in

support of the petition have to be viewed. These might now be briefly stated:

> (1) It was the accepted tenet of the Dawoodi Bohra faith that God always had and still has a representative on earth through whom His commands are conveyed to His people. That representative was the Imam. The Dai was the representative of the Imam and conveyed God's message to His people.

The powers of the Dai were approximated to those of the Imam. When the Imam came out of seclusion, the powers of the Dai would cease. The chain of intercession with the Almighty was as follows: The Dai-the Imam-

the Holy Prophet-and the one God (See Per Marten J. in Advocate General of Bombay v. Yusufalli Ebrahim (1).

(2) The position and status of the petitioner as the Dai-ul-Mutlaq was not contested since the same had been upheld by the Privy council the decision reported as Hasanali v. Mansoorali (2).

(3) It was not in dispute that subject to certain limitations and to the observance of particular formalities which were pointed out by the Privy Council in the decision just referred to, that the Dai-ul-Mutlaq has the power of excommunication and indeed, as observed by Lord Porter in that judgment, "the right of excommunication by a Dai-ul-Mutlaq was not so strenuously contested as were the limits within which it is confined."

(4) The Dai-ul-Mutlaq was not merely a religious leader-the religious head of the denomination but was the trustee of the property of the community.

(5) The previous history of the community shows that excommunicated persons were deprived of the exercise of religious rights. It was contended before the Privy Council that the effect of an excommunication was in the nature merely of social ostracism but this was rejected and it was held to have a larger effect as involving an exclusion from the right to the enjoyment of property dedicated for the benefit of the denomination and of worship in places of worship similarly dedicated or set apart.

The validity of Bombay Act 42 of 1949 (which I shall hereafter refer to as the impugned Act) has to be judged in the light of these admitted premises. Articles 25 and 26, which are urged as violated by the impugned Act run:

> "25. (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.
>
> (2) Nothing in this article shall affect operation of any existing law or prevent the State from making any law-

> (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
>
> (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.-The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion. Explanation II-In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

26. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right-

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law."

I would add that these Articles embody the principle of religious toleration that has been the characteristic feature of Indian civilization from the start of history. the instances and periods when this feature was absent being merely temporary aberrations. Besides, they serve to emphasize the secular nature of Indian Democracy which the founding fathers considered should be the very basis of the Constitution.

I now proceed to the details of the provisions of the impugned Act which are stated to infringe the rights guaranteed by these two Articles. The preamble to the impugned Act recites:

> "Whereas it has come to the notice of Government that the practice prevailing in certain communities of excommunicating its members is often followed in a manner which results in the deprivation of legitimate rights and privileges of its members;
>
> And whereas in keeping with the spirit of changing times and in the public interest, it is expedient to stop the practice; it is hereby enacted as follows :-"

Section 3 is the operative provision which enacts:

> "3. Notwithstanding anything contained in any law, custom or usage for the time being in force to the contrary, no excommunication of a member of any community shall be valid and shall be of any effect."

Section 4 penalises any person who does "any act which amounts to or is in furtherance of the excommunication" and subjects him to criminal proceedings as regards which provision is made in ss. 5 and 6. Section 2 contains two definitions:

> (1) of the word "community" which would include the religious denomination of Dawoodi Bohras, and (2) of "excommunication" as meaning:
>
> "the expulsion of a person from any community of which he is a member depriving him of rights and privileges which are legally enforceable by a suit of civil nature by him or on his behalf as such member;
>
> Explanation.-For the purposes of clause a right legally enforceable by a suit of civil nature shall include the right to office or property or to worship in any religious place or a right of burial or cremation, notwithstanding the fact that the determination of such right depends entirely on the decision of the question as to any religious rites or ceremonies or rule or usage of a community."

The question to consider is whether a law which penalises excommunication by a religious denomination or by its head whether or not the excommunication be for non-conformity to the basic essentials of the religion of that denomination and effects the nullification of such excommunication as regards the rights of the person excommunicated would or would not infringe the rights guaranteed by Arts. 25 and 26.

First as to Art. 25, as regards cl (1) it was not in dispute that the guarantee under it protected not merely freedom to entertain religious beliefs but also acts done in pursuance of that religion, this being made clear by the use of the expression "practice of religion". No doubt, the right to freedom of conscience and the right to profess, practise and propagate religion are all subject to "public order, morality or health and to the other provisions of this Part" but it was not suggested that (subject to an argument about the matter being a measure of social reform) the practice of excommunication offended public order, morality or health or any other part of the Constitution.

Here is a religious denomination within Art.26. The Dai-ul-Mutlaq is its spiritual leader, the religious head of the denomination and in accordance with the tenets of that denomination he had invested in him the power to excommunicate dissidents. Pausing here, it is necessary to examine the rational basis of the excommunication of persons who dissent from the fundamental tenets of a faith. The identity of a religious denomination consists in the identity of its doctrines, creeds and tenets and these are intended to ensure the unity of the faith which its adherents profess and the identity of the religious views are the bonds of the union which binds them together as one community. As Smith B. said in Dill v. Watson (1) in a passage quoted by Lord Halsbury in Free Church of Scotland v. Overtoun (2) "In the absence of conformity to essentials, the denomination would not be an entity cemented into solidity by harmonious uniformity of opinion, it would be a mere incongruous heap of, as it were, grains of sand, thrown together without being united, each of these intellectual and isolated grains differing from every other, and the whole forming a but nominally united while really unconnected mass; fraught with nothing but internal dissimilitude,

and mutual and reciprocal contradiction and dissension."

A denomination within Art. 26 and persons who are members of that denomination are under in Art. 25 entitled to ensure the continuity of the denomination and such continuity is possible only may by maintaining the bond of religious discipline which would secure the continued adherence of its members to certain essentials like faith, doctrine, tenets and practices. The right to such continued existence involves the right to maintain discipline by taking suitable action inter alia of excommunicating those who deny the fundamental bases of the religion. The consequences of the exercise of that power vested in the denomination or in its head-a power which is essential for maintaing the existence and unity of denomination must necessarily be the exclusion of the person excommunicated from participation in the religious life of the denomination, which would include the use of places of worship or consecrated places for burial dedicated for the use of the members of the denomination and which are vested in the religious head as a trustee for the denomination.

The learned Attorney-General who appeared for the respondent submitted three points: (1) Assuming that excommunication was part of the religious practice of the denomination, still there was no averment in the petition that the civil results flowing from excommunication in the shape of exclusion from the beneficial use of denominational property was itself a matter of religion. In other words, there was no pleading that the deprivation of the civil rights of a person excommunicated was a matter of religion or of religious practice. (2) The "excommunication" defined by the Act deals with rights of civil nature as distinguished from religious or social rights or obligations and a law dealing with the civil consequence of an excommunication does not violate the freedom protected by Art. 25 or Art.

26. (3) Even on the basis that the civil consequences of an excommunication are a matter of religion, still it is a measure of social reform and as such the legislation would be saved by the words in Art. 25(2)(b).

I am unable to accept any of these contentions as correct. (1) First I do not agree that the pleadings do not sufficiently raise the point that if excommunication was part of the "practice of a religion" the consequences that flow therefrom were not also part of the "practice of religion". The position of the Dai as the religious head of the denomination not being disputed and his power to excommunicate also not being in dispute and it also being admitted that places of worship and burial grounds were dedicated for the use of the members of the denomination, it appears to me that the consequence of the deprivation of the use of these properties by persons excommunicated would be logical and would flow from the order of excommunication. It could not be contested that the consequence of a valid order of excommunication was that the person excommunicated would cease to be entitled to the benefits of the trusts created or founded for the denomination or to the beneficial use or enjoyment of denominational property. If the property belongs to a community and if a person by excommunication ceased to be a member of that community, it is a little difficult to see how his right to the enjoyment of the denominational property could be divorced from the religious practice which resulted in his ceasing to be a member of the community. When once it conceded that the right guaranteed by Art. 25 (1) is not confined to freedom of conscience in the sense of the right to hold a belief and to propagate that belief, but includes the right to the practice of religion, the

consequences of that practice must also bear the same complexion and be the subject of a like guarantee.

(2) I shall reserve for later consideration the point about the legislation being saved as a matter of social reform under Art. 25(2)(b), and continue to deal with the argument that the impugned enactment was valid since it dealt only with the consequences on the civil rights, of persons excommunicated. It has, however, to be pointed out that though in the definition of "excommunication" under s. 2(b) of the impugned Act the consequences on the civil rights of the excommunicated persons is set out, that is for the purpose of defining an "excommunication". What I desire to point out is that it is not as if the impugned enactment saves only the civil consequences of an excommunication not interfering with other consequences of an excommunication falling within the definition. Taking the case of the Dawoodi Bohra community, if the Dai excommunicated a person on the ground of forswearing the basic tenets of that religious community the Dai would be committing an offence under s. 4, because the consequences according to the law of that religious denomination would be the exclusion from civil rights of the excommunicated person. The learned Attorney- General is therefore not right in the submission that the Act is concerned only with the civil rights of the excommunicated person. On the other hand, it would be correct to say that the Act is concerned with excommunications which might have religious significance but which also operate to deprive persons of their civil rights.

Article 26 confers on every religious denomination two rights which are relevant in the present context, by cl. (b)-"to manage its own affairs in matters of religion"-and by the last clause-cl. (d) -"to administer such property"

> which the denomination owns or has acquired (vide cl. (c) (d) "in accordance with law." In considering the scope of Art. 26 one has to bear in mind two basic postulates: First that a religious denomination is possessed of property which is dedicated for definite uses and which under Art. 26 (d) the religious denomination has the right to administer. From this it would follow that subject to any law grounded on public order, morality or health the limitations with which Art. 26 opens, the denomination has a right to have the property used for the purposes for which it was dedicated. So far as the present case is concerned, the management of the property and the right and the duty to ensure the proper application of that property is admitedly vested in the Dai as the religious head of the denomination. Article 26 (d) speaks of the administration of the property being in accordance with law and the learned Attorney- General suggested that a valid law could be enacted which would permit the diversion of those funds to purposes which the legislature in its wisdom thought it fit to appropriate. I feel wholly unable to accept this argument. A law which provides for or permits the diversion of the property for the use of persons who have been excluded from the denomination would not be "a law" contemplated by Art. 26(d). Leaving aside for the moment the right of excommunicated persons to the enjoyment of property dedicated for the use of a denomination let me take the case of a person who has renounced that religion, and in passing it might be observed that even in cases of an apostate according to the principles governing the Dawoodi Bohra

denomination there is no ipso facto loss of rights, only apostasy is a ground for excommunication which however could take place without service of notice or an enquiry. It could not be contended that an apostate would be entitled to the beneficial use of property, dedicated to the Dawoodi Bohra community be it the mosque where worship goes on or other types of property like consecrated burial grounds etc. It would be obvious that if the Dai permitted the use of the property by an apostate without excommunicating him he would be committing a dereliction of his duty as the supreme head of the religion-in fact an act of sacrilege besides being guilty of a breach of trust. I consider that it hardly needs any argument to show that if a law permitted or enjoined the use of the property belonging to the denomination by an apostate it would be a wholly unauthorised diversion which would be a violation of Art. 26(d) and also of Art. 26(c), not to speak of Art. 25(1). The other postulate is the position of the Dai as the head of the religious denomination and as the medium through which spiritual grace is brought to the community and that this is the central part of the religion as well as one of the principal articles of that faith. Any denial of this position is virtually tantamount to a denial of the very foundation of the faith of the religious denomination.

The attack on the constitutionality of the Act has to be judged on the basis of these two fundamental points. The practice of excommunication is of ancient origin. History records the existence of that practice from Pagan times and Aeschyles records "The exclusion from purification with holy water of an offender whose hands were defiled with bloodshed." Later the Druids are said to have claimed the right of excluding offenders from sacrifice. Such customary exclusions are stated to have obtained in primitive semitic tribes but it is hardly necessary to deal in detail with this point, because so far as the Muslims, and particularly among the religious denomination with which this petition is concerned, enough material has been set out in the judgment of the Privy Council already referred.

Pausing here, it might be mentioned that excommunication might bear two aspects: (1) as a punishment for crimes which the religious community justifies putting one out of its fold. In this connection it may be pointed out that in a theocratic State the punitive aspect of excommunication might get emphasized and might almost take the form of a general administration by religious dignitaries of ordinary civil law. But there is another aspect which is of real relevance to the point now under consideration. From this point of view excommunication might be defined as the judicial exclusion from the right and privileges of the religious community to whom the offender belongs. Here it is not so much as a punishment that excommunication is inflicted but is used as a measure of discipline for the maintenance of the integrity of the community, for in the ultimate analysis the binding force which holds together a religious community and imparts to it a unity which makes it a denomination is a common faith, common belief and a belief in a common creed, doctrines and dogma. A community has a right to insist that those who claim to be within its fold are those who believe in the essentials of its creed and that one who asserts that he is a member

of the denomination does not, at least, openly denounce the essentials of the creed, for if everyone were at liberty to deny these essentials, the community as a group would soon cease to exist. It is in this sense that it is a matter of the very life of a denomination that it exercises discipline over its members for the purpose of preserving unity of faith, at least so far as the basic creed or doctrines are concerned. The impugned enactment by depriving the head of the power and the right to excommunicate and penalising the exercise of the power, strikes at the very life of the community by rendering it impotent to protect itself against dissidents and schismatics. It is thus a violation of the right to practice religion guaranteed by Art. 25(1) and is also violative of Art. 26 in that it interfers with the rights of the Dai as the trustee of the property of the denomination to so administer it as to exclude dissidents and excommunicated persons from the beneficial use of such property.

It is admitted however in the present case that the Dai as the head of the denomination has vested in him the power, subject to the procedural requirements indicated in the judgment of the Privy Council, to excommunicate such of the members of the community as do not adhere to the basic essentials of the faith and in particular those who repudiate him as the head of the denomination and as a medium through which the community derives spiritual satisfaction or efficiency mediately from the God-head. It might be that if the enactment had confined itself to dealing with excommunication as a punishment for secular offences merely and not as an instrument for the self preservation of a religious denomination the position would have been different and in such an event the question as to whether Arts. 25 and 26 would be sufficient to render such legislation unconstitutional might require serious consideration. That is not the position here. The Act is not confined in its operation to the eventualities just now mentioned but even excommunication with a view to the preservation of the identity of the community and to pervent what might be schism in the denomination is also brought within the mischief of the enactment. It is not possible, in the definition of excommunication which the Act carries, to read down the Act so as to confine excommunication as a punishment of offences which are unrelated to the practice of the religion which do not touch and concern the very existence of the faith of the denomination as such. Such an exclusion cannot be achieved except by rewriting the section.

3. The next question is whether the impugned enactment could be sustained as a measure of social welfare and reform under Art. 25 (2) (b). The learned Attorney-General is, no doubt, right in his submission that on the decision of this Court in the Mulki Temple case-(Venkataramana Devaru v. State of Mysore(1), the right guaranteed under Art. 26(b) is subject to a law protected by Art. 25(2)(b) The question then before the Court related to the validity of a law which threw open all public temples, even those belonging to "a religious denomination" to "every community of Hindus including 'untouchable' " and it was held that, notwithstanding that the exclusion of these communities from worship in such a temple was an essential part of the "practice of religion" of the denomination, the constitutionality

> of the law was saved by the second part of the provision in Art. 25(2)(b) reading: "the throwing open of Hindu religious institutions of a public character to all classes and section of Hindus". The learned Attorney-General sought support from this ruling for the proposition that Art. 25(2)(b) could be invoked to protect the validity of a law which was "a measure of social welfare and reform"

notwithstanding that it involved an abrogation of the whole or part of the essentials of a religious belief or of a religious practice. I feel unable to accept the deduction as flowing from the Mulki Temple case. That decision proceeded on two bases : (1) As regards the position of "untouchables", Art. 17 had made express provision stating:

> "'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law."

and that had to be recognised as a limitation on the rights of religious denominations however basic and essential the practice of the exclusion of untouchables might be in its tenets or creed. (2) There was a special saving as regards laws providing for "throwing open of public Hindu Religious Institu-

tions to all classes and sections of Hindus" in Art. 25(2)(b), and effect had to be given to the wide language in which this provision was couched. In the face of the language used, no distinction could be drawn between beliefs that were basic to a religion, or religious practices that were considered to be essential by a religious sect, on the one hand, and on the other beliefs and practices that did not form the core of a religion or of the practices of that religion. The phraseology employed cut across and effaced these distinctions.

But very different considerations arise when one has to deal with legislation which is claimed to be merely a measure "providing for social welfare and reform". To start with, it has to be admitted that this phrase is as contrasted with the second portion of Art. 25(2)(b), far from precise and is flexible in its content. In this connection it has to be borne in mind that limitations imposed on religious practices on the ground of public order, morality or health have already been saved by the opening words of Art. 25(1) and the saving would cover beliefs and practices even though considered essential or vital by those professing the religion. I consider that in the context in which the phrase occurs, it is intended to save the validity only of those laws which do not invade the basic and essential practices of religion which are guaranteed by the operative portion of Art. 25(1) for two reasons:

> (1) To read the saving as covering even the basic essential practices of religion, would in effect nullify and render meaningless the entire guarantee of religious freedom-a freedom not merely to profess, but to practice religion, for very few pieces of legislation for abrogating religious practices could fail to be subsumed under the caption of "a provision for social welfare or reform". (2) If the phrase just quoted was intended to have such a wide operation as cutting at even the essentials guaranteed by Art.

25(1), there would have been no need for the special provision as to "throwing open of Hindu religious institutions" to all classes and sections of Hindus since the legislation contemplated by this provision would be par excellence one of social reform.

In my view by the phrase "laws providing for social welfare and reform" it was not intended to enable the legislature to "reform", a religion out of existence or identity. Article 25 (2)(a) having provided for legislation dealing with "economic, financial, political or secular activity which may be associated with religious practices", the succeeding clause proceeds to deal with other activities of religious groups and these also must be those which are associated with religion. Just as the activities referred to in Art. 25(2)(a) are obviously not of the essence of the religion, similarly the saving in Art. 25(2)(b) is not intended to cover the basic essentials of the creed of a religion which is protected by Art. 25(1).

Coming back to the facts of the present petition, the position of the Dai-ul-Mutlaq, is an essential part of the creed of the Dawoodi Bohra sect. Faith in his spiritual mission and in the efficacy of his ministration is one of the bonds that hold the community together as a unit. The power of excommunication is vested in him for the purpose of enforcing discipline and keep the denomination together as an entity. The purity of the fellowship is secured by the removal of persons who had rendered themselves unfit and unsuitable for membership of the sect. The power of excommunication for the purpose of ensuring the preservation of the community, has therefore a prime significance in the religious life of every member of the group. A legislation which penalises this power even when exercised for the purpose above-indicated cannot be sustained as a measure of social welfare or social reform without eviscerating the guarantee under Art. 25(1) and rendering the protection illusory.

In my view the petitioner is entitled to the relief that he seeks and the petition will accordingly be allowed.

BY COURT: In accordance with the majority view of this Court, the petition is allowed. The petitioner is entitled to his costs.

Petition allowed.