(G.C.P.) J-969 (3,00,000—11-2007)

[Spl.—H.C.,A.S., Cri.

PART I

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

SA 462 | 1933 DISTRICT :

Criminal Appeal / Application No. / Writ Petition / Revision Application of 20

Appellants ;

(Advocate Shri.

Versus

Respondents :

(Advocate Shri.

290—1000—8-35—X2(Supr.)
4398 dated 3-7-16

Thana

[Spl.—H.C. A.S. V.D. 53

In His Majesty's High Court of Judicature, Appellate Side, Bombay

(CIVIL JURISDICTION)

3A.

Appeal No. 462 of 1933 from Appellate Decree

1 Harbar Damodar Vaidya;
and others,

Appellants

(Original Plffs.)

versus

1 Dr. Bhimrao Ramji Ambedkar
member Joint Parliamentary
Committee London and
others,

Respondents

(Original Defts.)

Claim

" for pleader's fee.

V B Nirkar

for No. 1.

Appeal No.462 of 1933 from Appellate Decree.

Narhari Damodar Vaidya; and others.
(Original Plaintiffs Nos.2 to 9)...Appellants.

Vs.

Dr.Bhimrao Ramji Ambedkar, member of Joint Parliamentary Committee, London; and others.

(Original Defendants).....Respondents.

Second Appeal against the decision of S.M.Kaikini,Esquire, Second Assistant Judge at Thana in Appeal No.32 of 1931.

Mr.V.B.Virkar for the Appellants.

Counsel Mr.S.V.Gupte with Mr.B.G.Modak for ~~xxx~~Respondent No.1.

17th March 1937.

Coram:-Broomfield and N.J.Wadia JJ.

Oral Judgment (Per Broomfield J):- x x

By order of the Court,

BVB. Registrar.

C.C.P.—(J) J 289—3000—10-33—P8
R., J.D., No. 4398 dated 3-7-16

[Spl.—H.C. A.S. Civil 56

Appeal No. 462 of 1933 from ~~Original~~ Appellate Decree.

Date of decision 17. 3. 1937.

For approval and signature

The Hon'ble Mr. Justice Broomfield

The Hon'ble Mr. Justice N. J. Wadia

Whether Reporters of Local Papers may be allowed to see the judgment ?

To be referred to the Reporter or not ?

Whether Their Lordships wish to see the fair copy of the judgment ?

S. A. 462 of 1933

Broomfield J.

Coram: Broomfield & Wadia JJ.
17th March 1937.

The appellants, on behalf of the caste Hindus of the town of Mahad, sued the respondents, who represent the so-called "untouchables", for a declaration that the Choudhari Tank near the town belongs to them and that they alone have a right to use it and the respondents are not entitled to use it, and for an injunction against the respondents not to use it. The claim to ownership is not now persist and it is conceded that, as found by the trial Court, the tank belonged to Government under the provisions of section 37 of the Land Revenue Code and has now vested in the Municipality of Mahad under section 50 of the District Municipalities Act. It is also conceded now that the caste Hindus are not entitled to exclusive user of the tank as against all the world, since Mahomedans may and do use it. It is contended nevertheless that the appellants ~~xxx~~ have the right to use it themselves and to exclude the "untouchables" from the use of it, and this right is said to be based on immemorial custom.

The trial Judge found that the plaintiffs have proved a long-standing custom (he does not describe it as immemorial) of using the tank-water to the exclusion of the "untouchables". He held however that the custom conferred no legal right upon the plaintiffs because "mere user of a public tank by one class and non-user by another would not clothe the class making the user with any legal rights or rights of ownership". On appeal the Assistant Judge confirmed the finding that the caste Hindus have not proved that they have any legal right to exclude the "untouchables". He has relied to some extent on a judgment of Sir Sadashiv Ayar in Mariappa v. Vaithilinga, a case not reported apparently in the authorised reports but to be found in 1913 ~~1930~~ Mad.W.N. 247 and 18 Indian Cases 979; but his main reason seems to be that he held that the custom is not shown to be immemorial.

The Choudhari Tank is a small lake or l[illegible]ge pool,

between four and five acres in extent, on the outskirts of the town. It is surrounded on all sides by municipal roads beyond which are houses occupied by caste Hindus (and a very few Mahomedans), and the owners of these houses also own in many cases strips of land on the edge of the tank, ghats or flights of steps to get to the water and the masonry embankments along the sides. There are no houses of "untouchables" anywhere near. It is not known how old the tank is, except that it is admittedly not less than 250 years old. There is no evidence as to its origin. It is not even clear that it is artificial. The trial Judge took the view that it was "a natural excavation in the bed of the earth, of course repaired and remodelled by human agency". If this is so-----and the point was not disputed in the argument before us---it is probably many centuries old. The water-supply comes from the monsoon and a few natural springs. The population of the town of Mahad is between seven and eight thousand, of whom less than 400 are "untouchables". The Municipality was established in 1865, but there is no evidence available, at any rate on the record of this case, as to the early history of the town or as to the time when the site was first inhabited.

The plaintiffs have examined a number of witnesses, many of them old inhabitants, whose evidence may be said to have established that within the period of living memory the tank has been used exclusively by the caste Hindus (and a few Mahomedans) and has never been used by the "untouchables". It is in fact admitted that the latter never used it before the year 1927, when a campaign against the doctrine of "untouchability" was carried on by defendant no.1, and some of the "untouchables" went and drank the water as a protest. They were assaulted and beaten by the caste Hindus and there were criminal prosecutions which led to the present suit.

As there is no record of any attempt having been made by the "untouchables" to use the tank before that there is no evidence of any positive acts of exclusion. What is proved is user by the one party and absence of user by the other. This was due, no doubt, not to any accidental causes, but to the mutual acceptance of the doctrine of "untouchability" which until recent years was not openly challenged.

The learned Assistant Judge comments on the fact that there is no evidence of the exclusion of the "untouchables" in pre-British times, nothing to show that the exclusion or exclusive user was in force in the days of the Maratha rule or the Musalman rule. It is of course not always necessary to produce evidence going back beyond the memory of living persons. On proof of enjoyment for a period even less than that the Courts have frequently felt justified in holding, in the absence of evidence to the contrary, that a custom has existed from time immemorial. Nor, of course, is it necessary in a case of this kind to have evidence of positive acts of exclusion of one party by the other. There could be no such evidence as long as the enjoyment of the caste Hindus was not challenged, and it would not be likely to be challenged as long as the doctrine of "untouchability" prevailed and was accepted. But a custom proved to have existed during the period of living memory can only be presumed to have existed from before the period of legal memory in cases where conditions may be assumed to have been permanent and stable, so that it is reasonable to infer that what has happened during the period covered by the evidence has also happened from time immemorial. This is where the plaintiffs' case in ~~my~~ our opinion breaks down. As long as conditions were at all similar, as long as the houses of the caste Hindus have surrounded the tank (which is not necessarily very long as the tank is on the outskirts of the town and the land round it would not be likely to be occupied until after considerable expansion of the original settlement) it

may be safely presumed that the practice was the same as at present. It would not be safe to presume, however, that conditions have been similar for a period long enough to establish the alleged custom. The Konkan has had a chequered history, even in comparatively modern times, and to suppose that the caste Hindus have been in a position to exercise exclusive control over this large natural reservoir, situated as it is, from time immemorial would be contrary to reasonable probability.

In this connection some of the observations of Sir Sadashiv Ayar in Mariappa v. Vaithilinga are very instructive. He cites a saying of Manu's: "Waters are pure as long as a cow goes to quench her thirst in them....and they have a good scent, colour and taste"; and he points out that the Shastraic writings "make a distinction between rivers, tanks and other receptacles into whose beds cows could get down to quench their thirst, and smaller receptacles which are more easily contaminated and where purification by time, atmospheric conditions and movement of the water is much more difficult." The learned Judge suggests that the dictates of the Hindu religion would not require any elaborate precautions against the pollution of water in a large open tank, and he was dealing with a tank in a village site, considerably smaller than the Choudhari Tank at Mahad. The doctrine of "untouchability" therefore does not appear to go far enough to lend very much support to the appellants' case, and it is doubtful whether any attempt would be made to secure exclusive user of the water until such time as the tank came to be surrounded by the houses of the caste Hindus.

This is the only case to which our attention has been drawn dealing with a claim to exclude "untouchables" from the use of a watering-place of this description. The temple-entry cases, e.g. Anandrav v. Shankar, 7 Bom.323,

and Sankaralinga v. Rajeswara, 31 Mad.236 P.C., are not really on all fours. In such cases long practice acquiesced in by the other castes and communities may naturally give rise to a presumption of dedication to the exclusive use of the higher castes, and may throw upon the "untpuchables" the burden of proving that they are among the people for whose worship a particular temple exists. No such presumption of a lawful origin of the custom can be said to arise here.

We therefore agree with the learned Assistant Judge that the appellants have not established the immemorial custom which they allege. Had they succeeded on this point it might have been necessary to consider whether the custom were unreasonable or contrary to public policy (though strictly speaking that was not pleaded in the lower Courts). It would certainly have been necessary to consider the legal effect of the vesting of the Choudhari Tank in t Municipality, and the question whether in any case the appellants could be granted any relief in this suit in which the legal owner is not a party. But as it is not necessary to decide these questions in the view we take of the case, and as they have not been very fully or effectively argued, we prefer to express no opinion.

~~I would dismiss the appeal~~ appeal dismissed with costs.

Expedite

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(81) S.A. 462/33

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18 copies.

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S.—391/33

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

Wednes- *day the* 17th *day of* March 1937.

APPEAL No. 462 OF 1933 FROM APPELLATE DECREE.

1 Narhari Damodar Vaidya ; 2 Ramanarayan Girdhari Marwadi 3 Ganpat Bhiku Gandhi ; 4 Balkrishna Narayan Bagde ; 5 Narayan Anandrao Deshpande ; 6 Ramchandra Dharmaji Jadhav ; 7 Maruti Sitaram Vadke ; 8 Ramchandra Atmaram Shetye .. .. (Original Plaintiffs Nos. 2 to 9) — *Appellants.*

versus

1 Dr. Bhimrao Ramji Ambedkar, member of Joint Parliamentary Committee, London ; 2 Sitaram Namdev Sivtarkar ; 3 Kutannak alias Krishna Sayanak Mahar ; 4 Ganya Malu Chambhar ; 5 Kanu Vithal Mahar .. .. .. (Original Defendants) — *Respondents.*

Claim—Rs. 10 for all purposes.

The Plaintiffs-touchables sued for a declaration that the Choudhari Tank situate at Mahad belonged to them, that they alone had a right to the user thereof, that the Defendants-untouchables were not entitled to use the same and for an injunction against the Defendants not to use the suit tank.

The Original Suit No. 405 of 1927 was decided by the Second Class Subordinate Judge of Mahad who dismissed the Plaintiff's suit ordering each party to bear its own costs.

The Appeal No. 32 of 1931 of the District File was decided by the Second Assistant Judge of Thana who confirmed the decree of the Court of first instance and dismissed the appeal and cross-objections with costs.

An appeal has been admitted in the High Court from the decision of the lower Court. Notice was ordered to issue by the Honourable Mr. Justice Wadia on the 18th day of August 1933.

The grounds of objection to the decision appealed against are :—

1. The lower Courts are wrong to hold that the Choudhari Tank in suit is not private property but that it is of Municipal ownership.

2. The Defendants have not proved that the tank belongs to the Municipality of Mahad.

3. The lower Courts failed to see that the Municipality never came forward t[o] up their own title to the tank in dispute nor that the Municipality ever [re]d the private ownership of it.

4. The lower Court was wrong to hold that the ancient custom, among the [C]hable Hindus, of using the tank-water to the exclusion of the untouchables, [i]s not recognisable as a legal right.

5. The touchables and untouchables being the divisions amongst the Hindu [c]ommunity since immemorial time, according to Hindu religion and law, it [i]s, and it is now also, impossible to have one tank-water for their joint use, [h]aving regard to the principles of the Hindu religion and to the long-standing [re]ligious feelings and sentiments of the Caste Hindus.

6. Assuming that the tank has vested in the Municipality it has so vested in it as a trustee and the beneficiaries, who are the Plaintiffs, have got a right of exclusive user as against the untouchable classes by virtue of the immemorial custom which is a part and parcel of the Hindu law and religion.

7. The legal doctrine of " Lost grant and implied dedication " should have been applied to the facts of this case according to law.

8. The Madras ruling in 18 India Cases at page 979 applied, on all fours, to the case and the lower Appellate Court was wrong to distinguish it from the facts of this case. There is no distinction in principle applying to both the cases.

9. The facts show that the tank has been dedicated to the exclusive user by the touchable classes only.

10. The lower Appellate Court has misread and misconstrued the evidence establishing the immemorial custom of excluding the untouchables from the use of the water in question.

11. The water or the tank is a religious institution according to the Hindu religion and there is as much sanctity about it as about a temple under the Hindu Law. The lower Appellate Court's view, in this respect, is not according to law.

12. It should have been held that the Plaintiffs are entitled to a declaration and injunction as claimed.

13. The decision is against law, equity and justice and is opposed to the facts of the case.

14. Order as to costs is wrong.

Coram:-Broomfield and N.J.Wadia JJ.

For the reasons stated in the accompanying Judgment, the Court confirms the decree of the lower appellate Court and dismisses the appeal with costs.

17th March 1937.
BVB.

Registrar.

G.C.P.—(J) J 204—1150—8-36—X2(Supr.)
G.R., J.D., No. 4398 dated 3-7-16

[Spl.—H.C. A.S. Civil 1

~~CIVIL APPLICATION No.~~ ~~OF 193 IN~~ APPEAL No. 462 OF 1933

FROM ~~ORIGINAL~~ / APPELLATE DECREE

Bill of Costs in the High Court.

	By the Appellant ~~or Applicant~~	By the Respondent ~~or Opponent~~ No. 1.	By the Respondent or Opponent
	Rs. a. p.	Rs. a. p.	Rs. a. p.
Stamps for Memorandum of 2nd Appeal / ~~Application~~ ...	5-0-0		
Stamps for Copies of Decrees and Judgments ~~or Orders~~	1-8-0		
Stamps for Vakalatnama	2-0-0	2-0-0	
Stamps for applications to enter the names of the heirs of the deceased			
Stamp for application for calling for additional papers			
Bhatta for Process	2-8-0		
Sectioner's Fee	9-0-0		
Advocate's Fee	30-0-0	30-0-0	
Printing Charges	25-0-0		
Copying Charges for preparing paper-books ...			
Stamp for affidavit			
Search Fee			
Stamp for Memorandum of Cross-objections ...			
Advocate's Fee in the matter of Cross-objections			
Costs at the trial of issue sent down ...			
Translation Fee			
Copying Fee under Rule 82 or 111 of the High Court, Appellate Side Rules, 1936 ...			
Total ...	75-0-0	32-0-0	

Taxing Officer.

M. G. Rao
Deputy Registrar.

The 17th day of March 1937.

APPEAL No. 462 OF 1933 FROM APPELLATE DECREE.

Narhari Damodar Vaidya ; and others. (Original Plaintiffs Nos. 2 to 9) ... ... } Appellants.

versus

Dr. Bhimrao Ramji Ambedkar, member of Joint Parliamentary Committee, London ; and others. (Original Defendants) ... } Respondents.

Second Appeal against the decision of S. M. Kaikini, Esquire, Second Assistant Judge at Thana in Appeal No. 32 of 1931.

Mr. V. B. Virkar for the Appellants.

Counsel Mr. S. V. Gupte with Mr. B. G. Modak for Respondent No. 1.

17th March 1937.

(Coram :—Broomfield and N. J. Wadia JJ.)

Oral Judgment (per Broomfield J):—The appellants, on behalf of the caste Hindus of the town of Mahad, sued the respondents, who represent the so-called "untouchables", for a declaration that the Choudhari Tank near the town belongs to them and that they alone have a right to use it and the respondents are not entitled to use it, and for an injunction against the respondents not to use it. The claim to ownership is not now persisted in and it is conceded that, as found by the trial Court, the tank belonged to Government under the provisions of section 37 of the Land Revenue Code and has now vested in the Municipality of Mahad under section 50 of the District Municipalities Act. It is also conceded now that the caste Hindus are not entitled to exclusive user of the tank as against all the world, since Mahomedans may and do use it. It is contended nevertheless that the appellants have the right to use it themselves and to exclude the "untouchables" from the use of it, and this right is said to be based on immemorial custom.

The trial Judge found that the plaintiffs have proved a long-standing custom (he does not describe it as immemorial) of using the tank-water to the exclusion of the "untouchables". He held however that the custom conferred no legal right upon the plaintiffs because "mere user of a public tank by one class and non-user by another would not clothe the class making the user with any legal rights or rights of ownership". On appeal the Assistant Judge confirmed the finding that the caste Hindus have not proved that they have any legal right to exclude the "untouchables". He has relied to some extent on a judgment of Sir Sadashiv Ayar in *Mariappa* v *Vaithilinga*, a case not reported apparently in the authorised reports but to be found in 1913 Mad. W.N. 247 and 18 Indian Cases 979 ; but his main reason seems to be that he held that the custom is not shown to be immemorial.

The Choudhari Tank is a small lake or large pool, between four and five acres in extent, on the outskirts of the town. It is surrounded on all sides by municipal roads beyond which are houses occupied by caste Hindus (and a very few Mahomedans), and the owners of these houses also own in many cases strips of land on the edge of the tank, *ghats* or flights of steps to get to the water and the masonry embankments along the sides. There are no houses of "untouchables" anywhere near. It is not known how old the tank is, except that it is admittedly not less than 250 years old. There is no evidence as to its origin. It is not even clear that it is artificial. The trial Judge took the view that it was "a natural excavation in the bed of the earth, of course repaired and remodelled by human agency". If this is so — and the point was not disputed in the argument before us — it is probably many

centuries old. The water-supply comes from the monsoon and a few natural springs. The population of the town of Mahad is between seven and eight thousand, of whom less than 400 are "untouchables". The Municipality was established in 1865, but there is no evidence available, at any rate on the record of this case, as to the early history of the town or as to the time when the site was first inhabited.

The Plaintiffs have examined a number of witnesses, many of them old inhabitants, whose evidence may be said to have established that within the period of living memory the tank has been used exclusively by the caste Hindus (and a few Mahomedans) and has never been used by the "untouchables". It is in fact admitted that the latter never used it before the year 1927, when a campaign against the doctrine of "untouchability" was carried on by defendant No. 1, and some of the "untouchables" went and drank the water as a protest. They were assaulted and beaten by the caste Hindus and there were criminal prosecutions which led to the present suit. As there is no record of any attempt having been made by the "untouchables" to use the tank before that there is no evidence of any positive acts of exclusion. What is proved is user by the one party and absence of user by the other. This was due, no doubt, not to any accidental causes, but to the mutual acceptance of the doctrine of "untouchability" which until recent years was not openly challenged.

The learned Assistant Judge comments on the fact that there is no evidence of the exclusion of the "untouchables" in pre-British times, nothing to show that the exclusion or exclusive user was in force in the days of the Maratha rule or the Musalman rule. It is of course not always necessary to produce evidence going back beyond the memory of living persons. On proof of enjoyment for a period even less than that the Courts have frequently felt justified in holding, in the absence of evidence to the contrary, that a custom has existed from time immemorial. Nor, of course, is it necessary in a case of this kind to have evidence of positive acts of exclusion of one party by the other. There could be no such evidence as long as the enjoyment of the caste Hindus was not challenged, and it would not be likely to be challenged as long as the doctrine of "untouchability" prevailed and was accepted. But a custom proved to have existed during the period of living memory can only be presumed to have existed from before the period of legal memory in cases where conditions may be assumed to have been permanent and stable, so that it is reasonable to infer that what has happened during the period covered by the evidence has also happened from time immemorial. This is where the plaintiffs' case in our opinion breaks down. As long as conditions were at all similar, as long as the houses of the caste Hindus have surrounded the tank (which is not necessarily very long as the tank is on the outskirts of the town and the land round it would not be likely to be occupied until after considerable expansion of the original settlement) it may be safely presumed that the practice was the same as at present. It would not be safe to presume, however, that conditions have been similar for a period long enough to establish the alleged custom. The Konkan has had a chequered history, even in comparatively modern times, and to suppose that the caste Hindus have been in a position to exercise exclusive control over this large natural reservoir, situated as it is, from time immemorial would be contrary to reasonable probability.

In this connection some of the observations of Sir Sadashiv Ayar in *Mariappa* v *Vaithilinga* are very instructive. He cites a saying of Manu's; "waters are pure as long as a cow goes to quench her thirst in them.....and they have a good scent, colour and taste"; and he points out that the Shastraic writings "make a distinction between rivers, tanks and other receptacles into whose beds cows could get down to quench their thirst, and smaller receptacles which are more easily contaminated and where purification by time, atmospheric conditions and movement of the water is much more difficult". The learned Judge suggests that the dictates of the Hindu religion would not require any elaborate precautions against the pollution of water in a large open tank, and he was dealing with a tank in a village site, considerably smaller than the Choudhari Tank at Mahad. The doctrine of "untouchability"

therefore does not appear to go far enough to lend very much support to the appellants' case, and it is doubtful whether any attempt would be made to secure exclusive user of the water until such time as the tank came to be surrounded by the houses of the caste Hindus.

This is the only case to which our attention has been drawn dealing with a claim to exclude "untouchables" from the use of a watering-place of this description. The temple-entry cases, e.g., *Anandrav* v *Shankar*, (1883) I.L.R. 7 Bom. 323, and *Sankaralinga* v *Rajeswara*, (1908) I.L.R. 31 Mad. 236 P.C., are not really on all fours. In such cases long practice acquiesced in by the other castes and communities may naturally give rise to a presumption of dedication to the exclusive use of the higher castes, and may throw upon the "untouchables" the burden of proving that they are among the people for whose worship a particular temple exists. No such presumption of a lawful origin of the custom can be said to arise here.

We therefore agree with the learned Assistant Judge that the appellants have not established the immemorial custom which they allege. Had they succeeded on this point it might have been necessary to consider whether the custom were unreasonable or contrary to public policy (though strictly speaking that was not pleaded in the lower Courts). It would certainly have been necessary to consider the legal effect of the vesting of the Choudhari Tank in the Municipality, and the question whether in any case the appellants could be granted any relief in this suit in which the legal owner is not a party. But as it is not necessary to decide these questions in the view we take of the case, and as they have not been very fully or effectively argued, we prefer to express no opinion.

Appeal dismissed with costs.

By order of the Cour

Registrar.

Exd by KSL
Read by M·S·M·

BOMBAY: PRINTED AT THE GOVERNMENT CENTRAL PRESS.