Before Mr. Justice Broomfield and Mr. Justice N. J. Wadia.

NARHARI DAMODAR VAIDYA 1937

v. March 17.

BHIMRAO RAMJI AMBEDKAR.*

Custom—Evidence as to immemorial custom—Proof of existence of custom during living memory—Presumption as to immemorialty—Conditions requisite for.

To establish the right of exclusive user of a public tank by immemorial custom it is not always necessary to produce evidence going back beyond the memory of living persons ; nor is it necessary to have evidence of positive acts of exclusion of one party by the other.

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.

Mariappa v. *Vaithilinga*,[1] followed.

Anandrao Bhikaji Phadke v. *Shankar Daji Charya*[2] and *Sankaralinga Nadan* v. *Rajeswara Dorai*,[3] distinguished..

SUIT for declaration and injunction.

In the town of Mahad in the Colaba district there was a public tank named the Chaudhari tank, admeasuring five hundred and forty feet by three hundred and forty feet. It lay on the outskirts of the town. The banks of the tank were occupied mostly by high caste Hindus, who constituted a large majority of the population. The defendants represented the untouchables of the place, who numbered about four hundred out of a total population of seven or eight thousand.

The tank was in use by the high caste Hindus as well as by Mahomedans. The untouchables never used the tank so far as human recollection went. Latterly, however, they insisted on using the water of the tank.

Narhari and others (plaintiffs), who represented the high caste Hindus of Mahad, sued, on December 12, 1927, for a declaration that they alone had the right to use the water of the tank and for an injunction to restrain the defendants from using it.

The defendants contended *inter alia* that the tank vested in the Municipality of Mahad and was open to the user by the defendants, that if the Mahomedans and Christians of the place could use the water, they (defendants) had a better right to it being within the fold of Hinduism, and that the custom of untouchability was against justice and conscience and was detrimental to public interest.

The trial Court held that the plaintiffs failed to prove that there was a long-standing custom of using the tank-water to the exclusion of the untouchables

* Second Appeal No. 462 of 1933, from the decision of S. M. Kaikini, Second Assistant Judge at Thana, in Appeal No. 32 of 1931, confirming the decree passed by V. R. Saraf, Subordinate Judge at Mahad, in Civil Suit No. 405 of 1927.

1 [1913] M. W. N. 247, s. c. 18 I. C. 979.

2 (1883) I. L. R. 7 Bom. 323.

3 (1908) I. L. R. 31 Mad. 236, s. c. 10 Bom. L.R. 781, P. C.

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and that the custom was not recognisable as a legal right. The suit was, therefore, dismissed.

On appeal, the decree was affirmed by the Assistant Judge for the following reasons :—

"Assuming for the sake of argument that the tank was constructed by Hindu rulers and that principles of Hindu law govern this case, still no text has been pointed out to show that under that law an untouchable should be held to have been excluded from the use of this tank... Great support to this, that in the case of big tanks there is no restriction on the ground of untouchability, is afforded by *Mariappa Nadan* v. *Vaithilinga Mudaliar*, 18 I. C. 979... In the face of such high authority and with the absence of any evidence to show that any custom exists anywhere in this Presidency excluding the untouchables from the use of any large public tank, or evidence clearly showing that even as regards this tank untouchables have been excluded from time immemorial, the finding on the second issue must be in the negative. There is nowhere any evidence produced to show that this exclusion of untouchables dates back from, say, pre-British days. All witnesses, the oldest of them is of sixty-five years, speak of their personal knowledge of the present exclusion of the untouchables. No person speaks of anything indicating that this exclusion dated from the days of the Maratha rule or the Mussalman rule."

The plaintiffs appealed to the High Court.

V. B. Virkar, for the appellants.

S. V. Gupte, with *B. G. Modak*, for respondent No. 1.

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 s. 37 of the Bombay Land Revenue Code and has now vested in the Municipality of Mahad under s. 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 Sadashiva Ayyar in *Mariappa* v. *Vaithilinga*[1] (a case not reported apparently in the authorised reports) ; but his main reason seems to be that he held that the custom is not shown to be immemorial.

1 [1913] M. W. N. 247, s. c. 18 I. C. 979.

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The Chaudhari 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 two hundred and fifty 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 four hundred 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 Mussalman 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

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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 Sadashiva Ayyar 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 Bhikaji Phadke* v. *Shankar Daji Charya*[1] and *Sankaralinga Nadan* v. *Rajeswara Dorai*,[2] 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 was 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

1 (1883) I. L. R. 7 Bom. 323.

2 (1908) I. L. R. 31 Mad. 236, s. c. 10 Bom. L.R. 781, P. C.

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.

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Appeal dismissed.

Before Mr. Justice Broomfield and Mr. Justice Macklin.

HIRALAL LACHMIRAM PARDESHI

v.

JANARDAN GOVIND NERLEKAR.*

1937

February 24.

Specific Relief Act (I of 1877), Secs. 14, 15 and 16—Agreement of sale—Specific performance—Inability of vendor to carry out whole contract—Purchaser entitled to relief only if he agrees to buy remaining property for stipulated consideration.

Defendant No. 1 owned four plots of land, (*a*), (*b*), (*c*) and (*d*), which were mortgaged. On October 21, 1929, he agreed to sell plot (*d*) to defendant No. 2 for Rs. 2,000 and received Rs. 200 as earnest money. The contract was to be completed and the sale-deed executed in a fortnight's time. This was not done. On April 18, 1930, defendant No. 1 agreed to sell all the four plots to plaintiff for Rs. 7,000, out of which defendant No. 1 was to pay off the mortgage debt and relieve the properties from the encumbrance. In the agreement of sale, reference was made to the prior agreement of sale of plot (*d*), and it was stated that as the balance of the purchase money was not paid in time the transaction was void. In May, 1930, plaintiff called upon defendant No. 1 to complete the agreement. On June 6, 1930, defendant No. 2 sued for specific performance of the agreement of sale in his favour; and on September 1, 1930, the suit ended in a consent decree by which defendant No. 1 undertook to receive Rs. 1,600 and to execute a sale-deed of plot (*d*) in defendant No. 2's favour in a fortnight's time. Meanwhile on June 25, 1930, plaintiff sued for specific performance of the agreement of sale in his favour. The trial Court dismissed the suit for the reason that the plaintiff was unwilling to purchase plots (*a*), (*b*) and (*c*) without compensation for defendant No. 1's inability to convey plot (*d*) to him, as permitted by s. 15 of the Specific Relief Act, 1877. On appeal :—

Held, (1) that the agreement of sale in favour of defendant No. 2 was binding on the plaintiff;

(2) that defendant No. 1 by reason of his prior agreement with defendant No. 2 was as much unable to carry out the whole of his part of the original agreement within the meaning of ss. 14 and 15 of the Specific Relief Act as if he had no legal title to plot (*d*);

(3) that s. 14 did not apply, since plot (*d*) did not bear only a small proportion to the whole;

* First Appeal No. 185 of 1932, from the decision of Sumitra A. H., First Class Subordinate Judge at Sholapur, in Civil Suit No. 926 of 1930.