S.—391/33.

APPEAL No. 462 OF 1933 FROM APPELLATE DECREE.

Appeal filed on 24th January 1930.
Appeal decided on 30th January 1933.
Duration of the Appeal—Two years and six days.

In the District Court of Thana, at Thana.

APPEAL No. 32 OF 1931 FROM DECREE IN REGULAR CIVIL SUIT No. 405 OF 1927 OF THE COURT OF THE SUB-JUDGE OF MAHAD (MR. V. R. SARAF).

(1) Narhari Damodar Vaidya ; (2) Ramnarayan Girdhari Marwadi ; (3) Ganpat Bhiku Gandhi ; (4) Balkrishna Narayan Bagade ; (5) Narayan Anandrao Deshpande ; (6) Ramchandra Dharmaji Jadhav ; (7) Maruti Sitaram Wadke ; (8) Ramchandra Atmaram Shete (original Plaintiffs) .. .. APPELLANTS ;

(Pleader—Mr. V. B. Virkar)

against

(1) Dr. Bhimrao Ramji Ambedkar ; (2) Sitaram Namdev Sivtarkar ; (3) Kutamnak alias Krishna Sayanak Ma[illegible] ; (4) Ganya Malu Chambhar ; (5) Kanu Vithal Mahar ([illegible]al Defendants) .. .. RESPONDENTS.

(Pleaders—Messrs. D. M. Gupte ; Asayekar and Kotwal)

CLAIM—Rs. 10.

This is an appeal against a decree of the Subordinate Judge of Mahad dismissing the Plaintiff's suit. Plaintiffs brought this suit as representatives of the touchable Hindu castes of Mahad against the Defendants as representing the untouchable castes. Plaintiffs sought a declaration that the tank known as the Chawdhar tank at Mahad belongs to them and they alone have a right to the user of it. They further asked for an injunction restraining the Defendants from using this tank for any purpose.

Defendants contended that this tank was not the private property of the Plaintiffs ; it was a public tank. They further contended that the custom of untouchability is against justice and detrimental to public interest and this suit involved a caste question and so was not within the jurisdiction of Civil Court.

The lower court held that though this suit involved a caste question still the Civil Courts had jurisdiction to try this suit as it involved a question as to right to property. It further held that this Chawdar tank was not the private property of the Plaintiffs ; the custom of using this tank to the exclusion of untouchables is proved, but the same cannot be recognized by courts of law. On these findings it held that Plaintiffs were not entitled to the declaration and injunction sought and so dismissed this suit. As regards costs, as Defendants incurred unnecessarily heavy costs it ordered each party to bear its own costs.

Feeling aggrieved at this order the Plaintiffs appeal. The Defendants have filed cross-objections.

The only points that were argued before me by the two parties are :—

Issues.

(1) Do Plaintiffs prove that the Chawdar tank is their private property ?

(2) If not, do they prove a legal right in them to exclude the untouchables from the use of this tank ?

(3) Are they entitled to the declaration and injunction sought by them ?

(4) Is the order of costs proper ?

My findings are :—

Findings.

(1) No.
(2) No.
(3) No.
(4) Yes.

Reasons.

On the first point as regards the title to this tank, the case for the Plaintiffs is not quite definite. At one time they contend that this tank belongs to the whole community of the touchable Hindus of Mahad and at another that it belongs to those Hindus who have their strips of land on the banks of this tank.

In the evidence led very few of the several Hindus for whom ownership of the parts of the banks is claimed are examined. And, in their evidence nothing substantial is found. Exhibit 66 is the sketch of this tank giving an idea of the situation of the same and its banks. Exhibit 104 is one if the claimants of a plot of land on the banks. His idea of the ownership of the bed of this tank is curious. He states that that portion of the tank which is in front of his house and up to the middle of the tank and of the breadth of his house belongs to him. This is the idea of other claimants also. No doubt that all these have borrowed this idea from the law of riparian owners of a flowing stream. This idea cannot be applied to a tank and specially this tank. The absurdity of applying it here is obvious. If this witness is is en the right to that strip of the bed of this tank of the width of his house and nding up to the middle of this tank, then clearly it would come in conflict w nilar rights claimed by the claimants of lands on the banks to his right and l . Such a right may properly be claimed when the claimants are on opposite banks only and there are no banks to the right or left.

Exhibit 146 is another witness who claims a right to a strip of the bank.

His claim is similar to that of the previous witness. He admits that the tank is rectangular and still he claims that the length of the bed of this tank of his ownership would be 60 or 70 cubits, the same as the lengths of his compound and it would extend, not up to the middle of the tank but up to that point where the water would recede in summer.

Exhibit 178, though similarly situated as the above two witnesses, is more modest. He does not lay exclusive claim on any part of the bed of the tank. He states that it belongs jointly to all the owners of the surrounding houses.

These are the only three such witnesses. None of them is directly a Plaintiff ; none of them has any writing to support his claim. They base this claim on the ground that the *ghats* or flight of steps in front of the strips of banks claimed by them are repaired by them and are considered by their ownership, therefore they must be considered the owners of the bed of the tank. Now, it is well-known that in several *kshetras* or places of pilgrimage like Pandharpur there are similar *ghats* owned by Indian Chiefs and other rich people. Nobody on that ground suggests that these owners of *ghats* are the owners of the bed of the river in front. Strips of land on the banks would be owned by people either by purchase or long possession. But, such a method of claiming title cannot be lightly applied to beds of rivers or tanks.

Then there are some witnesses examined for the Plaintiffs who speak to this tank being of the ownership of all touchable Hindus. The only reason why they say this is that only such Hindus have been using this tank. But, that is a very very weak reason. No doubt there is evidence to indicate that this tank was cleaned by raising public subscription. That would not make it of the ownership only of the subscribers to the fund. And there is nothing to show that amongst these subscribers there were no untouchables.

It must be admitted that the evidence on the record shows that for a long time the untouchables have not been using this tank. That by itself would be no evidence that this tank is of the ownership of the touchables. And, as it is the

Plaintiffs' case that they are owners of this tank, and they want a declaration to that effect, they must prove that case by cogent evidence. The evidence that they have been using it for the last 70 or 80 years and Defendants have not been so using it cannot be said to be such cogent evidence.

For these reasons I find in the negative on the first point.

The second point is the most important point in this case. In dealing with this it must be remembered that we are concerned with a big tank, described in the lower court's judgment as measuring 540 feet × 340 feet. It is in connection with such a reservoir of water that Plaintiffs' claim the right to exclude a class of the public. In support of this claim it was argued by the learned Advocate for the Appellants that the long user in this case should be taken as indicative of the wishes of the dedicator of this tank. As regards this, it must be noted that there is absolutely no evidence as to who constructed this tank, whether he was a Hindu or Musalman; and further, since how many years the untouchables have been excluded from the use of this tank.

Assuming for argument's sake that this was constructed by the 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. In Ganpatty Iyer's Law relating to Hindu and Muhammadan Endowments, Second Edition, Chapter XIII, deals with endowments of this nature. That learned author classes these as secular endowments. At the bottom of page 294 it is stated "The Bhavishya Puran ordains a special rule according to which the person dedicating should, after saying that the water has been given for all beings and all animals partake of the same, etc." So the water of such reservoirs is dedicated to *all beings*. Then at page 297 the effect of this dedication is mentioned. It has the effect of extinguishing the private rights of owner and to constitute it the property of . . . s, for whose benefit they have been constructed. Everybody is entitled to . . . e of the water. . . . "The Mantra used for dedication shows clearly that it is for the benefit of all beings in common."

Great support to this, that in the case of big tanks there is no restriction on the ground of untouchability, is afforded by the ruling which was relied upon by the learned Advocate for the Appellants in support of his own case. I refer to Nariappa Nadan *v.* Vaithilinga Mudliar 18 I. C. 979. The main judgment in this case is of that eminent Judge Sir Sadashiv Ayar. The dispute there was about two things, one a well and the other a tank 150 feet × 150 feet much smaller than the present one. At the beginning of page 982 the learned Judge quotes Sreedhara described by him as the most authoritative commentator of the Bhagvatam. "In respect of waters alleged to be polluted by the bathing of *chandalas*, etc., the purity or impurity depends on the smallness or largeness of the waters in the receptacle." Then holding that the custom of excluding untouchables from directly drawing water from a well must be upheld he proceeds: "As regards the fairly big *niravi* (i.e. the tank) it seems to me that somewhat different consideration arise: . . . A fair sized tank, unless it is attached to a temple or belongs to a *math* or private individual, is usually used by all castes." Then dealing with the evidence in that particular case the learned Judge proceeds: "The evidence is wholly confined to wells and to private tanks and throws no light on the right, *prima facie*, existing in all castes including Paribs and Pallars, to the use of a public tank." Then in that case it was urged that the untouchables concerned had their separate tank and so they should be excluded from the tank in dispute. To this the learned Judge answered: "But this (fact) cannot deprive them of their common law right to the use of a public tank when it is of not inconsiderable size." In conclusion the learned Judge stated: ". . . The Defendants have failed to prove that the tank has been dedicated (either by express dedication or by long practice acquiesced in by the other castes and communities) to the exclusive use of the higher castes among the Hindu community."

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, and 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 Musalman rule.

On the third point, clearly the Plaintiffs are not entitled to the declaration of their title to this tank, since the finding on the first issue is against them.

As regards injunction the view expressed by their Lordships of the Judicial Committee in Saklat *v.* Bella 28 Bom. L. R. 161 is against the Plaintiffs. Their Lordships stated that for an injunction the suit should be brought by beneficiaries against the trustee and not against rivals taking benefit of the trust, ignoring the trustee altogether. No doubt that they expressed a view that where a question of caste and worshippers of a higher caste being defiled by the presence of a lower caste were concerned in India, it may be that such a suit may be allowed. But, they restricted this opinion to a special kind of suits, involving questions concerning a religious institution like a temple. As already stated a tank is not a religious institution. It is a secular endowment and considerations which arise in the case of a temple should not arise in such a case.

The learned advocate urged that following this above ruling a mere declaration that this tank is for the exclusive use of the touchable Hindus should be granted. I have already held that the evidence in this case does not support this case of the Plaintiffs. And, the case cited referred to an endowment, the object of which could be clearly seen from the documents passed between the Government and the trustees.

For these reasons I find in the negative on the third point.

As regards the costs of the Defendants, it is quite clear that these Defendants went out of their way [illegible]ing unnecessary and irrelevant evidence recorded. Much of this evidence referred to the sanction of *shastras* to untouchability, and then the present ideas of some leading Hindus on this point. This has no bearing on the question of this Chaudar tank being of the exclusive use of the touchables of Mahad to the exclusion of untouchables there. For this reason the lower court was right in ordering each party to bear its own costs.

For these reasons I hold the decree of the lower court to be correct. I confirm the same and dismiss this appeal and cross-objections with costs.

(Signed) S. M. KAIKINI,
Second Assistant Judge.

30th January 1933.

[True copy]
(Illegible)
Clerk of the Court.

G.C.P.—(J) J 263—2000—10-33—X2(Supr.) [Spl.—H.C. A.S. Civ. 7
G.R., J.D., No. 4398 dated 3-7-16

CIVIL DEPARTMENT.

INWARD No. 4008 OF 1937

The District Judge of Thana

No. 2536 dated 20th July 1937

Certifies full execution of the High Court's Writ No. 3414 dated 18-6-1937, forwarding copy of the decree or order in

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

Record.

Assistant Registrar.

Received on the 21st July 1937.

Sent to the Record-keeper with all papers complete on the 25th October 1937.

Assistant Sheristedar.

Received and entered in Catalogue of Appeals.

Placed on the Shelf,

...eper.