S.—391/33

APPEAL NO. 462 OF 1933 FROM APPELLATE DECREE.

Suit filed on 12th December 1927.
Suit retaken on file 6th July 1929.
Suit decided on 8th January 1931.
Duration of the case—One year, six months and three days.

EXHIBIT

## IN THE COURT OF THE SECOND CLASS SUB-JUDGE AT MAHAD.

### REGULAR CIVIL SUIT No. 405 OF 1927.

(1) Pandurang Raghunath Dharap (since deceased); (2) Narahari Damodar Vaidya; (3) Ramnarayan Girdhari Marwadi; (4) Ganpat Bhiku Gandhi; (5) Balkrishna Narayan Bagade; (6) Narayan Anandrao Deshpande; (7) Ramchandra Dharmaji Jadhav; (8) Maruti Sitaram Wadake; (9) Ramchandra Atmaram Shetye. All residing at Mahad .. .. PLAINTIFFS;

(Pleaders—Messrs. M. B. Virkar and G. V. Sathe)

*against*

(1) Dr. Bhimrao Ambedkar; (2) Sitaram Namdeo Siwatarkar; (3) Kutannak alias Krishna Saynak Mahar; (4) Ganya Malu Chambhar; (5) Kanu Vithal Mahar. Nos. 1 and 2 residing at Bombay, No. 3 at Kinjloli Budruk, Nos. 4 and 5 at Mahad .. DEFENDANTS.

(Pleader—Mr. D. M. Vaidya for Defendants Nos. 1, 2, 3 and 5)

CLAIM—Rs. 10.

1. The Plaintiff-touchables sue to have a declaration that the Choudhari Tank, situate at Mahad within the jurisdiction of this court, belongs to them; that they alone have a right to the user thereof; that the Defendant-untouchables are not entitled to use the same and that injunction should issue against them not to use the suit tank alleging *inter alia* that the Choudhari Tank was constructed some hundreds of years ago before the advent of the British Government; that it is surrounded on all its sides by strips of land owned by private individuals; that the touchable Hindus own houses round about the suit tank, which stand beyond the municipal roads, bounding the suit tank on all its sides; that the touchables have been using the said tank from times immemorial; that the untouchables have never used it; that the said tank is not a public one but is a private property, originally constructed by some private individual for the use and enjoyment of the touchable community, having regard to the rights of private persons in relation to the said tank; that the Municipality of Mahad began to supervise the said tank from the sanitary point of view; that this supervision by the Municipality did not affect the rights of private individuals; that touchables, who own the surrounding sites, put up the embankments to the suit tank so far as their sites are concerned; that they also have constructed flights of steps (*ghats*) to the suit tank in order to approach the water therein; that there are only two untouchable communities at Mahad, namely Mahars and Chambhars; that they reside in different and detached localities; that there are separate municipal wells for the use of these communities; that according to the Hindu religion and the *shastras* thereof the Hindu society is really divided into two classes, namely touchables and untouchables, and that this classification is also supported by the customs or usages, obtainable since time immemorial; that these two classes cannot meet and hence the untouchables d

not use the suit tank; that the untouchables, however, started a movement in March of 1927 to do away with the custom and to force an entry into the suit tank; that they succeeded on one occasion, which resulted in a fracas between the two communities as the religious feelings of the touchable community were wounded; that the suit tank had to be purified because of the pollution caused by the entry of the untouchables; that the untouchables threatened to re-enter the suit tank; that the rights and privileges of the touchable community are thus jeopardised; that their religious feelings and sentiments also stand in danger of being wounded; that the touchables learnt of the determination of the untouchables to effect an entry into the suit tank in November 1927, when the cause of action accrued and hence Plaintiffs sue for declaration and injunction. Plaintiffs also claim in the alternative the same beliefs even if the suit tank is held to be the Municipal property.

2. Defendants Nos. 1 and 2 put in their written statement at exhibit 51. Defendants Nos. 3 and 5 have adopted the said written statement by their *purshis* exhibit 52. Defendant No. 4 did not put in any appearance at all. Defendants present mainly contend that the suit tank is Government-Municipal and that it vests in the Municipality of Mahad. They therefore challenge the alleged ownership of the touchables and their exclusive user of the suit tank. They also contend that the civil court has no jurisdiction to try the suit as the question involved is a caste question and hence not a civil right; they further allege that Muhammadans, Christians and other communities, which are recognised as untouchables, use the suit tank and hence contend that the Defendants should have a better right to use the same as they are within the fold of Hinduism; they further contend that the prohibitions or mandates of the *shastras* are not recognisable and enforceable in a court of law; that they cannot be availed of for limiting the user of the suit tank, which stands within the limits of and vests in the Municipality; that the Municipality of Mahad by its resolution dated 5th January 1924 threw open all the tanks within its limits for the user of the public including the untouchables; that the custom of untouchability is against justice and conscience and is detrimental to public interest and hence the Defendants contend that it cannot be recognised in a court of law. They, therefore, pray for a dismissal of the suit.

3. Upon these pleadings issues were framed by Mr. V. G. Gupte at exhibit 70. Those issues with my findings thereon are as follows :—

*Issues.*

(1) Whether the question involved in this suit is a caste question and whether the civil court has no jurisdiction to try it?

(2) Whether the Plaintiffs prove that the tank in suit is private property?

(3) Whether the Plaintiffs prove that there is a long-standing custom of using the tank-water to the exclusion of the untouchables?

(4) If so, whether the custom is recognisable as a legal right?

(5) Whether Plaintiffs are entitled to the declaration and injunction sought for?

(6) What orders to pass?

No further issue was sought.

My findings are :—

*Findings.*

(1) Yes on part 1; No on part 2.

(2) No.

(3) Yes.

(4) No.

(5) No.

(6) As per order.

*Reasons.*

4. This is a suit by Plaintiff-touchables of the Hindu community for a eclaration and injunction against Defendant-untouchables belonging to the same

community. Both parties sue and are sued in their representative capacity and necessary permission has been accorded to them. The subject-matter of the suit is a big tank by name Choudhari and it is situated in a part of the town of Mahad, which is mostly inhabited by Hindu touchables. The suit tank is a vast expanse of water mainly fed by the torrential rains and a few natural springs. It is rectangular in shape and measures about 540 feet from east to west and 340 feet from north to south (*vide* scale in the plan at exhibit 66). An accurate plan thereof has been drawn in this case and is at exhibit 66, the correctness of which is admitted by both the sides. This tank has three big stone *ghats* by names *Gomukhi*, *Shahabahiri*, and the *Bail Ghat*, marked serially as 1, 2, 3 in exhibit 66. Besides these, there are numerous smaller *ghats* (which are mere flights of steps for descending into the tank in order to approach the water) which number about 37. The water in the tank never rises up to the brim thereof and is generally at a depth of 8 to 10 feet from the level of the banks and sinks lower and recedes further to the centre during the hot season. This condition of the suit tank has necessitated the construction of the several *ghats*, big and small, as the water is neither pumped out nor are there other arrangements for drawing the same from outside. The sides of the tank are embanked, though some of the embankments have fallen down.

5. A cursory glance at exhibit 66 shows that the suit tank is surrounded by small strips of land on almost all the sides and the names of private individuals, who are alleged to own them in portions, are also mentioned therein. Many of the sites are now vacant but there are some buildings standing even now quite adjacent and close to the bank of the suit tank. Beyond this strip of land lie the municipal roads bounding the suit tank on all its sides as shown in exhibit 66 and beyond the municipal roads are houses, owned by private individuals, whose names are mentioned for the strip of land adjacent to the tank. It is in evidence that all these houses so surrounding the suit tank are owned by touchable Hindus. It is only in the Sarekar lane, which branches off from the municipal road to the west of the suit tank and opposite *ghat* no. 2 that there are 2 or 4 Muhammadan houses. It may also be stated here that just opposite the south-western corner of the suit tank is the Shahabahiri Darga. There are sheds constructed on the blank spaces shown opposite the three main *ghats* to serve as washing stands. There are also water troughs constructed under these stands and also one to the south of the suit tank and adjacent to the gymnasium as marked in exhibit 66. This last water trough is admitted by both the sides to have been constructed by the municipality for watering the cattle. I may also mention here that there were also small strips of land near the north-eastern corner of the suit tank as belonging to Mones and also to the south of the suit tank at the eastern end (where the water trough and the name of Hardikar are mentioned in exhibit 66) belonging to the Hardikar family and these strips of land were subsequently made over to the municipality, which utilised them for widening the road. After the suit was filed a commissioner was appointed at the instance of the Defendants and his report is at exhibit 32. He mentions therein that there are inscribed stones (slabs) to *ghats* nos. 2 and 3 and states that the inscription for *ghat* no. 3 is "Municipality Muhad 1899 A. D." and the one for water trough at *ghat* no. 2 mentions "Municipality Mahad 1925 A.D.". The said report also states in the opening part thereof that there is also an inscription stone for *ghat* no. 2 which mentions year 1901 and that the letters have been obliterated by cutting them away but states that the letters टी and ह are yet visible. The said report also mentions that there are posts planted in the tank along the western side.

6. A number of resolutions passed by the municipality leading to the dispute between the touchables and the untouchables and resulting in the filing of the present suit are on record. To understand their significance and importance and to appreciate the points urged for either side, a brief statement of the facts in the chronological order will not be out of place here. The Honourable Mr. Bole moved a resolution no. 4770 in the Bombay Legislative Council on 4th August 1923 by which all public watering-places, wells, *dharmashalas*, which are built and maintained out of public funds or administered by bodies appointed by Government or created by statutes were prayed for being thrown open to untouchable classes. The Government in pursuance of the resolution adopted, a resolution approving of and recommending the said resolution. The full text of the resolution by Honourable Mr. Bole and the resolution adopted by Government is at exhibit 227. In

pursuance of this resolution, the Collector of Kolaba forwarded a copy thereof to the Mahad Municipality for compliance. The Mahad Municipality passed a resolution no. 67 on 5th January 1924 to the effect that the Municipality had no objection to allow the untouchables to use the municipal tanks within its limits but this resolution did not specify the names of the tanks, which were contemplated thereunder. It is important, however, to note that no reservation of the suit tank was made thereunder. A copy of this resolution is at exhibit 38. That this resolution covered the suit tank is manifest from exhibit 149, which is an application by a number of touchable Hindu citizens to the municipality under date 21st March 1927 requesting the municipality to reconsider the question of allowing the untouchables to use the suit tank. In pursuance of this appeal the municipality passed a resolution no. 59 on 4th August 1927 to the effect that the previous resolution no. 67 of allowing untouchables to use the municipal tanks should be kept in abeyance till the public opinion was reformed. A copy of this resolution is at exhibit 39. Subsequently on 23rd November 1927 the municipality passed a resolution no. 95 calling a referendum to ascertain the public opinion about throwing open the suit and other tanks to the untouchables (*vide* exhibit 207). A public meeting appears to have been convened on 4th December 1927 in compliance with exhibit 207 and it appears that a large majority of the rate-payers, who attended the meeting, was against the user of the suit tank by the untouchables (*vide* exhibit 219). The untouchables had forced an entry into the suit tank on or about March 1927, which gave rise to exhibit 149, and they further threatened to enter the suit tank by starting *satyagraha* and with that view they had summoned a conference of the untouchables to be held at Mahad in December 1927. The touchable Hindus in order to avoid any such action on the part of the untouchables filed the present suit for declaration and injunction and secured an *interim* injunction against the Defendants.

7. Before I proceed to consider the main points of dispute between the parties to the suit, I should like to consider a preliminary objection which have been raised by the Defendants to the present suit on the ground that the suit is not cognizable by a civil court as the question involved therein is a caste question. This point, which is covered by issue no. 1, was not, however, pressed by the Defendants. The bar was sought to be alleged under section 9 of the Civil Procedure Code. The explanation added to section 9 of the Civil Procedure Code expressly saves a suit to property or to an office notwithstanding that the right depends entirely on the decision of questions as to religious rites or ceremonies. The present suit is clearly covered by the explanation to section 9 of the Civil Procedure Code. I, therefore, find the first part of issue no. 1 in the affirmative and part two in the negative.

8. Plaintiffs in this suit seek to establish their ownership of the suit tank and mainly contend that the said property is a private one. If the plaint is critically and carefully read, Plaintiffs expressly state in paragraph 1 of the plaint that according to them the suit tank was constructed by some private individual in ancient times for the use and enjoyment of the touchable Hindus. But the name of this individual is nowhere mentioned throughout the plaint and for obvious reasons. Plaintiffs have admitted therein that the origin of the construction of the tank and the history or other details thereof are lost in antiquity and hence even according to the Plaintiffs, as the language of paragraph 1 points out, the allegations that the suit tank was constructed by some private individual for the use and enjoyment of the touchable Hindus are only a surmise and a suggestion made by them on the strength of the continuous user and other facts detailed therein. The oral evidence, as was led by Plaintiffs, is conflicting with regard to the number of persons, who own the suit tank. For example witnesses exhibits 101, 106, 122 and 155 state very clearly that all touchable Hindus, whether residing and owning sites roundabout the suit tank or not, own the suit tank and this position is perfectly consistent with the plaint on record. As against this, we have the evidence of exhibits 146, 178, 102 and 104 who assert that the ownership is confined to the owners of the surrounding hous s alone and the user is only extended to the touchable Hindus in general. The story of ownership of a limited number of touchables was first released at the hearing and there is nothing to support it in the pleadings on record. The learned pleader for the Plaintiffs endeavoured to explain this innovation in the story of ownership and

the conflicting positions thereby created by pointing out the recitals in paragraph 2 of the plaint as a foothold therefor. I have carefully gone through the whole of the plaint and I am unable to concur with the suggestion made. The only thing, which is stated in paragraph 2 of the plaint, is that the remaining of the site in which the suit tank is sunk belongs to private persons and that they are in possession thereof since ancient times. No statement about the ownership of the bed of the suit tank by the owners of the surrounding sites or houses is made in this paragraph or any other portion of the plaint. It is to be noted that exhibit 102 referred to above figures as a Plaintiff in this suit. Plaintiff No. 1, Pandurang Raghunath, who died some time after the institution of the suit put in an affidavit at exhibit 6 in support of the application exhibit 5 for interim injunction. This Pandurang Raghunath is admitted by exhibit 146 to be one of the co-owners of the suit tank. Exhibit 6 is significant in this respect that it omits altogether even the slightest reference to the ownership of the suit tank by the Deponent. The ownership of the suit tank was an important fact to be stated and affirmed in support of the application for interim injunction and hence the fact would certainly have been mentioned in exhibit 5 and sworn to in exhibit 6. The language in exhibit 6 on the other hand points to the contrary and it is expressly stated therein that the site beyond the road and in front of the house as far as the edge of the tank belongs to the Deponent. The omission of ownership of the suit tank vesting in the owners of the surrounding houses in the plaint is very important and the evidence of witnesses for Plaintiffs, who try to prop it up by their oral testimony, is a distinct improvement attempted to be introduced to prove the private nature of the suit tank by taking advantage of the ownership on the surrounding strip of land. Plaintiffs also filed a *purshis* at exhibit 100, whereby they admitted that the nature of the private property as covered by issue no. 2 is correctly covered by the rights mentioned in paragraph 1 of the plaint and hence this *purshis* also conflicts with the theory of ownership by a limited number of persons, above referred to.

9. I, however, propose to consider the question of ownership from both the stand-points suggested for the Plaintiffs, namely (*a*) the ownership of the touchable-Hindus in general and (*b*) that of the touchable-Hindus residing in the vicinity of the tank. To start with, it is an admitted fact that Plaintiffs are unable to state the name of the person who according to them constructed the suit tank, or the year and the manner in which it was brought into existence. It is also admitted by the Defendants that the suit tank is in existence for the last 250 years. There is no evidence on record as to when the town of Mahad was first established. There is also no evidence to show how and in what manner the said town developed. If we look at the map, which is attached to exhibit 230, it is apparent that the suit tank is not in the heart of the town but is located in a portion bordering on the limits thereof. It is in evidence that there is only a single row of houses on the north of the suit tank, beyond which lie the paddy fields. There is no evidence on record to show that there has been habitation roundabout the suit tank of touchable-Hindus alone during all the 200 or 300 years the tank has been in existence. The evidence on record takes one not beyond the last hundred years and it may be that the habitation that we find to-day roundabout the suit tank is a growth of the last 100 or 150 years. Similarly there is absolutely no shred of evidence that the suit tank is an artificial and constructed one. The municipal records, which are exhibited in this case, show that there are about 7 to 8 tanks, big and small, within the limits of the Mahad Municipality. The population of Mahad does not outnumber 7 to 8 thousand even according to the last census. Many of the tanks have now gone out of repairs and become unserviceable. But that they were so, some 200 or 300 years ago, cannot be presumed. Looking to the number of the tanks, the area of the town, and the population thereof and last but not the least the expanse of the suit tank, it is difficult to accept the suggestion or allegation made by the Plaintiffs that it is an artificial one and the fruit of human efforts. I am inclined to believe that it was a natural excavation in the bed of the earth, of course repaired and remodelled by human agency to suit its convenience. The total absence of any documentary evidence to show that the land in which this tank was sunk belongs or belonged to some private individual or individuals leads also to the same conclusion. Even if we examine the Plaintiff's story of the ownership by a limited number, other difficulties creep in. This story, if accepted, naturally

leads to certain conclusions, which are irresistible in themselves, viz. that all the owners of the surrounding houses own different portions of the suit tank (water and bed included) in proportion to the breadth of their houses. This means that I have to presume that all these persons, who number not less than 60, own the whole site covered by the suit tank in small parcels of land and that their ancestors or predecessors-in-interest co-operated with each other some 300 years ago in getting the suit tank excavated. There is however no evidence on record to support such a conclusion.

10. Plaintiffs however rely upon certain facts and circumstances in support of issue no. 2, which may be mentioned as follow : (*a*) Ownership of the surrounding strips of land, (*b*) ownership of the embankments to the suit tank, and their construction and repairs by private individuals, (*c*) ownership of the *ghats* to the suit tank, (*d*) former existence of raised platforms (*mach*) in the suit tank by private individuals, (*e*) collection of subscriptions by private individuals for removing the silt from the suit tank, (*f*) continuous user by the Hindu-touchables of the suit tank. All these facts were first denied by the Defendants but they have been amply proved by the evidence on record and hence Defendants conceded these points in favour of the Plaintiffs during the course of the arguments. I will however briefly summarise the evidence on record in support of these facts. Applications by private individuals to the Municipality for permission to build embankments to the suit tank are at exhibits 35, 36, 37, 128, 129 and permissions granted by the Municipality to several persons to build embankments are at exhibits 109 and 164 besides those which are mentioned above. Notices by the Municipality to several persons to reconstruct the stony embankments and to remove *mach* etc., which had gone out of repairs, are at exhibits 44, 107, 108, 110, 123, 124, 127 and 162. Besides, there is an old partition deed at exhibit 45 an agreement of partition for Shake 1755 at exhibit 105, an application at 125, a resolution of the Managing Committee No. 69 under date 5th June 1916 at exhibit 133, reports by the Municipal Inspector under date 4th April 1906 at exhibits 131 and 132, a resolution of the General Body of the Municipality No. 25 under date 5th July 1916, adopting the resolution covered by exhibit 133 and declaring the line of the road along the edge of the suit tank so as to include the small strip of land intervening between the existing road and the suit tank (*vide* exhibit 134), a resolution of the Managing Committee No. 88 at exhibit 173, an agreement of Shake 1791 at exhibit 231 certified copies of a decree in suit no. 2109 of 1874 dated 20th September 1875 at exhibit 232, a *taba pawati* dated 5th January 1876 at exhibit 233, a decree passed in February 1872 in a partition suit no. 1323 of 1871 at exhibit 234, and a sale deed dated 25th December 1928 at exhibit 160. All this evidence prove beyond dispute that the strip of land lying about the suit tank is not owned by the Municipality but by private individuals, who are touchable-Hindus owning houses beyond the adjoining municipal road. They also prove that some of these persons had their cattle shed in these sites, which were discontinued by order of the Municipality on grounds of sanitation and public health. They also prove that the stony embankments were constructed by the persons owning the adjacent sites and that the Municipality served notices to such persons from time to time for reconstructing them, whenever they were found to have gone out of repairs. They also mention that some persons, residing on the west of the suit tank, used to put up raised platforms or *mach* in the suit tank to stack hay or *pendhas* thereon and this was discontinued by order of the Municipality. Exhibits 45, 105, 232, 234 and 160 are documents beyond dispute and they clearly show that the strip of land and the stony embankment belong not to the Municipality but to private individuals and this fact finds further corroboration in the resolutions of the Municipality at exhibits 133, 134 and 173. Defendants' witness exhibit 199 also admits that the other *ghats* or flights of steps excluding *ghats* nos. 1 to 3 shown in exhibit 66 belong to private individuals. He and exhibit 204, another important witness for the Defendants and who was for some 3 years the President of the Municipality, also admit that the strip of land intervening between the municipal roads and the suit tank belongs to private individuals and not to the Municipality. I have, therefore, no hesitation in holding points (*a*) to (*d*) noted above as duly proved. As to point (*e*), several extracts of account books are produced for the Plaintiffs at exhibits 112, 137, 138, 153, 157, 168, 180 and

183, which show that subscriptions were raised by private persons in the year 1900 A. D. for removing the silt from the suit tank and there is sufficient oral evidence on record to hold that the said subscriptions were utilised for removing the silt. I, therefore, hold that fact also proved. As regards point (*f*), the user by the touchable-Hindus is not denied by the Defendants. They only challenged the exclusive user by them and their right to continue it in the future. As the user is not denied and it is sworn to by witnesses for the Plaintiffs I hold point (*f*) also proved.

11. Plaintiffs have also produced report by the Collector of Kolaba to the Revenue Commissioner, Northern Division, bearing date 18th September 1875 at exhibit 230 in connection with a scheme to supply-water to the town of Mahad from the Savitri river. Paragraphs 3 and 5 of this report refer to the Choudhari Tank and paragraph 5 mentions that the Muhammadans are not allowed the user of the suit tank, which statement the Plaintiffs rely upon. This report, however, does not mention that the suit tank is private property. The description of the condition and the user of the suit tank mentioned in paragraph 3 of the said report shows that the suit tank was not then exclusively used for drinking purposes but even cattle were allowed to enter and wallow therein. A certified copy of the property register of the Municipality is also produced at exhibit 229 but this property register has no value so far as this suit is concerned as it is prepared on 5th April 1929, i.e. long after the filing of the present suit. This property register no doubt excludes the suit tank but this omission is directly in conflict with the previous conduct of the Municipality in relation to the suit tank as I will detail out later on and hence I attach no importance to it.

12. The Defendants in this suit mainly contend that the suit tank is not a private property as alleged by the Plaintiffs but that it is a public tank belonging to the Municipality of Mahad and in support of this they rely upon certain documents, which have been placed on record. Exhibits 33, 235 and 34 are extracts from the village record, the first two of village forms nos. 16 and 15 mentioning the suit tank as Government-Municipal and the latter an extract of form no. 23, showing the water-supply for the town of Mahad. Exhibit 130 is a proclamation published by the Municipality of Mahad on 5th May 1911 under sections 133 and 134 of the District Municipal Act reserving the suit tank and another by name Habus tank for drinking purposes only. Exhibit 205 is an application dated 15th August 1867 by one Gopal Soyaro Tipnis requesting the payment of money due to him for the contract-work of repairing the suit tank, which he got through Government. It is a tattered document and hence the authority to which it was addressed cannot be made out. The order thereon is also torn in some places; but it appears from the said order that the application was returned to the Applicant with an intimation to him that the matter of payment of money would be duly settled in consultation with the Municipality. Exhibit 206 is a report under date 29th July 1846 by the Superintendent, Roads and Tanks Department, to the Revenue Commissioner, Southern Division, in which paragraph 46, appearing on page 16 of the said report, makes a reference to the Choudhari Tank in suit and repairs thereto, which were subsequently effected by the Government. This report expressly states that the costs of the repairs to the suit tank were to be defrayed out of certain collections to be made by the inhabitants of Mahad and government contributions. The language employed in this paragraph also shows that the repairs were to be effected by the Government and that the Muhammadan population of Mahad was also to have contributed towards them. The next important documents on record are three certified copies produced from the Secretariat, Bombay, which are collectively exhibited at exhibit 241. The first is a report dated 9th June 1843 to the Revenue Commissioner, Northern Division, by [illegible] Collector, Kolaba, supplying information in connection with the repairs to [illegible]k. It is important to remember that Gopal Soyaro Tipnis is mentioned [illegible]port as a likely contractor desiring to execute the contract and [illegible] Soyaro is the applicant for exhibit 205 above referred to. Paragraph 6 [illegible]rt mentions that there were 5 public tanks then in the vicinity of the [illegible] the names thereof are not mentioned. The language of the report, [illegible]shows that the suit tank was one from that number. Paragraph 7 of [illegible] is very important inasmuch as it shows that the suit tank, according [illegible]ment, was not a private property but a government one. The reference

to the possibility or otherwise of making the suit tank available for irrigation purposes would not have been mentioned if the suit tank was a private property. The language of this report unmistakably shows, according to me, that the Government treated the suit tank as their property. The second copy is a report by the members of the Military Board to the Governor-in-Council, Bombay, and is dated 6th March 1865. This document also refers to the repairs of the suit tank under contemplation of Government and it also supports the conclusion mentioned in connection with the last document. Paragraph 2 of this report clearly states that the Muhammadan inhabitants of Mahad had promised to contribute towards the repairs of the suit tank. The last document collectively exhibited is a petition to the Governor-in-Council by the inhabitants of Mahad in connection with the very repairs to the suit tank and appears to have been dated 1st July 1846. This petition appears to have been signed by 59 inhabitants but unfortunately the copy produced on record mentions only the names of two of the signatories. It is not, therefore, possible to say as to which caste, community or religion the several signatories belonged. Assuming, however, that all of them were touchable-Hindus, as undoubtedly the two signatories whose names are mentioned in the copy appear to be, it is significant to note that this was a petition to the Government in connection with the repairs to the suit tank and simply praying that the work, which was proposed to be done by the Government should be executed through the Mamlatdar in preference to the Engineer, Public Works Department, and the reasons set out for this petition are also important in a way. The petitioners state that if their request is granted they will not only get the silt removed but also get the embankments repaired. Further below, the said petition states that the late Mamlatdar of the place had forwarded an estimate of the cost of excavating the tank and repairing the embankments on the very grounds, which the petitioners urged. This petition therefore not only acknowledges the ownership of the Government to the suit tank and their right to repair it but further indicates that even the embankments to the suit tank were not claimed as private property at least at the date of this petition.

13. Unfortunately the record of the Municipality of Mahad was destroyed by fire in or about the year 1905 A.D. The Municipality was established somewhere in 1865 A.D. and the important record for the period intervening between the dates of its establishment and the fire is not available. It is, however, admitted by Plaintiffs that the suit tank is managed by and supervised by the Munipality since a very long time. They, however, do not admit the ownership of the Municipality and seek to explain the management, supervision, etc., by the Municipality on the grounds that this is done by it as a sanitary body and possibly they attempt to rely upon section 120 of the District Municipal Act, III of 1901. No doubt, the said section does empower a Municipality constituted under the said Act to take sanitary and precautionary measures with respect to property, whether private or otherwise. The record of the Mahad Municipality, which has been exhibited in this case, except for the property register at exhibit 229, which has pointed out above, is prepared recently and subsequent to the filing of the present suit, does not, however, countenance such a suggestion. The proclamation at exhibit 130 with regard to the suit tank has been expressly published under section 133, which categorically excludes a private property. Exhibits 35 and 36 are two applications by different surrounding owners to the Municipality for permission to put up an embankment in the bed of the suit tank and these applications have been granted by the Municipality as recently as 22nd April 1926 on the condition that a portion from the strip of land adjoining the municipal road and belonging to the applicants was to be made over to the Municipality for widening the municipal road. The language of exhibit 36 clearly shows that both the applicant and the Municipality treated it as a transaction of exchange. The Defendants therefore argue that these two documents show that the Muncipality is the o[illegible] suit tank on the ground that if the case was otherwise and the suit tan[illegible] to the applicants and their co-partners or co-communists, no permissio[illegible] Municipality would have been required as prayed for under exhibits 3[illegible] The Plaintiffs, on the contrary, seek to explain these applications on the g[illegible] permission was necessary under section 96 and that the transactions, evi[illegible] these two documents, cannot be treated as exchanges, having regard to the [illegible] of section 40, clause 2, of the District Municipal Act. Section 40, cl[illegible] doubt, does necessitate the previous sanction of the Commissioner before a[illegible]

of property vesting in the Municipality is made. There is no evidence on record to show that the requirements laid down by section 40, clause 2, were not complied with for exhibits 35 and 36. Besides, I am not aware of any provision and none has been pointed out to me that the Municipality can grant permission under section 96 conditioning it on terms. We find in exhibits 35 and 36. This fact, therefore, that two of the touchable-Hindus who are alleged to own the suit tank should put up the embankments in the bed of the suit tank with previous permission from the Municipality and by surrounding portions of their own sites in exchange, stands against the contentions of the Plaintiffs and supports the story of the Defendants. Exhibits 125 and 126 are other applications by different touchable-Hindus to the Municipality in April 1915 requesting the Municipality to construct stony embankments to the suit tank in front of their houses at the cost of the Municipality undertaking not to claim any rights on or ownership of the embankments so constructed. The applicant in exhibit 125 also expressed his willingness to part with necessary site as far as the municipal road in favour of the Municipality for the construction of the said embankment. Exhibit 214 is a statement by another touchable-Hindu owner dated 9th February 1925 to the effect that he was willing to surrender the site for the old *ghat* in favour of the Municipality without claiming any compensation provided the Municipality constructed a new flight of steps to descend into the tank. It is also in evidence that the strip of land, lying to the south of the suit tank at its eastern end and adjoining the gymnasium mentioned in exhibit 66 was acquired by the Municipality for purposes of widening the road and that the stony embankments to the suit tank at this place as well as at the north-eastern corner have been put up by the Municipality at its own cost. Exhibits 125 and 126 relate to the north-eastern corner and exhibit 214 to the embankment to the south of the suit tank and above referred to. The inscription slabs at *ghat* nos. 2 and 3 show that they were constructed by the Municipality at its own cost as also the water trough at *ghat* no. 2. It is also admitted by the Plaintiffs that the water trough to the south and near the gymnasium is constructed by the Municipality. They also admit that the sheds at the three *ghats* are maintained and repaired by the Municipality; they further own that the Municipality has maintained a servant at its own cost to supervise and watch the suit tank as also to supply water to the untouchables from the suit tank. It is common ground that the management and supervision is made by the Municipality, which also regulates the user thereof. Plaintiffs further admit that the Municipality has spent its funds on the suit tank, whether for repairs, new constructions, management or otherwise from time to time. Exhibits 208 and 209 are extracts from the Municipal record showing the sums spent on waterworks and exhibit 237 is an extract of the proceedings book of the Municipality for resolution no. 11 dated 30th May 1926 voting an additional grant of Rs. 300 for removing the silt from the suit tank. If exhibit 208 is read along with exhibit 237, it appears that the amount of Rs. 288-13-6 shown in exhibit 208 was spent on the suit tank in compliance with exhibit 237, though the name of the tank is not specified in exhibit 208 and the details furnished are insufficient and inaccurate.

14. The natural inference that arises from the expenses incurred by the Municipality on account of the suit tank from time to time is that the Municipality owns it. But this is sought to be combated by the Plaintiffs and they seek to explain these expenses on the ground that the Municipality can spend its funds on private tanks or water-courses provided the public or a section of the public use them as of right and for this purpose reliance is placed upon the proviso to section 120, clause 2, of the District Municipal Act. With regard to this argument I need only say that the absence of any compliance with the other salutary provisions of this s[illegible] also the absence of any subsequent resolution by the Municipality to br[illegible]ase within the ambit of the proviso above referred to sufficiently show[illegible] expenses by the Municipality were not defrayed under section 120 of t[illegible]ct Municipal Act. The resolution at exhibit 237 above referred [illegible] the grant was voted even before the expenses were incurred and [illegible]ggestion made and the explanation proferred do not hold water. I [illegible]derstand why the Municipality should construct stony embankments [illegible]tank at least in some places when it did not own the suit tank and [illegible] must be deemed to do, that the tank may be filled up and its size [illegible] varied at the sweet will of the alleged private owners and thus [illegible]ring the whole costly embankment useless and unserviceable. The

Municipality, without spending on the embankment, had ample powers under the District Municipal Act to acquire necessary sites for widening the road and at the same time to compel the alleged owners to maintain and repair the embankment and approaches at their own cost. Exhibit 37 is another application by an alleged owner of the suit tank dated 17th March 1926 to the Municipality for permission to set up a water-pump in the bed of the suit tank. This application was rejected by the Municipality. If the suit tank was not the property of the Municipality, I cannot comprehend the importance and necessity of such an application. The order on the said application does not show that the permission was refused on grounds of sanitation or public health. The conduct of the Municipality in passing the resolution no. 67 produced at exhibit 38 and throwing open the municipal tanks (including the suit tank) within its limits to untouchable classes in compliance with the Government resolution is perfectly consistent with its previous record and can only be explained on the hypothesis that according to the Municipality the suit tank was its property. I have already pointed out in paragraph 6 above that this resolution did cover the suit tank both according to the Municipality and the public including the Plaintiffs, though the name of the suit tank is not specified therein. The assertion of ownership of the suit tank by the Municipality finds further corroboration in the attitude of the Plaintiffs themselves. Plaintiffs, instead of taking any legal steps against the unwarranted action of the Municipality in dealing with private property in an unauthorised manner, petitioned the Municipality by exhibit 149 to reconsider the resolution exhibited as 38. The signatories to exhibit 149 are all touchable-Hindus, who are Plaintiffs in this case. The first and foremost thought, which would have sprung up in the minds of the signatories, on learning of the resolution at exhibit 38 would have been to assert their ownership to the suit tank and challenge the right of the Municipality to pass the resolution under consideration. But nowhere is this alleged ownership asserted or even suggested by exhibit 149. Some of the signatories to exhibit 149 are either Plaintiffs or witnesses for them and the only ground on which these important omissions are sought to be explained are the hurry and inadvertence in signing exhibit 149 without reading it. These grounds, however, do not appeal to me. Even the conduct of the touchable Hindus subsequent to exhibit 149 is in no way brighter. The Municipality suspended the operation of exhibit 38 by another resolution at exhibit 39. But further we find a resolution at exhibit 207 by the Municipality passed some 3 months and more after exhibit 39 demanding a referendum. Resolution at the referendum is at exhibit 219. If the suit tank was not the municipal property, why were these subsequent steps taken ? Why none of the Plaintiffs or their witnesses, who were members of the Municipality and its office-bearers or who were present as rate-payers at the referendum, raised a hue and cry against the unwarranted and illegal action of the Municipality and asserted the ownership now alleged and sworn to by them ? Another point which is not of any great importance for the purposes of this suit but which also tells against the Plaintiff to some extent, is that the resolution at exhibit 38 has not been finally abandoned by the Municipality but its operation is only suspended. The rights of the Plaintiffs as alleged by them are directly invalid by the Municipality by its aforesaid resolution as by the untouchables ; and I should certainly have expected Plaintiffs to file a suit against both these persons. But the Muncipality is no party to the suit and has not been joined even when the Defendants allege its ownership. If we look at the plaint itself, it was got amended by the Plaintiffs and they prayed for the very reliefs against the Defendant-untouchables even if the suit tank is held to be the municipal property. If so, nothing was easier or more convenient than to have joined the Municipality as a party to this suit. So as to obtain a final adjudication against both the intruders. It therefore appears [illegible] that the Municipality has been intentionally excluded as Plaintiffs fe[illegible] they have a hard case against it.

15. As already pointed out, the whole evidence of own[illegible] [w]hich Plaintiffs have led i[s] limited to the small strip of land bounding the [illegible] the stony embankments and approaches thereto. It is important [illegible] that there is not a single document on record on behalf of the Plai[illegible] that the site covered by the suit tank, i.e., the bed thereof or the o[illegible] which according to the Plaintiffs the suit tank must have been exca[illegible] or belonged to any private individual. Exhibit 45 is a partition [illegible] 105 an agreement to partition of Shake 1755, exhibit 160 a sale de[illegible]

December 1828 and the two decrees at exhibits 232 and 234 out of which the latter is one in a suit for partition produced on behalf of the Plaintiffs. But all these documents do not cover any portion of the suit tank itself and stop at the embankment thereto. If, as is sought to be alleged for the Plaintiffs, the suit tank belonged to the surrounding owners exhibits 45, 105 and 234 which deal with partition of properties belonging to the touchable families, would certainly have mentioned the portion of the suit tank or ownership in common owned by the said families so as to make it the subject-matter of partition. Similarly exhibit 160 which is a sale deed of a house and portion of the surrounding strip of land, would have also included the proportionate portion of the suit tank or the quantum of share in the common ownership which the vendor possessed and the vendee also would have purchased his vendor's right in the suit tank under the said sale deed. The omission, therefore, in these papers also strengthens the conclusion that the suit tank is not owned by any private individual or a group of them. Plaintiff's theory of the ownership of the Hindu-touchables in general as disclosed by paragraph 1 of the plaint rests upon two important facts, viz. the construction of the suit tank by a single individual and dedication of it by him to the exclusive use and enjoyment of the Hindu-touchables and in support of this theory certain remarks, which find place in the decisions reported at 31 Madras (I. L. R.) 236 and 7 Bombay (I. L. R.) page 323 were relied upon and Plaintiffs on the strength thereof contended that the user by the Plaintiffs and non-user by the Defendants should not be considered as merely accidental but must be presumed to have rested on deeper grounds ; they also further argued that the continuous user by the Plaintiffs to the exclusion of the Defendants should be presumed to have had a legal origin and as sufficient to furnish neceessary data to presume the intention of the founder of the trust. The reasoning above referred to would have been of some weight and importance if a Hindu temple were to be the subject-matter of the suit instead of a tank. A Hindu temple or a Shrine would necessarily imply the existence of a touchable-Hindu founder. The subject-matter of the present suit, however, is of such a nature that it can be used by all persons of whatever caste, creed or religion and such as does not necessarily imply the existence of a founder. The considerations above noted cannot, therefore, arise in the present suit.

16. There is also another difficulty in accepting Plaintiff's story. The plaint is no doubt restricted to the Hindu-touchables. The evidence on record, however, shows that some Muhammadans use the suit tank. Exhibit 104, a witness for the Plaintiffs, admits this fact and the same is corroborated by witnesses for the Defendants at exhibits 193, 199 and 204. The other witnesses for Plaintiffs are not prepared to deny this use and hence I take it as a proved fact that some Muhammadans do use the suit tank quite openly and to the knowledge of the Plaintiffs. Exhibit 122, an important witness for the Plaintiffs, has no objection to the user of the suit tank by the Muhammadans as according to him, they fall within the class of touchables. Exhibit 140 another important witness for the Plaintiffs modifies the position taken up by exhibit 122 by dividing the Muhammadans into two sub-classes : (1) those converted to Muhammadanism from the touchable-Hindus and (2) those converted from amongst untouchable-Hindus, and this witness says that he has no objection if class (1) uses the suit tank as they are touchables. Are these Muhammadans—whether touchables or unto... but who use the suit tank—owners of the suit tank along with the ...laintiffs, however, do not admit Muhammadans to be co-owners ...hem and hence the question arises as to why and how the ...s came to acquire the user of the suit tank. The proved user of ...dans and the reference to contributions by them towards the repairs ...k made in exhibits 206 and 241 again throw a cloud of dust on the ...rship of the Plaintiffs and strengthen the contention of the ...at the suit tank was governmental and is now municipal property. ...e facts and circumstances there are also the important provisions ...ection 37 of the Bombay Land Revenue Code and section 50 of the ...cipal Act. According to the former all property which is not private ...s in the crown and according to the latter all property within the ...its, which is not private property and which is not specially reserved ...nment, vests in the Municipality. The question, therefore, is whether ...nces and facts mentioned in paragraph 10 are sufficient to prove ... of the Plaintiffs with respect to the suit tank. The facts no doubt

lend some colour to the story of the Plaintiffs ; but whatever little weight attaches to them, they are not sufficient in my opinion to warrant a conclusion in favour of Plantiffs' ownership in view of the numerous facts and circumstances detailed out above and also in view of the discussion in paragraphs 8 and 9 above. It may also be as is sought to be contended by the Defendants that the stony embankments and approaches are mere encroachments put up at the sufferance of the Municipality, the former being constructed by private individuals to save the strip of land from any subsidence, likely to be caused by the washing of the bed thereof by the water in the suit tank. Giving, therefore, my best consideration to all the facts connected with issue no. 2 I do not think that Plaintiffs have proved that the suit tank is of the ownership either of the Hindu-touchables in general or of the surrounding owners. On the contrary, the evidence on record according to me points clearly to the conclusion that the suit tank was the state property before the establishment of the Municipality and it now vests in the Municipality of Mahad. Mere user of such a property is not sufficient to clothe one with ownership and hence for all the reasons set out above I answer issue no. 2 in the negative.

17. *Issue no. 3.*—A good deal of evidence was led on the questions as to whether the religious texts on the Hindu Religion recognise untouchability, whether the untouchables, who are represented in this suit by the Defendants are untouchables according to those *shastras*, whether untouchability as is ordained by the *shastras* is recognised and followed in practice to-day and whether untouchability is a custom recognised by the Hindu Society. It was also hotly debated before me as to whether untouchability, either as a custom or as one ordained by the *shastras*, is in accordance with the principles of justice, morality and good conscience and whether the same can be recognised in a court of law. Defendants in this case examined one Mr. Palaye Shastri as an expert on Hindu Religion at exhibit 196 and this witness has cited some texts which, according to him, show that the Defendants are not untouchables according to the religious texts and secondly that no untouchability attaches to the watering-places. This witness has been severely cross-examined by the other side and was confronted with numerous other texts to prove the contrary. I need not enter into the labyrinth of the several texts cited on either side. Suffice it to say that the texts, referred to, show that the Hindu *shastras* do recognise untouchability and certain classes designated as अंत्य, अंत्यज, श्वपच, चाडाळ, etc., were recognised by them as the untouchables. Exhibit 196 had also to give in and admit in his cross-examination that Hindu Religion as stated in the several *shastras*, namely the Shritis, Smritis and Puranas, did recognise untouchability. A strenuous attempt was made on the part of the Defendants to show that the Defendant-untouchable classes are not untouchables according to the Hindu *shastras* and to support this it was argued that the expressions Mahar, Mang, Dhor and Chambhar, who denote the untouchable classes of to-day and some of whom are the Defendants in the present suit, are not mentioned in the Hindu *shastras*. I do not, however, accept this argument as the expressions mentioned above are vernacular expressions, while the religious texts are written in Sanskrit. Besides, the said texts (particularly the Manu Smriti, which is the first Smriti available) were written even according to the Defendants some 500 years before Christ and the said *shastras* could not be expected to enumerate all the castes and sub-ca[...]btaining amongst the untouchables of to-day. Placita 15 to 18 in Chapte[...] Smriti show that several castes spring up from pratiloma-un[...] castes enumerate same, which are untouchables. Placitum 23 [...] वर्ण संकरा: (Warna-Sankaras) spring up. Similar is the case wit[...] of the same Chapter. The Chandal according to the Manu Smriti [...] of Brahmin male and a Shudra woman (*vide* Manu Smriti, Chapter [...] and 30). Chandal is also spoken of as Narâdham, i.e. the lowest a[...] of a human being by Manu (*vide* Manu Smriti, Chapter X, placita n[...] 26). Yadnyawalkya also states that the Chandal is born of the unio[...] Brahmin and the Shudra (*vide* Yadnawalkya Smriti, Chapter IV, [...] Kulluk Bhatta, the commentator on Manu Smriti, also states in his [...] on placitum 13, Chapter X, that the Chandal, who is thus born of t[...] union, is untouchable. Placita 51 to 53 from Chapter X of Man[...] describe the Chândâl and Shwapacha and they state that these two [...] dwell outside the town and that no religious connection should b[...]

with them, similar texts giving rise to the untouchable classes are also to be found in the Manu Smriti at various places. Purificatory ceremonies are also laid down for touchable classes in case they come in contact with the untouchables. Different duties, professions and rules of conduct are also laid down for the touchables and the untouchables. All this therefore shows the untouchability was recognised by the Hindu *shastras*. Even the expert for the Defendants, namely exhibit 196, had to admit this fact in his cross-examination. His Holiness the Shankaracharya of Karvir (Dr. Kurtakoti), whose evidence has been recorded on commission on behalf of the Defendants at exhibit 92, admits that the custom of untouchability is in accordance with the *Vaidic* Hindu Religion and that untouchability arises by birth and is of a permanent nature even according to the Smritis. This, therefore, in my opinion places beyond dispute the position controverted by the Defendants, namely the Hindu Religion recognises untouchability. The next question that arises for consideration is as to whether the present Defendant communities, namely Mahars and Chambhars, are untouchables according to the Hindu *shastras*. The expression Charmakar (चर्मकार), which corresponds to the Chambhar of to-day, has been used by the religious works to denote a class of untouchables and hence the Defendants practically gave up the contention with respect to the Chambhar community. As regards the Mahars, Bhatta Nilkantha in Prayaschitta-Mayukha uses the expression Mrutahar (मृतहार) as denoting a class of persons, whose profession it is to carry the dead for payments as is shown on page 99 of the book styled Prayachitta-Mayukha and edited by Mr. G. R. Gharpure. The expression Mrutahar has been used by Nilkantha as denoting an untouchable class. The interpretation of Mrutahar by Bhatta Nilkantha also conforms with that by the late eminent orientalist Dr. Bhandarkar. Acharendu, another work which is published in the Ananda Shram Sanskrit series in 1909, shows on page 245 of the said book that the caste Swapâk (श्वपाक) is now popularly called Mahars, that Antyawasaim (अंत्या वसायिन्) as Domb and Shwapacha (श्वपच) as Mang. The late Mr. B. G. Tilak, in his eminent work styled Gita-rahasya, also states on page 39 that Shwapachas mean the Mangs and he has also interpreted the expression Shwapak as Chandal (*vide* page 690 of the same book). Shwapak is also one of the untouchable classes according to the old *shastras* and the later commentaries thereon and that it was so is manifest from the passages on pages 245 to 248 of the book Acharendu above referred to. All these passages deal with the लक्षण (characteristics) of the Chandals as stated at the bottom of page 248. So, whether we accept the interpretation of Dr. Bhandarkar and Bhatta Nilkantha on the one hand or Acharendu and Mr. Tilak on the other, it appears a fair inference to draw that the Mahars are untouchables according to the Hindu *shastras* and that they were included in the untouchable classes specified by the Smritis. I may also mention here that it is admitted for the Defendants that the Mahars used to carry the dead on payment, though it is alleged for them that the Mahars have nowadays given up this profession. That they dwell outside the town and in a separate locality is also a fact and these two facts answer the characteristics of the untouchable classes laid down in the Smritis and the later commentaries thereon. Besides, it appears to me that the expressions—Chandâl, Antya, Antyaja, Asprushya—used in the several works are not used as denoting particular classes of untouchables but in the generic sense. And this fact is admitted by the expert for Defendants at exhibit 196 (*vide* paragraphs 13 and 17). Along with this, the fact that the Mahars and other similar castes have been treated as untouchables from very ancient times is also a circumstance sufficiently weighty in itself. I have, therefore, no hesitation in holding that the Defendant-untouchables are untouchables according to the *shastras* and the later treatises thereon. It is sufficient to state that the existence of the custom of untouchability is admitted by the Defendants, though an attempt was made by them to show that the said custom is not legal and valid inasmuch as it was an imposition on the lower classes by the upper classes against their will and consent. Even the speech by Defendant No. 1, which he delivered as the president of the Satyagraha Parishad on 25th December 1927, a copy of which is at exhibit 187, mentions that according to the custom and usages the Hindu Society is divided into five *varnas*, the last of which is that of the Ati Shudrâs, i.e. the untouchables.

Whether the said custom is enforceable or not I will consider later on. Suffice it to say at this stage that the custom obtains and has been followed from very ancient times.

18. I will now take up another objection, which was urged by the Defendants, viz. that the Shastras ordained that untouchability should not be recognised as regards the watering-places and a number of extracts have been produced at exhibit 196-*e* in support of this position. Other extracts have been produced at exhibit 196-*j* to show that the permission granted for the touchables and the untouchables to use the same watering-place can be made use of in emergencies alone. The extracts produced for the Defendants cannot be isolately read and relied upon and if they are read, as they ought to be, with reference to the context and the other extracts produced at exhibit 196-*j* are also borne in mind, it appears to me to be a fairly accurate conclusion to state that untouchability was not ignored so far as the watering-places were concerned and that the several provisions permitting the common user were introduced as आपद्धर्मा's (i.e. to provide for emergencies) or to allow routine business to be transacted without a hitch or hindrance. The existence of separate watering-places for the touchables and untouchables even to-day is also a circumstance, which adds strength to the interpretation suggested for the Plaintiffs. I am not, therefore, satisfied that the Defendants have proved that no untouchability attaches to the watering-places according to the *shastras*. The Defendants have put in a purshis at exhibit 69 admitting the fact that they have never used the suit tank. The user by the Plaintiffs is duly proved. Plaintiffs state in the plaint that the Defendant-untouchables never used the suit tank. The user of the Plaintiffs and the absence of user by the Defendants are facts beyond the shadow of dispute. But the question to be answered under issue no. 3 is whether a custom to use the suit tank to the exclusion of the untouchables is proved. There is not a single instance on record to show that the untouchables attempted to use the suit tank any time prior to 1927 A.D. The open user of the Plaintiffs, however, has to be presumed to have been done to the knowledge of the Defendants and the absence of any, on the part of the Defendants, must be construed as user of Plaintiffs to the exclusion of the Defendants. The suggested user of the suit tank by the untouchables *in cognito* is not proved and even assuming it to be proved, it will not help the Defendants in any way. Hence I find issue no. 3 in the affirmative.

19. I now consider issue no. 4 which deals with the question as to whether the custom, covered by issue no. 3, is recognisable as a legal right. According to me, this issue involves the question, which the Defendants raise, namely, as to whether the custom of untouchability is recognisable and enforceable in a court of law irrespective of its relation to the suit tank and apart from the question, which the issue directly raises, namely, as to whether the custom to use the suit tank amounts to a legal right in this particular case, and I proceed to consider both these questions. Caste-questions have often times become the subject of judicial decisions and rights and liabilities between the touchables and untouchables have also been adjudicated upon. S. Roy, the author of Customs and Customary Laws in British India, says on page 28 that in administering the Hindu Law, usages in accordance with the *shastras*, the Smritis and the original texts as also those in accordance with the *shastras* but found in the works of the commentators have got to be recognised. Similarly Dr. Gour in his Hindu Code mentions the several sources of Hindu laws and includes the Shritis, Smritis, commentaries and customs among them (*vide* para. 257 on page 184, Edition III). A reference to paragraphs 221 to 224 of the said book shows that custom or usage is recognised by a court of law. The Defendants, however, contend that the custom of untouchability is not valid and legal, inasmuch as it was imposed upon the inferior classes by the higher classes. They further allege that the said custom has undergone many transformations ; that it is not followed with the same rigidity ; that the untouchables do not accept it ; that they as well as others have been protesting against it since a long time ; that there is actually a growing section of the touchable Hindus who do not observe it ; that such seceders are not penalised by the Hindus Society and that the said custom is uncertain with regard to the number of persons and is opposed to justice and morality. Some evidence was led to substantiate these points and it was attempted to be shown that there were many untouchable classes according to the *shastras*, who have lost their

untouchability now and instances of the Burud, Nhavi and Parit were mentioned in support. And hence it was argued for the Defendants that the number of untouchables is not definite and certain. Even assuming this to be so, I do not think that the fact helps the Defendants in any way. So long as the custom of untouchability remains, it will have to be enforced as between the private parties irrespective of the fact that some of the castes, which were originally untouchables, have ceased to be so and the custom in such a case will only be enforced against 10 those whose untouchability still remains. This custom of untouchability has also been the subject of judicial decision and has been upheld by courts of law as I will point out later on. Considerations of morality and natural justice, the hardships inflicted by the observance of the custom, inequality which now appears to be based upon no better ground than the religious sentiment are considerations, which cannot affect the decision of the case and help the Defendants in any way. Similarly the attempts of the Hindu Maha Sabha or other social reformers to eradicate this custom from the Hindu Society, to place all members of the religion on an equal footing and afford equal opportunities in life to them, and to thus establish unity in the Hindu Society are indeed laudable but they 20 also do not help the Defendants and affect the question at issue The custom of untouchability is a part and parcel of the Hindu Law itself, which courts of law have been called upon to administer and as the said custom has been recognised in a number of cases the objection of the Defendants that it is in the nature of an imposition by the higher classes on the lower classes cannot stand. Besides, there is no evidence on record to show that this was originally an imposition as alleged, and even assuming it to be so, the uninterrupted observance thereof during the last 2000 years and over is a clear indication of the acquiescence in and acceptance thereof by the untouchables themselves. The laxity with which the said custom is recognised on certain occasions is also no ground in favour of 30 the Defendants, in view of the progressive times in which we are living. The objections raised by the Defendants to the validity of the custom cannot stand in my opinion and I therefore hold that as between private parties the said custom is perfectly legal and valid and hence enforceable.

20. For reasons mentioned above, the customary right to use a private place or a place dedicated to the Hindu Society to the exclusion of the untouchables is a legal right and enforceable in law. I may refer to the decisions reported at 7 Bombay (I. L. R.) 323 and 31 Madras (I. L. R.) 236. The last case was a suit by Hindu-touchables against the Nadar or Shanas caste preventing the said caste 40 to enter a Hindu-temple on the ground of untouchability and their Lordships of the Privy Council upheld Plaintiffs' right to exclude the Defendant caste from entering the suit temple. The case reported at 7 Bombay (I. L. R.) 323 was not between touchables and untouchables but between two touchable communities. The question there was whether the Defendant community had not the right to enter and worship on the ground of a custom set up by Plaintiffs. There also the custom was upheld and necessary injunction was issued to the Defendants not to enter and worship. In this view therefore the answer to issue no. 4 will be in the affirmative. In view of my finding on issue no. 2 the suit tank is not the private property either of the whole class of touchable Hindus or a limited number of them. 50 On the contrary, it is the municipal property according to me. Hence the question is whether the custom covered by issue no. 3 is a legal right in the Plaintiffs inasmuch as the suit tank is Municipal. Mere user of a public tank by a particular class and non-user by another would not clothe the class making the user with any legal rights or rights of ownership as against the other class and hence in this particular case the custom, covered by issue no. 3, cannot be said to be a legal right. It was, however, argued for the Plaintiffs that even assuming the tank to be the municipal property the Municipality is a mere trustee thereof and that the only persons, who can be said to be the beneficiaries, are the touchable-Hindus and that the Defendants would have therefore no right to use the suit 60 tank. I will fully consider this aspect of a trust in the hands of the Municipality in favour of the Hindu-touchables alone while dealing with issue no. 5. I need only say at this stage that I do not believe the story of a trust in favour of the touchable-Hindus alone and hence the custom proved under issue no. 3 does not amount to a legal right as against the Defendant-untouchables. My finding, therefore, on issue no. 4 is in the negative.

21. As Plaintiffs are not proved to be the owners of the suit tank, they are not entitled to any declarations and for reasons set out, while considering issue no. 4 they are also not entitled to any injunction as against the Defendants. But it was argued for the Plaintiffs that even assuming the suit tank to be the municipal property, Plaintiffs are entitled to the declarations and injunction on the ground that the Municipality is a mere trustee, holding the property for the benefit and enjoyment of the Hindu-touchables alone. The original plaint as filed asserted simply Plaintiffs' ownership of the suit tank. After the Defendants contended by their written statement that the suit tank was Municipal Plaintiffs got the plaint amended by an application exhibit 56 and prayed in the alternative for the very reliefs originally claimed even if the suit tank was held to be Municipal. This amendment for the alternative relief was made only in the prayer clause. If the Plaintiffs wanted to rely upon the theory of a trust in the hands of the Municipality for the exclusive benefit and enjoyment of the Plaintiff-touchables, appropriate pleadings and necessary statement of facts to cover the said theory was absolutely necessary. But the plaint discloses none. If this theory had been advanced in the plaint, necessary additional issues to cover the contentions of the parties in that behalf would have been framed. The said point has been taken up by the learned pleader for the Plaintiffs and I, therefore, proceed to consider it briefly. The learned pleader relied upon section 50, clause 2, of the District Municipal Act and argued that even assuming the suit tank to be municipal property, the Municipality stands in the shoes of a mere trustee. He further contended that the Municipality as trustee of the suit tank can only allow the use and enjoyment thereof to the Plaintiff-touchables alone, as he alleged that at the date when the suit tank vested in the Municipality it was being used by touchable Hindus only under the terms of a dedication by the original founder thereof. This argument is based on the hypothesis, which has been partly considered while dealing with issue no. 2. There is no evidence that the suit tank is an artificial one and brought into existence by some human agency. There is no evidence of any dedication to the use and enjoyment of the Hindu-touchables alone. The facts discussed while considering issue no. 2 do not support the existence of any private founder and dedication by him.

22. The language of section 50, clause 2, of the District Municipal Act no doubt shows that the Municipality is a mere trustee of all the property that vests in it under that section. But the Municipality would hold the property for the whole public in general and not a particular section thereof. The trust in the hands of the Municipality for the exclusive benefit and enjoyment of a particular section of the public may be a matter of agreement but such a thing does not follow from the mere language of section 50, clause 2. It may, however, be covered by an obligation accepted by the Municipality under section 51, proviso (*a*), which can only be done by a direct agreement. Such an agreement ought to have been pleaded and proved, if the Plaintiffs wanted to rely upon it. This has not been done in this case and hence it is an important departure from the case as laid by the Plaintiffs in their plaint, which the Plaintiffs in my opinion cannot be allowed to do. Besides, there is no evidence on record to support this private or special trust. The Defendants in answer to the theory of a private trust above discussed argued that Plaintiffs cannot sue in respect of the trust property and claim an injunction against Defendants as they would be mere beneficiaries and that it is the Municipality alone, which is competent to maintain such a suit. In support of this argument, Defendants relied upon the ruling reported at 28 Bombay L. R. 161 (Saklat *v.* Bella) to the effect that it is the trustee alone, who is entitled to sue a trespasser. The learned pleader for the Plaintiffs relied upon the decision reported at 7 Bombay (I. L. R.) 323 to show that even the beneficiaries can maintain a suit against a trespasser in respect of the trust property. The decision in 28 Bombay Law Reporter 161 above referred to approves of and makes an exception in favour of the ruling in 7 Bombay (I. L. R.) 323 and their Lordships, indeed, on page 172 say that a suit by the beneficiaries will be maintainable if, to quote their own words, "the juxtaposition of the two sets of persons is so repugnant to their habits of mind that the entrance of one set into the temple entails the departure of the other, so that it is as it were trespass to the person". The limitations so prescribed for a suit by the beneficiaries alone would indeed be fulfilled by the parties to the present suit and the nature of the dispute between

them, provided the Plaintiffs had alleged and proved the private trust as they have failed to do it, Plaintiffs are not entitled to the declarations and injunction sought, for reasons and facts set out above. My finding, therefore, on issue no. 5 is in the negative.

23. In view of my findings on issues nos. 2, 4 and 5 Plaintiffs are not entitled to any relief in this suit and their suit must be dismissed. Under the circumstances of this particular suit and in view of the fact that Defendants incurred heavy costs on points which they have failed to prove I order each party to bear its costs. I, therefore, pass the following order.

*Order.*

Plaintiffs' suit is dismissed. Each party to bear its own costs.

(Signed) V. R. SARAF,
Sub-Judge.

8th January 1931.

[True copy]

(Illegible)

Clerk of the Court, Mahad.

M Bk J 325—7

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