Privy Council Appeal No. 24 of 1940

Baba Narayan Lakras and others – – – – – – *Appellants*

v.

Saboosa and others – – – – – – – – – – *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT NAGPUR

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH APRIL 1943.

Present at the Hearing:
LORD RUSSELL OF KILLOWEN.
LORD WRIGHT.
LORD PORTER.
SIR GEORGE RANKIN.
SIR MADHAVAN NAIR.
[Delivered by SIR GEORGE RANKIN*]*

This appeal is preferred by the plaintiffs in a suit brought on behalf of the Hindus of a place called Basim, situated in Berar, against a number of Muslim defendants as representing the whole Muhammadan community of Basim. An Order under r. 8 of Order I of the Code was duly made and the defendants contested the suit in three Courts in India. Their Lordships much regret, however, that they have not had the advantage of any argument for the defendants as no one appeared to represent them at the hearing before the Board.

The dispute is as to the right of the Muslims at the time of Muharram to immerse *tazias* in a tank called the Padmatirtha tank which lies to the North West of Basim. This tank is described as a large area of water and as having ten ghats. The relief claimed by the plaint, which was filed in the Court of the Subordinate Judge at Basim on the 20th June, 1929, was an injunction restraining the defendants from immersing *tazias* (*a*) from ghats 1 and 2; (*b*) from ghats 3-7 and 10; (*c*) from ghats 8 and 9. The plaint alleged that the tank was the property of the Hindus: it admitted that for about ten years—that is since about 1919—*tazias* had been immersed from ghats 1 and 2 but stated that this use was by permission of the Hindus. It complained that in 1925 damage had been done to certain trees sacred to the Hindus and that since 1925 all the ghats had been used, except ghats 8 and 9, in 1926. It alleged, quite truly, that what was done in 1927 and 1928 was covered by orders made by the District Magistrate to avoid a breach of the peace. The written statement denied that the ownership of the tank was in the Hindus, claimed that it belonged to an ancestor of the first defendant, and set up an alternative case that the Mussulmans had from time immemorial and as of right immersed *tazias* from all the ghats. The allegation of damage done to trees was met by a plea—both ill-advised and groundless—that

> " the Mussulmans have unobstructed right of immersing *tazias* in the tank. If branches of any tree come in the way, they are always cut, in order to allow a free passage, without any objection."

On 28th March, 1933, the trial Judge, after hearing a large number of witnesses on both sides, restrained the defendants " from using any of the steps of the tank for immersion of *tazias*." He found that the tank was the property of the Hindus, observing that it had been held in many cases

that a fluctuating body of persons, such as a village community or a particular community, is capable of owning property. On the question of user he held that before 1919 some *tazias* were immersed from ghats 1 and 2 as a matter of permission and not as of right, but that the first year in which all the ghats were used was 1925. Having negatived the existence of any easement, he considered whether the defendants had shown any customary right such as is contemplated by section 18 of the Easements Act (V of 1882). He found that such a right had not been made out, the user proved being inadequate in point of uniformity, continuity and certainty. He held further that the alleged custom was not reasonable.

The defendants' appeal to the Court of the District Judge was dismissed on the 7th February, 1935. The learned First Additional District Judge of Akola confirmed the trial Judge's finding that the tank belonged to the Hindus. He held that before 1925 there had been peaceful immersion but only from ghats 1 and 2: that immersion had taken place since 1925 from all the ghats but had been accompanied by dispute and not peaceful. He agreed with the trial Judge in rejecting the defendants' evidence that all the ghats had been used from before 1925. As regards ghats 1 and 2 he noted that the plaintiffs had in the course of the trial admitted that the use of these two ghats had begun about 1915. He referred to the evidence of D.W. 125—Mr. C. E. Middleton Stewart—who had been Assistant Superintendent of Police at Basim from the end of 1909 until 1912 and on whose evidence the trial Judge had relied. In a passage which summarises his findings he said:

> " To me it appears that there was no immemorial practice but that the Padma-Teerth attracted the Musalmans sometime about 1910 and one or two *Tajias* began to come for immersion. The Hindus did not object and so the practice went on growing till 1919 from which year all the *Tajias* began to come to Padma-Teerth for immersion. The origin of this practice prior to 1910 is not proved. From 1919 to 1924 there was peaceful immersion of all the *Tajias* from *Ghats* Nos. 1 and 2 only. I, therefore, uphold the finding of the Lower Court that some *Tajias* used to come to the tank prior to 1919 probably from 1910, that all the *Tajias* are immersed in the tank from 1919 but from *Ghats* Nos. 1 and 2 only and that since 1925 they are immersed from all the *Ghats* though in 1926 *Ghats* Nos. 8 and 9 were not used."

On the view that user before 1910 had not been proved and that after 1924 it was not peaceful he considered that no customary rights to immerse *tazias* from ghats 1 and 2 had been established, the user proved being insufficient in point of antiquity. He further held that from 1910 to 1919 the custom was not uniform as all the *tazias* did not come to Padmatirtha: " only some came and it is not proved that the same came in all the years." He found that the use of ghats 1 and 2 had been permissive.

In the High Court on second appeal the case came before Pollock J. who found once more that the tank belonged to the Hindu community. He said that it was not proved that 1910 was the first year in which *tazias* were immersed, and as regards ghats 1 and 2 considered that there was no objection on the part of the Hindu community until 1929. On this footing he held that " the length of time during which the *tazias* have been immersed in ghats 1 and 2 is such as to suggest that this usage has become the customary law of the place, and that therefore the Muhammadans have a customary right to use these two ghats in that way." He rejected the contention that the right claimed was not sufficiently certain and invariable, but agreed that " the number of *tazias* may have increased slightly though this is not clear, and it may be that the same *tazias* are not always immersed from the same ghats." By his decree of 20th October, 1937, he modified the injunction granted by the trial Court so as to exclude from its scope ghats 1 and 2, and he declared that the Muhammadans have a customary right to immerse *tazias* from ghats 1 and 2.

From this decree a certificate that the case was fit to be taken on appeal to His Majesty in Council was on the 13th April, 1939, granted to the

plaintiffs by a Bench of the High Court at Nagpur purporting to act under section 109 of the Code. This being contrary to section 111 of the Code, the present appeal was permitted by the Board to stand over to enable the plaintiffs to obtain special leave to appeal, and by Order in Council dated 1st July, 1942, such leave was granted.

The sole question now before the Board is as to the correctness of the finding that the defendants have shown a customary right in respect of ghats 1 and 2. The appellants complain that the learned Judge of the High Court has transgressed the limits set to his jurisdiction by sections 100 and 101 of the Code in that he disregarded the findings of fact arrived at by the lower Appellate Court when he treated the user of these two ghats as having begun before 1910 and as having been peaceful and without objection between 1925 and 1929. Their Lordships do not think it necessary or desirable however to decide this case upon grounds which though not unimportant relate to procedure rather than to merits. They are, moreover, prepared to assume—without giving any decision upon the point—that the existence of a custom may in this case be regarded as a question of the proper interpretation of the specific facts proved and thus as a question of law which was open in second appeal.

The burden lies upon one who sets up a custom in derogration of the ordinary rights of another as the owner of immoveable property to give clear and positive proof of the user relied upon to substantiate the custom; and in the present case the proof does not extend to any period before 1910. Again, the events of 1925 and of the subsequent years before suit (1925-1929) are almost wholly without force as evidence of customary right, since the interposition of the police authorities and not the acquiescence of the Hindus accounts for what took place at these two ghats as at the others, and protected the Muslims from interference in view of the danger of a breach of the peace. The user which can be of service to the defendants extends as the District Judge found from 1910 to 1925. It may perhaps be said that the history of the matter suggests that had the immersion of *tazias* been confined, in 1925 and afterwards, to ghats 1 and 2 thereby avoiding all temptation to damage sacred trees, the practice might well have continued without arousing objection. Unfortunately, events did not take that course, and it has now to be determined whether a practice which cannot be traced back further than 1910 had by 1925 ripened into a customary right or continued long enough to afford proof of such a right. The variation in the *tazias* or in the number of the *tazias* which were immersed and the evidence that the user of the tank for this purpose was increasing raises a difficulty about the uniformity of the practice which impressed the District Judge, but their Lordships are not satisfied that the alleged custom could or should be rejected on this ground if it were otherwise established. A clear and useful statement of the law was given in the leading case of *Kuar Sen* v. *Maman* (1894) I.L.R. 16 All 178 17 All 87 by Sir John Edge and Sir Pramada Charan Banerji in a case very close to the present: there as here the District Judge had found against the custom; the right claimed there was of stationing *tazias* and *alums* at the time of Muharram; and the user proved extended for a period of about twenty years. The appellate Bench found against the custom, saying:—

> " The custom must be proved by reliable evidence of such repeated acts openly done, which have been assented and submitted to, as leads to the conclusion that the usage has by agreement or otherwise become the local law of the place in respect of the persons or things which it concerns. . . . The statute law of India does not prescribe any period of enjoyment during which, in order to establish a local custom, it must be proved that a right claimed to have been enjoyed as by local custom was enjoyed."

This exposition of the law of India given by the High Court of Allahabad in 1894 was in substance repeated by the Board in *Musammat Subhani* v. *Nawab* (1940) L.R. 68 I.A. 1, 31:—

> " It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is neces-

sary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has by common consent been submitted to as the established governing rule of the particular district."

While these judgments both show that in India a custom need not be immemorial, the requirement of long usage is essential since it is from this that custom derives its force as governing the parties' rights in place of the general law.

In this case the tank was not in individual ownership and the use made of it by immersing *tazias* involved a minimum of interference with the rights of its owners or their enjoyment of its amenities. It took place only once a year and then in connection with religious ceremonies which though distinctively Islamic and intended to commemorate tragic events in the history of Islam would not fail to attract sympathetic attention on the part of non-Muslims. Ordinarily, there could be little motive for any churlish objection to a harmless and colourful ceremony on which much sentiment is centred. Communal tension or religious bigotry might supply such a motive but though at times it may take but little to bring such forces into play, it would be unwarranted as it would be invidious to postulate them as abiding features of life in Basim from 1910 onwards. It is by no means conclusive against a claim to customary right that the practice should have *begun* by permission or agreement, but it must be shown to have continued in such circumstances and for such length of time that it has come to be exercised as of right. In their Lordships' view what is proved to have taken place on ghats 1 and 2 annually at the time of Muharram between the years 1910-25 is an insufficient basis for a finding of customary right, and they see no reason to disagree with the findings of the learned District Judge, still less to hold that he was bound in law on the evidence before him to affirm the custom. That the Padmatirtha tank should not be available for the Muharram ceremony is a matter of regret to their Lordships as it will doubtless be to many inhabitants of the locality whose sentiments are entitled to respect. Their Lordships would be glad to think that some arrangement for permissive use might be arrived at in some future year as a matter of good will between Hindus and Muslims. Indeed their Lordships venture to hope that this will be so; but at the moment their only duty is to declare the rights of the parties.

They will humbly advise His Majesty that this appeal should be allowed, the decree of the High Court set aside, and the decree of the trial Court dated 28th March, 1933, restored. The orders of the District Judge as to the costs of the trial Court and of the first appeal will stand. The costs incurred by the plaintiffs in the High Court and their costs of this appeal must be paid by the respondents.

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In the Privy Council

BABA NARAYAN LAKRAS AND OTHERS

v.

SABOOSA AND OTHERS

DELIVERED BY SIR GEORGE RANKIN

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