

subject-matter of the action the plaintiffs were in the position, in March 1913, to obtain all the reliefs to which they were entitled but insisted upon continuing the action and in the result obtained a judgment for only £3.12.0 for damages and therefore as from the date of the defendants' offer there was no reason why the defendants should not have their costs of the action. The final order made by the Court of Appeal was that on the defendants for themselves, their servants and agents undertaking not to sell goods bearing the plaintiffs' design the defendants were ordered to pay to the plaintiffs £3.12.0 for damages and taxed costs of the plaintiffs' action down to the delivery of the defence and payment into Court by the defendants of the sum of £5. The Court further ordered that the defendants should also pay to the plaintiffs their costs of an application to the Court for a judgment embodying the undertaking. But the Court ordered the plaintiffs to pay to the defendants all taxed costs of the defendants of the action subsequent to the delivery of the defence and the payment into Court. The principles laid down in that decision of the Court of Appeal have been followed by the Calcutta High Court in 63 Cal 1146.²

The next case referred to by the learned counsel for the defendants is (1910) 1 Ch 257.³ In that decision it was laid down that when a registered trade mark is innocently infringed, the proprietor of the trade mark is entitled to an injunction against the offender, but not to an account of profits or an inquiry as to damages unless the offender continues to infringe after notice of the proprietor's rights. In that suit the plaintiffs sued the defendants for an injunction restraining them from infringing their trade marks and for the usual consequential relief. Three days after the action was commenced, the defendants who had no knowledge of the plaintiffs' trade marks and were innocent infringers, offered to submit to a perpetual injunction in the terms of the notice of motion, and took steps to remove the black cross from all golf balls in stock and to obliterate the reference to black cross balls in their catalogues as those were the things that the plaintiffs

complained against. Dealing with the facts of that case, the learned Judge stated that when the plaintiffs made a complaint of the infringement of the trade mark the defendants immediately met the plaintiffs in a satisfactory manner. He stated that the plaintiffs were wrong in proceeding with their action after the offer made to them by the defendants of an injunction with costs up to that date and £10 as nominal damages. The learned Judge ordered the plaintiffs to pay the costs of the action after the date of the defendants' offer.

This principle is stated in Kerly on Trade Marks, Edn. 6, p. 523. The learned counsel for the plaintiffs contended that the provisions of O. 24, Civil P. C., do not apply to a case of an infringement of a patent or a design. There is no doubt that the provisions of O. 24 do not apply to this case. But I see no reason why the principles laid down in O. 24 should not be applied to this case. In fact those principles have been applied by the English Courts as well as by the High Court of Calcutta to cases of this nature. I therefore pass a decree in favour of the plaintiffs against the defendants in terms of prayer (a) of the plaint but restricted to the subsistence of the plaintiffs' rights as registered proprietors of the designs mentioned in the prayer and also restricted to British India. I also pass a decree against the defendants for Rs. 199 as damages being the amount of the admitted profits made by the defendants by their piracy of the plaintiffs' rights. I order that the defendants do pay to the plaintiffs taxed costs of this action up to the date of the defendants' filing their written statement, viz. 23rd July 1935, and of the plaintiffs' application to this Court for a decree in the terms of the offer of the defendants contained in para. 8 of their written statement and of the decree. I order the plaintiffs to pay the taxed costs of the defendants of this action from and after 23rd July 1935.

N.S./R.K.

*Order accordingly.***A. I. R. 1939 Bombay 202**

BLACKWELL J.

*Janardan Govind Gore and others —
Plaintiffs.*

v.

*Advocate-General of Bombay —**Defendant.*Suit No. 510 of 1938, Decided on 6th
December 1938.

2. Calico Printers Association, Limited v. D. N. Mukherjee, (1936) 23 A I R Cal 493=166 I C 535=63 Cal 1146=40 C W N 938.

3. Slazenger & Sons v. Spalding & Brothers, (1910) 1 Ch 257=79 L J Ch 122=102 L T 390=27 R P C 20.

Will — Construction — "My community" — Interpretation.

The Chitpavan sub-section of the Maharashtra community is a community by itself having peculiar characteristics which distinguish it from other communities forming part of the larger Maharashtra community : 7 *Bom 323, Ref.*

[P 206 C 1, 2]

A testator, a Chitpavan Brahmin (Hindu), by his will directed his executors to pay certain legacies and bequests. One of them read as: "A sum of Rupees . . . towards medical relief of persons of my community or any other charitable purpose of utility of my community, such object to be named after me:"

Held that the words "my community" referred to Chitpavan Brahmin (Hindu) community and not to the Dakshini community as a whole.

[P 206 C 2]

S. R. Tendulkar — for Plaintiffs.

Dr. B. R. Ambedkar, M. H. Gandhi and D. B. Desai, and K. A. Somjee — for Defendants 2 and 3, and 4 respectively.

Judgment.—This is an Originating Summons which was brought by the plaintiffs, the proving executors of the will of one Dhundiraj Govind Gore, originally against the Advocate-General of Bombay, to determine the meaning of the words "my community" used by the testator in Cl. 3 (e) of his will, and whether the provision contained in that clause was intended to be for the benefit of the Dakshini Brahmin community as a whole or only for the Chitpavan sub-sect. thereof. By an order dated 27th July 1938, defendants 2 and 3 were added as parties to the suit on behalf of themselves and all other Chitpavan Brahmins who contend that the words "my community" in the will mean the Chitpavan Brahmin community, and defendant 4 was added as a defendant on behalf of himself and other Chitpavan Brahmins who contend that the words "my community" mean the Dakshini Brahmin community. The material portions of the will are as follows :

I, Dhundiraj Govind Gore of Mahim, Bombay, Chitpavan Brahmin (Hindu) inhabitant do hereby revoke all previous wills and codicils and make and declare this to be my last will and testament.

(3) After payment of funeral expenses, etc., and testamentary charges, my executors are directed to pay the following legacies and bequests.

(d) A sum of not less than Rs. 5000 (Rupees five thousand only) be spent for some useful public purpose (sinking of a public well or construction of sarai Dharmashala or such other purpose as my executors may think fit) and be named after my parents (Govind Saraswati).

(e) A sum of Rs. 50,000 (fifty thousand only) towards medical relief of persons of my commu-

nity or any other charitable purpose of utility to my community, such object to be named after me.

Mr. Tendulkar for the executors contended that the words "my community" although unambiguous in themselves are capable of a number of different meanings, and he submitted that he was entitled by S. 80, Succession Act, to adduce extrinsic evidence to show that these words admit of only one application which was intended by the testator. Mr. Somjee for defendant 4 supported Mr. Tendulkar in his contention as to the admissibility of evidence and argued upon the will itself apart from extrinsic evidence that the words "my community" mean the Maharashtra or the Dakshini community. On the other hand, Dr. Ambedkar for defendants 2 and 3 submitted that there is no room for extrinsic evidence with a view to showing that the words "my community" admit of applications, one only of which can have been intended by the testator, inasmuch as the testator has described himself in the will as a Chitpavan Brahmin (Hindu) inhabitant, and that it is therefore plain from the will itself that by the words "my community" he meant the Chitpavan community.

Mr. Tendulkar referred to a number of English authorities upon the admissibility of extrinsic evidence for the purpose of ascertaining what a testator meant when he used unambiguous words which on the particular facts might admit of more than one application, viz. (1720) 1 P Wms 674,¹ (1868) 18 L T 236,² and (1920) 2 Ch 59.³ All counsel before me are agreed that these cases exemplify difficulties such as are contemplated by the Illustrations to S. 80, Succession Act. Mr. Tendulkar referred me also to 39 Bom L R 1151,⁴ where Kania J. held that where the intention of the testator is expressed in the will it is open to a party to lead oral evidence to show circumstances, habits and the state of the testator's family, which would include the names of the testator's friends, on the principle of justice, equity and good conscience, and apart from Ss. 80 and 81, Succession Act, 1925. That however in my opinion is not a case which has any bearing upon the matter before me. The testator having

1. Attorney General v. Hudson, (1720) 1 P Wms 674=24 E R 564.

2. Gibson v. Coleman, (1868) 18 L T 236.

3. Rees In re; Jones v. Evans, (1920) 2 Ch 59=89 L J Ch 382=123 L T 567.

4. Janardan v. Narayan, (1937) 24 A I R Bom 496=172 I C 401=39 Bom L R 1151.

described himself as a Chitpavan Brahmin (Hindu) inhabitant Mr. Tendulkar pushed his argument logically to this length, that oral evidence would be admissible to show whether the testator intended by the words "my community" to mean the Hindu community as a whole, or a sub-division of it, viz. the Brahmin community, or one of various sub-divisions of the Brahmin community. I have been referred to various works upon the question of caste and customs which I will briefly refer to. In Steele's Law and Custom of Hindu Castes published in 1868 the following appears at page 79:

The Brahmin caste ranks higher than the others in general estimation. It contains however a variety of subdivisions, among the individuals of which restrictions exist as to marriage and eating in company, chiefly arising from their relative strictness in diet or other religious observances.

Mr. Somjee argued that the word "community" must be governed by religious doctrine alone. He cited Wilson on Indian Castes, Vol. 2 at p. 17, where it is pointed out that the Brahmins of India are generally divided into two great classes of five orders each, the five Dravidas, south of the Vindhya range, and the five Gaudas, north of the Vindhya range. The five classes of each of those two main divisions are set out, and the first of the five Dravida classes is stated to be the Maharashtras, of the country of the Marathi language. It is common ground that the word Dakshini has the same significance as Maharashtra. Mr. Somjee argued that the words "my community," quite apart from the question whether oral evidence is admissible, or not, can only mean the Maharashtra community of which the Chitpavan is a sub-sect or sub-division. Returning to Steele's Law and Custom of Hindu Castes, the author at p. 79 proceeds to enumerate the various varieties of Brahmins, and among them he mentions the Maharashtra, and in a footnote states as follows:

The varieties of the Maharashtra Brahmins are Desust, Kokunust, or Chitpawun, Deorookhee, Madyandin, Kunwa, or Prutumsakhee, Kurare, Ubheer, Mytrayunee, Senwee, Tirgool. The Desust consider themselves superior to others. The Kurare are accused of human sacrifices, but are invited by the other sects.

After enumerating a number of sects of Brahmins the author goes on to say that the Senwee Brahmins, being confined to three Kurum, or religious duties, and being less strict as to diet, are not invited to the houses of the ten mentioned sub-divisions. In Enthoven's Tribes and Castes of Bom-

bay, Vol. I, at p. 241, it is stated that the Maharashtra Brahmins consist of twelve divisions, among which the Chitpavans are mentioned. The author then says that all of these twelve divisions except the Golaks, Jayals, Kasts, Palshikars, Savashes and Tirguls eat together, but do not intermarry. He points out, however, that the latter statement must be qualified in the case of the Palshikar or local Bombay group of Deshasth Brahmins who have recently established marriage relations with Deshasth Brahmins of the Central Provinces and are successfully establishing their claim to be considered Shukla Yajurvedi Deshasth Brahmins of the Madhyandin Shakha. Poona Deshasthas, the author says, still refuse recognition, and the Golaks, Kirvants and Tirguls are commonly held to be degraded. Among the latter the Kirvants, the author says, are rising to the position of equality with strict Brahmins, and marriage connexions are occasionally formed between them and Chitpavans.

As regards the question of marriage, at p. 502 in Edn. 8 of the late Sir Dinshah Mulla's work on the Principles of Hindu Law, it is pointed out that while a marriage between persons who do not belong to the same caste is invalid, unless sanctioned by custom, a marriage between persons belonging to different sub-divisions of the same caste is not invalid, and authorities for that proposition are cited. Though such marriages may not be invalid, nevertheless Enthoven's work is an authority for the proposition that certain of the Maharashtra Brahmins do not intermarry as a matter of practice. Mr. Tendulkar frankly admitted that there were differences in custom and habits among the various sub-sects of Maharashtras, but he submitted that that made no difference to the question as to what the words "my community" mean and that evidence ought to be admitted for the purpose of enabling the Court to determine what the testator meant by the words "my community", those words being capable of different interpretation.

Dr. Ambedkar cited 7 Bom 323⁵ for the purpose of showing that the Chitpavan caste had been recognized in the Courts of Bombay as a community. That was a case in which four persons of the Chitpavan caste brought a suit alleging that they and the members of their caste, in common with certain

5. Anandray Bhikaji v. Shankar Daji, (1893) 7 Bom 323.

other castes, possessed the exclusive right of entry and worship in the sanctuary of a temple, and that the defendants, members of the Palshe caste, not being of the privileged castes, infringed that right by entering the sanctuary and performing worship therein, and the plaintiffs prayed for a declaration of their right and an injunction restraining the defendants from interfering with it. It was conceded by counsel that the defendants, members of the Palshe caste, belonged to the Maharashtra branch of Brahmins equally with the Chitpavan Brahmins. The case was cited by Dr. Ambedkar simply for the purpose of showing that the Chitpavans there regarded themselves as a community distinct from the Palshe community, both of them being members of the Maharashtra branch of the Brahmins.

In India there are a very large number of communities, and it is very common for persons to describe themselves as belonging to such and such a community. The word "community" is no doubt capable of being used in a number of different senses. There may be a large community, and within that large community a number of smaller communities, and within those smaller communities still smaller communities. For instance, the Mahomedans in India may no doubt be described as the Mahomedan community, but it is well known that there are a considerable number of sub-divisions in the Mahomedan community the members of each of which consider themselves a community among themselves, as for instance, the Bohras, the Khojas, the Cutchi Memons and Halai Memons, and if a man described himself as a Bohra, I have not the slightest doubt that he would intend to convey that he belonged to the Bohra community. Similarly, Christians may be described as a community, subject to the religious test of Christianity. But there are in India a number of Christian communities differing from one another in particular characteristics, racial and otherwise, such as East Indian Christians, Native Christians, Goan Christians and so on, and, though they are all Christians, they may I think properly be regarded as distinct communities. Similarly, there is the great Hindu community. It is well known that Hindus were originally divided into the four castes of Brahmins, Kshatriyas, Vaishyas and Sudras. Many other castes and sub-castes have however come into existence. In a sense all Hindus are members of the

same community. But I think that an orthodox Brahmin would be a little startled if he were told that he belonged to the same community as, say, an untouchable. Such a test appears to me to be useful in considering whether it is right in India to restrict the word community to the larger sense of which it is capable or whether the true view of the matter is that there are a large number of sub-divisions which are themselves regarded as distinct communities. I think that the latter is the true view. As appears from Wilson's work, the Brahmins are divided into two great classes, to each of which there are five main sub-divisions. All those sub-divisions from one point of view no doubt may be considered separate communities, but then the question arises whether within those sub-divisions there are not also further sub-divisions which are in themselves separate communities. It is common ground in this case that in the various sub-divisions there may exist differences in customs and habits as to eating, drinking, clothing and so forth. The very existence of such differences appears to me to afford strong ground for thinking that the persons who group themselves in the various sub-divisions regard themselves by reason of these differences as distinct communities, as the members of the Chitpavan caste undoubtedly did when they brought against the members of the Palshe caste who were Maharashtras like themselves, the case above mentioned: 7 Bom 323.⁵

In support of the contention put forward on behalf of defendants 2 and 3 that the Chitpavan sect of the Maharashtra Brahmin community is itself a separate community, and regarded as such, there is an affidavit of Mr. Balaji Vasudeo Athavale. In that affidavit he says that the Chitpavan Brahmins form a community in themselves, that that community has its own organization, and that it has its own special characteristics which are distinguished from the characteristics of the Deshasthas, the Karhadas, etc., which are the sub-divisions of the Dakshini Brahmin community, and various characteristics of different sub-sects of the Dakshini or Maharashtra community are set out in that affidavit. Further, it is alleged that the Chitpavans have some peculiar customs of their own such as Bodan which is performed on celebrative occasions, and that the Chitpavans are a denominational community which is as large and as distinct a

community as other sub-sections of the larger Maharashtra community.

In para. 3 of the plaint the alleged conversations which plaintiffs 1 and 3 had with the testator himself personally regarding the provision in Clause 3 (e) of the will are relied on, and they say that from the general knowledge which they all had about the testator's views and opinions they believe that the provision in question was really intended by the testator to be for the benefit of the Dakshini Brahmin community as a whole and not only for the benefit of the Chitpavan sub-section thereof: and in para. 6 of the joint affidavit made by plaintiffs 1 and 3 they state that after making his will the testator had discussed the same with each of them and told them that he had made provision in his will for the benefit of the Dakshini Brahmin community, and that on such occasions he did not refer in particular to the Chitpavan Brahmins: then in para. 9 they say that from the talks which the deceased had with them and from their general knowledge of his views and opinions they believe that the testator intended to benefit the Dakshini Brahmin community as a whole and not only that section of it known as the Chitpavan Brahmins. In addition to seeking to rely upon that part of the joint affidavit Mr. Tendulkar informed me that he desired to call oral evidence with a view to establishing what the testator intended by the words "my community", those words being capable as he contended of more than one interpretation. Mr. Somjee supported him in this contention. Dr. Ambekar for defendants 2 and 3 submitted that oral evidence in this case was inadmissible inasmuch as upon the face of the will itself the testator had made it plain what he himself regarded to be his community. I am satisfied from the affidavit of Mr. Balaji Vasudeo Athavale that the Chitpavan sub-section of the Maharashtra community is a community by itself having peculiar characteristics which distinguish it from other communities forming part of the larger Maharashtra community. That being so, I am also of opinion that the testator having described himself as a Chitpavan Brahmin (Hindu) meant by the words "my community," not the Hindu community, nor the Brahman sub-section of the Hindu community, which may itself be regarded as a community, but the Chitpavan sub-section of the Maharashtra community which in itself, as I find, com-

prises a number of smaller communities differing in certain material characteristics from one another. Accordingly being of opinion that oral evidence was inadmissible, I rejected the same.

Thereupon Mr. Tendulkar said that he did not wish to adduce any further argument on the terms of the will as it stood. Mr. Somjee, however, submitted further that the real test as to the meaning of the word "community" in the will was a religious test, and a religious test only. He argued that the true meaning of the words "my community" in the will is the Maharashtra community, and that the sub-divisions thereof ought not to be treated as communities. I cannot accede to this argument. In my opinion the true view of the matter is that the Hindu community forms, if I may say so, the outer circle and within that outer circle there are various inner circles which narrow and narrow constituting sub-communities of the all-embracing Hindu community, the sub-divisions themselves constituting separate communities with different characteristics. I answer the questions submitted as follows: The words "my community" used by the testator in cl. 3 (e) of this will refer to the Chitpavan Brahmin (Hindu) community, and not to the Dakshini Brahmin community as a whole. As regards costs, I make no order as to the costs of defendants 2, 3 and 4 inasmuch as by the terms of the order of 27th July 1938, these defendants undertook not to claim any costs from the plaintiffs, or from the estate of the deceased in any event. As regards the costs of the plaintiffs the order which I make is that they should get their costs as between attorney and client out of the trust fund of Rupees 50,000.

N.S./R.K.

Answer accordingly.

A. I. R. 1939 Bombay 206

LOKUR J.

Lakshmibai Madhusudan Patil —

Plaintiff — Appellant.

v.

Shantaram Narayan Patil and others

— Defendants — Respondents.

First Appeal No. 279 of 1937, Decided on 22nd November 1938, from decision of First Class Sub-Judge, Thana, in Darkhast No. 168 of 1937.

Hindu Law — Maintenance — Decree for maintenance in favour of widow giving her choice to recover that amount by sale of im-