APPELLATE CIVIL.

Before Sir Stanley Batchelor, Kt., Acting Chief Justice, and Mr. Justice Kemp.

BALA GENUJI NAVALE AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS *v.* BALWANT LAXMAN GHATPANDE (ORIGINAL PLAINTIFF), RESPONDENT.* 1918. *February* 7.

Vatandar Joshi—Observance of non-Brahmanical ceremonies—Yajman *himself performing the ceremonies—Right to recover fees.*

The defendants were non-Brahmin residents of a village. Defendant No. 1's mother having died, he, with the assistance of defendant No. 2 performed over the body certain non-Brahmanical ceremonies. No fees were paid to the defendant No. 2 and the whole conduct of ceremonies was with the defendant No. 1 himself. The plaintiff, a Vatandar Joshi of the village, having sued to recover damages for loss of his customary fees,

Held, that the plaintiff was not entitled to recover damages as the ceremonies performed were other than Brahmanical ceremonies and there was no ground upon which the plaintiff could lawfully exact the payment of his fees.

Vithal Krishna Joshi v. *Anant Ramchandra*(1); *Dinanath Abaji* v. *Sadashiv Hari Madhave*(2) and *Raja valad Shivapa* v. *Krishnabhat*(3), distinguished.

SECOND appeal against the decision of C. A. Kincaid, District Judge of Poona, reversing the decree passed by B. M. Butti, Additional Subordinate Judge at Khed.

Suit for damages.

The plaintiff claimed to be the hereditary Joshi or a village priest of Bhavdi, Taluka Khed. He alleged that defendant No. 1's mother died on September 17, 1910. Ten days later according to the Hindu religion it was necessary for defendant No. 1 to perform certain obsequial ceremonies. The plaintiff accordingly as village priest sent his brother to perform the necessary ceremonies. Defendant No. 1, however,

* Second Appeal No. 1109 of 1915.

(1) (1874) 11 Bom. H. C. R. 6. (2) (1878) 3 Bom. 9.

(3) (1879) 3 Bom. 232.

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in collusion with defendant No. 2 refused to allow his brother to perform the obsequies and also refused to pay the plaintiff his customary fee. The plaintiff, therefore, sued for Rs. 4 as damages and also prayed for a perpetual injunction restraining the defendants from obstructing the plaintiff in his right of *joshipana*.

Defendant No. 1 contended that he knew nothing of the plaintiff's right as village priest; that he was a member of the Satya Shodhak Samaj and according to the views of the sect its members did not invite Brahmins to perform ceremonies but performed them themselves; that though defendant No. 2 was present at the ceremony he paid him nothing and therefore caused the plaintiff no damage.

The Subordinate Judge held that the plaintiff was a hereditary village priest of Bhavdi; that at the time defendant No. 1's mother died, the plaintiff was in enjoyment of his office; but he dismissed the suit on the ground that as the ceremonies performed were not such as Brahmins could have performed, the plaintiff was entitled to no relief.

On appeal, the District Judge allowed the plaintiff's claim for damages holding that though defendant No. 1 himself performed the ceremonies there was an invasion of the plaintiff's rights. As to ceremonies he observed that the description of the ceremonies given by defendant No. 1 showed that they were copied out from the Puranic ceremonies; the fact that the defendant No. 1 did not recite the necessary Mantras was the only point where the copy differed from the original.

The defendants appealed to the High Court.

Jayakar with *K. A. Padhye*, for the appellants :—We submit the plaintiff would not be entitled to damages on two grounds : (1) the ceremonies were performed by

our client himself; and (2) the ceremonies were absolutely different from Brahmanical ceremonies.

The law hitherto has been that if a Hindu *yajaman* employes any other priest, he must pay the fees which the officiating priest would have received; but here the Court is asked to say that even if the house-holder performed the ceremony himself he is bound to pay fees to the plaintiff as damages. This is bad in principle and in law. It gives an authority to the priest to enforce his employment irrespective of the wishes of the householder.

Secondly, the ceremonies performed being of non-Brahmanical character, the plaintiff suffered no damages by the observance of those ceremonies. A Joshi is called for the knowledge of his Mantras and the performance of ceremonies in usual Brahmanical form and it is when these Brahmanical ceremonies are performed by a rival priest or by a third person, the village Joshi is entitled to claim damages. *Vithal Krishna Joshi* v. *Anant Ramchandra*[1]; *Dinanath Abaji* v. *Sadashiv Hari Madhave*[2]; *Raja valad Shivapa* v. *Krishnabhat*[3] and *Waman Jagannath Joshi* v. *Balaji Kusaji Patil*[4].

P. V. Nijsure, for the respondent:—The gist of the action lies upon the violation of the right and not upon anything else. If the Joshi had no right I have no case. If he had a right to officiate, whether defendant No. 1 himself performed the ceremonies or had them performed by anybody else, it was immaterial. Both the Courts found that my client was the village priest and was entitled to officiate and that being so, it gave him a right to be present at the ceremonies and to receive his fees. Defendant No. 1, by getting the

(1) (1874) 11 Bom. H. C. R. 6.
(2) (1878) 3 Bom. 9.
(3) (1879) 3 Bom. 232.
(4) (1888) 14 Bom. 167.

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ceremonies performed through defendant No. 2, invaded my client's rights. This entitled my client to receive damages.

On the point of ceremonies, the lower Court has found that they were copied from the Puranic ceremonies. The only difference was that defendant No. 1 did not recite the Mantras. I submit the mere failure to recite the Mantras would not make the ceremonies non-Brahmanical. The ceremonies must, therefore, be taken as Brahmanical. This is a finding of fact by the lower appellate Court.

BATCHELOR, Acting C. J.:—This is a second appeal, and it is very necessary to bear in mind the facts upon which it arises. The plaintiff is the Vatandar Joshi of the village of Bhavdi. The defendants are non-Brahmins, residents of Bhavdi. The 1st defendant, it appears, belongs to an association called the Satya Shodhak Samaj, one of whose tenets is that it is desirable that the villagers should themselves conduct their own ceremonies, and not call in Brahmin priests to do so. In accordance with this tenet, when the 1st defendant's mother died, the 1st defendant himself, with the assistance of his friend, the 2nd defendant, performed over the body certain non-Brahmanical ceremonies, or, if I may so call them, lay rites. No fees were paid to the 2nd defendant, and the whole conduct of the ceremonies was in reality with the 1st defendant himself. This is clearly the character of the ceremonies as it was understood by the learned trial Judge, Mr. B. M. Butti, himself a Hindu. Upon this point he writes:

"It is clearly proved that no Sankalp was made, and defendant No. 1 simply made a formal show of the Dashpinda Kriya and bathed in the river, bowed down to the pots and went home. Among the Hindus, it is specially the Mantras which give efficacy to the ceremoneis performed and it is not at all proved that any such Mantras were recited at the time. Looking to the

whole case I hold that the ceremonies were not performed in the way in which Brahmins would have performed them. The next question did defendant No. 2 perform the same? As I have said above there is not an iota of evidence to show that defendant No. 2 perfomed the same....I hold that no ceremonies were performed by anybody in the way in which a Brahmin would have done it."

In the appeal before the District Court, it is quite true, as Mr. Nijsure has pointed out, that the learned District Judge ventured to offer certain criticism of the Hindu Judge's opinion as to what Brahmanical ceremony consisted in. But we cannot read this criticism as involving any decision by the District Judge that the trial Judge's determination upon this point was wrong, and in spite of the criticism, we understand that the District Judge did not differ from Mr. Butti's finding that the ceremonies performed in this case by the 1st defendant himself were other than Brahmanical ceremonies.

The trial Judge, mainly by reason of his finding as to the non-Brahmanical character of the ceremonies, held that the plaintiff was not entitled to recover in respect of them any fees from the defendants. The District Judge took the other view, and gave the plaintiff a decree. In so doing, the learned District Judge relied upon certain cases of this Court, which, however, are, I think, clearly distinguishable from the facts which are now before us. In *Vithal Krishna Joshi* v. *Anant Ramchandra*[1] the law was carried no further than this, that if a Hindu employed another person to perform the usual priestly or Brahmanical ceremonies, he must pay the fee which the Village Joshi would have been entitled to, if he had performed the ceremonies. That is explained in the judgment by Mr. Justice West, who quotes Couch C. J.'s decision in *Sitarambhat* v. *Sitaram Ganesh*[2], where the Chief

(1) (1874) 11 Bom. H. C. R. 6 at p. 10.

(2) (1869) 6 Bom. H. C. R. (A. C. J.) 250 at p. 253.

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Justice said: "It is settled law, that if a person usurps the office of another, and receives the fees of the office, he is bound to account to the rightful owner for them." In summing up the discussion, Sir Raymond West says: "The result of the cases appears to be that the office of a village priest is one which may well be established by grant or prescription, and that if a person, not entitled, assumes to act in the office and receives the fees, he may be made to refund them." Here, however, no one has received any fees, nor, upon the facts found, has any one intruded himself into the office of the village Joshi.

The next cases decided upon this point are *Dinanath Abaji* v. *Sadashiv Hari Madhave*[1] and *Raja Valad Shivapa* v. *Krishnabhat*[2]. Those, however, were both cases where in the performance of priestly ceremonies the village Joshi had been superseded by a rival and intrusive priest. These decisions, therefore, carry the matter no further.

The case upon which most reliance was placed for the respondent-plaintiff was the decision of Sir Charles Sargent and Mr. Justice Candy in *Waman Jagannath Joshi* v. *Balaji Kusaji Patil*[3]. There the head-note is somewhat misleading, and the report must be read in its entirety in order that the exact scope of the decision may be apprehended. The suit was brought by certain hereditary Joshis, who complained that at the marriages of the defendant's daughters their services were not employed, though they were ready and willing to conduct the ceremonies. They claimed to recover damages as no fees had been paid to them by the defendant. In the High Court these plaintiffs were the appellants, and on their behalf

(1) (1878) 3 Bom. 9.
(2) (1879) 3 Bom. 232.
(3) (1888) 14 Bom. 167 at p. 169.

Mr. Mahadev Chimnaji Apte contended that there was an invasion of their privilege by the person who performed the ceremonies, and that they were entitled to whatever was paid to the Kunbi priest employed by the defendant. Clearly, therefore, the plaintiffs' case was that a Kunbi, calling himself a priest, had intruded himself into the office reserved for the plaintiffs. Sir Charles Sargent in the course of his judgment observed: "The Subordinate Judge with A. P. was of opinion that the plaintiffs were only entitled to recover in case a marriage was performed in any of the modes known to the Hindu law, or in the mode described by Mr. Mandlik with respect to castes other than the Brahmin caste, and that the marriages in dispute being not performed in any such way, they were not such marriages as they were entitled to recover fees for in virtue of any right acquired by grant or prescription. We agree with the lower appellate Court that, under such circumstances as he thinks existed here, there would have been no intrusion on the plaintiffs' privileges which would give them a right to recover their fees from the Yajman as laid down in the decisions of this Presidency." Then the Chief Justice after observing that there would have been an invasion of the plaintiffs' rights if the ceremonies—i.e., I understand, the usual Brahmanical ceremonies—had been performed, by whomsoever these ceremonies were conducted, goes on to point out that no express issue was raised as to the manner of the performance of the marriages in question, and the judgment concludes by sending down to the lower Court a specific issue to determine what ceremonies were performed on the occasions of the marriages, and by whom. Clearly, therefore, this case also cannot be invoked as an authority in the Joshi's favour where, as here, the ceremonies performed were of a non-Brahmanical character. In theory, one would suppose indeed that

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the Joshi's title to his fees results from his expert knowledge in the details of these Brahmanical ceremonies, so that where these ceremonies are deliberately avoided, it would be difficult to find a ground upon which the Joshi could lawfully exact the payment of the fees. There is no case, so far as we are aware, which goes so far as the plaintiff asks us to go here, and to lay it down as the law that whatever may be the personal preferences or convictions of a Hindu villager, he is bound to employ the Village Joshi at obsequial ceremonies, or to fee him as if he had employed him, even though no Brahmanical ceremony is employed, and all that happens is that a simple lay rite is carried out by the villager himself. As there is no authority in favour of such a proposition of law, I do not think that we should now be justified in imposing this fetter upon an individual's liberty of action In this connection it is relevant to recall the words which Mr. Justice Melvill used in *Raja Valad Shivapa* v. *Krishnabhat*[1] : "We should not, as at present advised, be prepared to sanction any injunction which would have the effect of forcing upon any section of the community the services of a priest whom they are unwilling to recognize." It is one thing to say that if the Hindu villager chooses to have Brahmanical ceremonies conducted, he must employ his Village Joshi, or fee him as if he had employed him, but it is a very different thing to say that though the villager may prefer another rite, and chose not to have the Brahmin ceremony, he is still under obligation to pay the Joshi, to pay, that is, for not doing that which the villager deliberately wished to avoid.

On these grounds, it appears to me that the learned Judge of trial reached the right conclusion in this case. I would restore his decree, setting aside the decree

[1] (1879) 3 Bom. 232 at p. 233.

under appeal, and allow the defendants their costs throughout.

The cross-objections which are not pressed are dismissed with costs.

KEMP, J. :—I agree that the appeal should be allowed, and the decree of the Subordinate Judge allowed to stand.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Marten.

SHRINIWAS APPACHARYA JAHAGIRDAR AND ANOTHER (HEIRS OF ORIGINAL DEFENDANTS), APPELLANTS *v.* JAGADEVAPPA BIN KALLAPPA PATIL (ORIGINAL PLAINTIFF), RESPONDENT.*

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Civil Procedure Code (Act V of 1908), section 70, Order XXI, Rule 72 — Bombay Civil Circulars, Chapter II, Clause 91, sub-clause 16†—Execution

* Second Appeal No. 1188 of 1916.

† The material portion of the sub-clause runs as follows :—

(16) The following powers are conferred on Collectors or such of their gazetted subordinates to whom a decree has or may hereafter be referred under rule 4 :—

(1) The power referred to in section 294, Order XXI, Rule 72, of the Code of Civil Procedure to grant express permission to the holder of a decree, in execution of which property is sold, to bid for or purchase the property : provided that the Collector or other officer aforesaid to whom an application for such permission may be made shall not grant such permission, unless the decree-holder—

(*a*) satisfies him that the application is made in good faith, and that the judgment-debtor is not a minor ;

(*b*) undertakes that he will not himself or through any other person bid or purchase for a sum less than such amount as the Collector or other officer granting the permission, having regard to the fair market value of the interest to be sold, may determine, and that the permission shall be subject to this condition ;

(*c*) agrees that if the decree-holder or any one on his behalf becomes the purchaser, the purchase-money shall be paid to the Collector or other officer executing the decree.