1872.
March 12.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 424 *of* 1871.

NA'RA'YAN SADA'NAND BA'VA' ..... *Appellant.*
BA'LKRISHNA SHIDHESHVAR and others ... *Respondents.*

Dahi hándi *ceremony—Suit to establish exclusive right to break a curd pot—Infringement of such a right—Damages.*

Where the plaintiff enjoyed the exclusive right of breaking, on a certain day, a curd-pot in a particular part of the temple of Shri Vithobá and Tukárám at Dehu :—

It was held that the defendants breaking their own curd-pot on that day in any part of that temple, was a violation of that right entitling the plaintiff to damages.

THIS was a special appeal from the decision of Satyendra-Nath Tagore, Assistant Judge of Poona, amending the decree of the Munsif of Poona.

The plaintiff, the representative of the elder branch of the family of the celebrated Tukárám, brought a suit against 17 members of his family to establish his exclusive right to perform the ceremonial of breaking a curd pot in the precincts of the temple of Shri Vithobá and Tukárám at Dehu, on Fálgun Vadya the 7th of each year. He alleged that in the year 1867 the defendants broke a curd-pot of their own on the same day in the same place, and thereby deprived the plaintiff of the benefit of a donation of Rs. 5,000 which one Kalliánji Shivji intended to make, but did not make in consequence of the defendants' wrongful act.

The defendants denied the plaintiff's exclusive right as claimed, and alleged that their act of breaking their own pot was not an interference with the plaintiff's right if any, and contended that the damages claimed by the plaintiff were excessive.

The Munsif awarded the claim, but the Assistant Judge, in appeal preferred by some of the defendants, held that the defendants' act was not tortious and that the damages claimed were too remote. He, therefore, reversed the Mun-

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sif's decree against the defendants, who appealed to him and awarded nominal damages to the extent of Rs. 50 against those who had not appealed.

The special appeal was heard before LLOYD and KEMBALL, JJ.

Vishvanáth Náráyan Mandlik for the appellants :—A decree of a competent court has already declared the plaintiff exclusively entitled to the management of the Dehu temple and its revenues, and this particular privilege of breaking a pot of curds is expressly included in the award. Some of the defendants have admitted positive interference on their part with the plaintiff's right. But active obstruction need not have been used ; because the mere fact of the defendants' breaking their own pot is sufficient to constitute a violation of the plaintiff's right. The damages claimed are not remote : Sedgewick on Damages pp. 85, 96, 97, 105, 112 and 118. ; *Lynch* v. *Knight* (*a*).

Bahiravnáth Mangesh for the respondent :—As to the decree referred to, it has not been shown that the defendants were parties or privies to it, nor is it proved that the defendants broke any pot of the plaintiff's. They broke a pot of their own in a place different from the plaintiff's though near it, and that is not any interference with the plaintiff's alleged right. The damages claimed are too remote.

Cur. adv. vult.

PER CURIAM :—In this case the plaintiff, claiming to himself the exclusive right to perform all the different duties connected with the Sawasthán of Shri Vithobá and Tukárám Bává in the village of Dehu, among which is the ceremony of breaking annually, on Fálgun Vadya 7th, the *dahi handi* or earthen pot containing curds, alleged that on that particular day in Shake 1788 (the 28th March 1867) the defendants, 17 in number and all members of his family, prevented his performing this last named ceremonial and thereby deprived him of a sum of Rs. 5,000 which one Kalliánji

(*a*) 9 Ho. Lo. Ca. 577.

Shivji, whom the Munsiff speaks of "as the well-known railway contractor whose munificence is known throughout India," would have presented to the plaintiff, on that occasion, in order, as Kalliánji deposes, "that my charity may be known," had he (plaintiff) broken his pot, and special damages to the amount of Rs. 5,000 were claimed.

The Munsif found that 8 of the defendants did interfere with the plaintiff's right of breaking the pot by breaking one themselves, and that therefore the plaintiff was entitled, as against them, to recover the full sum claimed. Against this decree two of the 8 defendants appealed, contending that they had not prevented the plaintiff breaking his own pot and that the damages had been extravagantly laid for the purpose of injuring them; and the Assistant Judge, finding that the appellants had not broken the plaintiff's pot, but only one of their own, held that this did not constitute a tortious act, and therefore, so far as the appellants were concerned, reversed the Munsiff's decree, remarking that if he had found in the plaintiff's favour on the question of tort or no tort, he considered the damages awarded were excessive, as the damage proved was "too remote from the cause of action." The Assistant Judge then, being of opinion that the plaintiff was "only entitled to nominal damages if any," modified the decree on the authority of Section 337 of the Code of Civil Procedure against those defendants who had been found liable in damages, but had not appealed, and awarded the plaintiff Rs. 50 with proportionate costs.

The special appellant now presents, for our consideration, three main points, 1st, that the Assistant Judge misconstrued the admissions of Rámchandra and Rámkrishna (against whom the Munsiff's decree was reversed) in holding that they did not prove that they had positively obstructed the plaintiff in the exercise of his right; 2nd, that if there was no positive obstruction, still the act of the eight defendants in breaking their own pot was an infringement of his (plaintiff's) right; and 3rd, that the special damages claimed were the direct and immediate result of the said tortious act.

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As regards the facts of the case, we think that we may, for the purposes of this appeal, take it as sufficiently established that the exclusive right to perform the *dahi hándi* ceremony was in the plaintiff and that on the occasion in question the defendants, in respect of whom this appeal is preferred, did break their own pot, albeit they did not in fact prevent the plaintiff from breaking his. The Assistant Judge seems to have supposed that the wrong complained of was the breaking of the plaintiff's pot by the defendants, and therefore to have considered the appellants before him in no way liable; but there was no such allegation in the plaint. It has not been seriously contended in argument, nor indeed does it appear to us, that there would be any foundation for such a contention that the defendants positively prevented the plaintiff from breaking his pot. We have, therefore, to determine whether there has been such a violation of the plaintiff's right as to entitle him to damages, and if so, whether the damages claimed were, as is alleged, the direct and immediate result of that wrong. As to the first question we think there can be no room for doubt that the act of the defendants, as found proved, was injurious to the plaintiff and occasioned immediate and necessary loss. The respondents contended that they did not violate the plaintiff's right because the ceremony was always performed in front of the "Garud-pár," a stand whereon rests the image of the eagle, whereas they broke their pot before Tukárám Bává's image. But this seems to us a mere evasion of the truth; both the images are within the sacred precincts of the Sawasthán and in close proximity, and there can be no doubt that the performance of the ceremony by a third person in any portion thereof was an infringement of the plaintiff's established right. With regard, however, to the second question whether the alleged loss to the plaintiff followed the defendants' act as its natural and proximate consequence, we consider that the Assistant Judge held rightly that the anticipated bounty was a matter too remote to be taken into account in ascertaining the true measure of damages. It has not been suggested, as observed by the Assistant Judge, that "to the exercise of the right of breaking the *hándi* are attached fees or emoluments;"

in point of fact the giving or withholding of the Rupees 5,000 rested on the arbitrary choice of a third party. It seems needless to refer to English cases in support of the proposition that the loss of the donation was not such a consequence as would flow in the ordinary course of things from the defendants' wrong; indeed the present case appears to us to be analogous to the well-known one of the midshipman who being detained on shore alleged that he had lost a lieutenancy which he would have gained, if he had been afloat; which has frequently been quoted as an *ad absurdum* case. It is clear that the wrong would not have been followed by the alleged damage, if some facts had not intervened for which the defendants were not responsible; first, there was the act of the plaintiff in not breaking his own pot at the usual place, which may have resulted from caprice or some other cause quite unconnected with the defendants' act, and then again there was the act of the intending donor changing his mind and not giving the money.

The Court, however, thinks that, although the plaintiff failed to prove the special damages alleged, the Assistant Judge was right, as against those defendants whose liability he thought he was compelled to acquiesce in, as they had not appealed, in awarding general damages. The Court, therefore, amends the Assistant Judge's decree so far as to include in it the two defendants Rámchandra and Rámkrishna with proportionate costs throughout.

Decree amended.