APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Crump.

BHAGOJI GANU RAUT (HEIR OF ORIGINAL PLAINTIFF No. 2), APPELLANT *v.* BABU BALU KADAM (ORIGINAL DEFENDANT), RESPONDENT.* 1919. December 19.

Vatandar barbers—Right to officiate on ceremonial occasions.

A Vatandar barber has the right to perform services as a barber on ceremonial occasions, and is entitled to recover customary fees from another barber who has acted in violation of his right.

SECOND appeal from the decision of T. R. Kotval, Assistant Judge at Ratnagiri, reversing the decree passed by H. N. Mehta, Subordinate Judge at Chiplun.

Suit for injunction.

The plaintiffs alleged that they were the Vatandar barbers of the village of Velaneshwar and as such they were entitled to officiate as barbers at the *Kshaur* (tonsure) ceremonies in the village. They complained that the defendant who was not a Vatandar barber had officiated as a barber at the houses of four persons in the village and received customary fees from them. They therefore sued to obtain a permanent injunction restraining the defendant from acting as a Vatandar barber in the village and to recover Rs. 5 as damages from him. The defendant contended, *inter alia*, that he was also a Vatandar barber.

The trial Court held that the plaintiffs had proved that they had the exclusive right as Vatandar barbers at Velaneshwar and awarded them Re. 1 as damages; but declined to give the injunction.

On appeal, the Assistant Judge reversed the decree and dismissed the suit, holding that though the plaintiffs were Vatandar barbers, the expression "Vatandar barbers" did not *ipso facto* carry with it any rights.

*Second Appeal No. 694 of 1917.

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The plaintiffs appealed to the High Court.

D. S. Warde, for the appellant :—The lower appellate Court has misapprehended the observations of Arnould J. in the case of *Muhammed Yussub* v. *Sayad Ahmed*[1] at p. 37 of the Report. If there were customary fees payable in respect of any office useful to the village community, an action would lie in respect of their privation by a wrongful intruder into the office. A village barber is in the same position as a village Joshi, and has a right to sue any one who is not a Vatandar barber of the village and yet encroaches upon the functions of the Vatandar barber.

K. N. Koyajee, for the respondent :—Arnould J. in *Muhammad Yussub* v. *Sayad Ahmed*[1] did not speak of customary fees alone as actionable, but laid down that "*fixed and certain* payments annexed to the discharge of official duties" were actionable. No doubt West J. explained in *Vithal Krishna Joshi* v. *Anant Ramchandra*[2] and Westropp C. J. in *Dinanath Abaji* v. *Sadashiv Hari Madhave*[3] that the fees need not be of a fixed, but may be of a reasonable amount. But I submit that there can be no such thing as a customary office of a Vatandar barber, as a barber only shaves the head and does not perform any ceremonial office as a village Joshi or Priest does.

[CRUMP, J.—But the defendant himself stated in his written statement that he was a Vatandar of the village along with the plaintiffs].

I submit that the statement does not debar me from urging now that the barber's office is not a Vatan and cannot be acquired by custom. It is not a hereditary office. And the lower appellate Court has found as follows : "The expression Vatandar barber does not

(1) (1861) 1 Bom. H. C. (Appx.) XVIII, XXXVII.

(2) (1874) 11 Bom. H. C. 6 at p. 8.

(3) (1878) 3 Bom. 9 at p. 11.

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ipso facto carry with it any rights, I do not think that the remarks at p. 104 of I. L. R. 36 Bom. applicable to a hereditary Vritti apply to the Vatan of a barber as is claimed in this case." The payments to a barber are not customary and fixed fees, but are only gratuities.

SHAH, J. :—The plaintiffs in this case claimed to be the Vatandar barbers of Velaneshwar and five other adjoining villages and as such claimed the exclusive right to officiate as barbers on ceremonial occasions in those villages. They sued the defendant for an injunction and damages in consequence of his having rendered services as a barber on some ceremonial occasion to certain Bhandaris on the 11th March 1915.

The defendant denied the exclusive right of the plaintiffs to officiate on all ceremonial occasions and claimed to be a Vatandar barber himself in the said villages.

The trial Court found all the issues, except one relating to injunction, in favour of the plaintiffs and passed a decree in their favour for damages.

The defendant appealed to the District Court and the plaintiffs filed cross-objections. The learned Assistant Judge, who heard the appeal, held that the suit was maintainable and that the plaintiffs were Vatandar barbers. He held, however, that the expression "Vatandar barbers" did not carry with it any rights and that the plaintiffs had no right to require the Bhandaris to get the *Kshaura* done by them and that the defendant was not liable for damages. He purported to follow the test laid down in *Muhammad Yussub* v. *Sayad Ahmed*[1]. The plaintiffs' suit was accordingly dismissed. The plaintiffs have appealed to this Court, and it is urged on their behalf that on the finding of the lower appellate Court the plaintiffs' claim for damages

[1] (1861) 1 Bom. H. C. Appx. XVIII at p. XXXVII.

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ought to be allowed, that the observations in *Muhammad Yussub* v. *Sayad Ahmed*[1] have not been properly understood by the lower appellate Court, that the office of a village barber is useful to the village community, that like a village Joshi, a village barber may acquire certain customary right to perform services as a barber on ceremonial occasions, and that such a barber would be entitled to the customary, though not necessarily fixed, fees from another barber, who has no right to perform similar services in the said villages, and who has deprived the Vatandar barber of his usual fees, by officiating to his detriment.

On behalf of the respondent it is urged that such a right is incapable of acquisition by custom, that the reason underlying the decisions relating to a village Joshi cannot apply and ought not to be applied to a village barber, that the payments made on ceremonial occasions to the barber are mere gratuities and not fixed fees, and that the test laid down in *Muhammed Yussub's case*[1] has been correctly applied by the lower appellate Court.

Apart from the findings of fact recorded by the lower appellate Court the respondent's contentions would have considerable force. In the present case it is found that the plaintiffs are Vatandar barbers, and that the defendant is not a Vatandar barber, though he claimed to be one, in respect of the villages in question. The lower appellate Court observes that "the conclusion from the whole evidence is that it is customary to recognise the right of a Vatandar barber to do service for his customers". The finding derives considerable support from the defence raised by the defendant that he himself had such a right in common with the plaintiffs. I do not see any sufficient reason not to

[1] (1861) 1 Bom. H. C. Appx. XVIII at p. XXXII.

accept this finding. On the basis of this finding, it is difficult to distinguish the case of a village barber from that of a village Joshi. The right of a village Joshi to officiate and to receive the customary dues on all ceremonial occasions has been recognised in this Presidency: see *Vithal Krishna Joshi* v. *Anant Ramchandra*[1] and *Raja Valad Shivapa* v. *Krishnabhat*[2]. It is true that the right of a village barber has not been similarly affirmed in any reported case. The learned pleaders in the case have not been able to draw our attention to any precedent in favour of such recognition, and I am not aware of any. It is quite possible that the Vatandar barbers with a right to officiate do not exist in the Presidency to the same extent as the hereditary village Joshis, and that may be a possible explanation of the absence of any precedent on the point. However that may be, we have to consider the question on its own merits.

In view of the finding that the plaintiffs are entitled to officiate on ceremonial occasions by custom, I do not see any sufficient ground to refuse to recognise their right. It is a customary right, which is not in any sense opposed to public policy, and it is not suggested in the argument that it is opposed to public policy. It is not unreasonable; and a barber is one of the recognised village servants, who are useful to the village community. It may be that his services are not religious in the sense that a village Joshi's services are. But the services of a barber may be essential on ceremonial occasions, and may form part of the religious ceremonies taken as a whole. I am, therefore, of opinion that there is no sufficient reason not to give effect to the finding of the lower appellate Court.

I am unable to agree with the lower appellate Court that the payments made to the barber for his services

(1) (1874) 11 Bom. H. C. 6. (2) (1879) 3 Bom. 232.

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on ceremonial occasions are mere gratuities. They are customary payments for services though they may not be fixed. As pointed out in *Vithal Krishna Joshi* v. *Anant Ramchandra*[1] they need not be fixed. They may vary within certain limits, which, though not defined, are usually well understood and recognised. The trial Court refused to grant any injunction but allowed relief to the plaintiffs on the lines accepted in the decisions relating to the village Joshis. I think that under the circumstances that was the proper decree.

I would, therefore, reverse the decree of the lower appellate Court and restore that of the trial Court with costs in this Court on the respondent. Each party to bear his own costs in the lower appellate Court.

CRUMP, J.:—I concur.

Decree reversed.

R. R.

[1] (1874) 11 Bom. H. C. 6.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice.

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December 19.

NURMAHOMED GULAM RASUL (ORIGINAL PLAINTIFF), APPELLANT *v.* THE SURAT CITY MUNICIPALITY (ORIGINAL DEFENDANT), RESPONDENT*.

District Municipal Act (Bom. Act III. of 1901), section 151 (1)—Use of property for a lime kiln—Nuisance—Municipality to determine whether the use is or is likely to be a nuisance—Power of the Court to interfere with the discretion of the Municipality.

The use of property for the purpose of a lime kiln would be a nuisance within the meaning of section 151 (1) of the District Municipal Act (Bom. Act III of 1901) and under that section it is the Municipality who is to

* Second Appeal No. 101 of 1918.