1905.
June 26.

BABA APPU *et al.* *v.* ABERAN *et al.*

D. C., Matara, 26,827.

Fishing—One known method of fishing—Innovation therein—Fishing custom —Its validity—Its reasonableness.

Where it was usual to catch fish in a certain place with one known kind of net, and where, when some fishermen introduced in the same place an improved method of fishing by a different kind of net, it was contended that this innovation amounted to a breach of custom, the proof of the existence of such custom being the fact of there having been fishing by only the first kind of net till the time of such innovation—

Held, that it was essential that a custom to be binding should be reasonable, and that the use of one known method of fishing does not raise a custom in its favour strong enough to preclude the introduction of improved methods.

IN this case the plaintiffs sued the defendants for damages, amounting to Rs. 375, arising from the interference of the latter in the free exercise of their right of fishing with a *nool-del* in a place in Matara called "Moderawella Waraya."

The defendants had been in the habit of fishing with a drag net called *ma-del*. Each of them took his turn in rotation.

On the 26th January, 1873, it was the third defendant's day to go out fishing. He, however, did not do so, because there was no shoal near enough. Seeing that no one went out fishing, the plaintiffs proceeded thither and began to fish with *nool-dels*, the use of which was objected to by the *ma-del* fishermen.

A quarrel ensued between the plaintiffs and defendants, in the course of which the defendants let go the fishes in the *nool-del*. It was the price of these fishes that the plaintiffs claimed.

The District Judge (Mr. J. A. Swettenham) found for the plaintiffs as follows on 6th September, 1873:—

"The issues in this case are: (1) were plaintiffs interrupted by defendants as alleged ? and (2) had plaintiffs a right to fish where the cast their net ?

"As regards the first point, I consider that it has been fully proved that plaintiffs did cast their *hil-del* and did encircle a small shoal of fish which they were prevented from taking by defendants' wrongful act in lifting up the net so as to allow the fish to escape ; all the admitted facts confirm plaintiff's story.

"The spot at which plaintiffs were fishing appears to have been 350 or 400 fathoms off the shore close to some rocks and on the shore side of them. Defendants plead a right by custom to fish

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the whole of Modarawella Waraya by drag nets (*ma-del*) to the exclusion of all other modes of fishing. It appears that these drag nets are used in rotation a day for each net, and that it was third defendant's turn on the day in question, but he did not fish as there was no shoal near enough to capture; a drag net cannot be hauled over rocks.

"I am not satisfied that plaintiffs were fishing over ground usually swept by drag nets. The evidence does not establish this, and some of the statements go decidedly to show that plaintiffs were well outside of the ground usually traversed by drag nets. A *ma-del* does not exceed 600 fathoms in length; it is stretched in the shape of a segment of a circle from the shore; the farthest point of a large net run along the shore would not exceed 240 fathoms, which is 100 fathoms short of plaintiffs' station on the day in question.

"The custom pleaded by defendants does not appear to me to form a defence in this case. It was set up as a defence in case No. 21,959, District Court, and was then pronounced to be untenable by the Supreme Court.

"It is unreasonable that the *ma-del* owner, whose turn it is to fish, should, when not occupying the water in any way, be able to prevent any one else fishing. It is unreasonable that a custom which has existed solely for the convenience of drag net owners should be used as an engine for preventing the introduction of new and improved nets. In fishing, as in every other industry, improved appliances when introduced diminish the profits of all who do not at once adopt the innovation. The true remedy for the sufferers is a timely adoption of the invention, and not an attempt to restrict the use of it.

"When no other net is being used at the spot it seems to me that the owners of a *hil-del* or of any other kind of net have a perfect right to fish wherever they please, whether a drag net is usually drawn over the place or not.

"Judgment for plaintiffs against defendants jointly and severally for the sum of Rs. 300 damages and costs of suit."

The defendants appealed.

Morgan, *Q. A.*, for appellant.

Ferdinands, for respondent.

26th June, 1874. The judgment of the Supreme Court was delivered as follows by CREASY, C.J.—

It was held by this Court in case No. 16,645, C. R., Galle (*Lorensz's Report, p. 161*), that the common right of fishing in the open sea may be controlled by custom regulating the time and mode of

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fishing; but such custom must be reasonable, and the Supreme Court does not think a custom reasonable which excludes all other modes of fishing except that with the *ma-del*, which is a huge and costly net, and requires a great number of persons to work it. Such a custom was held untenable by this Court in the case No. 21,959, District Court, Matara. Moreover, this alleged custom is not proved in the present case. The only evidence in support of it is that *ma-del* nets were exclusively used until *nool* nets were introduced into the district. To hold that the use of the only known form of net for a number of years raised a custom by which any other form of net was excluded would be a bar to any kind of improvement in this branch of industry. Since the introduction of the *nool* net the matter has been the subject of constant litigation, and the alleged custom has never been acquiesced in by the owners of the latter kind of nets.