Present: De Sampayo, J. and Schneider A.J. 1919.

DENISHAMY *et al. v.* DAVITH APPU *et al.*

330—D. C. Matara, 7,308.

Fishing with prohibited nets—Causing fish encircled to escape—Liability—Tort—Damages.

Fishermen who had completed the kraaling of fish were held to be entitled to maintain an action for damages against those who had cut their net and cause the fish to escape, though the net they used might be a prohibited one.

THE facts are set out in the judgment.

Bawa, K.C., for plaintiffs, appellants.

A. St. V. Jayawardene, for defendants, respondents.

Cur. adv. vult.

March 19, 1919. DE SAMPAYO J.—

The plaintiffs and the defendants are fishermen of Mirissa, in the District of Matara. The plaintiffs brought this action to recover damages from the defendants, alleging that they had, on February 21, 1916, fished in the sea at Mirissa with a net known as *Madela*, and had enclosed a large shoal of fish, and that while they were drawing the net ashore, the defendants came in boats and wrongfully and maliciously disturbed the shoal of fish, cut the net, and caused the fish to escape. At the trial the District Judge found the facts distinctly in favour of the plaintiffs, and gave them judgment for Rs. 450, with costs of action. On an appeal taken by the defendants, this Court, while affirming the findings as to the facts, considered that the District Judge had wrongly refused to frame an issue, suggested by the defendants, whether the net used by the plaintiffs was a prohibited one, and sent the case back for that issue to be framed and tried. At the further trial that issue was formulated and evidence heard thereon, and the District Judge decided it against the plaintiffs, and dismissed the action, with costs.

It appears that the use of the *madela* is regulated by the Weligam Korale fishing rules framed under the Village Communities Ordinance, No. 24 of 1889, and published in the *Government Gazette* of July 19, 1912. Rules 5 and 6 provide for registration of *madel*. Rule 7 makes it unlawful to use any *madel* that have not been so registered. Rule 8 provides that every *madela* so registered shall be cast by turns in the order of the register. Rule 12 mentions the

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nets other than *madel* which are allowed to be used within the limits to which the rules apply; and rule 14 declares that " except the foregoing nets, no other nets whatever shall be used within the above limits." Rule 20 imposes a penalty for breach of the rules. The plaintiffs' *madela* was in fact registered under the above rules, but it is said that the net has since been altered, and that notwithstanding its registration it must be taken as unregistered, and therefore a prohibited net. I may say that there is no express rule touching this point, and considering the restrictive effect of these rules on a lawful calling, I am not prepared to give an extensive interpretation to the rules. In my opinion the plaintiffs' *madela* ought not to be held to be prohibited, or its use unlawful. It appears that a *madela*, which is usually made of coir, consists of three parts, viz., the main net, the *madihe* or pocket into which the encircled fish fall, and the two *mandas* or ropes, one of which is attached to the boat and the other to the shore. It is said that when the plaintiffs' *madela* was registered it was wholly of coir, but that on the day in question a pocket made of *hana* or hemp was substituted for the coir pocket. This is the alteration which is said to make the use of the *madela* on that day unlawful. A hemp pocket is more closely woven than a coir pocket, and is capable of securing smaller fish. According to the Vidane Arachchi, who is also the registering officer, the difference in material is not of much consequence. He says, " the *madihe* (pocket) of a *madela* can be made of anything," and he admits that a *madela* with a hemp pocket cannot be described as prohibited. He adds that he had registered a number of *madel* with hemp pockets, and that the plaintiffs themselves had registered such *madel* both in years previous to and in 1917. There is good reason to believe the Vidane Arachchi was mistaken when he said that the *madela* in question had a coir pocket when he registered it. He spoke from memory rather than from his register. In the register the plaintiffs' *madela* is described as of coir, which it was. He finally stated, what appears to me to make the matter very clear, that *madel* with coir pockets were used in the south-west monsoon, and *madel* with hemp pocket was used in the north-east monsoon. This incident took place in the month of February, when the north-east monsoon is still on, and it seems to me that the plaintiffs had not used the *madela* unlawfully.

Even if the net was altered in the manner alleged, the question arises whether the defendants, who unlawfully disturbed the plaintiffs in their occupation, cut their net, and caused them serious loss, are free from civil liability. Mr. Jayawardene argues that as the plaintiffs' act of fishing with the *madela* in question was unlawful, they cannot sue for damages in a court of law, and he cites *Wills v. Higgins* [1] in support of his argument. That is a tundu case, and what is held there is that the planter, who issued a tundu for coolies,

[1] *(1911) 14 N. L. R. 131.*

but had in violation of the Labour Ordinance, 1909, failed to register them on the estate register, could not recover on the contract constituted by the tundu, which implies that the coolies were legally in his service. But the decision has no bearing on the point now under consideration. I shall here assume that in consequence of the Village Committee rules, and the alleged alteration of the net after registration, the use of the net was prohibited. What is the result? The plaintiffs may be liable to be prosecuted for breach of the rules, but are they prevented from claiming damages against the defendants for their wrongful act?

The principle applicable to the case, I think, is that which declares that a person who is in possession of property, though he may not have come by it legally, can maintain trespass against all persons except the true owner. Here the plaintiffs were the lawful owners of the net, and they had reduced into possession a shoal of fish. The defendants were entitled neither to the net nor to the fish and are *primâ facie* liable to the plaintiffs for what they did by force and without justification. Our law on the subject of the rights arising from the successful enclosure of fish in a kraal or net is fully discussed in D. C., Tangalla, No. 2,961.[1] It was there held that the plaintiffs, who had completed the kraaling of fish, though their method was unlawful, were entitled to maintain an action for damages. That is a direct authority, for this Court concluded the judgment as follows: "In the present case the plaintiff's mode of fishing was unlawful, but they had obtained such complete possession of fish, which were *feræ naturæ*, as to give them a property by first occupancy. The defendants were mere wrong-doers, and the case comes completely within the principle already quoted from the *Digest: adversus extraneos vitiosa possessio prodesse solet.*"

I think the judgment appealed against is erroneous in respect of law. The District Judge's assessment of damages in his first judgment is quite reasonable. I would allow the appeal, and give the plaintiffs judgment for Rs. 450, with costs in both Courts.

SCHNEIDER A.J.—I agree.

Appeal allowed.

[1] *Vand. Rep. 247.*