1957 *Present :* **Basnayake, C.J., and Sinnetamby, J.**

S. KANDIAH, Appellant, *and* VILLAGE COMMITTEE OF ATCHUVELY, Respondent

S. C. 555—D. C. Jaffna, 8,175

Village Communities Ordinance (amended Cap. 198)—Date of its commencement—Vesting of property in a Village Committee—Sections 39, 41 (2) (a)—Effect of words " principal Ordinance " in an amending enactment—Ordinance No. 60 of 1938, s. 4—Interpretation Ordinance, s. 5 (1) (4).

Section 39 of the Village Communities Ordinance reads as follows :—

" All property movable or immovable enjoyed or controlled at the commencement of this Ordinance by the inhabitants of any village area or of any area deemed by virtue of any written law to be a village area under this Ordinance, shall be vested in the Village Committee constituted or so deemed to have been constituted for that area under the provisions of this Ordinance . . . . "

Held, that the words " commencement of this Ordinance " in the Section meant, according to the words " principal Ordinance " in section 4 of the Village Communities Ordinance No. 60 of 1938, read with sub-sections (1) and (4) of section 5 of the Interpretation Ordinance, the commencement of Ordinance No. 9 of 1924, i.e., 1st November 1924.

Per Basnayake, C.J.—The expression " immovable property " in Section 39 of the Village Communities Ordinance is used in the sense of corporeal immovable property only and does not include incorporeal rights. Therefore, a right to water cattle at a kerni or pond, being an incorporeal right, cannot be vested in a Village Committee by that Section.

APPEAL from a judgment of the District Court, Jaffna.

H. V. Perera, Q.C., with *Sir Ukwatte Jayasundera, Q.C.*, *J. Senathirajah* and *N. K. Rodrigo*, for Defendant-Appellant.

S. J. V. Chelvanayakam, Q.C., with *E. B. Wikramanayake, Q.C.* and *V. Arulambalam*, for Plaintiff-Respondent.

Cur. adv. vult.

May 20, 1957. Basnayake, C.J.—

This is an action by the Village Committee of Atchuvely in respect of a land on which a kerni or pond existed prior to the year 1948. The claim is founded entirely on the ground that till then the public watered their cattle at the kerni which was in the land. In that year the defendant purchased the land and shortly afterwards filled up the kerni and erected thereon shop buildings costing about Rs. 20,000.

It would appear that for about 60 years prior to the purchase of the land by the defendant, cattle had been taken to the kerni for the purpose of watering them. None of the witnesses called by the plaintiff say that the persons who took the cattle to this kerni were all inhabitants of Atchuvely and that they did so as of right. The evidence does not establish when the kerni first came into existence. But it appears that

about 60 years ago one Arunar built some steps out of dressed stone to enable cattle to reach the water, but there is not a single witness who has been able to say why Arunar did this. Whether it was an act of kindness to animals or whether it was an assertion of a right does not appear from the evidence.

The documentary evidence produced by the plaintiff does not show that prior to 1939 the Village Committee cleaned the kerni although the oral evidence shows that it was cleaned by the Village Committee even before and as far back as 1924, but that evidence is of a vague and uncertain character.

A claim such as that made by the Village Committee should be established by clear and satisfactory evidence (*Smit v. Russouw & others* [1]) especially where it is sought to dislodge the title claimed by the defendant going as far back as 1925 or even 1904, which is the date of the plan relied on by him.

The kerni appears to have been generally in an insanitary condition and not at all times suitable for watering cattle. In 1929 the Sanitary Inspector reported that the kerni was dirty and money was voted to clean it. In 1932 it was reported that the pond was in " a very dirty condition and gave out a 'stinking smell' ", and money was voted again to clean it. In 1934 it was again reported that the pond was causing " stinking and unpleasant smells " and should be cleaned.

The plaintiff relies on section 39 of the Village Communities Ordinance. The material portion of that section reads—

> " All property movable or immovable enjoyed or controlled at the commencement of this Ordinance by the inhabitants of any village area or of any area deemed by virtue of any written law to be a village area under this Ordinance, shall be vested in the Village Committee constituted or so deemed to have been constituted for that area under the provisions of this Ordinance. "

In the first place it is necessary to determine the date of commencement of the Ordinance as section 39 vests in the Village Committee property enjoyed by the inhabitants on that date. The section in its present form was enacted by section 4 of Ordinance No. 60 of 1938 which introduced all the sections of the Village Communities Ordinance commencing from section 3 and ending with section 63. The enacting section reads:—

> " Sections 3 to 36, both inclusive, of the principal Ordinance are hereby repealed, and the following sixty-one sections are hereby inserted in the principal Ordinance and shall have effect as sections 3 to 63 thereof. "

What is the meaning to be given to the words " at the commencement of this Ordinance " in section 39. Do they mean at the commencement of Ordinance No. 9 of 1924 or at the commencement of Ordinance No. 60

[1] *1913 C. P. D. 847 at 853.*

of 1938 ? The answer to that is to be found in the words " principal Ordinance " in section 4 of Ordinance No. 60 of 1938. The effect of the use of the words " principal Ordinance " in an amending enactment is stated in section 5 of the Interpretation Ordinance. The material portions of that section read :—

" (1) In any Ordinance which amends any other Ordinance, the expression ' the principal Ordinance ' shall mean that other Ordinance, that is to say, the Ordinance which is amended.

" (4) Every amending Ordinance or Act shall be read as one with the principal Ordinance, enactment or Act, to which it relates. "

The sections inserted in Ordinance No. 9 of 1924 by Ordinance No. 60 of 1938 have therefore to be read as one with the principal Ordinance. The effect of reading section 39 as one with Ordinance No. 9 of 1924 is to make the reference to " this Ordinance " in that section a reference to Ordinance No. 9 of 1924 and not the amending Ordinance No. 60 of 1938. The " commencement of this Ordinance " would therefore mean the commencement of Ordinance No. 9 of 1924, i.e., 1st November 1924.

As the claim to the land in which the kerni was is founded on the ground that the public enjoyed the right of watering their cattle at the kerni, in order to succeed in its action the plaintiff has to establish that the particular right which it claims is movable or immovable property enjoyed or controlled by the inhabitants of the village area on 1st November 1924.

Now the right that is claimed is the right of watering cattle. There is evidence that cattle were watered at this kerni. But it is not clear whether they were watered as of right or not and whether it was the inhabitants alone who watered the animals. Is the right claimed movable or immovable property ? Clearly it is not movable property. Is it immovable property ? To answer that question it is necessary to ascertain the meaning of immovable property in this context. In our law property falls into two divisions, corporeal and incorporeal property, and corporeal property is further subdivided into movable and immovable property. There is nothing in the context of section 39 of the Ordinance which requires that the expression immovable property should be interpreted in any other than the ordinary sense. In that sense it means only tangible or corporeal immovable property, viz., land.

My view gains support from section 41 (2) (*a*) of the Ordinance from which it would appear that where the Legislature intended to vest rights over property as distinct from property it did so expressly.

Now a right to water cattle is an incorporeal right and would therefore not properly fall under the description of immovable property in a context such as this. That view of the matter concludes the case as far as the plaintiff is concerned because the right it claims, being an incorporeal right, is not vested in the Village Committee by section 39 of the Ordinance.

Learned counsel for the appellant submitted that the right contemplated in section 39 is a right which must be exclusively enjoyed by

the inhabitants of the village area and that that section does not contemplate rights which the public generally and not only of the village area enjoy. Learned counsel contended that according to the Ordinance the kerni being a pond situated by the side of the Chunakam Valli road, a public road, it was open to any person who led cattle along the road or drove any bullock-driven cart along it to water his animals at the pond as of right. Such a right which is not exclusively enjoyed by the inhabitants, he contended, is not a right which is vested in the Village Committee by section 39. As stated earlier, the evidence does not show that the kerni in question was enjoyed exclusively by the inhabitants of Atchuvely. Not one witness who took his animals to drink water at this kerni has been called. The witnesses are casual observers such as Advocates and local residents who deposed to the fact that they had seen animals being taken to this kerni for the purpose of watering. They also say that the Village Committee from time to time cleaned the kerni. In the absence of evidence that the pond was in the exclusive enjoyment of the inhabitants learned counsel contended that it may be regarded as a public pond and that such a public pond would be under the control of the Sovereign and would not be vested in the Village Committee unless a vesting order under section 45 of the Crown Lands Ordinance had been issued. The evidence is that there is no such vesting order.

In view of the conclusion I have reached on the meaning of the expression immovable property in section 39, it is not necessary to deal with this submission of counsel.

The learned trial Judge has rejected the evidence of title produced by the defendant on the ground that the inhabitants of Atchuvely had possessed the property from time immemorial and used it as public property. He has evidently not kept his attention focussed on section 39 which is all-important. For unless the claim of the plaintiff comes within the ambit of that section he cannot succeed.

As I have pointed out above the Village Committee is not entitled. to maintain this action against the defendant. Nor is there any reason for rejecting the defendant's title merely on the ground that the kerni on this land was at one time used for watering cattle. There is evidence that the water of this kerni was used for the purpose of irrigating the land which is now owned by the defendant and which was at that time owned by Dr. John, his predecessor in title. The only person who can speak to it at first hand is the witness Gunaratnam who was during the relevant period first a pupil and later a teacher at the Atchuvely English School which adjoins the land in dispute. He says that water from the kerni was used for the purpose of irrigating Dr. John's land from 1920 till 1927. That the water was again used in 1941 and 1942. The learned Judge does not reject the witness's evidence on this point. There is therefore definite evidence of the user of the kerni by the defendant's predecessors in title for purposes other than the watering of cattle.

For the above reasons the defendant's appeal is allowed and the plaintiff's action is dismissed. The defendant is entitled to his costs both here and below.

SINNETAMBY, J.—

I agree with the order made by my Lord the Chief Justice allowing this appeal. I would base my decision on the following grounds.

The right claimed by the plaintiff Village Committee is a right to the ownership to the land described in the schedule to the plaint. The decree against which the present appeal has been preferred declares the plaintiff entitled to the land described in the schedule to the decree, in extent one lacham, which includes the kerni in question. The plaintiff Village Committee makes its claim firstly on the basis that the land and kerni having been used and enjoyed by the inhabitants of Atchuvely it vested in the Village Committee by virtue of the provisions of section 39 of the Village Communities Ordinance and, secondly, on prescriptive possession.

Dealing first with the claim to title based on prescriptive possession I agree respectfully with the views expressed by my Lord the Chief Justice that the oral evidence of possession is of a vague and uncertain character. The only evidence of possession relied on by the plaintiff Village Committee is that which relates to the cleaning of the kerni. In my view the mere fact that the kerni was cleaned occasionally by the Village Committee does not establish adverse possession sufficient to establish a claim by prescription. The cleaning may well have been done for sanitary reasons and in the absence of other cogent evidence of possession *ut dominus* I take the view that the claim based on prescriptive possession must fail.

In regard to the main ground on which the Village Committee bases its claim, in order to succeed the Village Committee must show that the inhabitants of Atchuvely " enjoyed and controlled " the kerni and the land appurtenant to it when the Village Communities Ordinance came into existence in 1924.

My Lord the Chief Justice in his judgment which I have had the advantage of reading has set out, on this aspect of the case, the argument of learned Counsel who appeared for the appellants. I agree with the contention that the respondent, on whom the burden lies, has failed to prove that the kerni in question was *controlled and enjoyed* mainly if not exclusively by the inhabitants of the village area. The situation of the kerni by the high road and the existence of a weight rest close by suggest that they were intended for the weary traveller from afar to rest and to water his cattle. Had the kerni been by the side of a minor village road one may have been justified in coming to a different conclusion. The evidence does not disclose that those who rested and watered their cattle were the inhabitants of that area : on the contrary the chairman of the Village Committee, Mr. Veerasingham, in the course of his evidence stated that the kerni was used by members of the public which suggest that it was not confined to the inhabitants of the area. User from time immemorial by the public, as found by the learned trial judge, may establish a right in the public to the use of the kerni but it would not vest proprietary rights in a section of the public, viz., the inhabitants of Atchuvely as represented by the Village Committee.

Appeal allowed.