1978 *Present:* **Malcolm Perera, J. and Wanasundera, J.**

A. C. MOHAMED NASUHA, Petitioner

and

OFFICER-IN-CHARGE, HAMBANTOTA POLICE, and Another, Respondents

S. C. 656/76—M. C. Hambantota, 78014

Administration of Justice Law, No. 44 of 1973, sections 62, 63—Right to stack paddy stalks before threshing—Whether servitude—Enjoyment of right intermittent—Has person vested with such right possession as contemplated by these sections—Applicability of these sections in such case.

The right of stacking the paddy stalks before the threshing is a right in the nature of a servitude and accordingly such a right would come within the meaning of the expression "dispute affecting land" in section 62 of the Administration of Justice Law, No. 44 of 1973. The person vested with such a right of servitude undoubtedly has possession of that right or, to use a more exact term, quasi-possession of that right even though the enjoyment of that right, taking place only at harvest time, is intermittent. Accordingly a Magistrate is entitled to make an order under section 63 in respect of such right.

Cases referred to :

Tikiri Appu v. Dingirala, 36 N.L.R. 267.

Weerasinghe v. Perera, 43 N.L.R. 575.

Nayan Manjuri Dasi. v. Fasley Haq Sardar, (1922) A.I.R. Cal. 502.

Sheik Amir Hamze v. Sheikh Yakuk, (1957) I.L.R. 2 Cal. 316.

APPEAL from an order of the Magistrate's Court, Hambantota.

N. R. M. Daluwatte, for the respondent-petitioner.

G. L. M. de Silva, State Counsel, for the 1st respondent.

J. W. Subasinghe, for the complainant-respondent.

Cur. adv. vult.

March 21, 1978. WANASUNDERA, J.

In this matter counsel raised the question as to whether or not sections 62 and 63 of the Administration of Justice Law can have application in the case of a right in the nature of a servitude which has only been used intermittently by the complainant. The servitude involved here is a right claimed by the complainant to stack sheaves of paddy, after reaping, on a high land belonging to the respondent-petitioner.

On the findings of the learned Magistrate, the complainant, along with a few others had, since 1972, used this piece of ground (*godella*) for stacking paddy stalks at harvesting time. This land is about one-fourth of an acre in extent and consists of high ground. It is surrounded by a stretch of paddy fields where both the complainant and the respondent-petitioner had their paddy fields.

The complainant had bought his paddy field in 1972. His brother who gave evidence on his behalf also had a paddy field in this stretch, which he had bought in 1968 or 1969. Their evidence is to the effect that, since their purchase of the fields, they have always stacked the paddy stalks, after reaping, on this *godella*. Although farmers are usually accustomed to stack the cut paddy stalks in their own fields, the evidence in this case shows that these particular paddy fields go under water and it has therefore been the practice to stack this paddy on the *godella* close by.

The respondent-petitioner bought his field in 1970. In 1973 he bought this *godella* in the name of his wife. In January 1975, he says, he received a letter from the Chairman of the Cultivation Committee, directing him to cultivate this *godella*, as it was lying fallow, and that if he did not comply with the order, then the land would be taken and given to others for cultivation. Consequent to this the respondent-petitioner states that he and his cultivator started cutting the earth to convert this *godella* also into a paddy field. When the respondent-petitioner started destroying the *godella*, the complainant went to the Police, and the Police, after inquiry into the matter, warned the parties not to create a breach of the peace. Notwithstanding this action by the Police, the respondent-petitioner had continued his attempt to convert this *godella* into a paddy field.

The learned Magistrate accepted the evidence of the complainant and his witnesses and held that this *godella* had been used by them since 1972 to stack the paddy stalks during the harvesting. He was also of the view that the petitioner, after he bought this *godella*, had formed the idea of converting it into a paddy field, so that he could get complete possession of it. He gave no weight to the letter of the Chairman of the Cultivation Committee and held that the respondent-petitioner had sought the assistance of his friend, the Chairman of the Cultivation Committee, who had thought of a mode by which the respondent-petitioner would be able to get complete enjoyment of this property.

Counsel for the petitioner raised the question as to whether the rights claimed in this case constituted a servitude or right in the nature of a servitude affecting land. It seems to me that the facts adduced are sufficient to establish a right in the nature of a servitude affecting land. Such a right could arise where the owner of one property, *qua* owner, becomes entitled to do something or to prohibit the doing of something for his own benefit on the land of another. The instances of servitudes categorised

in the text books and decided cases are by no means exhaustive of all the servitudes known to the law. We have in this country recognised a local servitude; that of threshing paddy on land—*Tikiri Appu v. Dingirala,* 36 N.L.R. 267 and *Weerasinghe vs. Perera,* 43 N.L.R. 575. The right of stacking the paddy stalks before the threshing is implicit in that servitude. There is no reason why, in certain circumstances, this right could not be regarded by itself as a separate servitude. I, therefore, hold that this is a right in the nature of a servitude within the meaning of the relevant provisions.

The right of stacking harvested paddy stalks can take place only at harvest time. This enjoyment of that right is accordingly intermittent and, in this case, the right claimed has been exercised at intervals of about six months. Mr. Daluwatta submitted that, as the date of the alleged "dispossession" was not within a period of two months immediately preceding the date on which the notices were issued under section 62, no order can be made under the provisions of section 63(3). This provision, he argued, indicated the inapplicability of those sections to a right such as one now claimed.

The definition of "dispute affecting land" in section 62(4) includes a dispute relating to "any right in the nature of a servitude affecting the land". Such a right, therefore, falls clearly within the applicable provisions. Where such a right exists, we must presume that the Legislature has also provided the necessary statutory provisions for remedial orders to be made in respect of such a right.

I have looked at the corresponding Indian statutory provisions and, though they are not comparable to ours, a reference to the Indian law may be of some use. In India, much emphasis has been laid on the requirement of the likelihood of a breach of the peace and on the need for the continuity of possession, when it is sought to apply these provisions. In regard to the first condition, I find that there was sufficient evidence before the learned Magistrate, in the present case, of the likelihood of a breach of the peace. As stated earlier, notwithstanding the complaint to the Police and the action by the Police, the respondent-petitioner has persisted in his provocative acts. Further, what is involved here is not a mere denial of the right claimed or some act preventing the exercise of that right, but an attempt to destroy it completely. By trying to convert the high land into a paddy field, the respondent-petitioner has sought to destroy the character of the praedium upon which alone the

complainant can base his rights. In these circumstances, I think, the complainant was justified in bringing this matter before the Magistrate's Court.

The need for a continuity of possession has been discussed in the following cases. In *Nayan Manjuri Dasi v. Fasley Huq Sardar,* (1922) A.I.R. 502, the complainants were four stall holders in a *hat* (probably a private market place) which was held once a week. The respondent was the owner of the *hat.* The *hat* was held in a place surrounded by walls with gates for entrance and exit and these gates are shut at night. According to the evidence, the stall holders remove their goods and leave the *hat* at the end of the day. The gates of the *hat* are closed and the place is then empty, and in charge of the respondent. The complainants claimed the right to continue in occupation of the *hat* for the purpose of their vocations. On the other hand, the respondent claimed the right to let them out to other persons on better terms. Walmsley, J., observed :

> "Several rulings have been cited before us, but with one exception they do not seem to have any application to the question before us. The exception is the case of *Manik Chandra Chakravarti v. Preo Nath Kuar,* (1912) 17 C.W.N. 205 = 17 I.C. 533 = 17 C.L.J. 397. It is quite true that the facts of that case again are considerably different from those of the present case ; but they have this in common that one of the parties claimed the right to hold possession of a piece of land not continuously throughout the year but at long recurring intervals once every year while in this case the stall-holders claim possession once every week. The difference appears to be one of degree rather than of kind. The learned Judges in disposing of that case said that an enquiry under section 145 of the Criminal Procedure Code must be directed to the decision of the absolute continuing possession of either party of the subject matter of dispute.
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> It appears to me that that element of continuity of possession is an ingredient which is necessary, at any rate, in cases where interruption is not due to seasonal variations, in proceedings under section 145 of the Criminal Procedure Code."

This case was followed by Mukerjee, J. in *Sheikh Amir Hamze v. Sheikh Yakuk,* (1957) I.L.R. (2) Cal. 316. Here, the disputed land was claimed to have been used by members of the Mahomedan public on two occasions in the year, that is to say, during the *Iddujoha* and *Bakrid* festivals. The Muslim public are said to

assemble on the disputed plot in large numbers on those two days for the purpose of saying their prayers. However, at other times, this land had been used as a play ground by the local school. The allegation was that the respondents attempted to interfere with the possession of members of the Mahomedan public by cultivating the land.

The Magistrate came to the conclusion that the Mahomedan public were in actual physical possession and that they were entitled to possession for the purpose of saying *Id* prayers twice annually until evicted in due course of law.

In appeal, the order of the Magistrate was set aside. One ground relied on was that, since possession of the disputed land was claimed in connection with *Id* prayers, the provisions of section 145 were inappropriate and that the matter should have been dealt with under section 147 of the Indian Code of Criminal Procedure.

It was next contended that there must be a continuity of possession for the purpose of obtaining an order under section 145 of the Code. Justice Mukerjee observed at page 318 :

> "Possession in order to be dealt with under s. 145 of the Code of Criminal Procedure, assuming that section applied, has to be continuous in the sense indicated by implication in s. 145 itself. There may be occasions when right of user of property which is the subject-matter of dispute is not capable of continuous exercise literally so-called ; but then in a case of this kind where possession of a plot of ground is claimed on behalf of a party it is necessary for that party to establish that the claim of possession is not intermittent but continuous, at any rate, in so far as the nature of the property admits. There may be instances where continuous possession is interrupted and such instance is envisaged in the first proviso to sub-s. (4) of s. 145 of the Code. In the present case, however, the nature of the property to which the dispute relates is such that the party claiming to be entitled to possession must succeed in adducing evidence of continuous actual physical possession. This view finds support in a Bench decision of this Court in the case of *Nawan Manjuri Dasi v. Fazley Huq Sardar*, (1922) I.L.R. 49 Cal. 871, where it was held that possession contemplated by s. 145 of the Code is, in cases where interruption is not due to seasonal variations, continuous and not merely occasional possession."

It seems to me that these cases deal with a situation where there is only occasional possession or temporary occupation while the possession of the property remains in the owner notwithstanding its temporary interruption by others. As far as I can gather, the situation referred to in these two cases appears to fall short of the rights enjoyed by the owner of a dominant servitude or easement. Where a servitude or easement is concerned. the person vested with that right undoubtedly has possession of that right or, to use a more exact term, quasi-possession of that right. Having regard to the definition contained in section 62(4), there could be no question that the relevant provisions of our law apply to rights in the nature of servitudes. This itself pre-supposes that an interference with the kind of possession associated with such servitude would bring these provisions into operation. The "possession" referred to in these provisions must be wide enough to take in the possession associated with a servitude.

This is sufficient to dispose of the matter. I, however, find that the order made by the learned Magistrate is in terms of section 63(2) and not under section 63(3), which was the provision on which Mr. Daluwatte based his submissions. The Magistrate has merely declared that the complainant was entitled to the right claimed by him and also prohibited any disturbance of that right.

In these circumstances, I see no reason to interfere with the order of the learned Magistrate. I therefore refuse the application with costs.

MALCOLM PERERA, J.—I agree.

Application refused.