1940 *Present* : **Wijeyewardene and Nihill JJ.**

FERNANDO *v.* FERNANDO *et al.*

126—D. C. Negombo, 10,190.

Fishing—Attempt to curtail common law right by custom—Validity of custom.

Where the common law right to fish in the foreshore and the high seas adjacent to a certain area of the sea was disputed on the ground of custom, whereby the "paduwas" in the area were allotted to particular villages on the principle that the fishermen in such villages shall only fish in the "paduwas" adjacent to their village,—

***Held*, that there must be proof of certainty and of the unbroken exercise of the right to enable the Court to uphold it as a valid custom.**

APPEAL from a judgment of the District Judge of Negombo.

This was an action brought by the plaintiff who is a fisherman claiming the right to fish in a fishing area known as Croosadipaduwa which is a section of the foreshore and the high sea adjacent thereto. The defendants resisted the plaintiff's right to fish on the ground that the fishing in the different "paduwas" between Negombo and Kochchikade was regulated by long established custom and that the plaintiff was attempting to upset this custom by asserting a right to fish in an area other than the one allotted to his family.

The learned District Judge dismissed the plaintiff's action.

N. Nadarajah (with him *M. Balasunderam*), for the plaintiff, appellant. —Every person has a right to fish in the waters of the sea—*Fernando et al. v. Fernando et al.*[1] The question for determination is whether any custom has been proved in this case which derogates from the common law. A custom to be valid must have four essential attributes. It must be immemorial; it must be reasonable; it must have continued without interruption since its immemorial origin; and it must be certain and definite—*Walter Pereira's Laws of Ceylon (1913), p. 143.* See also *Vallipuram v. Santhanam*[2]; *Abdul Khan v. Bibi Sona Dero et al.*[3]; *M. I. Rowther v. S. I. Rowther*[4]; *Tyson v. Smith*[5]. A custom of a vague and indefinite nature cannot be recognized by Court—*Selby v. Robinson*[6].

For proof of custom in regard to fishing, see *Walter Pereira's Laws of Ceylon (1913), p. 284; Guruvey v. Bastian*[7]; *Arumokam v. Tampaiya*[8]; *Baba Appu et al. v. Aberan et al.*[9]; *Fernando et al. v. Fernando et al. (supra)*.

H. V. Perera, K.C. (with him *R. L. Pereira, K.C.*, and *K. Aserappa*), for the defendants, respondents.—The customs proved in this case is not one which the law will refuse to recognize. It is a reasonable custom, and the evidence is quite definite. The class of beneficiaries is sufficiently

[1] *(1920) 22 N. L. R. 260.*
[2] *(1915) 1 C. W. R. 96.*
[3] *(1917) L. R. 45 I. A. 10.*
[4] *(1922) A. I. R. (P. C.) 59.*
[5] *(1838) 9 A. & E. 406.*
[6] *(1788) 2 Term Rep. 758.*
[7] *(1859) 3 Lor. 161.*
[8] *(1893) 2 C. L. Rep. 205.*
[9] *(1905) 8 N. L. R. 160.*

clear—*Hall v. Nottingham et al.* Custom is local in its operation. What was originally a mere arrangement may perpetuate and crystallize itself into a custom. See the cases cited in the article on customs in *Wood-Renton's Encyclopædia of the Laws of England, vol. IV.* The judgments in *Mercer v. Denne* in *L. R. (1904) 2 Ch. D. 534* and *L. R. (1905) 2 Ch. D. 538* are particularly applicable. See also *Encyclopædia of the Laws of England, vol. VI., Article Fisheries,* p. 88.

N. Nadarajah, in reply.—Fishing in the seas is a common law right given to every member of the public—*Attorney-General for the Province of British Columbia v. Attorney-General for the Dominion of Canada*[2]. Exclusive right of fishing cannot be acquired either by prescription or by custom—*Fernando et al. v. Fernando et al. (supra).*

A custom, to be recognized by Court, must be reasonable—*Arjun Kaibarta et al. v. Manoranjan De Bhoumick et al.*[3]

Cur. adv. vult.

December 3, 1940. NIHILL J.—

The plaintiff-appellant is a fisherman who brought an action in the District Court of Negombo claiming the right to fish with the aid of what is known as a "madel" net in a fishing area known as Croosadipaduwa which is a section of the foreshore and the high sea adjacent thereto lying between Negombo and Kochchikade. The respondents had resisted the appellant's right to fish in these waters with a "madel" net on the grounds that the fishing in different "paduwas" between Negombo and Kochchikade was regulated by long and firmly established custom and that the plaintiff was attempting to upset this custom by asserting a right to fish in an area or "paduwa" other than the one allotted to himself and his family.

According to the respondents there are nine "paduwas" between Negombo and Kochchikade and these are allotted so far as "madel" net fishing is concerned to different villages along the foreshore on the principle that the fishermen in such villages shall so fish only in the "paduwas" adjacent to their villages. Some of the larger villages may have the use of more than one "paduwa" but that, as I understand it, is the principle.

Now the appellant being a man of the village of Palangature in the sense that he was born there, has the right to fish in certain other "paduwas" but not in the "paduwa" known as Croosadipaduwa, which is reserved for the fishermen who are born and bred in the village of Kudapaduwa. From the appellant's own evidence at the trial it is apparent that he is aware of this custom or arrangement but he claims his common law right to fish anywhere in the high seas.

That such right exists in every subject of the Crown is unassailable. The problem in this appeal is to determine whether the appellant has lost that right because he himself is bound by a custom which this Court would be prepared to uphold.

[1] *(1875) 1 Exch. D. 1.*
[2] *L. R. (1914) A. C. 153 at 170.*
[3] *A. I. R. 1934 Cal. 461 at 464.*

That the common law right may be controlled by custom regulating the time and mode of fishing was recognized in the case reported in *3 Lorensz, p. 161* and this principle was approved by Bertram C.J. in *Fernando v. Fernando*[1]. In stating the common law right Bertram C.J. said :—" It might no doubt be shown that by long established custom the public rights of fishing must be exercised in a particular way or even subject to particular rotation designed to secure the fairest and most effective exercise of the general right ".

The same principle was referred to in the earlier case of *Baba Appu v. Aberan*[2], but in both cases it was made clear that any such custom must be reasonable. It must not for example be a custom which would preclude the introduction of improved methods of fishing or a custom which would deprive a section of the community of its common law rights in the very matter which the custom was supposed to regulate.

The learned District Judge surmounted this difficulty because he considered that the claim of the defendants would not deprive a section of the community of its common law rights, but I think what he had in mind was that the plaintiff being a man belonging to a neighbouring village had, by the custom itself, his own " paduwa " to fish in, that is to say, in the waters opposite his own village.

Certainly the arrangement by which fishermen residing on this stretch of cost habitually fish with a " madel " net in the sea nearest to their homes strikes one as reasonable or at least convenient and it may be very regrettable that the plaintiff in this action was not content to stay where he belonged. Nevertheless the question having been raised, its determination in the sense adopted by the learned District Judge, would involve a great deal more than the return of a wandering fisherman to his own waters, for the custom as stated by certain of the witnesses for the defendants is one which would, if upheld, in its strict sense be good against all the inhabitants of Ceylon, for it would for all time reserve for this type of fishing, a certain section of the sea coast and the high sea adjacent to a particular community.

In other words the section of the community deprived of its common law rights would be all others not inhabitants of the village of Kudapaduwa. It may seem highly improbable that fishermen from Colombo, Jaffna, Batticaloa or other parts of Ceylon will ever desire to fish at Kudapaduwa with " madel " nets but when we are asked to uphold a custom and so turn it into law every consequence must be considered.

Mr. H. V. Perera has pointed out in supporting the reasonableness of the custom that according to the evidence fishing by a " madel " net involves the use of private property adjoining the seashore, and that whilst it is reasonable that landowners should permit fishermen whom they know to use their lands for dragging or drying their nets it would not be reasonable to expect them to extend the same facilities to every stranger. That may be, but there would remain the case of the stranger who had come to terms with a landowner and who then found himself precluded by the custom.

[1] *22 N. L. R. 260* [2] *8 N. L. R. 160.*

It is not, however, so much on the score of reasonableness that the custom alleged is open to question. As a right against all the world, in my opinion, it would be unreasonable; as a restriction operative only upon fishermen born and bred on this section of the coast it might not. Mr. Perera did not, I think, put the custom higher than that, but there was considerable uncertainty in the evidence as to precisely who was entitled and who was excluded. It is the uncertainty which I think must prove fatal to the respondents' case.

A custom to be valid must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect. Vide *Halsbury's Laws of England, vol. 10, p. 6.*

The learned Judge himself has confessed that the evidence with regard to the details of the custom is conflicting. After a careful scrutiny of the evidence it seems to me that all that has been proved is a loose arrangement, generally acquiesced in because of its convenience, but not invariably followed.

Take the position of the appellant himself. He was born in the village of Palangature. He married a woman named Rosaline who was a granddaughter of Istakki who owned "madel" nets at Kudapaduwa. Rosaline's mother was Elizabeth who married a man of Palangature but after their marriage they lived at Etukal which lies between Kudapaduwa and Palangature. By the custom the inhabitants of Etukal are not permitted to fish with "madels" at Croosadipaduwa. One of Istakki's nets devolved on Elizabeth. Her husband worked that net at Croosadipaduwa but this according to the witnesses was no breach of the custom because he worked only as a "mandady" or manager. It is this practice of employing "mandadys" that is responsible for the first uncertainty in regard to the appellant. He also worked "madel" nets at Croosadipaduwa but the respondents maintain that he only did so as a "mandady".

It seems that other nets also devolved on Elizabeth through her mother who was a woman of Kudapaduwa.

It is admitted that the appellant worked nets at Kudapaduwa but again it is contended that he only did so as a "mandady" for Elizabeth, that is, during the illness and after the death of Elizabeth's husband. But the appellant has two "madel" nets of his own and he contends that as well as acting as a "mandady" he cast these nets at Croosadipaduwa.

Prima facie the documentary evidence supports his contention. In 1931 a dispute arose between the parties in this appeal and the respondents petitioned the Magistrate at Negombo, that is the document P 1, and it was supported by an affidavit P 2.

In neither document is the appellant described as a "mandady"; indeed in paragraph 2 of the affidavit he is definitely described as an owner. The purport of both documents is not to the effect that the custom now alleged had been violated but that there had been a refusal on the part of the appellant and another man from Etukal to co-operate with them in arranging turns by rotation.

Looking at these documents for a moment apart from the oral evidence ; that, to my mind, was the custom put forward in 1931, and if that was all that was claimed to-day, this Court might have no difficulty in upholding it as a reasonable custom, for it would be a custom not disigned to exclude but to facilitate the exercise of the general right.

The learned District Judge appreciated that these documents were against the defendants but he seemed to think that " P 2 " being in English the defendants should not be held responsible for the wording used. That seems to me a dangerous proposition to make. The affidavit was sworn before a Justice of the Peace who has deposed to the fact that the document was read over to the defendants in Tamil and Sinhalese and that they seemed to understand its contents. If the documents then be taken at their face value the balance of evidence on this point swings very definitely in the appellant's favour and I think we must regard it as shown that he did cast his own net at Croosadipaduwa.

No doubt he obtained a footing at Croosadipaduwa through his wife's relations but that does not alter the facts that the custom was not rigid or certain enough to prevent him casting his own net once he had got there.

A further uncertainty arises when the evidence with regard to those entitled to benefit by the custom is considered. Thus it was said that the right by custom was vested in the inhabitants of Kudapaduwa, next that it devolved only on those born and bred in that village which would exclude temporary sojourners or those who might move to the village to set up a permanent home. Then two witnesses stated that only members of St. Sebastian's Church could fish at Croosadipaduwa.

This brings me to what may be termed the religious background in this case. It is a fact that the inhabitants of these fishing villages are almost entirely adherents to the Catholic faith. There may be a few Muslim and Buddhist traders but these have never sought to fish with " madel " nets and if they did, it seems highly probable that their enterprise would be fiercely resented.

All the fishermen pay tithes which consist of a proportion of their catch or its money equivalent to the church of the village to which they belong. Thus there is a nexus between the fishing industry and church finance on this section of the coast. That is probably why the Parish Priest of St. Sebastian's Church under cross-examination stated that to fish at Croosadipaduwa an outsider would not only have to reside at Kudapaduwa but have to be also a member of his congregation. His colleague, however, the incumbent of the church at Palangature, thought that Muslims residing at Palangature would be entitled to cast nets at any of the " paduwa " reserved for the inhabitants of Palangature.

Elizabeth, whose evidence greatly impressed the trial Judge, said that strangers taking up residence in a village were not allowed to fish with a " madel " net in the adjoining " paduwas " and she gave a very good reason, namely, that they would be trespassing on the adjoining lands if they did so. In cross-examination she also put the custom in its extreme

form—the right was vested in the Catholic congregation of St. Sebastian's Church. "My son Benedict (*i.e.*, a man of Etukal) would have no right to fish at Croosadipaduwa without the permission of the people of Kudapaduwa and of the priest. If the priest objects he has no right to fish, or if the people object". She even stated that a man of Kudapaduwa itself would have to arrange with the people to fish at Croosadipaduwa. Perhaps here she was thinking of turns by rotation.

Lastly there was the evidence of the two "oldest inhabitants". Sebastian Perera aged 80 did not think a religious qualification essential but he excluded the stranger who bought land and settled down at Kudapaduwa. Gordianu Fernando aged 60 denied the custom altogether but he was the plaintiff's witness and his character was attacked. It may be better to ignore his evidence.

As I have already indicated, on this evidence I am not able to hold that there is sufficient proof either of certainty or of unbroken exercise of the right to enable this Court to uphold it as a valid custom.

Immemoriality might be inferred, reasonableness might be conceded, but these two essentials are by themselves insufficient where there is a lack of certainty in respect of the nature of the custom generally and there has been interruption.

On such material I am of opinion that this Court would not be justified in upholding a custom which in effect must take away, not the rights of a particular individual, but the rights of the public at large.

Having declared the appellant entitled to his rights, I feel constrained to say that I regret this litigation.

The appellant belongs to a community deeply attached to its faith and accustomed to accept the leadership and practical guidance of its village priests. There was plenty of evidence in the present case of the beneficient part played by the ecclesiastical authorities in the settling of fishing disputes. It is evident that arbitration was open to the disputants in the present case had the appellant so desired. He is entitled to his victory but I doubt whether it will bring him either happiness or profit.

I would therefore set aside the order of the District Judge and direct that decree be entered declaring the plaintiff entitled to fish in the area called Croosadipaduwa. I allow the plaintiff costs here and in the Court below and damages as agreed upon in the nominal sum of Rs. 15.

WIJEYEWARDENE J.—I agree.

Appeal allowed.