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Present: Bertram C.J. and De Sampayo J.

FERNANDO *et al.* *v.* FERNANDO *et al.*

184—D. C. Chilaw, 5,562.

Exclusive right to fish at a "modera"—Prescription—Custom—Diverticulum.

Pitipane street people and Sea street people at Chilaw came to an agreement about 1871 as to fishing for prawns at the "moderas" (channels on either side of a small island) through which the waters of the Chilaw river pass. The plaintiffs, who, defendants alleged, belonged to another section of fishers, claimed the right to fish at the spot.

The defendants (Pitipane street people) resisted the claim on the ground that they had acquired, along with the Sea street people, by prescription or custom, the exclusive right of fishing at the spot.

Held, that the defendants' claim was not one which was capable of being acquired by prescription, nor was it one which could be supported on the ground of custom.

As the "modera" was not a *diverticulum* within the meaning of the term as used by *Voet 41, 1, 15*, an exclusive right to fish there could not be acquired.

Primâ facie, all the King's subjects have a right to fish in the waters of the sea and in all tidal estuaries connected therewith.

A fluctuating and uncertain body of people, such as the inhabitants of a district or a section of the inhabitants of a district, cannot by prescription acquire a right of fishery against any individual member of the community, and still less against the public itself.

The rights of the public or of sections of the public to fish in the sea or in tidal waters are not governed by prescription, but may be regulated by custom. A custom to be recognized by the Court must be a reasonable custom; a custom which deprived a section of the community of its common law rights in the very matter which the custom was supposed to regulate is not a reasonable custom.

THE facts are set out in the judgment of the District Judge (W. H. B. Carbery, Esq.):—

This is an action by the plaintiffs, who are residents of Alutwatta in Chilaw town, asking for a declaration of this Court, as against the defendants, who are, excepting the 20th and 21st defendants, residents of Pitipane, also in Chilaw, entitling the plaintiffs, equally with the defendants, to the free and unfettered right of fishing for prawns with "kattu del" (or "bandinal del" or "issan del") at the two moderas, the Chilaw and the Deduru-oya, where the mouths of these rivers empty themselves into the sea.

Both the plaintiffs and the defendants are Sinhalese-speaking members of the "Karawa" or "Fisher" caste.

There is, besides them, a branch of Tamil-speaking members of the same caste, who reside at Sea street in Chilaw. Originally, there can be no doubt that all these people were actually fishers, that is to say, that their occupation and livelihood was fishing, but in course of time many of them have become educated and rich, and therefore do not now carry on their ancestral avocation, that having been left to the poorer members of their community. There have been two cases previous to the present one about this same right of fishing. The first case was D. C., Chilaw, 12,559, an action filed on April 24, 1844, by the so-called Sinhalese-speaking fishers of Pitipane against the Tamil-speaking fishers of the Sea-street asking for an injunction of Court against the defendants, that they be prevented from exercising this very identical right of fishing for prawns, the plaintiffs exclusively claiming that right on the strength of a Dutch grant and by prescriptive right from time immemorial.

It is necessary here to state that these Sinhalese-speaking fishers were known by the prefix of "Mihindukulasuriya" (*i.e.*, "descendants of a king), and the Tamil-speaking fishers by the prefix "Warnakulasuriya," meaning much the same thing. It is, however, interesting to note that the prefix to the names of the four last plaintiffs in that case, D. C., 12,559, is "Curukkulasuriya," that they are Tamils and bear Tamil names, and that they all lived at Timilla, a village outside Chilaw.

With regard to that case, it is only necessary to note that the Dutch "sannas" relied on by the plaintiffs was never produced, and that they were non-suited with costs. In the next case, C. R., Chilaw, 9,192, we come to more modern times. That was an action instituted on October 12, 1870, by one Manuel Fernando, a "Warnakulasuriya," of Sea street, against two Mihindukulasuriyas of Pitipane street, claiming damages for having been prevented from fishing for prawns with "*kattu*" or "*issan del*" at the "moderas" of Chilaw. In that case, too, the defendants again set up the exclusive privilege in themselves of this fishing, relying again upon a grant from the Dutch Government. The judgment and decree in that case have been put in evidence in the present action, and throw a great deal of light on it, both on facts and the law. In approaching the present case, there is one important point that must not be forgotten, and that is, that when D.C., Chilaw, 12,559, was instituted and contested, "Alutwatta" or "Chenehe," was not existent, and that it was but just being opened up, with two or three families at most residing in it, at the date when C. R., Chilaw, 9,192, was decided. This is the reason—and a very good reason too—why the fishers of Alutwatta do not appear as parties in the two earlier cases. There were no fishers of Alutwatta then as a recognized entity to appear.

The meaning of the word "Alutwatta" is "new garden," its Tamil equivalent "Chenehe" means "the chena village," much the same thing. This village has grown, is growing, and will go on growing. It now comprises some 400 to 500 souls, and is therefore treated, by the Catholic Church authorities in Chilaw, as a separate body, the other two being the older ones of Pitipane and Sea street. All the fishers of these villages are Catholics, and have been divided, for the purpose of church functions and services, and even for the collection of the fish-rents which the church in Chilaw leases every year from the Local Board, into these three separate communities. Wattakkaliya, still newer village beyond Alutwatta, is similarly growing from a house or

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two into a distinct village, it has lately been brought within Local Board limits, and the church in a few years' time will have to count with it also in similar fashion as a separate and distinct entity. But, to my way of thinking, this division by villagers, when applied to the rights and privileges of fishing, which is really a common law right, is arbitrary and artificial.

The "Curukkulasuriyas," so far as Chilaw is concerned, have died out, and there remain two great classes of fishers, the "Mihindukulasuriyas" or Sinhalese-speaking and the "Warnakulasuriyas" or Tamil-speaking fishers.

There is no doubt whatever in my mind, from the oral evidence led and from documents produced, that the plaintiffs as well as the defendants all belong to the former class; that there is no distinction whatever between them; that the plaintiffs equally with the defendants are entitled to the prefix "Mihindukulasuriya."

P 12 and P 13 are two documents dated 1883 and 1886, respectively, which show the plaintiffs' families used that title. Very late in this trial the defendants, apparently through the instrumentality of Mr. Thomas Fernando, who I consider to be at the back of the whole of this defence, introduced, on purely hearsay evidence, an allegation that the plaintiffs belong to a class known as "Kosagammeddas," meaning "castrated people." Where defendants got this from beyond the fertile brain of Thomas Fernando, whose intention was no doubt only to insult the plaintiffs, it is impossible to say. But there is absolutely no foundation for it in fact.

The present community of Alutwatta are undoubtedly descended from the few families who migrated there from Pitipane, when Alutwatta or Chenehe was first opened up. The defendants in this case, like the defendants in C. R., 9,192, had produced no Dutch grant giving them the exclusive right of fishing for prawns. No such grant has ever been produced at any time, and it is therefore safe to conclude that no such grant exists or ever did exist. The only Dutch document which was produced in C. R., 9,192, did not refer to the prawn fishing at Chilaw at all, but to the fishing in Negombo.

Have the defendants, then, acquired the right they claim by prescriptive uses from time immemorial and without any interruption? The two previous cases already cited alone prove that they have not, and the oral evidence adduced, both for the plaintiffs and even for the defendants, establishes the same beyond any question of doubt.

There is, for the plaintiffs, the evidence of the late Notary A. J. Fernando, a "Warnakulasuriya" or Tamil-speaking Karawa. He was fifty-eight years old when he gave his evidence, he was a man of righteousness and honesty, and I am sure that there would be no one who would doubt his word. What does he say? Speaking of the two classes of Karawas, "Mihindukulasuriyas" and a "Warnakulasuriya," he says: "We all claim the right, as Karawas of Chilaw, to fish in its waters." And again: "I have seen several Alutwatta fishermen going to fish for prawns at the 'modera'; they do not fish on the day allotted to us, but on the other three days, along with the Pitipane street people," and he names certain of those men whom he has seen going, among them Loku Appu (20th defendant), who went on September 8, 1916, in the defendants' party.

Again A. J. Fernando says: "I know the five plaintiffs; they are all Alutwatta men; they have a right to fish for prawns at the 'modera.'"

Then take the evidence of Bamunuge Peduru Perera, a witness for the defence. Does his evidence not prove the right of the Alutwatta fishers to fish for prawns with "kattu del," and the fact that they have so fished for the last thirty years? Most of the evidence of Father Peter Boulic, Parish Priest of Chilaw at the date this case was heard, is hearsay evidence, for he came to Chilaw, as he admits, only on May 7, 1915. But even he says: "I cannot say that none of the plaintiffs ever went to the 'moderas' to fish for prawns with 'kattu del.' There are four native families of Alutwatta I know who have had the special privilege of fishing for prawns with 'kattu del' at the 'moderas' along with the Pitipane street people—one person in each family. This privilege has descended from father to son for a long time." What special privileges this witness refers to has not been proved. The truth is that no special privilege, but only a common law right, modified by certain Village Committee rules, has ever existed. I do not think it necessary for me to quote the law that governs the right of fishing in cases such as the one now in dispute, for it has been fully and learnedly enunciated by District Judge Jayatilleke in his lengthy judgment delivered in C. R., Chilaw, 9,192. Suffice it to say that the right of so fishing is a common law right, free and open to all. English law does not apply in a case of this nature in Ceylon.

As pointed out by Judge Jayatilleke, there is no doubt that by the Roman-Dutch law, which is the law applicable in Ceylon to such cases, a man may, by special act and permission of the Sovereign, acquire an exclusive right to a fishery. But, as in C. R., 9,192, so in the present case, no such special act or grant has been produced by the defendants.

Nor can the present defendants claim the exclusive right they do, on the ground that they have, from time immemorial, enjoyed that privilege. The evidence, even that led for the defence, proves (1) that the right claimed has not been exclusive; (2) that it has not been undisturbed and uninterrupted from time immemorial. The defendants' claim, therefore, on the ground *prescriptio longissimi temporis* altogether fails . . . . .

I forgot to say, in referring to the judgment and decree in C. R., 9,192, that, after decree, the question of the rotation of prawn fishing was referred by Court to a certain select number of the townspeople, and a settlement was arrived at. That settlement, however, was never embodied in the decrees of Court in the case, and does not form part of that decree, and, as I have already said, the reason why the present Alutwatta fishers were not considered in that settlement is the simple one, that even at that time there were no residents of Alutwatta to speak of; they have gradually migrated there. In a similar manner, when Wattakkaliya grows in importance, the fishers who establish themselves there will claim a similar right, and will have to be let in, otherwise another case of this kind will once more crop up.

The only local rules regulating fisheries according to local customs are those that have been put before me by the plaintiffs. There is nothing in these rules (P 5) regulating the use of the special net called "kattu del" or "issan del." But rule 19, regulating the limits of restricted fishing, states: "No one shall fish with nets in the waters outside the limits of the subdivision of which he is a resident without a special license from the Assistant Government Agent of the district." Which means nothing more or less than that all those, and only those living within such subdivisions, may fish with nets in the waters within the said subdivision, except upon a special permit. So much then for the law on the subject.

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I enter up judgment, therefore, as follows:—

1. That the plaintiffs be declared entitled to the free and unfettered right of fishing for prawns with "kattu del" or "issan del" at the "moderas" of Chilaw and Deduru-oya.

2. That the first fourteen, the 16th, 17th, 19th, and 20th defendants do pay to the plaintiffs, jointly and severally, the sum of Rs. 250 as damages incurred prior to institution of action, and that the first fourteen, the 16th, 17th, and 19th defendants do jointly and severally pay to the plaintiffs further damages at Rs. 50 per mensem from the date of institution of this action until they restore to the plaintiffs the said right declared to them.

3. That the first fourteen, the 16th, 17th, and 19th defendants do jointly and severally pay to the plaintiffs their costs of this action. The 20th defendant will bear his own costs.

Let a decree be entered up accordingly. I have purposely refrained from saying anything about the rotation or turns in which the two classes of fishers, the Mihindukulasuriyas and Warnakulasuriyas, should in future fish for prawns with "kattu del" at the "moderas," because I have not been asked to do so.

The present system of turns, three days for the Mihindukulasuriyas and one day for the Warnakulasuriyas, alternately, might be continued, or some other amicable arrangement might be arrived at, but whatever arrangement is come to in that, I think should be embodied in a further decree of Court in this case.

Elliott (with him *M. W. H. de Silva*), for defendants, appellants.

A. St. V. Jayawardene (with him *Croos-Dabrera*), for plaintiffs, respondents.

Cur. adv. vult.

December 3, 1920. BERTRAM C.J.—

This is an action relating to the fishing rights of three sections of the public at Chilaw. It is a question which has had a long history, but I need not refer to that history in detail. The early stages of the story are narrated in the judgment of the learned District Judge. It is sufficient to say that in the year 1871 a judgment was given by the District Court of Chilaw which declined to recognize an exclusive claim set up by one of these sections of the public to fish for prawns at two spots at the mouth of the Chilaw river, and declared that, not only that section, but also the other section then at issue with it was entitled to the right of fishing at the places and in the manner in question.

The two sections of the public then at issue were the Pitipane street fishers, who set up the exclusive right, and who were a body of Sinhalese-speaking fishers, and the Sea street fishers, who were Tamils. A friendly arrangement was made after that judgment, under which, on the basis of a census taken at the time, three days were assigned to the Sinhalese-speaking fishers for fishing for prawns at the places in question, and one day to the Tamil-speaking fishers. That arrangement has been peaceably observed ever since.

The new development of the question out of which this action arises is a claim put forward by a body of persons known as the Alutwatta community. They claim, though inhabiting a different locality, to be an integral part of the Pitipane community, and to be entitled to fish for prawns at the places in question. The Pitipane fishers, on the other hand, maintain that the Alutwatta people are a separate community, and have no right to fish for prawns. They say that, in fact, the Alutwatta people are deep-sea fishers, and that the practice has always been for these deep-sea fishers to buy their prawns from them, the Pitipane people. They say that by prescription or custom they have acquired, with the Tamil-speaking community above mentioned, an exclusive right to fish for prawns at the two places in question.

Before examining the question of fact, it would be convenient, in the first place, to consider whether such a claim could be sustained in law. *Primâ facie*, all the King's subjects have a right to fish in the waters of the sea and in all tidal estuaries connected therewith. Mr. Elliott, who appears for the appellants, freely admits this principle, but he seeks to escape from it by pointing to the passage in *Voet 41, 1, 5*, which attributes a special right to a person who *pluribus annis solus in fluminis publici vel maris diverticulo piscatus sit*. He says that the two places where prawns are taken are each a *diverticulum* within the meaning of this passage, and that as he has been shown that the community for which he appears has *pluribus annis* to the exclusion of all others taken prawns at these spots, he is entitled *alterum prohibere eodem jure uti*.

It appears to me that this claim must fail on many grounds. In the first place, these spots are not *diverticula*. They are known as "moderas." They are two channels on either side of a small island, through which the waters of the Chilaw river pass into the sea. They are not, in my opinion, *diverticula*. The passage in Voet is a commentary on two passages in the *Digest*, namely, an opinion by *Marcianus 44, 3, 7*, and another by *Papinianus 41, 3, 45*. These passages are the basis of the law in all countries. The corresponding expression has been imported into English law, and a reference to it will be found in *Hale's De Jure Maris, Ch. IV.* (See *Encyclopedia of the Laws of England, Article Fisheries, p. 88*) :—

> "But though the King is the owner of this great waste, and as a consequent of his propriety hath the primary right of fishing in the sea and in the creeks and arms thereof . . . . yet the common people of England have regularly a liberty of fishing therein as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places or creeks or navigable rivers where either the King or some particular subject hath gained a propriety exclusive of that common liberty . . . "

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And see further (*p. 89*):—

> "The King may grant the fishing within a creek of the sea or in some known precinct that hath known bounds though within the main sea . . . . A subject may by prescription have an interest of fishing in an arm of the sea, in a creek or part of the sea, or in a certain precinct or extent lying in the sea, and there not only free fishing but several fishing."

We are not here concerned with the English law, but I take it there can be no doubt that a *diverticulum maris* means a creek or arm of the sea with definite metes and bounds, so that it can be regarded as something distinct from its main waters though connected therewith. Nathan, in his reference to the passage of Voet, limits the right of exclusive fishing in an arm of a public stream to a person who "possesses the adjoining ground" (*Vol. I., p. 349*). I am not sure what is Nathan's authority for using these words. Possibly he bases them upon an inference drawn from the context, but it is not necessary to discuss this, inasmuch as the places in question cannot be described as *diverticula*.

But, apart from this question, even if Mr. Elliott had made out his case on the facts, and even if this were a *diverticulum maris*, his case must fail on other grounds. A fluctuating and uncertain body of people, such as the inhabitants of a district or a section of the inhabitants of a district, cannot by prescription acquire a right of fishery against any individual member of the community. (See the judgment of Lord Selborne L.C. in *Neill v. Duke of Devonshire*.[1]) Still less could such a fluctuating and uncertain body acquire a prescriptive right against the public itself. Indeed, the rights of the public or of sections of the public to fish in the sea or in tidal waters are not governed by prescription at all. The only principle by which they can be regulated is a different principle, that of custom. It might no doubt be shown that by long-established custom the public rights of fishery 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. This is the principle recognized by the case cited from *3 Lorensz 161*, where it is declared, that the common right of fishing in the open sea may be controlled by custom regulating the time and mode of fishing. But any such custom to be recognized by the Courts must be a reasonable custom (see *Baba Appu v. Aberan*[2]), and I take it that no Court would recognize as reasonable a custom which deprived a section of the community of its common law rights in the very matter which the custom was supposed to regulate. It appears to me, therefore, that Mr. Elliott's claim must fail on all these grounds. The places are not *diverticula*. The claim he makes is not one which is capable of being acquired by prescription, nor is it one which could be supported on the ground of custom, even if such an alleged custom were proved.

[1] *(1882) 8 A. C. 154.*

[2] *(1905) 8 N. L. R. 160.*

It is not, therefore, necessary for us to give a considered opinion on the facts. The learned Judge has given his finding, and he had no doubt ample material for finding as he does. There was a very considerable body of testimony called before him, which declared that the Alutwatta people had uninterruptedly exercised the right of fishing for prawns at the two "moderas," and that the present challenge to their claim had arisen out of a local election. The learned Judge was entitled to take such a view of the case. I confess, however, that if I had to decide the question on the facts, I should attach more weight than the learned Judge has thought necessary to attach to the evidence of Father Boulic, the Parish Priest of Chilaw, and in a minor degree to the evidence of Mr. Cooke, late Crown Proctor of Chilaw. Father Boulic it is true has not had a long experience of the district, but his account of the origin of the dispute is that the Alutwatta people, who were deep-sea fishers, obtained their prawns by purchase from the Pitipane people; that the price of these prawns was raised, and that even when they arranged to pay the higher price, they were not given sufficient prawns for their purpose; and that they thereupon declared that they would go to Court to ask for a separate turn to fish for prawns. If that evidence is accepted, I do not see how it can be reconciled with the theory that the Alutwatta people had been fishing for prawns uninterruptedly for the last generation. I hesitate, on the other hand, to believe that the whole body of evidence called by the plaintiff was fabricated. It may well be that from time to time the Alutwatta people have fished for prawns at the "moderas," but I am inclined to believe that, in recent years at any rate, they must have ceased to do so.

It is unnecessary to discuss this question any further, because all that the plaintiffs have to do on the above view of the law is to point to the fact that they are members of the public, and to claim their rights on that basis. They told Father Boulic that they intended to apply to Court claiming a separate turn. It would have been much better if they had done so. Instead of doing this, they established themselves on the spot and commenced to fish. The defendants replied to this demonstration by a violent assault. Again, it would have been much better if the defendants had applied to the Court, instead of asserting their supposed rights in this way. Under the circumstances, the defendants must pay damages, and in view of the violence of their action, the learned Judge was right in imposing punitive damages. With regard, however, to the continuing damages which he had awarded, that is another question. They are based upon the supposition that the plaintiffs were regularly pursuing the avocation of prawn fishing at the "moderas," and that they have been interrupted in that avocation, and have consequently suffered substantial loss. That is just the part of the case on which I do not feel satisfied. I do not see how that supposition can be

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reconciled with the evidence of Father Boulic. I am not prepared, therefore, to endorse this award of continuing damages, and I think that the sum of Rs. 250, which the learned Judge has awarded as general damages, fully meets the circumstances of the case, more especially as the defendants will have to pay the costs.

The learned Judge, at the conclusion of his judgment, contemplates a supplementary decree arranging for fishery in rotation. I do not see how this can be passed, except by consent, nor could it be made to include the Warnakulasuriyas, as they are not parties. It is very much to be regretted that the efforts which were made to bring about a friendly settlement failed of success. It is much to be hoped that even now some settlement may be arrived at which could be embodied in a supplementary decree. There is an alternative method of dealing with the subject. Rules could be passed under section 6 (3) of the Village Communities Ordinance (No. 24 of 1889) for regulating the local fisheries according to local customs, and I see no reason why such rules should not fix a rotation to be observed by the various groups interested. This method of dealing with the subject may well receive the attention of the Government Agent.

In my opinion the appeal must be dismissed, with costs.

DE SAMPAYO J.—I am of the same opinion.

Appeal dismissed.