1952 *Present :* **Gratiaen J. and Pulle J.**

K. D. G. MADAPPULI, Appellant, *and* S. D. PATRICK *et al.*, Respondents

S. C. 122—D. C. Kalutara, 26,779

Fishing—Custom—Proof.

The Court will not recognize an existing arrangement arrived at by particular fishermen for the purpose of regulating their respective rights to fish in the open sea as binding on other members of the community who were not parties to that arrangement unless such arrangement already possesses all the attributes of a valid legal custom.

Semble : Unless such an arrangement is inherently capable of adaptation to all future variations in numbers and circumstances, it cannot form the basis of a valid legal custom.

Per GRATIAEN J.—" Under the common law every member of the public has an equal right to fish in any part of the open sea. Such rights may be curtailed regulated or even abrogated by *statute* . . . . . They may be regulated, but certainly not extinguished, by *custom.* "

APPEAL from a judgment of the District Court, Kalutara.

N. K. Choksy, Q.C., with *D. M. Weerasinghe*, for the plaintiff appellant.

N. E. Weerasooria, Q.C., with *W. D. Gunasekere*, for the 1st defendant respondent.

V. T. de Zoysa, for the 2nd and 3rd defendants respondents.

Cur. adv. vult.

November 18, 1952. GRATIAEN J.—

This unprofitable action commenced very nearly five years ago. It concerns the conflicting claims of the parties to enjoy, in one degree or another, a monopolistic right to fish with *madelas* or large fishing nets in a part of the open sea adjoining an area of the sea-beach in the Maggona district known as the Kuda Waraya.

The truth is that no such monopoly exists, because under the common law every member of the public has an equal right to fish in any part of the open sea. Such rights may be curtailed, regulated or even abrogated by *statute*, but that has admittedly not occurred in Maggona. In some districts they may be regulated, but certainly not extinguished, by *custom*. In the large majority of cases, however, the situation of persons engaged in any locality in the hazardous enterprise of fishing, unregulated either by statute or custom, calls for a spirit of sensible compromise which alone would ensure, by private agreement, some convenient arrangement designed to prevent "a sort of warfare perpetually subsisting between the adventurers" (*Fennings v. Grenville*) [1]. One can but express the hope that even at this late stage the parties to the present dispute will appreciate the advantages which they would derive from such an arrangement. I do not doubt that the good offices of the Assistant Government Agent of the district, if invoked, would be readily available to them in this regard. If all else fails, the local authority is, we understand, empowered to introduce statutory by-laws and rules designed to avoid friction and unhealthy competition.

Prior to November 1947 the plaintiff had never interested himself in fishing with a *madela* at the Kuda Waraya. Indeed the evidence discloses that for many years certain members of the defendants' family (a group conveniently designated as "the Abrahams") and of another family ("the Coorays") had virtually shared a monopoly of fishing with *madelas* in these waters. In the result, the very limited number of persons exercising a common law right which in truth belonged to the entire community made it a simple matter for the persons concerned to regulate their activities by fishing in accordance with an agreed system of rotation instead of indulging in spirited and unprofitable competition with one another. In 1946 T. M. R. Cooray, the last surviving member of the "Cooray" family, died and the fishing rights in the Kuda Waraya were for the time being exercised exclusively by "the Abrahams". During this brief period, a

[1] *1 Taunton 241 at 248.*

few members of the defendants' family continued to fish with *madelas* in the locality undisturbed by outside competition, and they were therefore able to introduce to their mutual advantage a somewhat different system of fishing by rotation to that which had previously obtained. In November 1947, however, the plaintiff proposed to break this monopoly by purchasing a *madela* and a fishing boat and, having thus equipped himself, he claimed that he too was entitled to fish at the Kuda Waraya. His " intrusion " was resented, and was strenuously resisted by the defendants. Hence the present litigation.

It is now necessary to examine the basis of the claim asserted by the plaintiff and also the grounds on which it was resisted. It will be found that the claim as well as the objections thereto were equally insupportable in law.

The plaintiff was not content to rest his claim on his undoubted common law right, as a member of the public, to fish wherever he chose in the open sea. What he did assert was a claim that, by virtue presumably of some nebulous right of " succession " to the extinct family of " Cooray ", he alone (to quote the language of his pleadings) was " entitled to the right to fish with a *madela* at the Kuda Waraya as between himself and the defendants *on three days of each week* ". Mr. Choksy has very properly conceded before us that no such exclusive claim can be maintained. If it be equated to a claim to enjoy a monopoly for a part of each week during the annual fishing season, it is manifestly ill-founded. If, on the other hand, it be construed as a claim to have succeeded to the contractual rights of " the Cooray family " in their convenient working arrangement with " the Abrahams " which had subsisted in the past, it was equally without substance. In the result the learned District Judge was perfectly right in refusing him the protection of a declaratory decree in the form in which it was asked for in the plaint, and in refusing to award him damages for resistance to an exaggerated claim which was not his to exercise.

The position taken up by the defendants was equally ill-founded. They pleaded in effect that since the death of T. M. R. Cooray, the *de facto* monopoly which had temporarily been shared by both families had, by some unexplained principle of " survivorship ", become legally and permanently vested in them to the exclusion of the entire community.

The common law right of the members of the public to fish in the waters of the sea cannot be extinguished by any length of adverse user.— *Fernando v. Fernando* [1] and *Fernando v. Fernando* [2]. The learned District Judge therefore correctly decided that, subject to any strict proof of any valid custom in the locality which would operate to regulate the exercise of this right, the plaintiff and the defendants equally enjoyed the privilege of fishing with *madelas* in the Kuda Waraya. Learned Counsel who argued the appeal before us both acknowledged the correctness of this long established principle, but Mr. Choksy strongly urged that the decree under appeal should be amended by incorporating an alleged local custom whereby persons fishing with *madelas* at the Kuda Waraya were under an obligation to observe a system of rotation " designed to secure

[1] *(1920) 22 N. L. R. 260.* [2] *(1940) 42 N. L. R. 279.*

the fairest and most effective exercise of the general right". (*per* Bertram C.J. in *Fernando's case* [1].) He accordingly argued that it was the duty of the Court, as the petition of appeal suggests, "to fix the turn or turns to which the plaintiff is entitled", and "that such other directions be given as will enable the plaintiff effectively to exercise the right to which he has been held entitled."

Before I consider whether the evidence in the case establishes a "custom" such as the plaintiff (in a more chastened mood) now relies on and, if so, whether it is capable of enforcement or recognition by a Court of Law, it will be convenient to examine the law which is applicable. The leading South African authority on the subject is *Van Breda et al. v. Jacobs et al.* [2] where the Court upheld the validity of a local custom amongst fishermen carrying on their business off a portion of the Cape coast whereby "once on a free beach, namely a beach where no boats are permanently stationed, fishermen have set their lines for the purpose of catching a shoal of fish seen travelling along the coast, no other fishermen are entitled to set a line in front". Solomon J.A. pronounced the judgment of the Appellate Court and pointed out that, under the Roman-Dutch Law, which does not differ substantially from English Law on the subject :—

(1) the Court must be satisfied beyond any reasonable doubt that the alleged custom does in fact exist ;
(2) a custom to be valid must be an ancient or long-established one ;
(3) it must be reasonable ;
(4) it must have been uniformly observed, in the sense that the evidence "must not vary in regard to the relative circumstances of the act in regard to time, thing and place"—in other words, the custom must be proved to be certain.

These rules, which are based on the authority of *Voet 1. 3. 27-35*, have in the past substantially guided this Court in disposing of cases where a party has sought judicial recognition of a disputed local custom—*Curuvey v. Bastian* [3], *Baba Appu v. Aberan* [4] and the more recent decisions to which I have already referred earlier.

I have considered with care the evidence relied on by the plaintiff, and in my opinion it has signally failed to establish the observance of any long-established, precise and uniform system of fishing by rotation by the persons who have from time to time in the past fished with *madelas* at the Kuda Waraya. I have already mentioned two very convenient but nevertheless distinct and different procedures agreed upon in more recent times, first when only "the Coorays" and "the Abrahams" shared the fishing in these particular waters, and later when "the Abrahams" alone enjoyed that privilege. During each of these periods, as I understand the evidence, there had been an agreed working arrangement which was based on contract, but which, though eminently reasonable at the time of its particular application, was not inherently capable of adaptation to suit every conceivable new situation which might arise—for example, a decision of a larger and more unwieldy

[1] (*1920*) *22 N. L. R. 260 at 266.*
[2] (*1921*) *S. A. A. D. 330.*
[3] (*1859*) *3 Lor. 161.*
[4] (*1905*) *8 N. L. R. 160.*

group of fishermen to enter the field of competition by asserting for the first time their common law rights as members of the public. In such an event the previous systems of rotation might well prove both impracticable and unreasonable. Besides, there is the evidence of a disinterested and reputable witness who speaks of an even earlier period when " two or three families were fishing ". At that stage apparently, yet another agreed system of rotation had been in vogue.

All that emerges from an attempt to discover some common denominator between the various procedures indicated in the evidence is that the particular persons fishing in the locality at any given point of time had always been prudent enough to agree upon a working arrangement (appropriate to that particular situation and binding upon themselves alone) which would remove the immediate disadvantages of unregulated competition. None of those agreements, even if appropriate, could, *in the absence of some fresh agreement*, legally bind others who might subsequently choose to exercise their right, as members of the public, to fish in the same waters. In the result there exists at the present time no custom, in the sense in which that term is properly understood, capable of recognition or enforcement by a Court of Law. For " the test of custom is continued observance, and *ex hypothesi* cannot be suddenly created to meet a new problem ". In other words, " custom cannot create a rule to deal with a future difficulty ".—*Paton : A Textbook of Jurisprudence (2nd Edn.) p. 146.*

In this state of the law, the only practical solution to the difficulty presented by the plaintiff's insistence on his right to fish with a *madela* in this locality would be for all the persons who are presently engaged in the fishing industry at the Kuda Waraya to enter into some sensible agreement as to how they should eliminate friction by regulating their common law rights to their mutual advantage. The Courts possess no benevolent jurisdiction to enforce upon people an arrangement in which the element of *consensus* which is essential to a contract is lacking. Nor is it possible to invent a new " custom " to meet the situation. Finally, there would be no virtue in a pious judicial decree directing litigants to be sensible in their transactions with one another. The only assistance which the Courts of law could give them would be to pass a decree embodying any lawful agreement which they may hereafter conclude for the better regulation of their legal rights *inter se*, without prejudice of course to the rights of persons who are not parties to the litigation. In the hope that even some limited degree of finality may within a reasonable time be achieved in regard to the present dispute, I propose that provision should be reserved in the decree to make this possible.

I would, for the reasons previously indicated, amend the decree passed by the learned Judge to read as follows :—

" 1. It is ordered and decreed that the plaintiff is not entitled to the exclusive right to fish with a *madela* at the Kuda Waraya at Maggona on three days a week and that the defendants are also not entitled to the exclusive right to fish at the said Kuda Waraya.

2. It is further ordered and decreed that the plaintiff and the defendants as members of the public are equally entitled to fish with *madelas* at the said Kuda Waraya.

3. If the parties should at any time before 31st January 1953 arrive at a lawful compromise whereby they agree to regulate *inter se* their respective rights to fish with *madelas* at the Kuda Waraya, the parties are at liberty to apply to the District Court of Kalutara for the entering up of a supplementary decree in this action incorporating the said agreement, but any supplementary decree so entered shall be without prejudice to the rights of other persons who are not parties to this action or to the said agreement."

Subject to the above amendment, the appeal of the plaintiff and the cross-objections of the defendants must be dismissed, and there will be no order as to costs in either Court.

PULLE J.—I agree.

Decree amended.