1947 *Present :* **Howard C.J. and Jayetileke J.**

THE VILLAGE COMMITTEE, MAPE-KESBEWA, Appellant, *and* SILVA, Respondent

S. C. 234—D. C. Colombo, 15,744.

Contract—Sale of exclusive right of ferry—Soil on either side of ferry—Should vendor have the property in it?

The defendant sold to the plaintiff the exclusive right of a ferry and, according to the terms of the contract, was under an obligation to place the plaintiff in quiet possession of the two ends of the ferry.

Held, that the failure of the defendant to place the plaintiff in quiet possession of one end of the ferry was a breach of contract for which the defendant was liable in damages.

Per HOWARD C.J.—It was not necessary that the defendant should have the property in the soil on either side of the ferry. He must, however, have the right to land on either side.

APPEAL from a judgment of the District Judge, Colombo. The facts appear from the judgment of Jayetileke J.

H. V. Perera, K.C. (with him *N. M. de Silva* and *S. Wijesinha*), for the defendant, appellant.—The action by the plaintiff was for breach of agreement caused by the defendant's failure to put the plaintiff in quiet possession of both ends of the ferry. The action has been framed on the basis that the agreement "A" of October, 1943, was a lease and that by such agreement the relationship of landlord and tenant was created between the defendant and plaintiff.

The right of ferry is not a lease which entitled the lessee to be put in possession of the thing leased by the lessor. The right of ferry is only a privilege or a franchise which confers on the grantee, the plaintiff in this case, the right to carry passengers between the two ends of the ferry and take toll from such passengers, and involving also the duty on the grantee to maintain the ferry service for the convenience of the public. This privilege or franchise is also entitled to protection from being disturbed or violated by anyone. So that if the right of ferry is violated or disturbed the remedy is against the persons violating or disturbing that right and the remedy in this case is clearly an injunction against Caldera or anyone else who has disturbed or violated the defendant's right of franchise of ferry. See *Hammerton and Another v. Earl of Dysart and Another*[1]. Also Blackstone's *Commentaries* (1768 Edit.), Vol. III., Ch. 13, p. 219.

Originally all rights of ferries over public waters belonged to the Crown, but such rights have now been vested as far as this ferry is concerned in the denfendant. See Village Communities Ordinance (Chapter 198). The action has not been framed on the footing that the defendant did not have the right of ferry but only on the footing that vacant possession of one end of the ferry was not given to the plaintiff. The action is clearly misconceived. On the action as it now stands the plaintiff has no remedy against the defendant.

[1] *L. R. (1916) 1 A. C. 57.*

N. E. Weerasooria, K.C. (with him *S. R. Wijayatilake*), for the plaintiff, respondent.—The defendant agreed to confer ferry rights on the plaintiff. The defendant has failed to do so. Neither the defendant nor the Moratuwa Urban Council owned the Moratuwa end of the ferry. Caldera was in possession of the Moratuwa end of the ferry and obstructed the plaintiff in various ways in the exercise of the right of ferry. It is well settled law that, though the owner of a ferry need not own the land at one or both ends of the ferry, the owner of the ferry must have the right to land on both ends of the ferry. See *Peter v. Kendal*[1]. Caldera was in possession of, and collected toll from passengers at, the Moratuwa end. Therefore, under section 110 of the Evidence Ordinance, it is quite legitimate to presume that Caldera was the owner and not the defendant or the Urban Council of Moratuwa. The right of the defendant to land on the Moratuwa end of the ferry has not been proved by the defendant. The action is based on breach of agreement "A" of October 5, 1943, and is clearly maintainable.

H. V. Perera, K.C., replied.

Cur. adv. vult.

September 18, 1947. HOWARD C.J.—

In my opinion the appellant did not by entering into the contract with the respondent guarantee, as in the case of landlord and tenant, the quiet enjoyment of the ferry. Nor was it necessary that the appellant should have the property in the soil on either side of the ferry. The appellant must however have the right to land on either side. In this connection I would refer to *Peter v. Kendal*[2]. In the judgment in the case the following passage occurs at pp. 612-613 :—

> "Then it is said that this is not a good ferry, because the land on both sides does not belong to the owner of the ferry. I am of opinion, that it is not necessary that the owner of a ferry should have the property in the soil on either side. He must have a right to land upon both sides, but he need not have the property in the soil on either. It is sufficient if the landing-place be in a public highway. This is perfectly consistent with the principle laid down in Saville. That principle is, that a ferry is in respect of the landing-place, and not of the water. But I cannot agree to what is stated as a conclusion resulting from that principle, 'That every owner of a ferry must have the land on both sides of the water, for otherwise he cannot land'. The reason given for his having the property in the soil is insufficient, for he may have a right to land on both shores without having any property in the soil of either."

I agree with my brother Jayetileke that the appellant has not proved that the Council had the right to land on both sides of the ferry. In these circumstances the appeal must be dismissed with costs.

JAYETILEKE J.—

The defendant in this case is the Village Committee of the Mampe-Kesbewa village area. The Bolgoda Lake is partly within the limits of the denfendant and partly within the limits of the Urban Council of

[1] *(1827) 6 B. & C. 703 ; 108 E. R. 610.* [2] *(1827) 108 E. R. 610.*

Moratuwa. The Willorawatte Road, which is on the Moratuwa side of the lake, ends at the northern bank of the lake, and the Kitalandaluwa Ferry Road, which is on the Kesbewa side of the lake, ends at the southern bank of the lake.

One Caldera, who owns a land by the side of the bank at the end of the Willorawatte Road, claims to be entitled to the bank adjoining his land. For about 25 years prior to 1943 the Village Headman of Deltara conducted a ferry service between the ends of the said roads. The headman, in the course of his evidence, said that Caldera refused to allow passengers to land on the bank adjoining his land, and he was obliged to take a lease of a land adjoining Caldera's land and disembarked the passengers there. This evidence shows that for several years prior to 1943 Caldera had been in possession of the bank at the end of the Willorawatte Road. In the year 1943 the defendant and the Urban Council of Moratuwa decided to establish a ferry service between the ends of the two roads. By an indenture, D 2, dated August 30, 1943, the Urban Council of Moratuwa agreed that the defendant should have the administration and control of the said ferry service. On October 5, 1943, the defendant sold by public auction the exclusive right of ferry for the year 1944 between the said points. At the sale the plaintiff purchased the said rights for the sum of Rs. 1,400 payable in twelve monthly instalments of Rs. 116.67, and entered into the agreement A. It provides, *iner alia* :—

(1) That the plaintiff shall not levy more than the amounts set out in the agreement.

(2) That the plaintiff shall post a copy of the rates in a frame with a glass face at each end of the ferry and keep and maintain the same in good and legible condition and well protected from water and sun.

(3) That the plaintiff shall cause to be erected in front of the toll station or if there is no toll station on either end of the ferry on the bank as near to the road as possible so as to be conspicuously visible to passengers a post bearing at a height of six feet from the road and set at right angles to the road and having painted on it on both sides in block letters not less than one inch in size the name of the ferry and toll station in English and Sinhalese.

(4) That the plaintiff shall pay any fines or impositions inflicted or imposed by the Chairman by reason of any breach of the conditions in the agreement.

The plaintiff says that as the ferry rights had not been claimed by the defendant prior to 1943, and as he had to put up buildings and to erect posts, he thought the defendant should place him in possession of the two ends of the ferry, and he accordingly called upon the defendant to do so. The defendant placed him in possession of the Kesbewa end, but failed to place him in possession of the Moratuwa end. He put a shed at the Kesbewa end, and, when he attempted to put up a shed at the Moratuwa end, Caldera drove him away and did not allow him to remove the materials he took with him. Thereupon, he wrote P 3 dated January 4, 1944, informing the defendant that Caldera would not allow him to erect the shed, or to remove his materials, or to take his canoes up to the bank.

and requesting the defendant to cancel the agreement and refund his deposit. He received no reply to that letter from the defendant. He then wrote another letter P 4 informing the defendant that, owing to Caldera's dispute, he could not charge the passengers any fare and that he was suffering a loss of about Rs. 10.50 a day. On March 6, 1944, he wrote P 5 inquiring from the defendant whether he could stop the service. This letter shows that P 4 was sent on January 4, 1944, under registered cover. In reply to P 4 and P 5 the defendant sent P 6 dated March 8, 1944, calling upon the plaintiff to pay the rent for January, February and March. The plaintiff sent a reply P 7 dated March 13, 1944, through his Proctor, refusing to pay rent on the ground that the defendant failed to place him in quiet possession of the ferry. On March 29, 1944, the plaintiff's Proctor by his letter P 8 invited the defendant's attention to P 7 and requested the defendant to place the plaintiff in possession of the Willorawatte end of the ferry. To that, too, there was no reply. On April 24, 1944, and on May 2, 1944, the plaintiff sent to the defendant statements P 9 and P 10 of the losses sustained by him. On September 20, 1944, the plaintiff instituted this action for the recovery of a sum of Rs. 6,332.10 as damages up to December 31, 1944. The cause of action pleaded by him in the plaint is that the defendant committed breach of the agreement by failing to place him in quiet possession of the two ends of the ferry. After instituting the action the plaintiff, on the advice of his lawyer, continued the ferry service up to the end of December in terms of his agreement.

The District Judge held that the landing place on the Moratuwa side was not the end of Willorawatte Road, but the bank between the water's edge and the road, and that the defendant committed a breach of the agreement by failing to place the plaintiff in quiet possession of that bank. He awarded to the plaintiff a sum of Rs. 4,152.10 as damages. This amount represents the actual out-of-pocket expenses of the plaintiff. The finding of the District Judge that the landing place is the bank is supported by the evidence of the headman and by the documents D 2 and A.

At the argument before us, Mr. Perera contended that the defendant was under no obligation to place the plaintiff in quiet possession of the two ends of the ferry. On the facts of the case it seems to me that this contention is not well founded. The agreement provides that the plaintiff shall erect in front of the toll stations or on the banks of the lake two posts giving the name of the ferry and toll station in English and Sinhalese, and that, if he fails to do so, he shall be liable to pay a fine. The evidence shows that, owing to Caldera's opposition, the plaintiff could not erect the toll station or the post at the Willorawatte end. The Chairman of the defendant admitted in cross-examination that he had to give the plaintiff possession of the two ends of the ferry in order to enable him to erect the stations. He, however, withdrew this admission when he realised that it would destroy his defence. In my opinion the agreement implies that the defendant was under an obligation to place the plaintiff in quiet possession of the two ends of the ferry. It follows, therefore, that the defendant's failure to place the plaintiff in quiet possession of the bank at the Willorawatte end is a breach of the agreement for which

the defendant is liable in damages. Mr. Perera conceded that, if the Urban Council of Moratuwa was not entitled to the landing place at the Willorawatte end of the ferry, the plaintiff would be entitled to succeed. In view of my decision on the interpretation of the agreement, it is unnecessary for me to consider whether Caldera had title to the bank at the Willorawatte end. No issue has been framed on this point though evidence has been led on both sides. Caldera has undoubtedly been in possession of the bank for several years. When he was charged by the plaintiff in the Magistrate's Court he produced a plan of his land which included the bank. He also produced some tax receipts which show that he paid rates for the land depicted in that plan. The Chairman of the Urban Council of Moratuwa did not make any attempt to prove that the Council was entitled to the bank. His evidence shows that he was not aware of the existence of the bank.

For the reasons given by me, I would dismiss the appeal with costs.

Appeal dismissed.