

1959

Present : Basnayake, C.J., and Pulle, J.

MODERA PATUWATA CO-OPERATIVE FISHING SOCIETY LTD.,
Appellant, and GUNAWARDENA, Respondent

S. C. 516—D. C. Galle, 1299/X

Fishing—Right to fish in the sea—Enforceability—Regulations under Game Protection Ordinance, 1909—Regulation 3—Fisheries Ordinance, No. 24 of 1940, s. 28—Several remedies—Right to elect.

Where there is an existing liability at common law and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law, both the common law remedy and the statutory remedy are available to a person at his election.

Accordingly, the right to fish in the sea which exists under the common law can be enforced by way of ordinary action although a specific remedy is provided by the Regulations made under the repealed Game Protection Ordinance, 1909, which are kept alive by section 28 of the Fisheries Ordinance No. 24 of 1940.

APPEAL from a judgment of the District Court, Galle.

H. W. Jayewardene, Q.C., with G. P. J. Kurukulasuriya and N. R. M. Daluwatte, for Defendant-Appellant.

G. E. Chitty, Q.C., with C. N. Gunawardena and Hanan Ismail, for Plaintiff-Respondent.

Cur. adv. vult.

May 29, 1959. BASNAYAKE, C.J.—

This action relates to the plaintiff's right to fish in the portion of the sea known as Modera Patuwata Waraya by the coast of Dodanduwa in the Galle Revenue District. The defendant is a Co-operative Society known as the Modera Patuwata Co-operative Fishing Society Ltd. The plaintiff is a fisherman who has been fishing in the Modera Patuwata Waraya for thirty-two years. At one time he had seven boats and used ma-del fishing nets, but at the material time he had only two fishing boats. His ancestors had fished in the same waraya before him. Till the defendant Society was formed in 1950 the plaintiff was the sole fisherman in the Modera Waraya. The ma-del fishing season begins on 1st September and ends on 31st May. The sea is too rough for ma-del fishing in the intervening period. Regulations made under the repealed Game Protection Ordinance, 1909 (*Gazette* No. 7,866 of 3rd July 1931, p. 1179), which are kept alive by section 28 of the Fisheries Ordinance, No. 24 of 1940, provide for the regulation of fishing in the area covered by the territorial waters adjoining the Galle Revenue District. The material regulations read :

“ 1. The ma-del net fishing season begins on September 1 and ends on May 31 each year.

“ 2. All ma-del, baru-del, visi-del nets and yoth within a Patabendi Arachchi's jurisdiction shall be registered on application to the Government Agent in a book to be kept for the purpose by such Patabendi Arachchi. A tab bearing the registration number shall be attached to each ma-dela, baru-dela, or yotha in such position as may be most convenient. All ma-del, baru-del, and yoth for use in a particular boat shall bear the same registration number. The particulars to be registered in regard to such nets are the registration number and the names of the owners ; in the case of a ma-dela the length of the net shall also be registered. The Government Agent shall have power, for special reasons to be given by the applicant, to register such ma-del nets after September 15.

“ 3. In case of any dispute as regards the description and number of the nets to be registered the parties entitled to register them, or the boundaries of the warayas or ports the decision of the Government Agent shall be final.

“ 4. The Government Agent shall have power to limit the number of ma-del, baru-del, visi-del nets or yoth to be used in each waraya or port.

“ 5. Registered ma-del, baru-del, visi-del, or yoth shall be used in the waraya for fishing by turns in rotation calculated from October 1 in the order of the registration numbers (of which order each owner should keep himself informed). The turn of each group of ma-del and baru-del bearing the same registration number shall begin at sunrise and terminate at sunrise of the following day.”

It would appear that the registration of nets in Modera Waraya was discontinued after 1938 and re-started in 1950 when the Co-operative Fishing Society was formed. It may be that the authorities did not consider registration necessary so long as the plaintiff was the sole fisherman in the waraya.

In 1950 two boats of the plaintiff were registered and these boats were assigned the numbers 1 and 2. Two boats of the defendant numbered 3 and 4 were also registered. Under Regulation 5 the plaintiff and the defendant were given alternate days for fishing in the waraya. The advent of a rival to the field which the plaintiff monopolised seems to have resulted in unpleasantness between the plaintiff and the President of the Co-operative Society, especially as some of the plaintiff's employees went over to the Co-operative Society. The 1950 fishing season which began in October 1950 and ended in April 1951 passed off without any untoward happenings. In September 1951 an attempt was made to bring the plaintiff within the fold of the Co-operative Society. With that end in view a meeting presided over by the Director of Fisheries was held at Dodanduwa on 26th September 1951. But the meeting failed to achieve its purpose. The President of the Society claimed that the plaintiff having agreed to join the Society backed out of it later, while the plaintiff maintained that he never agreed to become a member of the Society. On account of the uncertainty created by this conflict, the Patabendi Arachchi did not serve on the plaintiff and the defendant the list of their respective fishing days before 1st October 1951 as he should have done.

By 21st October it became clear that the plaintiff would not join the Co-operative Society. The Patabendi Arachchi therefore handed on 22nd October the list of fishing days of the Co-operative Society for the 1951 season to its President. He refused to accept it. The days of the month bearing odd numbers were assigned to the plaintiff and the days of the month bearing even numbers to the defendant. The defendant defied the allocation of turns for fishing and fished on the days allotted to the plaintiff as well. This led to friction between the defendant and the plaintiff. On 31st October 1951 there was an open clash between the parties in which a number of persons were seriously injured on both sides. The plaintiff was charged along with others of offences involving violence to person and eventually convicted of attempted murder and sentenced to undergo five years' rigorous imprisonment. Thereafter fishing in the waraya was suspended for a number of days and the waraya was guarded by the Police to avoid further clashes. There is a conflict of evidence as to the exact period of suspension of fishing. The Inspector of Police states that fishing was suspended from 31st October to 21st November. The Inspector of Fisheries who stated in examination-in-chief that from 23rd October to 16th November the defendant fished in the waraya to the exclusion of the plaintiff, when cross-examined said that he was unable to state definitely whether from 31st October to

10th November there was fishing in the waraya. Even the Patabendi Arachchi is unable to say whether any fishing was done in the waraya between 31st October and 12th November. The plaintiff himself is unable to throw any light on the matter as he was taken into Police custody on 31st October and later remanded to the custody of the Fiscal from which he was not released till 15th November.

The learned Judge has held that the defendant fished on the days allotted to the plaintiff during the period commencing on 23rd October 1951 and ending on 10th November 1951, but I am unable to find any satisfactory evidence in support of his finding that fishing was carried on by the defendant between 31st October and 10th November or that the defendant prevented the plaintiff from exercising his rights during that entire period.

It is not clear on what basis the learned Judge has awarded the plaintiff damages in a sum of Rs. 3,500. Even assuming that the defendant fished on the days allotted to the plaintiff between 23rd October and 10th November, the number of fishing days of the plaintiff would be ten and the amount of damages Rs. 1,500 on the plaintiff's own assessment of net profits of Rs. 150 per day. But it is not established that the defendant fished between 31st October and 10th November. The President of the defendant Society admits that he fished on the dates allotted to the plaintiff from 23rd to 31st October 1951. Therefore it is only the period from 23rd October to 31st October 1951 that can be taken into account for the assessment of damages. In this period the plaintiff had five fishing days. Giving him credit for 10th November as well, on which day according to Waduge Simon's statement (D5) to the Patabendi Arachchi the defendant fished, the total number of days on which the defendant usurped the plaintiff's right would be six. The maximum he can obtain as damages is therefore Rs. 900.

Anyone is free to fish in the open sea. The right is subject to regulation by the State within its territorial waters. This right is also subject to regulation by custom (*Van Breda & others v. Jacobs & others*¹). Where the right is regulated anyone is free to exercise his right subject to the regulations. It is even granted in our common law that where a person has fished alone for a long time in a backwater of the sea he can prevent anyone else from enjoying the same right (Voet, Bk. XLJ, Tit. I, s.5). Such a right of exclusive fishing is recognised by the Law of England as well (Hall—Rights of the Crown in the Sea Shore, p.46).

Learned counsel for the appellant also contended that the specific remedy provided in Regulation 3 barred the plaintiff's right of action. It is a well established principle of law that where a statute creates new rights and provides a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to the prescribed remedy or the prescribed tribunal and to no other. But

¹ (1921) A. D. 330.

the instant case does not fall within the ambit of that principle. The plaintiff is seeking to enforce his rights not under the regulations but under the common law. It is equally well established that where there is an existing liability at common law and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law, both the common law remedy and the statutory remedy are available to a person at his election. Under our law everyone has the right of access to the established courts of law for relief against the infringement of his rights and to no one will the courts deny that right if their powers are invoked in appropriate proceedings. Even if it be conceded that such a right can be taken away by an enactment of a Sovereign Legislature there is no doubt that a subordinate law-making authority cannot do so.

The appeal is dismissed subject to the substitution of the sum of Rs. 900 for the sum of Rs. 3,500 awarded as damages.

Even though the appellant has succeeded in obtaining a substantial reduction of the damages awarded against him as the respondent's claim for damages has not been properly presented, we order the appellant to pay the costs of appeal because throughout these proceedings he denied the plaintiff's right to fish in these waters.

PULLE, J.—I agree.

Appeal mainly dismissed.

