

APPELLATE CRIMINAL.

Before Mr. Justice Curgenvven and Mr. Justice King.

1935,
January 22.

SETHU KARUPPAN AMBALAM *alias* PASUKALAKKI
AND THREE OTHERS (Nos. 1, 2, 4 AND 8 of B PARTY)—
PETITIONERS,

v.

PEER MAHAMMAD SAMMATTI AND THREE OTHERS
(Nos. 1 TO 4 OF A PARTY) RESPONDENTS.*

Criminal Procedure Code (Act V of 1898), sec. 147 (2)—Fishing in open sea—Order restraining one section of public from, except in manner specified—Maintainability of.

None can acquire a right, exclusive against the public or any other person, to fish in any particular area of the open sea, or in that part of it within three miles of the shore, known as territorial waters; and where the right cannot form the subject-matter of property or be enjoyed as an easement, an essential condition for an order by a Magistrate under section 147 (2), Criminal Procedure Code (Act V of 1898), does not exist; and an order under it directing one section of the public to fish in the sea only in accordance with certain long-established usages and not at all on certain specified days, cannot be maintained.

Baban Mayacha v. Nagu Shrivacha and others, (1876) I.L.R. 2 Bom. 19, followed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Joint Magistrate of Ramnad, dated 23rd March 1934 and passed in Miscellaneous Case No. 1 of 1934.

K. S. Jayarama Ayyar for R. Ramasubba Ayyar for petitioners.

V. L. Ethiraj for S. K. Ahmed Meeran and C. A. Mohamad Ibrahim for respondents.

* Criminal Revision Case No. 438 of 1934.

A. Narasimha Ayyar for *Public Prosecutor*
(*L. H. Bewes*) for the Crown.

Cur. adv. vult.

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The ORDER of the Court was delivered by CURGENVEN J.—This criminal revision petition is presented against an order of the Joint Magistrate of Ramnad under section 147 of the Criminal Procedure Code, passed in the following circumstances. There is a system of fishing, well-known upon this coast, whereby a long net is hung like a curtain in the sea, being supported by floats and kept vertical by weights. This net is laid parallel to, and at some distance from, the shore, and is then pulled in by means of ropes fixed to the two ends. In this way a catch of fish is landed. In the case now under reference, the system embraced the use of successive nets, and further particulars of it are given in the learned Joint Magistrate's order. It was worked by seven fishing-boats, which were originally owned by Muhammadans; but sometime ago Hindus acquired what is described as a $2\frac{5}{8}$ share in the seven boats—in other words the shares enjoyed by the Muhammadans and the Hindus were in the ratio of 5 to 3. Disputes subsequently arose between these two sets of owners due, it has been found, to the Hindus refusing to conform to the customary method of working the boats in laying and drawing the nets, and insisting upon fishing on Fridays and Muhammadan holidays. This naturally provoked the Muhammadans, being, it is said, in breach of the understanding upon which the Hindus acquired their interest; and the Joint Magistrate has found that the dispute is likely to cause a breach of the peace. He has accordingly passed an order under section 147 of the Criminal Procedure Code directing the

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Hindus to fish only in accordance with the long-established custom of each boat taking its turn, and not to fish at all on Fridays and Muhammadan holidays.

This order has been attacked before us upon two grounds. It is argued in the first place that for the purposes of section 147 the open sea is beyond the Magistrate's territorial jurisdiction. Secondly, that the Muhammadans have no legal right to restrain the Hindus from fishing in any manner they please.

The first point turns upon the question whether the sea, regarding the alleged right of user of which the dispute exists, is within the local limits of the Joint Magistrate's jurisdiction; because that is one of the conditions necessary for the application of the section. We have heard a very interesting argument upon this question, which is undoubtedly a question of great difficulty. There is no authority directly in point in this country, and indeed very little in any reported Indian decision which would assist us to a right conclusion. The contention that the ordinary criminal jurisdiction of a Magistrate extends only to the water's edge has been urged before us by citation of English law, particularly of the leading case, *The Queen v. Keyn*(1). We are reluctant to leave the point undecided having regard to the labour which has been expended in presenting it to us. But on the second point taken in this petition we think that no such obscurity or scope for difference of opinion exists, and our decision upon it will suffice for the disposal of the case. In these circumstances, and as the question of territorial jurisdiction is not likely to arise frequently in practice, we think it preferable that a

(1) (1876) 2 Ex. D. 63.

pronouncement upon it should await an occasion when its decision is unavoidable.

Turning then to the second point, a reference to the section will show that there must not only be a dispute regarding an alleged right of user of any land or water but that, under sub-section 2, it must appear to the Magistrate that such right exists. By "right" is meant, of course, legal right, and the purpose of the section, there can be no doubt, is, by an order following a summary inquiry, to prohibit interference with the exercise of a legal right. Sub-section 4 makes such an order subject to any subsequent decision of a civil Court. Now in the present case the learned Joint Magistrate, while accepting the evidence of the custom regulating the fishing, has deliberately abstained from entering into the question whether such a custom gives rise to any rights legally enforceable. He has not put to himself the question whether the petitioners before him would be able, by process of law, to restrain the respondents from doing the things which he has directed them not to do.

If we were satisfied that such a right did in fact exist, such an omission would not justify us in interfering with an order which, in other respects, appears to be unexceptionable. But if the right to fish in the sea, which every man enjoys, cannot be taken away from him by contract, custom, prescription, or otherwise, it is evident that no such "right" can be found as will afford the Court ground for action under the section. It appears to be indisputable that in general none can acquire a right, exclusive against the public or any other person, to fish in any particular area of the open sea, or in that

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part of it, within three miles of the shore, known as territorial waters.

“The right of fishing in the sea being common to all subjects of the realm, a prescription for such a right annexed to a tenement is bad.” [*Ward v. Cresswell*(1), cited at page 376 of Coulson and Forbes on Waters and Land Drainage, 5th Edn.].

Further quotations from the same case are to be found in a judgment by WESTROPP J. in *Baban Mayacha v. Nagu Shravucha and others*(2), and in particular:—

“This prescription, therefore, for a right common to all the subjects of the realm cannot be supported. A man might as well prescribe that he, and all whose estate he has, have a right to travel on the King’s highway as appurtenant to his estate.”

It follows, we think, that as the right to fish in the sea cannot form the subject-matter of property, or be enjoyed as an easement, so no one can, by contract or otherwise, relinquish to another his right or any part of it. If any such contract has been made, the civil Court will not enforce it, whatever other remedies may be open to the aggrieved party to the contract. Accordingly in the present case we are unable to hold, in the terms of sub-section 2 to section 147, “that such right exists”, i.e., a right to restrain the petitioners before us from fishing except in a certain manner. That being so, an essential condition for an order under the section fails, and the order cannot be maintained. It is much to be hoped that, however the law may stand, the parties will have the good sense to come to an understanding with each other, and compose this regrettable dispute.

We allow the petition and set aside the order.

K.W.R.

(1) (1741) Willes. 265.

(2) (1876) I.L.R. 2 Bom. 19, 48.