1878.
June 6.

SIRIPINA *v.* KIRIBANDA KORALA.

D. C., Ratnapura, 10,289.

Kandyan Law—Nindagama—Right of landlord or tenant to break up land in search of minerals without consent of each other.

In the absence of proof of any custom, neither the landlord nor the tenant of a nindagama can gem on the land without the other's consent.

PLAINTIFFS claimed to be owners of three-eighths of Palgastunewatta and owita, appertaining to Miganadeniya-manane-panguwa. They alleged that defendants had forcibly entered into possession of the lands, and had removed gems to the value of Rs. 1,200 therefrom. They prayed for a declaration of title and damages.

The first defendant claimed Miganadeniya as a nindagama, alleging that he was the owner of one-half thereof and that the remaining defendants owned the rest. He admitted plainiffs' rights to what they claimed only subject to rajakariya to the

1878.
June 6.

defendants. He admitted mining for gems on the owita, but not the watta; but alleged it was with plaintiff's consent. He prayed for dismissal of plaintiff's action.

Ths second, third, and fourth defendants filed a separate answer denying the gemming.

The plaintiffs replied admitting that the lands were rajakariya lands. They denied consenting to the gemming.

The District Judge found that first defendant acted without the plaintiffs' consent, and gave judgment against him for Rs. 750 damages and costs. He found the other defendants improperly joined, as they did not act with first defendant.

First defendant appealed, and the case was sent back for further evidence as to the relative rights of landlord and tenant, where one party has gemmed without the consent of the other, and leave was given to defendants to amend their answer.

First defendant accordingly filed an amended answer stating that plaintiffs as tenants were only entitled to the crops from the land, while the minerals, which originally belonged to the king, were now the property of the landlord by virtue of the Tudapota creating the nindagama.

Plaintiffs replied that neither party was entitled to diminish permanently the value of the land to the other's loss; they denied that the Tudapota conferred the king's prerogatives on the grantee.

The District Judge found that there was no uniform custom giving the landlord the sole right to gem on the lands of paraveni tenants, and he allowed to plaintiffs three-eighths of one-half of Rs. 1.600, the amount found to have been realized by the sale of gems.

First defendant appealed again.

The case came on for argument before Clarence, J., and Dias, J.

There was no appearance of counsel for appellant.

Van Langenberg, for respondent.

On the 6th June, 1878, Clarence, J., delivered the judgment of the Court as follows:—

Plaintiffs sue four defendants. They aver that they were at the date of the acts complained of owners and in possession of an undivided three-eighths of certain lands belonging to a certain panguwa, and they aver that defendants forcibly entered upon the lands and dug gems of the value of Rs. 1,200, and by so doing prevented plaintiffs from having due enjoyment of the land; and plaintiffs claim a declaration of title, an injunction, and Rs. 1,200 damages.

1878.
June 6.

It is not disputed that plaintiffs are the paraveni tenants of the share of the land in question, and that first defendant owns one-half of the nindagama of which the land is held, the other defendants owning the other half. and it is also not disputed that first defendant did open a pit on the land and dig for gems. The second, third, and fourth defendants in their answer deny the alleged trespass. The first defendant originally filed an answer, in which he pleaded the plaintiffs' consent to his gemming. Evidence was adduced at the trial to prove that consent. The District Judge, however, was dissatisfied with that evidence, and gave judgment against the first defendant for Rs. 750 and costs, ordering second, third, and fourth defendants simply to bear their own costs. The first defendant appealing against that decree, the Supreme Court set it aside and sent the case back for evidence as to custom with respect to the mutual rights of nindagama lord and tenant in such matters. Leave was also given to defendants to amend pleadings, and to all parties to adduce evidence generally. In pursuance of this leave to amend, first defendant filed a pleading which purports to be an "amended answer," but whether included as an addition to or in substitution for the original answer, does not distinctly appear. The new answer, which is so confused as not to be quite intelligible, appears to deny the existence of any custom as to sharing between the lord and tenant, and also avers that the right to minerals belonged of old to the Kandyan kings, and by virtue of a Royal grant had become vested in defendants.

At the new trial defendants called several witnesses apparently to prove a custom in their favour, but these witnesses do not prove more than that they had as a fact gemmed without the tenants' permission on lands in nindagama, of which the witnesses were the lords. Iddamalgoda Basnaike Nilame, a witness called by the Court, on whose evidence the District Judge appears to have placed considerable reliance, testified to the effect that in former times paraveni tenants did not oppose their landlord's claims to the gems under the land, but whether from respect to the landlords or in compliance with a custom the witness could not say. The witness, however, did say that, in accordance with the custom of the Udarata, the landlord used to be entitled to all minerals below the surface, but that for the last four or six years the tenants had disputed the landlord's right to take all the minerals.

Taken as a whole, the evidence adduced as to custom does not appear, as such, to establish a customary law authorizing the landlords breaking up the land in search of minerals without the tenants' consent.

1878.
June 6.

In 2,336, D.C., Kegalla, decided by this Court on 13th July, 1875, a nindagama lord who had leased the land to a third party for plumbago mining sued the paraveni tenants who had ejected the lessee and were working the pit for themselves, and the Supreme Court, in the absence of any customary law, held, affirming the judgment of the District Court, that the right of both proprietor and tenant of a paraveni panguwa being a qualified one, it is reasonable and consistent with principle that, whilst the former should not be allowed to lease the mine or any interest therein to third parties, the tenant should not, on the other hand, be allowed to do any act which would permanently diminish the value of the land. And in a very recent judgment of this Court it was held that a tenant had no right, in a panguwa of which the Crown was lord, to impair the value of the land by breaking up the land and digging out clay. As to the contention advanced in the first defendant's amended answer, that the right to mines and minerals belonged to the Kandyan kings, and that by virtue of a certain royal grant the royal right has become vested by descent in the defendants, we need only say that the first defendant has not proved the royal grant.

Whatever may have been the process by which the primeval community now represented by this panguwa assumed its present constitution of nindagama owner and pangukarayas, the truth appears to be that we have before us in this case no materials upon which we can ascertain that any corresponding right with respect to gemming has crystallized or grown up as between the party who has grown up into the nindagama owner, and those who have subsided into the rank and file paraveni holders of the panguwa, with respect to gemming. It may be, to quote Sir H. S. Maine (*Village Communities, p. 141*), the lord, in succeeding to the legislative power of the old community, was enabled to appropriate to himself such of its rights as were not immediately valuable, and which, in the event of their becoming valuable, required legislative adjustment to settle the mode of enjoying them. And it might be that in this manner the lord would acquire righs, to the exclusion of the tenants, in respect of minerals. It certainly is extremely probable that in an Eastern country like Ceylon, where the attitude of political inferiors towards their superiors is markedly servile, nindagama owners would very frequently carry matters against the tenants with a high hand as regards gemming, as well as other things. In like manner it is probable enough that the native kings would deal after a very despotic fashion in similar matters with those below them. Whatever may have been done, we have not before us any materials upon which we can

1878. *June 6,*

pronounce that the lord has acquired any right to gem on the tenants' land without the tenants' consent, and this Court appears to have arrived at a similar conclusion in the Kegalla case above referred to. We find no proof of any exclusive right either in the nindagama owners or the paraveni tenant. In this state of things the only holding open to us is, that neither can gem without the other's consent.

[The judgment then dealt with the question of the amount of damages and affirmed the District Judge's award.]