Present : De Sampayo J.

WANDURAGALA *v.* SENMANDA *et al.*

5—C. R. Kurunegala, 4,946.

Nindagama—*Grant of royal village by the British Government*—Muttetu *fields—Action by one co-owner—Registration of* nindagama—*Conclusive proof—Service Tenures Ordinance, No. 4 of 1870, s. 10.*

A claim to a *nindagama* cannot be based on a grant from the British Government of "*muttetu* fields" only.

The registration of a land as a *nindagama* is not conclusive proof of its existence as a *nindagama*.

The owner of an undivided share of a *nindagama* cannot sue the tenants for commuted dues without joining the co-owners as parties to the action.

THE plaintiff as the owner of Gettuwana *nindagama* sued the defendants, forty-three persons in all, as the *paraveni* tenants of the Galahitiyawa *panguwa* of the said *nindagama* for the recovery of a sum of Rs. 64.50 as the commuted dues of the said *panguwa* for the years 1922 and 1923. According to plaintiff, the original owner of the *nindagama* was Wanduragala Mohottala, Ratelekam. He left one child, Bandara, who had two children, P. B. Wanduragala and Mrs. Hulugalla. P. B. Wanduragala, by deed No. 32,175 dated January 11, 1913, gifted his half share to his wife Embelegoda Kumarihamy. In the year 1918, P. B. Wanduragala and his sister, Mrs. Hulugalla, it was alleged, made an amicable division of their family lands, the former taking the entirety of this *nindagama*. The plaintiff claimed on a deed of transfer No. 423 dated July 4, 1923, executed by Embelegoda Kumarihamy. The Commissioner of Requests held that by virtue of the arrangement specified above the plaintiff on the deed of transfer became the sole proprietor of the *nindagama*, and gave judgment for the plaintiff.

Drieberg, K.C. (with *Croos Da Brera*), for defendants, appellants.—The plaintiff is the owner of an undivided half share of the *nindagama*. She cannot, therefore, maintain the action for dues without joining the co-owners as parties (*Banda v. Lapaya* [1]). The Crown grant gives the plaintiff only two amunams of *muttettu* fields, but she is claiming the lands in dispute as a *nindagama*, which cannot be composed of *muttettu* fields only. The grant itself negatives the idea of a *nindagama*. The entry in the Service Tenures Register is not conclusive. Evidence can always be led to disprove this entry (*Punchirala v. Kandapat vihare* [2]). The judgments in the Village Tribunal cases are not binding on the defendants. They

[1] *(1891) 2 C. L. R. 38.*

[2] *(1884) 6 S. C. C. 157.*

were decided without jurisdiction. The land is situated within the limits of the Local Board of Kurunegala. The value of the land is over Rs. 20. There is no evidence of payment of dues. The plaintiff's rights, if any, are therefore prescribed. The account book produced has not been kept in the ordinary course of business.

H. V. Perera (with *Samarakoon*), for plaintiff, respondent.—The account books were never challenged. They were kept by the plaintiff's predecessor in title. Entries were made whenever payments were made. The plaintiff's witness states that he knew personally of these payments. The defendants are bound by the Village Tribunal cases, which were merely for rent. The plea of jurisdiction cannot therefore be raised. The judgments in these cases certainly arrested prescription. The nature of the Crown grant shows that extensive rights were granted. The description is wide enough to include the claim of the plaintiff.

Drieberg, K.C., in reply.

April 8, 1925. De Sampayo J.—

The amount involved in this case in small, but some important and interesting questions arise for consideration, and their effect will be far reaching. The plaintiff, alleging that she is the owner and proprietor of Gettuwana *nindagama*, and that the defendants, forty-three persons in all, are the *paraveni* tenants of the Galahitiyawa *panguwa* of the said *nindagama*, claims Rs. 64.50 as the commuted dues of the said *panguwa* for the years 1922 and 1923. I will presently deal with the question whether Gettuwana is a *nindagama* and whether the defendants are *paraveni* tenants of any *panguwa* therein. But at the outset of the case a difficulty arises as to the constitution of this action. The plaintiff's case is that the original owner of the *nindagama* was Wanduragala Mohottala, Ratelekam; that this Mohottala left one child Bandara, who had two children, P. B. Wanduragala and Mrs. Hulugalla, that P. B. Wanduragala by deed No. 32,175 dated January 11, 1923, gifted his half share to his wife Embelegoda Kumarihamy, and that in the year 1918, P. B. Wanduragala and his sister, Mrs. Hulugalla, made an amicable division of their family lands, the former taking the entirety of this *nindagama* and Mrs. Hulugalla some other lands. The Commissioner of Requests holds that by this arrangement Mrs. Hulugalla relinquished her rights to the *nindagama*, and that by reason of the deed of sale No. 423 dated July 4, 1923, executed by Embelegoda Kumarihamy in favour of the plaintiff, she (the plaintiff) became the sole proprietor of the *nindagama*. But this is impossible for more than one reason. At the date of the alleged exchange P. B. Wanduragala had no interest in the *nindagama*, as he had five years before transferred his half share to his wife. In the next place there was no deed for effectuating the exchange, and assuming that P. B. Wanduragala

possessed the *nindagama* on behalf of his wife, there was not sufficient length of time to mature a prescriptive title, even if the Prescription Ordinance applies to a case of the overlordship of a *nindagama*. The alleged exchange has therefore no legal effect. Finally, the deed of sale from Embelegoda Kumarihamy in favour of the plaintiff in express terms transferred only an undivided half share and not the whole of the *nindagama*, the vendor actually reciting the deed of gift from her husband for that half share. The plaintiff cannot in any sense be regarded as the proprietor of the whole *nindagama*. The material importance of this point is that the owner of only a share of a *nindagama* cannot sue tenants for commuted dues without joining the co-owners as parties to the action, and the plaintiff, therefore, is at once out of Court.

The practically important questions, however, are as to the *nindagama* itself and as to the defendants' alleged liability as *paraveni* tenants. The plaintiff herself stated in her plaint that she was "owner and proprietor of Gettuwana *nindagama* consisting of about four amunams of *muttetu* and the appurtenances thereof." This appears to me to involve an impossibility. A *nindagama* can in no case consist of *muttetu* fields only, and if plaintiff meant by "appurtenances" the fields possessed by tenants subject to services, it appears to me absurd to call some fields as appurtenances of other fields. The fact is that the plaintiff is in a considerable difficulty in calling Gettuwana a *nindagama*, and the history of her title negatives that idea. Gettuwana was a royal village consisting of service lands and *muttetu* fields, and the British Sovereign succeeded to the ancient King and became the proprietor of the entire royal village. But the policy of the British Government was not to exact services or dues from the tenants of the royal villages, but to leave the service lands to be possessed absolutely by the *nilakarayas*. The preamble to the Service Tenures Ordinance, No. 4 of 1870, is sufficient evidence of this fact, for it recites that "the enforcement of services for lands in the royal villages has been long since abandoned by the Government." It is in these circumstances that on January 9, 1820, the Governor, Sir Robert Brownrigg, made a certain grant to Wanduragala Mohottala which is the origin of the plaintiff's title. It is significant that the Governor did not grant the village Gettuwana or the service land: he only granted "the *muttetu* fields of the village Gettuwana being two amunams in extent." The plaint speaks of the *muttetu* fields being four amunams. How the original two amunams got enlarged into four amunams does not appear, but it is unnecessary to notice the discrepancy, so far as this case is concerned. The grant itself negatives the idea of Wanduragala Mohottala having become the proprietor of a *nindagama*. Counsel for the plaintiff, however, relied on the further words in the grant—"with the rights and appurtenances formerly enjoyed according to custom by the chief grantee

of the said vilage Gettuwana being the property and in possession of our Sovereign Lord the King "—and argues that Wanduragala Mohottala had rights over the service fields and their tenants. The document does not admit of this construction. It describes the village as being the property and in possession of the British Sovereign, and it follows that Wanduragala Mohottala had no rights in it previous to the grant. The expression "rights and appurtenances formerly enjoyed according to custom by the chief grantee " is a curious way of referring to the Mohottala having rights to the services of the *paraveni* tenants. It seems to me that this is a mere flourish of language quite characteristic of Governor Sir Robert Brownrigg. The plaintiff and her predecessors could only rely on the grant itself which only transferred the *muttetu* fields. The plaintiff's counsel next relies on the fact that Gettuwana is registered as a *nindagama* in the Service Tenures Register under the Ordinance No. 4 of 1870. The entry is very peculiar. It mentions for *pangus*, but the fields and gardens of which the *pangus* consisted are not even named, nor are the services mentioned, but only the amount of money to be paid in lieu of services is stated. There is something wrong in this register. The Ordinance expressly requires the Commissioners to inquire into and record in the register, *inter alia*, the nature and extent of the services due for each *pangu*. But assuming that the entry in this instance is regular in every respect, what does it amount to ? The Ordinance (see section 10) makes the register final and conclusive as to the tenure of the *pangu*, whether it be *paraveni* or *maruwena*, the nature of the service due for each *paraveni pangu* and the annual amount of money payment for which the services may be fairly commuted. It nowhere makes the registration of lands as a *nindagama* conclusive proof of the existence of it as a *nindagama*. It may indeed be some material which along with other evidence may be used in the case of a contested question. An attempt was made in this case to prove that the Wanduragala family had in fact exercised rights over Gettuwana as overlords and exacted services or commuted dues from the holders of lands other than *muttetu* fields. This attempt, however, wholly failed. In 1917 P. B. Wanduragala instituted over hundred cases in the Village Tribunal of Pilessa against the present defendants and others for the recovery of small sums as the commuted value of services due by them for the years 1914, 1915, and 1916. So far from showing that previous to those cases the defendants had rendered services or paid their value, it seems to me that the very institution of these numerous cases leads to the opposite conclusion. The cases themselves are very peculiar. The severest criticism of them comes from the Commissioner of Requests who says " at the trial of the test case P. B. Wanduragala gave oral evidence. No document was produced. Judgment was entered against the various defendants without their being heard. In the test case the defendant was not

asked to state his defence . . . . and an *ex parte* judgment appears to have been obtained." Moreover the Village Tribunal appears to have had no jurisdiction. The plaint itself in this case states that Gulahitiyawa *panguwa*, of which the defendants are alleged to be tenants, is situated within the Local Board limits of Kurunegala, and it is clear that the jurisdiction of the Village Tribunal of Pilessa did not extend to these limits. The Commissioner of Requests is obviously right in holding that the defendants are not estopped from denying the plaintiff's claim. It is of a piece with the nature of the proceedings that the judgments have been wholly fruitless. Writs were issued to the Fiscal to seize and sell the lands in satisfaction of the judgments, but the plaintiff was unable to point out to the Fiscal the boundaries of the lands. The representative of the Wanduragala family admits that none of them knows the boundaries and can point out the lands, and the result is that the judgments remain up to this day unexecuted.

Another attempt to prove that the defendants had paid dues is the production of a book said to have been kept by P. B. Wanduragala who is now dead. The production of this book is sought to be justified under section 32 (2) of the Evidence Ordinance. But it is not a book " kept in the ordinary course of business " within the meaning of that section. It is in fact not an account book, but a memorandum book apparently made *ad hoc* for the purposes of the Village Tribunal cases, for I find the particulars of those cases given at the end of the document. It is at best a register of the lands and their alleged tenants. It is not in the handwriting of P. B. Wanduragala, and nobody can say in whose handwriting it is. It is said to be genuine—no doubt it is, so far as it is not a fabrication. But I do not consider it to be admissible in evidence.

The only person who gave evidence on behalf of the plaintiff is her husband and attorney Mr. M. B. Wanduragala. He is a young man who obviously knows nothing of the history of the so-called *nindagama* or of its tenants. It must be said to his credit that he frankly confesses his ignorance. He cannot even say that the defendants are descendants or heirs of the men whose names appear in the Service Tenures Register as tenants. It is impossible to say that the plaintiff has proved that the defendants are tenants in any sense. I have already held that the plaintiff and her predecessors in title had no right to any land subject to service. The plaintiff is entitled to a share in certain *muttetu* fields originally granted to Wanduragala Mohottala by the Crown, but the defendants are not in possession of them nor dispute the plaintiff's title to them. Their claim is only to the holdings which they have possessed for years as their own property.

In my opinion the judgment appealed from is erroneous, and must be set aside with costs in both Courts.

Set aside.