[FULL BENCH.]

1917.

Present: Ennis, Shaw, and De Sampayo JJ.

APPUHAMY *et al. v.* MENIKE *et al.*

498—D.C. Ratnapura, 2,216

Partition suit—Action by paraveni nilakaraya of a nindagama—Is action maintainable?

Persons entitled to an undivided share in a panguwa in a nindagama are not entitled to bring a suit for the partition of the land.

THIS was a partition suit brought by a paraveni nilakaraya of a certain panguwa of the Dodampe nindagama for the partition of certain lands comprised in the panguwa. The proprietors of the nindagama intervened and disputed the right of the plaintiffs to bring an action under the Partition Ordinance. The learned District Judge upheld the objection. The plaintiffs appealed.

Bawa, K.C. (with him *Samarawickreme* and *F. J. de Saram, Jr.*), for appellants.

E. W. Jayewardene (with him *Dassanaiyake*), for respondents.

Cur. adv. vult.

March 6, 1917. ENNIS J.—

The question for determination on this appeal is whether one of the paraveni nilakarayas of a nindagama can compel a partition under the Partition Ordinance, No. 10 of 1863. That Ordinance provides that when landed property belongs in common to two or more owners, one or more of such owners may compel a partition, or, if a patition be impossible or inexpedient on account of the nature of the property, may apply for a sale thereof. In the case of *Jotihamy v. Dingirihamy*[1] the question was answered in the negative, on the ground that the Partition Ordinance had hitherto been regarded as requiring nothing short of the full dominion, and that the dominion in service tenures was generally regarded as vested in the ninda lord, while nilakarayas were spoken of as tenants. It was also observed that the indivisibility of the services was another objection. This case was followed in *Kaluwa v. Rankira*,[2] but in neither case were any authorities cited for the decision.

It is now urged that a paraveni nilakaraya is in fact an owner of the land, and that the ninda lord is not the owner. It is clear that the relations of the ninda proprietor and the nilakaraya as of a paraveni panguwa are not the ordinary relations of a landlord and tenant. A nilakaraya of a paraveni panguwa holds the land in

[1] *(1906) 3 Bal. 67.*

[2] *(1907) 3 Bal. 264.*

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perpetuity subject to the service (Ordinance No. 4 of 1870, section 3); and since 1870 the ninda proprietor has no right to eject a paraveni nilakaraya for non-performance of the service, he can recover only the value of the services in an action for damages (Ordinance No. 4 of 1870, section 25). It is to be observed that a panguwa is only a portion (allotment or share) of the holding of a ninda lord as the "proprietor" of the whole nindagama of which any part is held by a nilakaraya. A "paraveni nilakaraya" is defined as a "holder" of a paraveni panguwa, while the term "tenant" is used to describe a maruvena nilakaraya, who is a tenant at will, as distinct from a paraveni nilakaraya, a holder in perpetuity.

Burge (*vol. IV.*, *p.* 68), speaking of the hereditary tenure under the Sinhalese kings, says: "The king was the lord paramount of the soil, which was possessed by hereditary holders on the condition of doing service according to their caste. The liability to perform service was not a personal obligation, but attached to the land..... Besides the land thus held by the ordinary peasant proprietors, there were the estates of the crown, of the church, and the chiefs. These are known as gabadagam, royal villages; viharagam and dewalagam, villages belonging to Buddhist monasteries and temples (dewala); and nindagam, villages of large proprietors. These last were ancestral property of the chiefs, or were originally royal villages bestowed from time to time on favourites of the court. In these estates certain portions ..... were retained for the use of the palace ..... while the rest was given out in parcels to cultivators, followers, and dependents, on condition ..... performing various services ..... These followers or dependents had at first no hereditary title to the parcels of land thus allotted to them. These allotments, however, generally passed from father to son, and in course of time hereditary title was in fact acquired. The real status of these followers was thus well described in 1824 by Mr. Wright, the Revenue Commissioner. Writing of the followers of the chief, he says: 'They are in fact servants by inheritance, whose wages are paid in lieu of money, and though he has the power of dismissing them and transferring their land to others if he pleases, this is seldom or rarely ever execised; they leaving in most instances a kind of birthright, by long residence and possession, living happily and contented in performing all the customary services which by the tenure of these lands they are bound to perform to their chief.'"

Pereira in his *Collection* (*Pereira 303*) says: "The only paraveni tenants were those who were on the land prior to the grant of the village to the ninda lord".

The word "paraveni" imports a right in pepetuity (*Weerasinghe v. De Silva*[1]). It would seem then that historically paraveni nilakarayas were originally hereditary holders under the king before

[1] *6 S. C. C. 17.*

the grant of the royal village to the ninda lord. Thereafter certain followers were given allotments (panguwa) by the lord, and in the course of years the holders of these allotments assimilated their tenure to that of the original paraveni tenants, *i.e.*, the holding became heritable and alienable, and the holders acquired by prescription all the rights . the original paraveni tenants under the king.

Until 1870 the ninda lord could eject the paraveni nilakarayas for non-performance of service (*Golehalle v. Naloowadene Nilam*[1]). In a recent case, *Kiriduraya v. Kudaduraya,*[2] it was held that the title of a paraveni nilakaraya could be acquired by prescription, and in *Ranhamy v. Asin Umma*[3] I expressed the opinion that a paraveni nilakaraya could maintain an action for ejectment.

It has been contended that the ninda lord reserved to himself certain mining and timber rights in the land. In the case of *Molligodde Umambuwa v. Punchi Weda*[4] a nindagama proprietor was allowed a half share in plumbago mined by a nilakaraya of a paraveni panguwa, and in the case of *Siripina v. Kiribanda Korala*[5] it was held that neither the nindagama proprietor nor the nilakaraya can gem without the other's consent, as there was no proof of any exclusive right in either. As to timber, the only authority is an Avissawella case (No. 5,303), referred to in *Molligodde Umambuwa v. Punchi Weda.*[4] These cases seem to show that the ninda lord and the nilakaraya were owners in common of the mineral rights, but I am unable to see that the common ownership of such a right affects the question before us, as there would be no difficulty in limiting mining rights to the several shares after partition.

Ownership has been defined (*2 Maarsdorp 31*) as comprising (1) the right of possession, (2) the right of usufruct, and (3) the right of disposition, and that these three factors are all essential to the idea of ownership, but need not all be present in equal degree at one and the same time.

In my opinion a paraveni nilakaraya holds all the rights which, under Maarsdorp's definition, constitute ownership, but he, nevertheless, does not possess the full ownership, in that the ninda lord holds a perpetual right to service, the obligation to perform which attaches to the land. In *Asmadale v. Weerasuriya*[6] it was held that this obligation was indivisible. In *Marikar v. Assanpillai*[7] it was held that the nature of the service is definite and determined, and the nilakaraya is bound by that and no other. In *Martin v. Hatua*[8] it was held that the liability to pay commuted dues was indivisible. In the present case counsel on both sides agree that the service is indivisible, and in the circumstances it is not necessary to refer to

[1] *(1862) Beven & Siebel's Rep. 120.*
[2] *(1916) 3 C. W. R. 188.*
[3] *(1915) 1 C. W. R. 151.*
[4] *(1875) Ram. 226.*
[5] *(1878) 5 N. L. R. 326.*
[6] *3 Bal. 51.*
[7] *(1916) 4 C. A. C. 85.*
[8] *(1913) 16 N. L. R. 93.*

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the two old cases in *Ramanathan's Reports*[1] cited in *Martin v. Hatua*,[2] where a contrary opinion was held, except to say I am in agreement with the later opinions.

It was finally urged that certain ownerships short of the full ownership have been made the subject of partition. In *Abdul Rahiman v. Muttu Natchia*[3] it was held that *superficies* was such an ownership, and in *Babey Nona v. Silva*[4] it was held that property burdened with a *fidei commissum* may be partitioned under the Ordinance No. 10 of 1863. In the latter case Lascelles A.C.J. said: "By Roman-Dutch law the *fiduciarius* was a true owner; he had a real, though burdened, right of the ownership."

The present tenure of a paraveni nilakaraya could well be described in much the same terms. It seems to me that this case enunciates the rule as to whether or not a burdened ownership can be the subject of partition, *i.e.*, the question as to whether or not the burden can be made to attach to the partitioned parts in severalty decides the point. The same test was suggested in *Tillekeratne v. Abeyesekere*,[5] where, speaking, *inter alia*, of the Partition Ordinance, No. 10 of 1863, their Lordships of the Privy Council said: "(The Ordinance) appears to be limited to cases in which the persons interested, whether as joint tenants or tenants in common, are full owners, and are not burdened with a *fidei commissum;* and even if they were not held to be so limited, the partition which they authorize would not necessarily destroy a *fidei commissum* attaching to one or more of the shares before partition."

As the service of a paraveni nilakaraya is indivisible, it cannot be made to attach to portions of the panguwa in severalty, and for this reason I am of opinion that the decision in *Jotihamy v. Dingirihamy*[6] is right. It is to be observed further that the Partition Ordinance was passed in 1863, while the Service Tenures Ordinance was not passed till 1870. In 1863 the ninda lord still had a right of re-entry for non-performance of the service—one of the rights of a landlord, and at that date paraveni nilakarayas could not compel a partition, because the ninda lord was then the real owner of the land. No special provision for partition was made in the Ordinance of 1870, and in the absence of special provision the indivisibility of the service presents an insuperable difficulty to partition. It was urged that the nilakarayas might partition the land voluntarily by cross conveyances, and that a partition under the Ordinance might be made without affecting the rights of the ninda lord. The possibility of a voluntary partition among the nilakarayas forms no basis for a right to compel a partition. The Partition Ordinance appears to have contemplated such a division of the land as would make each several part independent of the others.

For these reasons I would dismiss the appeal with costs.

[1] *(1877) Ram. 131 and 395.*
[2] *(1913) 16 N. L. R. 93.*
[3] *1 Br. 250.*
[4] *(1906) 9 N. L. R. 251.*
[5] *(1897) 2 N. L. R. 313, at page 318.*
[6] *(1906) 3 Bal. 67.*

SHAW J.—

The question for our determination is whether persons entitled to an undivided share in a panguwa in a nindagam are entitled to bring a suit for partition of the land.

The same question has twice been before this Court in the cases of *Jotihamy v. Dingirihamy*[1] and *Kaluwa v. Rankira.*[2]

In the first of these cases Wendt and Middleton JJ., and in the second Hutchinson C.J., decided the question in the negative, and we are now asked by the appellants to say that these decisions are wrong.

I think the previous decisions are perfectly correct, and am of opinion that nilakarayas of a nindagama are not owners within the meaning of section 2 of the Partition Ordinance.

In no case since the first passing of the Prescription Ordinances in this Colony has any one been held to bring a partition suit who has not had the *dominium* in the property sought to be partitioned. Some persons who are not absolute owners have been held to be so entitled, such as the trustee of a Buddhist vihare (*Daniel v. Saranelis Appu*[3]), a person entitled subject to a *fidei commissum* (*Abeyesundere v. Abeyesundere*[4]), and the owner of a *superficies* (*Abdul Rahiman v. Muttu Natchia*[5]), but in all these cases the persons seeking partition have had the *dominium* in the property.

The position of a nilakaraya is very different from that of the persons I have referred to; he holds his land subject to rendering rajakariya to his overlord, sometimes the rendering of personal services, sometimes the delivery of certain produce from the land; he has no right to dig for minerals on the land, except by the permission of his overlord (*Siripina v. Kiribanda Korala,*[6] *Molligodde Umambuwa v. Punchi Weda*[7]), and it has even been held that he has no right to cut down trees growing on the land (Avissawella No. 5,303 cited in *Molligodde Umambuwa v. Punchi Weda*[7]), although the correctness of this decision may be doubtful. Prior to the passing of Ordinance No. 4 of 1870 the tenant could have been ejected for non-performance of services, and although under section 29 of that Ordinance he must now be sued for damages if he neglects to perform them, and his interest in the land can only be sold as a last resort, I am unable to see that that Ordinance makes him in any way the owner of the land, and his position seems to me to fall far short of the full ownership, which the Privy Council said, in *Tillekeratne v. Abeyesekere,*[8] was necessary for the purposes of the Partition Ordinances.

I may further add that tenures of this description are by no means uncommon in this country, and had the Legislature intended

[1] *(1906) 3 Bal. 67.*
[2] *(1907) 3 Bal. 264.*
[3] *(1903) 7 N. L. R. 163.*
[4] *(1909) 12 N. L. R. 373.*
[5] *1 Br. 250.*
[6] *(1878) 5 N. L. R. 326.*
[7] *(1875) Ram. 226.*
[8] *(1897) 2 N. L. R. 318.*

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that lands subject to them should be partitioned under the Ordinance it would no doubt have provided what should become of the interest of the overlord, as it provided for the right of holders of mortgages and leases and rights of property in trees apart from the soil.

The decision of the District Court appears to me to be right, and I would dismiss the appeal with costs.

DE SAMPAYO J.—

The plaintiffs and the defendants are the paraveni nilakarayas of certain panguwa of the Dodampe nindagama, and this action is brought to partition among the plaintiffs and the defendants certain lands comprised in the panguwa. The proprietors of the nindagama intervened and disputed the right of the plaintiffs to bring an action under the Partition Ordinance, which provides for the partition of lands which belong in common to two or more owners. The issue stated at the trial was: Can this action be maintained, the plaintiffs merely possessing the rights of nilakarayas? The main, though not the only, question involved in this issue is whether the paraveni nilakarayas of a panguwa are the owners of the lands constituting the panguwa. I had to consider this question incidentally in *Marikar v. Assanpillai*[1] and *Kiriduraya v. Kudaduraya*,[2] and ventured to express the opinion that the paraveni nilakarayas are the owners of their holdings subject only to the performance of service to their overlord. I find that a somewhat similar view was taken in *Ranhamy v. Asin Umma*,[3] in which an objection that only the overlord, and not the paraveni tenant, could sue a third party in ejectment was over-ruled. The authority to the contrary is *Jotihamy v. Dingirihamy*[4] decided by Wendt and Middleton JJ., and followed by Hutchinson C.J. in *Kaluwa v. Rankira*.[5] That decision was not cited to me in the cases above referred to, and now that the whole question comes for consideration afresh, I may say, with great respect to Wendt J., who delivered the judgment, that I am not convinced that his conclusion as to the nature of the title of a paraveni nilakaraya was right. He did not profess to discuss the origin of this species of feudal tenure, nor refer to any authorities. All that is said in the judgment is that " the *dominium* in service tenure land is generally regarded as vested in the person usually described as proprietor of the nindagama or the overlord, while the nilakarayas are similarly spoken of as tenants. " There are no grounds stated for the opinion that the *dominium* is generally regarded as vested in the overlord. That is the very problem requiring solution. The terms " overlord " and " tenant " are natural to any system of tenure, such as the fee simple tenure in the English system of real property, but they do not necessarily describe the nature of the rights. After all, the point decided in *Jotihamy v. Dingirihamy*[4] is that the provisions

[1] *(1916) 4 C. A. C. 85*
[2] *(1916) 3 C. W. R. 188.*
[3] *(1915) 1 C. W. R. 151.*
[4] *(1906) 3 Bal. 67.*
[5] *(1907) 3 Bal. 264.*

of the Partition Ordinance do not apply to nindagama lands, as to which one may agree without assenting to the proposition that a nilakaraya has no legal title to the lands belonging to his panguwa.

The argument for the intervenients emphasized the word " tenant ", and it was contended that the position of a paraveni tenant was no more than that of a lessee, and that before the Ordinance No. 4 of 1870 he was liable to be ejected for non-performance of service. As to such liability to be ejected, the only authority cited to us was *Golehalle v. Naloowadene Nilam.*[1] The nature of the particular tenancy is not clear from the report, and the judgment is that of the District Court, and not of the Supreme Court in appeal. In any case, the Ordinance No. 4 of 1870, to which I shall presently refer, in prohibiting the ejectment of the tenant, appears to me to recognize him as the owner, and not a mere possessor. A broad distinction should be drawn between a paraveni tenant and a maruvena tenant. The Ordinance No. 4 of 1870, which is based on the report of the Service Tenures Commission, and in most points is declaratory of the customary law, defines " paraveni pangu " as an allotment or share of land in a temple or nindagama village held in perpetuity by one or more holders subject to the performance of services to the temple or nindagama proprietor, and " maruvena pangu " as an allotment or share of land in such a village held by one or more tenants at will. The origin of these two classes of tenants is significant, and is illustrative of the difference in their respective titles. The theory of the old Sinhalese constitution, as much as that of the English constitution, was that the king was the lord paramount of all the land, and on this basis the Sinhalese king granted away whole villages to temples or individual persons, though much of the land was already held by private parties. A village so granted to a temple is a viharagama or dewalagama, and a village granted to an individual is a nindagama. The proprietor of a temple village or a nindagama would also, after the grant, assign portions to tenants subject to service. Sir John D'Oyley's Notes quoted by Marshall state (see *Marshall's Judgments 300*) that paraveni tenants are those who held their lands before the nindagama or the temple village was granted to the proprietor, and maruvena tenants are those who receive their panguwas from the proprietor subsequent to the grant. This is confirmed by the Service Tenures Commissioners, who in their report (see *Pereira's Collection 303*) say that the only paraveni tenants were those who were on the land prior to the grant of the village to the ninda lord or vihare or dewale. With regard to the nature of the paraveni tenant's right, Sawers (see *Marshall's Judgments 307*), after stating that a person having " the absolute possession of (and right to) real or personal property has the power to dispose of such property unlimitedly, " adds " but to the unlimited power of disposing of landed property there was this exception, that lands liable

[1] *(1862) Beven & Siebel's Rep. 120.*

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to rajakariya, or any public service to the Crown, or to a superior, could not be disposed of either by gift, sale, or bequest to a vihare or devale without the sanction of the king, or the superior to whom the service was due." This passage is very important. Here paraveni nilakarayas are included in the class of persons who have "the absolute possession of and right to" landed property, and I cannot imagine that it would have been necessary to prohibit rajakariya land from being put in mortmain without a license unless the holder was considered to be the owner. In this connection I may refer to *Leana Aratchy v. Mukelamea.*[1] There the Crown claimed the land in dispute adversely to both the parties to the action, on the ground that land within a gabadagama or royal village belonged to the Crown as owner, and Phear C.J., in deciding against the Crown, said: "But we are of opinion that this is not, as a general rule, an incident of all gabadagamas, and we know of no principle of Kandyan law which should lead us to hold that the relation of the Crown to the gabadagama is materially different from that of the private owner or lord to the nindagama." Here the obvious comparison was between the paraveni nilakarayas of a gabadagama and those of a nindagama, and the Court, which included Dias J., a Judge of eminence and wide experience, impliedly stated it as an accepted proposition that the paraveni nilakaraya, and not the proprietor of the nindagama, was the owner of his holding.

The state of the law to be gathered from the above references is made clearer by the Service Tenures Ordinance, No. 4 of 1870. It is remarkable that nowhere in the Ordinance is the lord of a nindagama referred to directly or indirectly as the owner of the lands held by the paraveni nilakarayas. On the other hand, section 24 declares that if services are not rendered or commuted dues paid by the paraveni nilakarayas for a period of ten years, the panguwa shall be deemed free thereafter from any liability on the part of the nilakarayas to render services or pay commuted dues. It seems to me clear that in such a case the Ordinance intends that what was previously qualified ownership shall become absolute ownership. Section 25 lays down the order in which the property of the nilakaraya may be sold in execution for default of payment of damages for non-performance of services, and provides that the value of services shall be recovered in the last resort "by a sale of the pangu." Here the pangu does not mean the possessory interest, because the same section enacts that the tenant shall not be ejected for non-performance of service. The pangu is defined in the Ordinance itself as the "allotment or share of land"; there is, to my mind, no meaning in providing for the sale of the pangu, unless the tenant is the owner of the allotment. A difficulty is no doubt created by such cases as *Siripina v. Kiribanda Korala*,[2] but I confess I cannot quite understand the principle by which it was held in those

[1] *(1878) 2 S. C. C. 2.*

[2] *(1878) 5 N. L. R. 326.*

cases that neither the proprietor of the nindagama nor the tenant could gem or dig for minerals, without the consent of the other. The Court appears to have struck out a middle course, with regard to gems and minerals in the absence of anything to be found in the law relating to agricultural land such as those belonging to a panguwa. In any case I do not think that this consent to gemming or mining really affects the question of ownership of the land.

For the reasons I have above stated, I am of opinion that paraveni nilakarayas are the owners of the lands comprised in the panguwa. This, however, is not a complete answer to the issue stated in this case, for there is the further question whether such land can be the subject of a partition action under the Ordinance. The services are indivisible, and it would be an anomalous thing to divide the land and yet to keep the services undivided. The analogy of land subject to *fidei commissum* does not apply, because in *Babey Nona v. Silva*,[1] which is the chief authority as regards the partition of *fidei commissum* land between the *fiduciari*, it has been held that the partition will bind the *fidei commissarii* when their interests accrue, and that the rights of the various sets of *fidei commissarii* will attach to the portions allotted in severalty. I may say that that case decided a point as to which there had been great doubts, and the decision reaches the limit and should not, in my opinion, be extended to cases like lands subject to service, which are, *primâ facie*, not within the purview of the Ordinance. I therefore agree that on this ground the appeal should be dismissed with costs.

Appeal dismissed.