1943 *Present :* **Howard C.J. and Keuneman J.**

BANDARA *et al.*, Appellants, *and* DINGIRI MENIKA *et al.*, Respondents.

240—D. C. Kegalla, 1,486.

Partition—Paraveni pangu—No services performed or dues paid for over ten years—Land may be partitioned among the nilakarayas.

Land, which forms part of a paraveni pangu in a nindagama and in respect of which no services have been performed nor dues paid to the overlord for over a period of ten years, may be the subject of a partition action among the nilakarayas.

APPEAL from a judgment of the District Judge of Kegalla. The facts appear from the argument.

H. V. Perera, K.C. (with him *Dodwell Gunawardana*), for the 3rd and 4th defendants, appellants.—The plaintiffs seek to partition a land which, according to appellants, formed part of a paraveni pangu in a nindagama. The District Judge held that the land at the time of registration under the Service Tenures Ordinance (Cap. 323) belonged to the nindagama. The only question that arises for consideration on this appeal is whether non-performance of services or non-payment of dues by the paraveni nilakarayas for a period of over ten years would be sufficient to vest the *dominium* of the land in them by virtue of section 24 of the Service Tenures Ordinance. It is submitted that what is extinguished by lapse of time is the right to services or commuted dues. The *dominium* is unchanged. The ninda lord does not cease to be such unless there is ouster and further adverse possession for a period of over ten years

under the Prescription Ordinance—*Naguda Marikar v. Mohammadu*[1]. The rights of the ninda lord extend not merely to the services or dues but also to the minerals and timber. As long as there is some vestige of a ninda lord's rights he remains an owner and therefore the land cannot be partitioned—*Dias v. Carlinahamy*[2], *Appuhamy v. Menike*[3], *Asmadale v. Weerasuriya*[4], *Martin v. Hatana*[5].

L. A. Rajapakse (with him *R. N. Illangakoon*) for the plaintiffs, respondents.—In interpreting section 24 the scope of the Service Tenures Ordinance must be considered. A paraveni nilakaraya is defined as a "holder" subject to the performance of services. His position is analogous to that of an emphyteutic tenant, who, in the Roman Law, had the *plena proprietas* subject to the payment of a quit-rent. Section 24 first deals with the limitation of action in respect of services or dues and then goes on to deal with the total loss of the right to claim performance of services or payment of dues. The cases cited for the appellant only decide that if the tenancy continues to exist no partition action can be brought. In *Appuhamy v. Menike* (*supra*) the three Judges constituting the Bench came to one conclusion for different reasons. Whether such rights as claimed over minerals and timber existed at all in the time of the Sinhalese Kings is doubtful—*Hayley: Laws and Customs of the Sinhalese* at p. 225. In this case there is no evidence of performance of services or payment of commuted dues for a period of over fifty-five years. Ouster may be presumed in such circumstances—*Tillekeratne v. Bastian*[6]; *Ondiris v. Ondiris*[7]. It is therefore submitted that the *dominium* of the land is now vested in the nilakarayas and consequently the land can be partitioned.

H. V. Perera, K.C., in reply.—Under section 24 only one obligation, viz., to perform services or pay dues, is taken away by lapse of time. The Ninda lord still remains the owner and the nilakarayas still remain tenants. The principle underlying the decision in *Appuhamy v. Menike* (*supra*) is applicable to the present case.

Cur. adv. vult.

July 29, 1943. HOWARD C.J.—

This is an appeal by the third and fourth defendants from a decree of the District Judge of Kegalla holding that a partition action in respect of the land described in the schedule can be maintained by the plaintiffs who claimed by virtue of inheritance and possession. The appellants contended that the land which was the subject-matter of the action formed part of a paraveni pangu in a nindagama and as such could not be the subject of a partition action. The learned Judge held that the land in question at the time of the registration under the Service Tenures Ordinance (Cap. 323) did belong to the Nindagama but, as over ten years had elapsed since the performance of any services or the payment of any dues to the overlord in respect of this land, the *dominium* in such land had, by reason of the provisions of section 24 of the Ordinance, become vested in the nilakarayas.

[1] *(1903) 7 N. L. R. 91.*
[2] *(1919) 21 N. L. R. 112*
[3] *(1917) 19 N. L. R. 361 F. B.*
[4] *(1905) 3 Bal. 51.*
[5] *(1913) 16 N. L. R. 92.*
[6] *(1918) 21 N. L. R. 12.*
[7] *(1935) 14 C. L. Rec. 201.*

The contention of Mr. Perera that the learned Judge came to a wrong decision is based on the following grounds—

(*a*) that a paraveni panguwa cannot be the subject of a partition ;
(*b*) that it must be shown that neither services have been performed nor dues paid in respect of all the lands included in the panguwa and not merely in respect of the lands the subject of the action ;
(*c*) that the burden of proof that no such services have been performed nor dues paid rests on the plaintiffs ;
(*d*) that even if it is established that no services have been rendered and no dues paid for over ten years and no action brought therefor, section 24 of the Ordinance merely provides that the right to claim such services and dues is lost but does not confer on the nilakarayas *dominium* in the land.

Proposition (*a*) is not disputed. In fact it was so held in *Jotihamy v. Dingirihamy* [1]. This case was followed by the Full Bench in *Appuhamy v. Menike* [2] where it was held that 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. In his judgment in this case Ennis J. cited with approval the case of *Asmadale v. Weerasuriya* [3] where it was held that the obligation was indivisible. Also the case of *Martin v. Hatana* [4] where it was held that the liability to pay commuted dues was also indivisible. After quoting the definition of "ownership" from *2 Maasdorp 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 Ennis J. said that in his 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. *Appuhamy v. Menike* (*supra*) was subsequently followed by Schneider A.J. and Loos A.J. in the case of *Dias v. Carlinahamy* [5] who held that lands subject to service tenures cannot be sold or partitioned under the provisions of the Partition Ordinance, unless it may be in cases where the proprietor of the nindagama and the paraveni nilakaraya are all consenting parties to the proceedings. It will be observed that in neither *Appuhamy v. Menike* nor *Dias v. Carlinahamy* did any question arise as to the position created when the panguwa, by reason of section 24 of the Service Tenures Ordinance, was free from any liability on the part of the nilakarayas to render services or pay commuted dues therefor.

With regard to propositions (*b*) and (*c*), due regard must be paid to the decision in *Asmadale v. Weerasuriya* (*supra*), which was followed in *Martin v. Hatana* (*supra*), that the obligation of the tenants of a panguwa of a nindagama to render services is in the nature of an indivisible obligation, and therefore the liability to pay commuted dues is also indivisible. The whole amount may be recovered from one tenant. The payment, therefore, of the dues by one tenant in respect of the whole panguwa prevents

[1] *3 Bal 67.*
[2] *19 N. L. R. 361.*
[3] *3 Bal 51.*
[4] *16 N. L. R. 92.*
[5] *21 N. L. R. 112.*

forfeiture of the ninda proprietors' rights against the other tenants under section 24 of the Service Tenures Ordinance, and it is also a bar to the other tenants gaining prescriptive rights under section 3 of the Prescription Ordinance. So far as the evidence in this case goes, I agree with the learned Judge that the plaintiffs have established that neither services were performed nor dues paid in respect of the land, the subject of this action for a period of ten years. No evidence has been tendered by the appellants that such services were performed or dues paid in respect of other lands of the panguwa. In view of the fact that the plaintiffs had proved that no services were performed nor dues paid in respect of the land sought to be partitioned, I am of opinion that the burden of proof rested on the defendants to show that such performances were made or dues paid in respect of other lands of the panguwa.

With respect to proposition (*d*), Mr. Perera contended that section 24 did not create in the nilakaraya a *dominium* over the land free from services. Residual rights over minerals and timber, so he asserts, retain for the landlord the *dominium* over the land. It is, therefore, necessary to consider what these rights are. In *Molligodde Unambuwa v. Puncha Weda*[1] it was held that a tenant of a paraveni land has not the right to dig for his own use for plumbago to be found in the panguwa, or do anything permanently to diminish its value; nor has the proprietor a right to lease the mine to third parties. The judgment in this case also referred to an unreported case, Avissawella No. 5,303, in which the Supreme Court decided that, in the absence of agreement authorising a tenant to appropriate or to cut down trees growing on the land, he had no right to do so. The judgment also stated as follows:—"It is true that a paraveni tenant is a proprietor in that he cannot be ejected so long as he performs services." This seems to imply that the only clog on the full ownership of the nilakaraya is the obligation to perform services. Relief from such obligation would, therefore, confer full ownership. This view was also apparently taken by Ennis J. in *Appuhamy v. Menike* (*supra*) in the following passage:—

> "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 mineral rights to the several shares after partition."

Further on in the judgment the following passage occurs:—

> "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 learned Judge then held that, as the service of a paraveni nilakaraya is indivisible, it cannot be made to attach to portions of the panguwa in severalty and hence the decision in *Jotihamy v. Dingirihamy* (*supra*) was

[1] (*1875*) *Ram. 226.*

right. It is also relevant to refer to the following passages from the judgment of de Sampayo J. delivered in the same case :—

"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 . . . . A difficulty is no doubt created by such cases as *Siripina v. Kiribanda Korala* [1], but I confess I cannot quite understand the principle by which it was held in those 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."

The only other case that in this connection merits attention is that of *Siripina v. Kiribanda Korala* (*supra*) where it was held that in the absence of proof of any custom, neither the landlord nor the tenant of a nindagama can gem on land without the other's consent.

Inasmuch as the land is no longer subject to a liability to perform indivisible services I am of opinion that the learned Judge was right in coming to the conclusion that it could be the subject of a partition action under the Ordinance. The appeal is therefore dismissed with costs.

KEUNEMAN J.—I agree.

Appeal dismissed.