

1931

Present : Maartensz A.J.
DIVITOTAWALA v. KEERALA.

201—C. R. Badulla, 5,326.

Nindagama—Action by proprietor—Value of commuted services—Proof of title—Court of Requests.

The overlord of a Nindagama who sues the tenants of a panguwa for the value of commuted services, must establish his title to the Nindagama, where the same is traversed.

It is competent to a Court of Requests in such a case to go into the title.

A PPEAL from a judgment of the Commissioner of Requests, Badulla.

Hayley, K.C. (with him *Navaratnam* and *Ranawake*), for defendants, appellants.

E. W. Jayawardene, K.C. (with him *N. E. Weerasooriya*), for plaintiff, respondent.

May 15, 1931. MAARTENSZ A.J.—

The plaintiff in this action alleging that he is the proprietor or lord of the Nindagama called Udahadana Nindagama and that the defendants are the tenants of the tenement No. 7 of the said Nindagama called Urulawattekumbura Panguwa sued them for the recovery of a sum of Rs. 37.80, the commuted value of services not performed by them for the years 1925, 1926, and 1927.

Three of the four defendants—the second, third, and fourth—filed answer denying plaintiff's title to more than two-thirds of the Nindagama and traversing his right to sue without joining the owner of the remaining one-third share.

They also pleaded that the right to sue or the services not rendered in 1925 was prescribed and that the tenants of the panguwa were freed from liability as services had not been rendered since 1873.

The action was tried on the following issues :—

- (1) Have the plaintiff's rights, if any, to demand value of services from the defendants in respect of the panguwa in question been extinguished by prescription?
- (2) Are the defendants the tenants of the plaintiff, or are they in possession of the panguwa as successors of the original tenants?

- (3) Is plaintiff the proprietor in entirety of the panguwa in question?

The learned Commissioner held in favour of the plaintiff on all the issues and entered decree accordingly. The second, third, and fourth defendants appeal from this decree.

It was contended in appeal that the evidence of performance of services was that of only one witness and should not have been accepted by the Commissioner, that the plaintiff was not entitled to more than two-thirds of the Nindagama, and that he was not entitled to sue without joining the owners of the other one-third.

It is clear from the evidence that Urulawattekumbura was held by Katuwekumbure Punchirala, subject to the performance of certain services the annual value of which was assessed at Rs. 16.80.

It is common ground that it is a panguwa of the Udabadana Nindagama which belonged prior to March 1, 1873, to Edward James Dehigama and Dingiri Amma. They by deed dated March 1, 1873, sold it and other panguwas to A. M. Galloway, William Ronald, and William Henry. Galloway by a deed dated February 13, 1877, sold his one-third share to Ronald from whom two-thirds passed through various transferees to the plaintiff, who is a grandson of James Dehigama and Dingiri Amma.

The title of the defendants is not set out in their answer. According to the evidence the second defendant bought certain interests in 1909 by deed D 7 from one Dingiri Menika. He says he took a lease of another interest by deed of lease D 8, but this deed refers to a field called Waka-arawedaranda.

The second and fourth defendants purchased three pelas in 1925 from Kamsa Naina who bought two pelas in 1910 by deed D 10.

None of these deeds mention that the lands conveyed are held subject to the performance of services. But the second defendant admitted that he had purchased the interests of Kiriwanti and Ukku Menika, two of the children of Punchirala,

the tenant mentioned in the Service Tenure Register, and that the interests of Siyatu, another child of Punchirala, have been acquired by the third defendant through his father, Vidane. The third and fourth defendants purchased an interest from Kamsa Naina by deed D 9 who purchased by deed D 10 from the children of Kiriwanti.

The learned Commissioner therefore had ample reason for holding that the second, third, and fourth defendants were the successors in title of Punchirala, the original tenant.

The learned Commissioner has accepted the evidence of Punchirala Vidane that services were performed up to 1924, and I see no reason to disagree with his finding on the issue of prescription.

There remains the issue whether the plaintiff is entitled to sue for more than two-thirds of the amount claimed which at the trial was limited to the value of services for the years 1926 and 1927, namely, Rs. 37.60. The case for the plaintiff on this issue is that in spite of the transfer to Galloway, Henry, and Ronald, the Dehigama family continued to be the overlords of the Nindagama, that their tenants continued to render services to them, and that the plaintiff took the conveyance D 6 with the object of removing doubts about his title. But the case relied on by the plaintiff is not supported by any evidence. This action appears to be one of a series of actions against the tenants of various panguwas. In one of them, No. 4,966 of the Court of Requests of Badulla-Haldumulla, the subject of which was tenement No. 15, the plaintiff's title appears to have been fully gone into. In appeal, however, it was held that the issue of title did not arise. Either on the strength of this decision or the admission in evidence of pleadings and decrees in other cases, which were clearly irrelevant as *res inter alios acta*, no evidence was given of plaintiff's title.

The fact that plaintiff is a grandson of Edward James Dehigama can vest him with title to, at most, James Dehigama's

interests. The title of the plaintiff to the interests of the other Nindagama owners has not been proved.

The decision in case No. 4,966 of the Court of Requests of Badulla-Haldumulla, which is a decision of two Judges, was cited to me in support of the argument that it was not necessary for plaintiff to prove his title. I have sent for and examined the record for the purpose of ascertaining the scope of the decision and find that the first issue in the case was : "Is plaintiff the landlord of the Nindagama called Udabadana Nindagama?" Schneider J. who delivered the judgment in the case said with regard to this issue : "The Court of Requests had no jurisdiction to decide the question of title to the Nindagama. The first issue which raises this question must therefore be ruled out." He also ruled out the fifth, sixth, seventh, and eighth issues which were framed to try the defendant's title to the panguwa. The judgment of the Court below in plaintiff's favour was affirmed.

Since the date of this decision, December 21, 1926, it was held by a divisional Court that the question of title could be tried by a Court of Requests—*Heen Banda v. Aluvihare*¹. The plaintiff's title should therefore have been inquired into and properly proved in this action.

In an ordinary case I would not have permitted the plaintiff to supply the omission after the weakness of the evidence as to title had been ascertained in appeal. But as plaintiff has already proved his title in case No. 4,966 and this case is not one in which evidence will have to be sought for after the pinch of the case has been discovered, I would remit the case to the Court of Requests to enable the plaintiff to prove his title to the one-third share of the Nindagama outstanding.

I accordingly make the following order:—

The judgment of the Court below is affirmed as to two-thirds of the amount sued for. The plaintiff will be entitled to two-thirds of the costs in the Court below but not to any costs in appeal.

¹ (1929) 31 N. L. R. 152

The judgment of the Court below as to one-third of the amount claimed is set aside and the case remitted to the Court below for proof of plaintiff's title to the outstanding one-third share of the Nindagama. Judgment will be entered according to the Commissioner's finding on the plaintiff's claim to the outstanding one-third share.

The appellants will be entitled to the costs of this appeal. They will also be entitled to the costs of the new trial in any event.

Order varied.
