

Present : Bertram C.J. and Jayewardene A.J.

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MARTHELIS *v.* SIRIWARDENEHAMY.

80—C. R. Ratnapura, 18,063.

*Nindagama—Transfer of right to agricultural services—Payment of ottu—Right to personal services apart from possession of lands.*

Where a nindagama is held by paraveni nilakarayas and pelkarayas (sub-tenants), each being entitled to the possession of separate lands as their panguwas, the pelkaraya stands to the paraveni nilakaraya in the same relation in which the latter stands to the nindagama proprietor or overlord.

In such a case the paraveni nilakaraya is entitled to transfer his right to the agricultural services due from pelkarayas, without at the same time transferring any of the lands of the paraveni panguwa.

For the purpose of recovering the value of such agricultural services, it is not necessary to prove that the services due from the paraveni nilakaraya to his overlord have been performed, as such services may not have been enforced or the right to enforce them might have been lost by prescription.

The right to demand personal services cannot be sold apart from the land.

CASE referred by Jayewardene A.J. to a Bench of two Judges.

The facts are stated in the reference as follows :—

In this case several questions relating to service tenure land in the Province of Sabaragamuwa, one of the Kandyan provinces, arise for decision.

One Bentota Viñanilage Siman Naide was the paraveni nilakaraya of a pangu called the Muttettuwatte (Galladaye) panguwa. This panguwa consisted of seven fields, one owita, and seven wattas.

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The proprietor was the Maha Saman Dewala of Sabaragamuwa. The nilakaraya had to perform certain services enumerated in the service register P 1, and the services were commuted for an annual payment of Rs. 50. This panguwa, with the facts above stated, was registered in the register of paraveni panguwas under Ordinance No. 4 of 1870 (*vide* P 1 and D 11).

The nilakaraya of the Muttettuwatte (Galladaye) panguwa, called the ganladda, had certain panguwas tributary or subordinate to him, and he was entitled to claim certain services from these tributary panguwas, and among the latter was the Gamage panguwa which consisted of the Gamagekumbura, of which the defendants are said to be nilakarayas or the successors of the original nilakarayas. Siman Vidane who might be regarded as the ganladda at the time of the register P 1—by deed No. 2,278 of May 29, 1885, P 5—sold and transferred to one Guna Nachchire for a sum of Rs. 380 the customary dues (such as ottu, dekum, penum, and rajakariya services) recoverable from twenty-two panguwas, all tributary panguwas and appurtenant to Muttettuwatte (Galladaye) panguwa which he claimed to be entitled to by virtue of a deed of gift. The rights conveyed on P 5 have now devolved on the plaintiff.

The plaintiff pleading this title sues the defendants as the owners of the Gamage panguwa, and claims a sum of Rs. 20 as “ottu” for Gamagekumbura. He alleges that they have failed to pay these dues for the last three years. His claim is resisted on various grounds, and the following issues were suggested and framed by the Court :—

- (1) Was Siman Vidane owner of Muttettuwatte (Galladaye) panguwa, and as such entitled to “ottu” of Gamage panguwa ?
- (2) If so, has Siman Vidane’s title devolved on the plaintiff ?
- (3) Is the plaintiff the sole owner of Siman Vidane’s title, and, if not, can the plaintiff maintain this action ?
- (5A) If the plaintiff had any rights, has he lost them by prescription ?
- (5B) Can the right to collect “ottu” be lost by prescription ?
- (6) What amount, if any, is due to the plaintiff ?

The Judge heard argument on issue (5B) first, and held in the affirmative. He said that payment of “ottu” was in the nature of performance of service, and held that on non-payment for the prescribed period the right to claim “ottu” would be prescribed. The next point argued was whether in view of the fact that the Muttettuwatte (Galladaye) panguwa—the quasi-dominant tenement—was not now vested in one person, but portions of it have been sold to various persons who are not parties to this action, the plaintiff who has only a part of the Muttettuwe panguwa can maintain the action ? On this question the Court held that if a person who

owned a share of Siman Vidane's Muttettuwatte panguwa, and so had a right to perform the services, performed all the services that Siman Vidane owed to the dewala, then that person could demand the "ottu" from the holders of the quasi-servient tenements. "It is a question of fact," he said, "whether the plaintiff performed all the services specified in P 1—subject to this the plaintiff can maintain this action."

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The plaintiff, I find, is not entitled to any of the Muttettuwatte (Galladaye) panguwa lands at any rate on P 5. The Judge then proceeded to inquire into the question whether the plaintiff had performed all the services enumerated in the register as due to the dewala. After some witnesses called by the plaintiff had given evidence, he found the evidence so grossly contradictory that he stopped the case and dismissed the action. In his view the plaintiff had failed to prove that he performed all the services, and such proof alone, in his opinion, entitled the plaintiff to maintain the action. From this judgment the plaintiff appeals.

As regards the last point decided by the learned Judge, I am unable to agree with him. I am not sure that the plaintiff is bound to prove that he performed all the services before he can succeed in this action.

In my opinion it is sufficient if he proves that he has substantially complied with the requirements regarding the performance of service.

Some of these services cannot be performed now, others are not insisted upon, and I think the plaintiff has succeeded in establishing a *prima facie* case of performance of services by him. He still acknowledges the temple as his overlord, and the temple acknowledges him as its tenant. It is not suggested that anyone else has performed any of these services. If I had to decide the case on this point, I would send the case back for its resumption from the stage at which it was stopped.

But the respondent contends on the authority of *Ukku Banda v. Lapaya*<sup>1</sup> that the plaintiff cannot maintain the action without joining all the other owners of the lands given in P 1 as composing the Muttettuwatte (Galladaye) panguwa, and that the order of the Commissioner on this point is wrong.

These fields, wattas, and owitas mentioned in P 1 have passed into the hands of a large number of persons who are now in possession of them. But by deed (P 5) Siman Vidane has expressly conveyed the right to recover customary dues (ottu, dekum, penum, and rajakariya), and that right has now devolved on the plaintiff.

The only document produced which discloses any dealing with any of the lands belonging to the Muttettuwatte (Galladaye) panguwa before the execution of P 5 is a Fiscal Transfer of 1884, D 1. But

<sup>1</sup> (1891) 2 C. L. R. 38.

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this is a sale in execution, and conveys a specific field, and it cannot be construed as conveying any rights appurtenant to the panguwa to which the execution-debtor was entitled as overlord.

All the voluntary conveyances have been executed subsequent to P 5, that is, after Siman Vidane had divested himself of his right to the customary dues in favour of Guna Nachchire.

This case must be decided on the effect to be given to P 5. By it not one of the wattas, fields, or owitas constituting the Muttettuwatte (Galladaye) panguwa was transferred. What appears to have been transferred is the right to customary dues recoverable from twenty-two panguwas appertaining to Muttettuwatte (Galladaye) panguwa alone.

Can this right be transferred or otherwise disposed of apart from the lands of the Muttettuwatte (Galladaye) panguwa ?

The plaintiff's rights depend on the decision of this question. The point is not covered by any authority. There are, however, some dicta in *Siyatu v. Kiri Saduna*,<sup>1</sup> which appear to negative such a right. Reference might also be made to *Samarasinghe v. Weerapulle*.<sup>2</sup>

This is a test case, and I understand that a number of other cases have been laid over until the decision of this case. This question, undoubtedly, goes to the very root of the plaintiff's title.

I would, in the circumstances, direct that this case be fixed for argument before a Bench of two Judges for the decision of the question whether Siman Vidane was entitled to transfer the rights to customary dues apart from the lands of the Muttettuwatte (Galladaye) panguwa, as he has purported to do by P 5 ?

*E. W. Jayewardene, K.C.* (with him *Samarawickreme* and *Weerasinghe*), for appellant.

*Allan Drieberg, K.C.* (with him *Keuneman*), for respondent.

November 26, 1924. JAYEWARDENE A.J.—

The main question arising in this case was reserved by me for consideration before a Court of two Judges. The case was accordingly argued before my Lord the Chief Justice and myself. [His Lordship after stating the facts proceeds as follows : ]

To decide this question, it is necessary to consider the position of Siman Vidane—the ganladda—with reference to the appurtenant panguwas.

All these panguwas are registered in the registers compiled under Ordinance No. 4 of 1870. See P 1, P 2, and D 11. They are described as being in the village Kotaketana. The name of panguwa No. 1 is given as Muttettuwatte (Galladaye) panguwa. Under

<sup>1</sup> (1893) 3 C. L. R. 17.

<sup>2</sup> (1882) 5 S. C. C. 40.

the head "Description and extent of panguwa," the names of seven fields, one owita, seven wattas, and one chena are given. The name of the paraveni nilakaraya is given as "Bentota Vidanalage Siman Vidane." The proprietor is given as "Sabaragamuwa Maha Saman dewala," and the commutation value is fixed at Rs. 50. In the fifth column, "Nature and extent of services," we find a full description of the services due from the paraveni nilakaraya to the dewala, and the following right referred to:—"To receive 'ottu' at the rate of five lahas for each pela whenever the pelkara panguwa fields and chenas belonging to this panguwa were cultivated, and also that the pelkarayas shall perform services for the panguwa and give the other presents." This is the translation appearing in D 11 (page 108). The translation in P 1 (page 1) is not materially different, although the translation in D 11 appears to be more accurate.

Then we have the registration of three other panguwas numbered two to four. Their position is similar to that of the Muttettuwatte (Galladaye) panguwa. Then follows the registration of thirty-five panguwas, and the eleventh panguwa is the Gamage panguwa which consists of only one land, Gamagekumbura—the one in respect of which the present claim for "ottu" is made. The names of the tenants of this panguwa and of the other thirty-four panguwas are given under the head "paraveni nilakaraya." The proprietor is the Sabaragamuwa Maha Saman Dewala, and "the nature and extent of services" of the Gamage panguwa are described as follows:—(D 11 (page 112) ): "The services of this pangu belong to the ganladda of Muttettuwatte. To give 'ottu' on each harvest of fields as in pangu No. 1, and a pair of buffaloes for muttettuwa cultivations, to help on the seven occasions of the muttettuwa cultivations on receiving one meal a day and to give meals, and for measuring "ottu" as in pangu No. 1," and at the end of the list of panguwas of this village there is the entry:—

"The services of pangus Nos. 5 to 24 belong to the ganladda of pangu No. 1. Those of pangus Nos. 25 to 30 to the ganladda of pangu No. 4, those of pangus Nos. 31, 32, and 33 to the ganladda of pangu No. 3, and those of pangu Nos. 34 and 35 to the ganladda of pangu No. 2. See register of nindagamas. The *gan-gatte* of all animals shot in the village shall be given to the ganladda of that pangu on which the animal fell. The owner of each pangu shall keep the roads clean."

There can be no doubt that the "pelkara panguwa" fields and chenas referred to in the description of the services due to pangu No. 1 are the panguwas Nos. 5 to 24, and although the names of the tenants appear under the head "paraveni nilakarayas"—they are in fact paraveni pelkarayas, and stand to the ganladda in the

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same relation in which the ganladda stands to the Sabaragamuwa Maha Saman Dewala, the proprietor. It is necessary to explain the terms "ganladda" and "pelkaraya" as used here, and the relation in which they stood to each other. These terms are explained in the "*Glossary of native terms occurring in the Service Tenure Registers*" given as an appendix to the report of the Service Tenure Commissioners for 1872 :—

"Ganladda : An owner of land.—Sometimes applied to small proprietors and sometimes to proprietors of inferior castes, *e.g.*, the proprietors of the village Kotaketana (smith and wood carvers) are always so styled."

"Pelkaraya : A sub-tenant.—See dalupothkaraya. The mulpangukaraya gets a person to settle on the lands of his panguwa in order to have a portion of the services due by him performed by the person so brought in, who is called 'pelkaraya' : lit. cotter.—and 'dalupothkaraya' : a sub-tenant—a garden tenant ; one who has asswedumized land belonging to the mulpangukaraya. In this district (Sabaragamuwa) the dalupothkaraya is called 'pelkaraya.'"

It is to be noted that the description of the term "ganladda" refers to the very village in which these panguwas are situated, viz., Kotaketana, and that the term is used as referring to the proprietors of lands in this village. The "ganladda-pelkara" tenure is referred to by Mr. Turnour in a report made by him on the Sabaragamuwa District in the year 1824 and given as an appendix (C 2) to the Service Tenures Commissioners' Report of 1872 (see *Administration Reports, 1872, p. 464*). Explaining the various modes of tenure prevailing in Sabaragamuwa, he says :—

"It is so obviously true that the divisions of which every considerable estate in the interior consists were originally made by the chief of the village (ganladda) or for his advantage and convenience that the assertion needs not to be proved. In a country where money is so scarce, that it can hardly be said to be in circulation, dues from estates can only be raised in kind, and labour be obtained by attaching personal services to land. Accordingly, it is found in these provinces, as in the instance of nindagamas, that the ganladda was in possession, generally speaking, of only a fifth or sixth of the property. The rest was distributed among the pelkarayo under various tenures. The portions reserved by the ganladda were gratuitously cultivated by them in *ninda* or *anda*, as the lands might be *ninda* or *anda* muttettus : he received dues in money or kind from many of the pelkarayo, whose personal services were light ; and all were obliged to build and repair his houses and to perform any other labour

required of them. Some were fed while so employed, and others not. As many of them as were required attended him on all his journeys, and at his annual appearance in Kandy to pay his tribute of five ridis. It was their duty to follow him and convey his provisions and baggage, maintaining themselves all the while he remained there at their own charge."

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Through the courtesy of the Government Agent, Sabaragamuwa, I have been able to obtain a copy of the register of nindagamas relating to these panguwas and referred to in D 11. This register, which I have marked S C 1, throws a great deal of light on the difficulties arising in this case, if it does not solve them altogether.

The nindagama register contains the following entry :—

" This is a village (Kotaketana) possessed by a family of the silversmith caste. They perform 'rajakariya' to the Maha Saman Dewala and are possessing four shares. The remaining twenty-nine shares are the 'pelkara pangus' for performing 'rajakariya' to the 'ganladda. For details see dewalagam register."

And under the head " proprietors " appears the following :—

" (1) Bentota Vidanelage Siman Vidane, (2) Muduwegaladdalage Selappu Naide and others, (3) Hittarage Givane Naide, (4) Kodal Badde Givan Naide."

These are the names of the four persons to whom the " rajakariya " services from the tenants of the 29 pelkara panguwas are due or belong. See register D 11. I have also obtained a copy of the dewalagam register. I find it is the same as the register of paraveni panguwas D 11, P 1, and P 2.

Now Siman Vidane is described as the proprietor of the nindagama consisting of twenty-two panguwas, and he must be given all the rights such a proprietor is entitled to. One of these is the right to sell his nindagama with its proprietary rights, and to make the transferee entitled to all the services of tenants, and I presume to receive " ottu : " *Tillekeratne v. Dingihami*.<sup>1</sup>

Such a sale amounts in law and in fact to a sale of the right to the services to be performed by the nilakarayo. The tendency of legislation has been, as pointed out by De Sampayo J. in *Appuhamy v. Menika*,<sup>2</sup> to make the nilakaraya the real owner of the panguwa. The proprietor's rights are restricted to the right to services and nothing more. The proprietor who is under the Ordinance entitled to sell the nindagama and enable the transferee to obtain performance of services, ought, in my opinion, to be able to sell the right to the services alone without also transferring the almost empty right to the nindagama lands.

<sup>1</sup> (1861) *Ram. (1860-62)* 114.<sup>2</sup> (1917) 19 *N. L. R.* 361 (368).

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If Siman Vidane is regarded as the proprietor of the twenty-two panguwas, as he must be, he had, in my opinion, the right, like all other nindagama proprietors, to sell his rights, and confer on the purchaser a valid title to them.

In *Siyatu v. Kiri Saduna (supra)*, Lawrie J., whose knowledge of Kandyan law and customs was almost unrivalled, expressed the opinion that a nindagama owner can so lease or alienate his land as to entitle the lessee or purchaser to the agricultural services due to the owner in respect of the land.

But he thought that the right to demand personal services, such as carrying burdens and palanquins and presents, could not be leased or assigned, but if the nindagama is sold, then the new proprietor would step into the place of his vendor—in respect of all services, agricultural and personal.

It may be that Siman Vidane has purported to sell the right to services, both agricultural and personal, but in the present case no claim is made for failure to perform any personal services, and the demand is for the payment of “ottu” or its equivalent in money. It may be that this transfer is invalid so far as personal services are concerned, but that cannot affect the right to agricultural services or to a share of the produce. In view of the entry in the nindagama register, Bentota Vidanalage Siman Naide must be regarded as the proprietor of the pelkara panguwas and as having supplanted the Maha Saman Dewala in that position.

The documentary evidence also shows that the transferee of Siman Vidane and his successors in title have been leasing the right to receive “ottu” in the years 1897 and 1912. In the year 1897 Gabo Naide, acting on behalf of the then owner of these rights, who was his grandmother—two months before the notarial deed of gift in his favour—leased these rights to two persons called Appu Naide and Siribohamy of the village Koteketana for a term of years. Again, in the year 1912 by lease 3,876 of October 10, the first defendant himself took on lease the right to collect “ottu.” In the year 1895 Siman Vidane himself had leased the same right to a Moorman called Kumister Casi Lebbe Marikar, who successfully sued the tenants of Acharige panguwa, one of the pelkara panguwas, for the value of the “ottu” due to him under the lease. And so lately as 1920 or 1921 the present plaintiff sued the tenants of Epitagedera Gamaralage panguwa and Liyadebodage panguwa—two of the pelkara panguwas, and recovered the value of “ottu” and the commuted dues. P 14 and P 15. These transactions show that the rights granted by Siman Vidane on P 5 have been exercised and enforced. There are, however, some difficulties to be considered. The first is whether the holder of these rights is bound to perform any services to the Maha Saman Dewala, and whether the right to receive “ottu” is dependent on the performance of such services. In my opinion the performance of services



mentioned in the register (P 1, P 2, and D 11) is attached to the possession of the lands forming the Muttettuwatte (Galladaye) panguwa. The transferees of these lands would have to perform the services, and not the transferees of the lands of, or the rights over, the pelkara panguwas. Otherwise, we would have two sets of persons having to perform the same services—the transferees of the Muttettuwatte (Galladaye) panguwa and the transferees of the pelkara panguwa. None of the services which the pelkara panguwa holders have to perform is to be performed for the benefit of the dewala directly. They have to be performed for the benefit of the ganladda—the proprietor of these panguwas.

The inclusion of the right of the ganladda to certain services among the services he has to perform to the dewala is, in my opinion, a mistake, and this is apparent when the register of paraveni panguwas (D 11) is read with the register of nindagamas (S C 1). One of the services the pelkara pangukarayas have to perform is to give buffaloes for the ploughing of the muttettu fields and to otherwise assist in their cultivation. These services may pass to the transferees of these fields, but the payment of “ottu” is a different obligation arising from the possession of land belonging to the ganladda, and may be acquired by any person to whom the right is transferred.

In my judgment the right to recover “ottu” from the possessors of the pelkara panguwas has nothing whatever to do with the ganladda’s possession of the lands of the Muttettuwatte (Galladaye) panguwa, and can be dealt with by the ganladda according to his pleasure. It is to my mind immaterial whether the ganladda has performed the services due to the dewala or not. The dewala might have abstained from enforcing the performance of these services, and the right to them might have become extinguished by prescription. But that would not affect the liability of the pelkarayas to perform services and to pay “ottu,” to the ganladda and his successors in title if these rights have been kept alive.

I would answer the question propounded in the affirmative. The judgment appealed from will be set aside, and the case sent back for the decision of the question whether the plaintiff has lost his right by prescription. The appellant is entitled to the costs of this appeal. All other costs will abide the event.

BERTRAM C.J.—I agree.

*Set aside.*

*Case remitted*

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