1944 *Present:* **Soertsz, Hearne, and Jayetileke JJ.**

JAYARATNE *et al.*, Appellants, *and* GUNARATANA THERO, Respondent.

104—D. C. Kurunegala, 18,780.

Service tenure—Commuted dues—Paraveni panguwa of nindagama—Indivisible obligation—Service Tenures Ordinance (Cap. 323), ss. 9, 10, 14 and 15.

The obligation to pay dues attached to the paraveni panguwa of a nindagama is indivisible and is exigible from any of the nilakarayas subject to his or their right to claim contribution.

THIS case was referred to a Bench of three Judges. The facts appear from the argument.

E. B. Wikremanayake (*H. V. Perera, K.C.*, with him and *H. Wanigatunge*), for the substituted-defendants, appellants.—The main question for consideration is whether the obligation of *paraveni nilakarayas* to pay commuted dues is divisible or indivisible, *i.e.*, whether one or more out of several nilakarayas are liable to pay the entire commuted dues fixed under section 15 of the Service Tenures Ordinance (Cap. 323). There are conflicting decisions on this point. The cases which have a bearing on this question are *1877 Ram. 131; 1877 Ram. 395; Asmadale et al. v. Weerasuria* [1]; *Appuhamy et al. v. Menike et al.* [2]; *Banda v. Amir Tamby* [3]; *Martin et al. v. Hatana et al.* [4]. The correct view would be that when the primary obligation to render services is converted into a secondary obligation to pay commuted dues the debtors would be bound each for his part only. *Pothier 2, 4, 3, 1* which is referred to in Walter Pereira's *Laws of Ceylon* (*1913 ed.*) *p. 590* is not considered in the reported cases. None of the sections in the Service Tenures Ordinance gives the nature of the obligation. The general rule is that, *unless otherwise expressly agreed upon*, the liability of co-obligors is joint merely and not joint and several, and each co-obligor is only liable for his share of the contract and not for the whole contract *in solidum*—*Gunasekere v. Gunasekere* [5].

N. Nadarajah, K.C. (*N. E. Weerasooria, K.C.*, with him, *Ivor Misso* and *S. R. Wijayatilake*), for the plaintiff, respondent.—The unit which is liable is the pangu and not the individual nilakaraya. The question was considered recently in *Bandara et al. v. Dingiri Menika et al.* [6]. For purposes of service the panguwa, whatever the number of the co-heirs may be, is indivisible and the co-heirs are jointly and severally liable for the service—H. W. Codrington's *Ancient Land Tenure in Ceylon, p. 3.* If the services are commuted the character of the liability is not altered. Sections 10, 15, 24 and 25 make the position clear. When there is commutation what takes place is a substitution of the primary obligation; it is not a conversion of a primary obligation into a secondary obligation.

[1] *(1905) 3 Bal. Rep. 51.*
[2] *(1917) 19 N. L. R. 361.*
[3] *(1914) 3 Bal. N. C. 24.*
[4] *(1913) 16 N. L. R. 92.*
[5] *(1941) 43 N. L. R. 73 at 75.*
[6] *(1943) 44 N. L. R. 393.*

Compare, for example, the obligation of the co-heirs of a mortgagor when the latter dies—Wille's *Mortgage and Pledge in S. Africa (1920) p. 267; Unguhamy v. Hendrick*[1]*; Asmadale et al. v. Weerasooria (supra), Martin et al. v. Hatana et al. (supra)* and *Appuhamy et al. v. Menike et al. (supra)* are applicable in the present case. The proprietor can proceed against any one of the nilakarayas; the latter would have the right of contribution against the other nilakarayas.

E. B. Wikremanayake in reply.—The correct test is, if an obligation is capable of being divided into parts the liability will be *pro rata*—*Ramalingam v. James*[2]*; Panis Appuhamy v. Selenchi Appu et al.*[3].

If the unit which is liable is the pangu, all the nilakarayas of the four pangus in the present case ought to have been joined as parties.

Cur. adv. vult.

January 19, 1944. SOERTSZ J.—

The plaintiff who is the Viharadhipathi and Trustee of Maraluwa Vihare is seeking to recover from the defendants who are the present owners of the land known as Maraluwa estate, the entire commuted dues fixed under the Service Tenures Ordinance as payable in respect of four pangus of a Nindagama of which Maraluwa Vihare is the overlord, the plaintiff's case being that some of the lands of those pangus are included in Maraluwa estate.

In view of the admissions made at the trial and of the Judge's finding it is clear that some of the lands of the four pangus are within Maraluwa estate. But the defendants' case, as presented to us, is that even so, the plaintiff must fail, firstly, because his action is barred by section 24 of the Service Tenures Ordinance, the defendants and their predecessors not having paid any commuted dues for over ten years, or, secondly, because, if they are liable their liability is no greater than to pay in the proportion that the lands of these pangus which they hold bear to all the lands of those pangus and that, therefore, the plaintiff's proper course was to sue all the nilakarayas.

These contentions raise, once more, questions which have been considered by this Court on several previous occasions but, unfortunately, with divergent results. This conflict of views is, however, hardly surprising for, although the land tenures with which we are here concerned appear to have fitted naturally into the social and legal systems which called them into being, they are strange to the Roman-Dutch law and the attempts made in some of the earlier cases to solve these questions on the analogy of Roman-Dutch law principles have proved unsatisfactory. They are attempts to put new wine into old bottles. For instance, in the earliest of the cases cited to us, *1877 Ram. p. 131*, the argument of Counsel for the successful appellants was based on the Roman-Dutch law principle that if solidity of obligation is intended it should be expressly provided for, and that if it is not, the general rule applies that each of the persons bound is liable *pro rata*. Although the judgment of the Court in that case does not expressly enunciate this proposition, it seems clear that the Court took that to be the law when

[1] *(1930) 11 C. Law Rec. 54.* [2] *(1939) 40 N. L. R. 486.*
[3] *(1903) 7 N. L. R. 16.*

it said that " it was not aware of any law or custom in which one of several Nilakarayas of a panguwa is liable to render services for the whole panguwa that is to say for himself as well as for his co-tenants ", and thereby implied that in the absence of any law or custom relating to these tenures to the contrary, the Roman-Dutch law applied. This ruling was followed by one of the Judges who took part in that case, in the later case reported at page 395 of the same volume. But when the question came up again, many years later, in the case of *Asmadale v. Weerasooria*[1] Pereira J. took a very different view. He held that " the liability of the tenants of a panguwa is a joint liability. At the same time, the services in their nature were indivisible and therefore the obligation to pay the commuted dues must be regarded as an indivisible obligation ". This ruling was followed by Lascelles C. J. in *Martin et al. v. Hattana et al.*[2] and by Ennis J. in *Appuhamy v. Menike*[3]. If I may say so with respect this view, that the obligation to pay the commuted dues is an indivisible obligation, appears to me to be the correct view in the light of the provision of the Service Tenures Ordinance itself, and not for the reason given by Pereira J. that the services being indivisible, it necessarily followed that the alternative or secondary obligation was indivisible. Logically that reasoning seems to me to involve a *non sequitur* and as a general proposition of law, it is opposed to several instances to the contrary adduced by Pothier.

But as I have observed the Service Tenures Ordinance makes it sufficiently clear that the services as well as the dues are attached to the panguwa and are indivisible and owed jointly and severally by the nilakarayas and are exigible from any of them subject to his or their right to claim contribution. Sections 9 and 10 of the Ordinance provide for the ascertainment and registration of the nature and extent of the services in relation to each *pangu*. Sections 14 and 15 make it clearer still that the unit is the pangu and not the Nilakaraya for section 14 requires the application for commutation in the case of a pangu with several or many Nilakarayas to be made or acquiesced in by a majority of those above sixteen years of age, and section 15 requires the Commissioner to ascertain as far as practicable whether all the Nilakarayas above 16 years of age desire the commutation. Both these requirements would surely be out of place, if it were intended to leave it open to one or more of the Nilakarayas to commute his or their services for a *pro rata* payment of dues. Section 15 goes on to say that once commutation has been determined and fixed " the Nilakarayas shall be liable to pay the proprietors . . . . the annual amount of money payment due for and in respect of . . . . the services; and such commuted dues shall thenceforth *be decided* to be a *head rent* due *for and in respect of the pangu* ". That, as I understand it, makes the pangu " the head " or the unit. This view is supported by the terms of section 25 which provides the remedy of a proprietor when there is default of payment of the commuted dues. It enacts that if the dues be not paid, they shall be recovered by " seizure and sale of the crop or fruits on the pangu or failing these by the personal property of the Nilakaraya or

[1] *(1905) 3 Bal. Rep. 51.* [2] *(1912) 16 N. L. R. p. 92.*
[3] *(1917) 19 N. L. R. p. 361.*

failing both by a sale of the pangu ''. The crop and fruits on the whole pangu, and ultimately the whole pangu itself being made liable it follows that the proprietors may seize and sell any part of the crop and fruits or any part of the pangu.

The question then is whether in a case such as this where the proprietor elects to go against a particular nilakaraya and, by so doing, to limit his remedy to part of the fruits and crops on the pangu or to the personal property of that nilakaraya, and to the lands of the pangu in his possession, he must nevertheless join all the nilakarayas as co-owners. In regard to that question, I do not think we need embarrass ourselves with it in this case for, on the evidence accepted by the trial Judge, it seems clear that the defendants and their predecessors have acquired a prescriptive title to those lands of these pangus which lie within Maraluwa estate as against the original nilakarayas and their successors.

I am therefore of opinion that the plaintiff was entitled to sue the defendants to recover the entire dues and to sue them in this instance without joining the other nilakarayas or their successors.

The other question is that arising from the plea of prescription set up by the defendants as against the overlord. That plea must fail inasmuch as, on the finding of the trial Judge, some part of the dues has been recovered by the overlord by action or otherwise in respect of lands of these pangus within the last ten years and therefore the condition on which a successful plea of prescription against the overlord is made dependent, is not satisfied.

I would dismiss the appeal with costs.

HEARNE J.—I agree.

JAYATILEKE J.—I agree.

Appeal dismissed.