

1948

*Present : Jayatileke S.P.J. and Basnayake J.*UDURAWANA *et al.*, Appellants, and GALAGODA (Basnayake Nilame), Respondent*S. C. 288—D. C. Kandy, 1,772**Service Tenures Ordinance—Paraveni nilakarayas—Services not commuted—Damages—Amount to be awarded—Section 25.*

The remedy of a proprietor against a defaulting nilakaraya who has not commuted his services is an action for damages under section 25 of the Service Tenures Ordinance. Such damages would include the amount stated in the register as the amount payable in lieu of services in addition to such actual damage as he might prove as a result of the default.

APEAL from a judgment of the District Judge, Kandy.

H. V. Perera, K.C., with *C. Shanmuganayagam*, for the defendants appellants.

H. W. Jayewardene, for the plaintiff respondent.

Cur. adv. vult.

July 8, 1948. BASNAYAKE J.—

The plaintiff-respondent (hereinafter referred to as the plaintiff) is and has been for the twenty-three years immediately preceding the date of this action, December 12, 1944, the Basnayake Nilame of the Natha Dewale at Kandy. The defendants-appellants (hereinafter referred to as the defendants) are sued on the footing that they are the paraveni nilakarayas of the Natha Dewale and are the holders of the panguwa known as the Ankumbure Migonkattu panguwa of 420 pelas sowing extent.

The plaintiff alleges that he is entitled to a sum of Rs. 1,025, but he limits his claim to Rs. 1,000. He computes his claim thus:—

<i>Rs. c.</i>	
420 pelas at the rate of three shillings per pela on	
the basis of 75 cents per shilling ..	945 00
16 penumas at the rate of Rs. 5 per penuma ..	80 00
	<hr/>
	1,025 00

In his computation of the value of the penumas the plaintiff erroneously states the amount as Rs. 90 whereas it should be Rs. 80.

The first defendant, the Kandy Rubber and Tea Estates Ltd., in its answer denied liability to pay the plaintiff's claim and also claimed the benefit of section 24 of the Service Tenures Ordinance. Of the other 28 defendants, the 9th, 12th, 22nd, 24th, 27th and 29th defendants did not file answer, and the plaintiff withdrew the action against the 1st, 5th,

14th, and 15th defendants. The reason for the withdrawal of the action against those defendants does not appear on the record. The other defendants, who filed answer, while admitting that they were paravni nilakarayas, denied the plaintiff's claim and pleaded that they had paid the commuted dues and performed the services up to 1944, and asked that the plaintiff's action be dismissed.

The learned District Judge gave judgment for the plaintiff in a sum of Rs. 710 less Rs. 15·80 against all the defendants save the 1st, 5th, 14th and 15th defendants in respect of whom the action was withdrawn. He accepted the plaintiff's basis of calculation of three shillings for a pela and Rs. 5 for a penuma, but in his computation he appears to have adopted 50 cents and not 75 cents as the equivalent of a shilling. The present appeal by the defendants is from that order.

It will be convenient if I first discuss the relevant provisions of the Service Tenures Ordinance and next proceed to the question that arises for decision. The object of the Service Tenures Ordinance is, as stated in the long title, to define the services due by the Praveni Tenant of Wiharama, Dewalagama and Nindagama Lands, and to provide for the Commutation of those Services. It provides for the appointment of Commissioners (section 3) for carrying into effect the provisions of the Ordinance. They are authorised to notify all headmen, temple and nindagama proprietors to furnish them with lists of panguwas held by them with an enumeration of the services in detail of the praveni pangus or to give oral testimony in regard to those matters (section 7). Within a reasonable time after the expiry of the notice given under section 7, they are required to investigate all claims made to them after notice to all parties concerned (section 8). They are required particularly to determine—

- (a) the tenure of each pangu subject to service in the village, whether it be praveni or maruwena ;
- (b) the names, so far as the same can be ascertained, of the proprietors and holders of each praveni pangu ;
- (c) the nature and extent of the services due for each praveni pangu ;
- (d) the annual amount of money payment for which such services may be fairly commuted *at the time the registries are made* ;

and this determination is declared to be final and conclusive as to the tenure of the pangus, the nature of the service due for and in respect of each praveni pangu, and the annual amount of money payment for which the services due for each praveni pangu may be fairly commuted *at the time those registries are made* (section 9).

The Commissioners are also required to cause to be numbered and entered in a book of registry a list of praveni pangus in each village, the names of the proprietors and tenants of each pangu, the nature and extent of the services due for each pangu, and the annual amount of money payment for which such services may be fairly commuted *at the time the registry is made* (section 10). Section 14 of the Ordinance gives any praveni nilakaraya a right to apply for a commutation of any service to the Commissioners. The Commissioners are empowered by section 15,

after notice to the proprietor, to ascertain "whether the services may still be fairly commuted at the amount fixed in the registry, or whether they have risen or fallen in value, and to what extent". After ascertaining the amount the Commissioners are authorised to make an order that the service in respect of the pangu shall stand commuted for the annual payment mentioned in the registry or for any other sum that the Commissioners may consider just or reasonable. Section 15 then declares: "The order so made under this section shall be final and conclusive and binding upon all the proprietors and nilakarayas (even though they may not be parties to the application, in that or any future proceeding, whether before the said Commissioners, Government Agent, or any judicial tribunal), as to the liability of the nilakarayas to pay commuted dues and not to render services for such pangu; and all right to service from the nilakarayas of such pangu shall thereupon for ever cease and be at an end, and the said nilakarayas shall be thenceforth liable to pay to the proprietors, in equal half-yearly instalments, the dates whereof shall be fixed by the Commissioners or court, the annual amount of money payment due for and in respect of the said services; and such commuted dues shall thenceforth be deemed to be a head rent due to the proprietor for and in respect of the pangu, and shall be recoverable in the manner hereinafter prescribed."

The Ordinance (section 16) requires that the commutation made under section 15 shall be entered in the register and the entry so made is the best evidence of the nilakarayas to pay commuted dues and not to render services for their pangu. The functions of the Commissioners under sections 14, 15, and 16 are, from the day the Commissioners ceased to function, vested in the Government Agent of the district in which the praveni pangu is situated.

A proprietor is entitled to recover damages against the holders of the pangu who have not commuted under sections 14 and 15 and who have failed to render the services defined in the registry. The amount recoverable as damages is not only the sum for which the services shall have been assessed by the Commissioners for the purpose of perpetual commutation but such further sum as the Court shall consider fair and reasonable to cover the actual damages sustained by the proprietor through the default of the nilakaraya to render such personal services at the time when they were due (section 25).

In the instant case it is not pleaded that there was, nor is there any evidence of, an order for commutation under section 15 of the Ordinance. The proprietor is therefore entitled to claim not only the amount of commutation determined by the Commissioners under section 9 and entered in the registry under section 10 but also a fair and reasonable sum to cover the actual damages sustained by him through the default of the nilakarayas to render services when they were due. But the proprietor claims neither the amount entered in the registry under section 10 as the annual amount of money payment for which such services may fairly be commuted at the time the registry was made nor an amount to cover the actual damages sustained by him through the default of the nilakarayas to render service. He bases his claim on the entry appearing

in the registry under the heading "Nature and Extent of Services". Its translation in the document P1 produced by the plaintiff reads : "The service of this panguwa was originally to supply buffaloes for the ploughing of the Nata Dewale Muttetuwa at Deyyannewela. The panguwa has been divided into sixteen shareholders. Each share paying three shillings per pela. After the New Year the panguwa gives to the Basnayake Nilame the usual penum (16) according to the caste of the tenants of the 16 shares, namely, Welala give a boxful of sweets meats and forty leaves of betel, Duray give a pingo of vegetables and forty leaves of betel. Achari give an arekanut cutter and forty leaves of betel."

It is apparent from the words I have quoted that the "rate of 3 shillings per pela" is not the annual amount of money payment for which the services may be fairly commuted at the time the registries were made within the contemplation of section 9 (d). Nor is there any indication that the rate of 3 shillings per pela is a rate of commutation of services. The heading under which and the context in which the words occur seem to suggest that the payment in question was a part of the services in respect of the panguwa at the time the Commissioners held their inquiry. Perhaps an examination of the proceedings of the Commissioners in case No. 65 Kandy 464 referred to in the document P1 will throw some light on this matter which is at present obscure. The currency of the Island was altered from pounds, shillings, and pence to rupees and cents with effect from January 1, 1872 (*vide* Ordinance No. 2 of 1882). The date on which the register relating to the Ankumbure village was made does not appear from the documents produced or the evidence of the plaintiff, but the fact that the annual payment in lieu of services is stated in rupees and cents may be taken as an indication that it was made after January 1, 1872. It is unlikely that the Commissioners while expressing the amount of commutation under the appropriate heading in rupees and cents would have gone on to express a rate of commutation under the heading "Nature and Extent of Services" in a currency that had ceased to be recognised for all revenue purposes and in all Government transactions.

The submission of learned counsel for the appellants that the claim of the plaintiff is untenable in its present form is entitled to succeed. He conceded that a proprietor's remedy against a defaulting nilakaraya was an action for damages as provided by section 25 of the Ordinance, and I have so held in the earlier part of my judgment. In the assessment of this damage the Court has power, as I have stated before, to award not only the sum for which the services have been assessed by the Commissioners but such further sum as it shall consider fair and reasonable to cover the actual damages sustained by the proprietor through the non-performance of the services by the nilakaraya. The plaintiff has made no claim for damages, nor is there evidence of the actual damages sustained by the plaintiff. The form of the plaintiff's pleadings and the way in which the case has been presented do not give this Court the freedom to award the plaintiff any sum whatsoever in respect of his present suit. It is a well recognised rule that it is absolutely necessary "that the

determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made".¹

In view of my finding that the remedy of a proprietor against a defaulting nilakaraya is an action under section 25 of the Ordinance it is necessary that I should discuss the words "the sum for which the services shall have been assessed by the Commissioners for the purpose of perpetual commutation" therein, as it appears from the case of *Medhankara Istaweera v. Suppramaniam Chettiar et al.*² that it was argued in that case that the word "perpetual" indicated that the proprietor was not entitled to claim in an action under that section anything more than the amount of money payment in lieu of services determined by the Commissioners under section 9 (d) of the Ordinance. Such an interpretation would have the effect of giving the determinations under section 9 (d) the force of a determination under section 15. The scheme of the Ordinance clearly shows that it was never intended that a determination under section 9 (d) should have the same force and effect as a determination under section 15.

The words "holders of any praveni pangu who shall not have commuted" in section 25 clearly excludes those who have commuted under sections 14 and 15 from its ambit. The words "perpetual commutation" cannot therefore refer to the annual amount of money payment determined under section 15, and can therefore only refer to the sum for which the services have been assessed by the Commissioners under section 9 (d). That assessment is perpetual in the sense that it is final and conclusive as to the amount of money payment for which the services in respect of any particular pangu may be fairly commuted *at the time the registries were made*. It appears from section 25 that that sum is a basic figure which the proprietor is in any case entitled to claim in the event of non-performance of services by a nilakaraya. The words "not only the sum for which the services shall have been assessed by the Commissioners but such further sum as it shall consider fair and reasonable to cover the actual damages sustained by the proprietor" to my mind bring out the fact that the amount fixed under section 9 (d) is in the nature of a basic sum. This concept is expressed by the words "perpetual commutation".

The Ordinance is quite clear that a proprietor is not confined to the basic or perpetual commutation but he is entitled to claim, in addition, the actual damages sustained by him. In the case of *Medhankara Istaweera v. Suppramaniam Chettiar et al. (supra)*, Hearne S.P.J. observes: "The registers are a guide and no more than a guide, though they may, in the absence of evidence, provide the only basis of assessment." He apparently bases his opinion on that of Pereira J. in the case of *Yatawara Disawa v. Lekamalage et al.*³ wherein he says: "The Court may at its discretion call upon the proprietor to prove the actual damage sustained by him and refuse to be guided by the register." I find myself unable to give my unqualified assent to either of those propositions in so far as they are capable of the interpretation that the amount stated under section 9 (d)

¹ Per Lord Westbury, 11 Moores I. A., p. 7 at p. 20—*Eshenclunder Singh v. Shambhu Bhutto and others.*

² 41 N. L. R. 329

³ 16 N. L. R. 14.

is reducible in assessing damages. Section 25 clearly states that in assessing the damages the Court may not only award the sum mentioned in the register but increase that sum by the amount of actual damages found by the Court to have been sustained by the proprietor. In assessing the actual damage the Court is free to award more than the amount stated in the register by way of further actual damages. But neither the scheme of the Ordinance nor the language of section 25 gives the Court the liberty to reduce the amount stated in the register under section 9 (d). It has to determine on the evidence before it the actual amount of damages sustained by the proprietor through the default of the nilakaraya. The words "such further sum" indicate that the damages so determined are in addition to the amount stated in the register as the sum payable in lieu of services. I read section 25 as entitling the proprietor to the amount mentioned in the register even if he is unable to prove actual damages. If he proves actual damages he will get the amount of such damages in addition to the amount stated in the register as the amount payable in lieu of services. The amount determined by the Commissioners under section 9 (d) is fixed except where it is altered under section 15. Power to alter the amount stated in the register is taken only under section 15 where the Commissioners are empowered to revise the commutation. Those who have not commuted under section 15 are bound to render services; those who have, are not. A nilakaraya who has not commuted under section 15 and who fails to perform his services is liable in damages, the mode of assessment of which is stated in section 25 which I have explained above. I should not omit to mention that the commuted dues under section 15 are also recoverable by action in the same way as damages for non-performance of service. In such a case there is no question of damages, because that section expressly declares that after an order thereunder "all right to service from the nilakarayas of such pangu shall thereupon for ever cease and be at an end". Thereafter the commuted dues are "deemed to be a head rent due to the proprietor for and in respect of the pangu".

For the reasons I have stated the appeal is allowed with costs and the plaintiff's action is dismissed with costs.

JAYETILEKE S.P.J.—I agree.

Appeal allowed.