Privy Council Appeal No. 20 *of* 1959

The Attorney-General of Ceylon - - - - - - *Appellant*

v.

R. B. Herath and another - - - - - - *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JULY, 1960

Present at the Hearing:

LORD TUCKER
LORD KEITH OF AVONHOLM
LORD JENKINS
LORD MORRIS OF BORTH-Y-GEST
MR. L. M. D. DE SILVA

[*Delivered by* MR DE SILVA]

The first respondent instituted this action in the District Court of Colombo against the Attorney-General of Ceylon (the appellant on this appeal) and the second respondent for a declaration of title to, and possession of, two parcels of land which had belonged to the first respondent and which had been acquired by the Crown under the provisions of the Land Redemption Ordinance No. 61 of 1942, while in his possession and ownership. After acquisition the Crown had placed the second respondent in possession. The first respondent's contention was that the acquisition had been in excess of the powers conferred by the Land Redemption Ordinance. The Attorney-General denied the contention and also raised certain other defences.

The District Court dismissed the action. This decision was reversed on appeal by the Supreme Court (the principal judgment was delivered by Basnayake, C.J.) which upheld the first respondent's contention, rejected the other defences and directed that a decree be entered in the first respondent's favour. From that order the Attorney-General now appeals.

The scheme of the Land Redemption Ordinance, broadly stated, was to empower the Crown compulsorily to acquire agricultural land which had been lost on or after the first day of January, 1929, by a mortgagor in circumstances stated in the Ordinance and thereafter to place him (or certain other persons in a defined category) in possession of the said land under the provisions of another Ordinance namely the Land Development Ordinance.

Section 3 of the Land Redemption Ordinance is to the following effect:—

> "3. (1) The Land Commissioner is hereby authorised to acquire on behalf of Government the whole or any part of any agricultural land, if the Land Commissioner is satisfied that that land was, at any time before or after the date appointed under section 1, but not earlier than the first day of January, 1929, either—
>
> (*a*) sold in execution of a mortgage decree, or

(*b*) transferred by the owner of the land to any other person in satisfaction or part satisfaction of a debt which was due from the owner to such other person and which was, immediately prior to such transfer, secured by a mortgage of the land."

Sub-sections 2 and 3 have no bearing on the present appeal.

"(4) The question whether any land which the Land Commissioner is authorised to acquire under sub-section (1) should or should not be acquired shall, subject to any regulations made in that behalf, be determined by the Land Commissioner in the exercise of his individual judgment; and every such determination of the Land Commissioner shall be final."

A part of sub-section 5 is

"(5) Where the Land Commissioner has determined that any land shall be acquired for the purposes of this Ordinance, the provisions of the Land Acquisition Ordinance, subject to the exceptions, modifications and amendments set out in the First Schedule, shall apply for the purposes of the acquisition of that land."

The rest of sub-section 5 has no bearing on the present appeal.

The Land Commissioner was the officer entrusted with the administration of the Land Redemption Ordinance.

The first respondent had derived title in the following manner from the second respondent who had held the lands as a "paraveni nilakaraya" under a system of tenure prevalent in the Kandyan Provinces of Ceylon where they were situate. The second respondent had on the 26th May, 1926, mortgaged the lands to one Allis. Thereafter the second respondent in satisfaction of the debt secured by the mortgage transferred the property to Allis. Title passed from Allis to the first respondent under an undisputed chain of title. The first respondent contends that a "paraveni nilakaraya" is not an "owner" within the meaning of the term in section 3 (vide preceding paragraph) of the ordinance and that therefore, the terms of that section not being satisfied, the Land Commissioner had no authority to acquire the land. The appellant contends that a paraveni nilakaraya is an "owner" within the meaning of that word in the ordinance. This is the main point in dispute between the parties.

The word "owner" in the Land Redemption Ordinance, in the absence of definition in the Ordinance itself, must mean a person possessing the attributes of ownership under the general law at the time the Ordinance was passed subject to such modification, if any, as may be imposed upon it by the context.

Lee (Introduction to Roman Dutch Law 5th edition p. 121) in a chapter headed "The Meaning of Ownership" reflecting the views of Van der Linden says:—

"Dominion or Ownership is the relation protected by law in which a man stands to a thing which he may: (*a*) possess, (*b*) use and enjoy, (*c*) alienate. The right to possess implies the right to vindicate, that is, to recover possession from a person who possesses without title to possess derived from the owner."

Grotius in Book 2 chapter 3 of his Introduction to the Jurisprudence of Holland says:—

"Ownership is the property in a thing whereby a person who has not the possession may acquire the same by legal process."

Commenting on this Lee says (p. 121) "Grotius selects this right as the most signal quality of ownership".

Maasdorp (Volume 2 p. 27) says the rights of an owner are "comprised under three heads, namely, (1) the right of possession and the right to recover possession; (2) the right of use and enjoyment; and (3) the right of disposition". He goes on to say "these three factors are all essential to the idea of ownership but need not all be present in an equal degree at one and the same time".

Their Lordships are of opinion that the possession of the rights mentioned are generally sufficient to constitute a person an owner under the

law of Ceylon. They also think there is nothing in the context of the Land Redemption Ordinance which requires a modification of the general meaning.

The next question is whether a paraveni nilakaraya can properly be regarded as an owner. It is common ground that a " nilakaraya " holds an allotment of land (known as a " pangu ") subject to the performance of services for, or payment of dues to (where the performance of services had been commuted for the payment of dues) an " overlord " (referred to very appropriately by the learned Chief Justice in his judgment and hereafter by their Lordships as the " ninda lord "). Sometimes (as in the present case) a temple was the ninda lord. It is also common ground that the type of nilakaraya known as a " maruwena nilakaraya " holds the land as a tenant at will and the type known as a " paraveni nilakaraya " (second respondent belonged to this type) holds the land in perpetuity. It was, as stated by the learned Chief Justice, a " hereditary holding ". The learned Chief Justice makes a forceful point in support of the view that a " paraveni nilakaraya " must be regarded as a tenant and not as an owner when he points out that in certain legislation language is used which seems to imply that a " paraveni nilakaraya " must be regarded as a tenant and not as an owner. For instance, in Section 27 of the Budahist Temporalities Ordinance (Volume V Ceylon Legislative Enactments p. 655) the words " a paraveni pangu tenant's interest " are used. The Service Tenures Ordinance 4 of 1870 (Volume VI Ceylon Legislative Enactments p. 657) uses the words " nindagama proprietor " to designate a ninda lord :—

> " " nindagama proprietor " shall mean any proprietor of nindagama entitled to demand services from any praveni nilakaraya or maruwena nilakaraya, for and in respect of a praveni pangu or maruwena pangu held by him ; ".

This language normally, in the absence of other relevant material, would afford strong reason for the conclusion that a paraveni nilakaraya does not occupy the status of an owner. But ultimately the question whether a person is an owner or not must be determined by the rights and attributes he possesses in law. If those attributes clearly establish his position as owner the considerations which arise from the language referred to above must give way.

The " rights of a paraveni nilakaraya in respect of his holding became enlarged in the course of time " as stated by the learned Chief Justice and this fact with its accompanying uncertainty as to what those rights were at any particular time probably led to some confusion particularly in the language by which they were sometimes described.

Following on a report by a commission called the Service Tenures Commission an ordinance, The Service Tenures Ordinance 4 of 1870 was passed. It was, as stated by de Sampayo, J. in the case of *Appuhamy* v. *Menike* (19 N.L.R. 361 at p. 367), on most points declaratory. Whatever the position was before the ordinance was passed, after its passage its provisions must be accepted to the exclusion of all contending views that may previously have existed. And, though historical research into those contending views may be interesting, it cannot modify the clear provisions of the ordinance. In Section 2 a paraveni nilakaraya is said to be " the holder of a praveni pangu in perpetuity, subject to the performance of certain services to the temple or nindagama proprietor " ; a " paraveni pangu " is said to be " an allotment or share of land in a temple or nindagama village held in perpetuity by one or more holders, subject to the performance of certain services to the temple or nindagama proprietor ". Section 24 is to the following effect :—

> " 24. Arrears of personal services in cases where the praveni nilakaraya shall not have commuted shall not be recoverable for any period beyond a year ; arrears of commuted dues, where the praveni nilakaraya shall have commuted, shall not be recoverable for any period beyond two years. If no services shall have been rendered, and no commuted dues be paid for ten years, and no

action shall have been brought therefor, the right to claim services or commuted dues shall be deemed to have been lost for ever, and the pangu shall be deemed free thereafter from any liability on the part of the nilakarayas to render services or pay commuted dues therefor : ".

A proviso to the section has no bearing on this case.

It is common ground that the services to be rendered were personal. Section 25 is to the following effect:—

" 25. It shall be lawful for any proprietor to recover damages in any competent court against the holder or holders of any praveni pangu who shall not have commuted, and who shall have failed to render the services defined in the registry hereinbefore referred to. In assessing such damages, it shall be competent for the court to award 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 it shall consider fair and reasonable to cover the actual damages sustained by the proprietor through the default of the nilakaraya or nilakarayas to render such personal services at the time when they were due ; but it shall not be lawful for any proprietor to proceed to ejectment against his praveni nilakaraya for default of performing services or paying commuted dues ; the value of those services or dues shall be recoverable against such nilakaraya by seizure and sale of the crop or fruits on the pangu, or failing these, by the personal property of such nilakaraya, or failing both, by a sale of the pangu, subject to the personal services, or commuted dues in lieu thereof, due thereon to the proprietor. The proceeds of such sale are to be applied in payment of the amount due to the proprietor, and the balance, if any, shall be paid to the evicted nilakarayas, unless there should be any puisne incumbrance upon the holding, in which case such balance shall be applied to satisfy such incumbrance."

This is what the ordinance declared the law to be and was the law after the ordinance came into force.

It will be seen that a paraveni nilakaraya cannot be ejected for non-performance of service or non-payment of dues. This means that he is subject to no liability similar to that of forfeiture. Moreover he is accorded a right of possession in respect of his holding superior to the general rights of an owner. The latter in respect of a judgment debt is liable to have any part of his property proceeded against in execution. But a paraveni nilakaraya's holding may be proceeded against on a judgment for damages for non-performance of services or for non-payment of dues only after certain property belonging to him has been exhausted. It was not disputed that he had the right to the use and enjoyment of the land, the right to dispose of it, and the right to sue for and recover possession if he was disturbed. He has therefore all the rights which entitle him to be regarded as an owner.

Their Lordships are in complete agreement with the view expressed by Ennis, J. in the case of *Appuhamy* v. *Menike* (19 N.L.R. 361 at p. 363) when he said " In my opinion a paraveni nilakaraya holds all the rights which, under Maasdorp's definition, constitute ownership but he nevertheless does not possess full ownership in that the ninda lord holds a perpetual right to service, the obligation to perform whioh attaches to the land ". Considering the object and scope of the Land Redemption Ordinance their Lordships do not think that " full ownership " in the sense in which the word is used in the passage quoted is necessary to come within the meaning of the word " owner " in that Ordinance.

The case of *Appuhamy* v. *Menike* needs further comment. The question which arose in that case was whether a paraveni nilakaraya could bring an action under the Partition Ordinance 10 of 1863 to partition a holding which he held with others. Two points had to be decided. The first whether a paraveni nilakaraya was an owner, the second was whether the nature of the services to be rendered made the ordinance inapplicable.

There had previously been a conflict of authority and the case on appeal was referred for an authoritative decision to a bench of three judges of the Supreme Court, Ennis, J., de Sampayo, J. and Shaw, J. (normally two judges would have decided the appeal). On the question of ownership Ennis, J. came to the conclusion set out above. De Sampayo, J. said "I am of opinion that paraveni nilakarayas are the owners of the land". Shaw, J. dissented. It will be seen that the majority of the court were of opinion that a paraveni nilakaraya is an owner. With this view their Lordships are in entire agreement.

With all respect to the learned Chief Justice their Lordships cannot agree with the view expressed by him that two of the judges in that case held that "a paraveni nilakaraya is not the owner of his holding" and that de Sampayo, J. alone dissented from that view.

All the judges were agreed that in their opinion a partition was incompatible with the nature of the services to be rendered (their Lordships find it unnecessary in the present case to express an opinion upon this view) and rejected the appeal on that ground. The most that can be urged is that the case decided that a "paraveni nilakaraya" is not an "owner" within the special meaning of the term imposed upon it by the context of the Partition Ordinance as the services that had to be rendered were not capable of division but this does not affect the general meaning of the word or its meaning in the Land Redemption Ordinance.

As already stated a paraveni nilakaraya possesses all the essential attributes which a person must possess before he can be regarded as an owner. As for the "ninda lord" he has not the right of possession. He cannot even enter into possession for non-fulfilment of services or non-payment of dues. Further the right to possession of the paraveni nilakaraya has the special protection of the law already indicated. The "ninda lord" cannot sell or otherwise dispose of the holding of the paraveni nilakaraya. He has no right of use and enjoyment. He has a bare right to services. Their Lordships do not think he can possibly be regarded as the owner.

The learned Chief Justice relied on a passage in Salmond on Jurisprudence to the effect that a person could be "the owner of a material object who has a right to the general or residuary uses of it, after the deduction of all special and limited rights of use vested by way of encumbrance in other persons". Their Lordships are of the view that a ninda lord could not properly be regarded as being in that position. He has no general or residuary rights at all. He has as already stated the bare right to services or dues. Under Section 24 of the Service Tenures Ordinance the ninda lord loses his rights to these services (or dues) if they have not been rendered (or paid) for ten years and no action has been brought for them within those ten years. It was held by Howard, C.J. (Keuneman, J. agreeing) in the case of *Bandara* v. *Menika* (44 N.L.R. 393) that in such circumstances a paraveni nilakaraya became the full owner. Howard, C.J. said "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".

Their Lordships agree.

It was argued that a ninda lord had a right to minerals and timber on the land which prevented the nilakaraya from being regarded as the owner. Their Lordships are of opinion that such rights, if they exist, are extremely limited and do not affect the considerations set out above.

In the acquisition proceedings the right to the services which had to be performed by whoever owned the land for the ninda lord appears to have been acquired by the Government on payment of compensation. On this the learned Chief Justice says :—

> "The acquiring officer appears to have acquired the interests of the dewale as well. His act is clearly illegal. The praveni nilakaraya did not, and could not in law, transfer to his creditor the rights of the ninda lord, the dewale, nor did he purport to do so. The authority granted by section 3 (1) (*b*) is to acquire land transferred

by the owner in satisfaction or part satisfaction of a debt which was due from the owner and which was immediately prior to such transfer secured by a mortgage of the land. The ninda lord owed no debt, his rights were not secured by a mortgage, he did not transfer his rights to the 2nd defendant. Clearly the Land Commissioner had no authority to acquire the ninda lord's rights and his determination to acquire his rights being illegal cannot be final."

It has been argued against this view that although a land subject to the performance of services was transferred by the owner authority is conferred to acquire the land as a total entity free from the performance of services, the person entitled to services being duly compensated. Their Lordships find it unnecessary to decide this question in the present case. No objection was raised by the ninda lord who appears to have acquiesced in the acquisition. If he had objected such action, if any, as would have been necessary, could have been taken. The acquisition of the ninda lord's rights has not affected the first respondent's rights. Their Lordships are of opinion that even if the act of acquisition of the right to services was unauthorised it does not vitiate the acquisition of the first respondent's rights.

The learned Chief Justice has held that the provision in sub-section (4) of section 3 of the Land Redemption Ordinance, namely,

"(4) The question whether any land which the Land Commissioner is authorised to acquire under sub-section (1) should or should not be acquired shall, subject to any regulations made in that behalf, be determined by the Land Commissioner in the exercise of his individual judgment; and every such determination of the Land Commissioner shall be final.",

does not make final any decision made by the Land Commissioner in excess of the powers conferred by sub-section (1). With this their Lordships agree. The point was not pressed by the appellant before their Lordships and it is not necessary to discuss it further.

Section 5 (1) of the Land Acquisition Act 9 of 1950 it to the following effect :—

"5. (1) Where the Minister decides under sub-section (5) of section 4 that a particular land or servitude should be acquired under this Act, he shall make a written declaration that such land or servitude is needed for a public purpose and will be acquired under this Act, and shall direct the acquiring officer of the province or district in which the land which is to be acquired or over which the servitude is to be acquired is situated to cause such declaration in the Sinhalese, Tamil and English languages to be published in the Gazette and exhibited in some conspicuous places on or near that land."

A copy of the declaration in English alone was produced. The learned Chief Justice says "I am of the view that sub-section (1) of section 5 of the Act requires the Minister to make a declaration in each of the three languages and the requirements of the section are not satisfied if he does not do so." Their Lordships cannot agree. Publication has to be in three languages, the declaration need only be in one.

The learned Chief Justice also said "Sub-section (1) of section 5 further requires the Minister to direct the acquiring officer of the province or district in which the land which is to be acquired is situated to cause such declaration in the Sinhalese, Tamil and English languages to be published in the Gazette and exhibited in some conspicuous places on or near the land. There is no evidence that such a direction was given nor is there any evidence that the acquiring officer of the province or district in which the land is situated caused the declaration to be published in the Gazette in Sinhalese and Tamil. Learned counsel for the Crown tendered at the trial, not the Gazette in which the declaration was published, but an extract from the Government Gazette certified by an Assistant Land Commissioner 1D2 in which the declaration appears in the English language alone." He went on to say "Apart from the fact

that the declaration is invalid for the reason that the condition precedent to the making of the declaration is absent these other defects I have pointed out above also affect its validity". There is a presumption that "official acts have been regularly performed" (section 114 Ceylon Evidence Ordinance) that should in proper cases be acted upon. This was such a case. In the Courts in Ceylon the respondent did not raise any question as to due direction by the Minister or due publication in the Gazette. Further, counsel for the first respondent was constrained to admit on an inspection of the relevant gazette (produced by the appellant) that publication in three languages had been made. Sub-section (3) of section 5 says:—

> "(3) The publication of a declaration under sub-section (1) in the Gazette shall be conclusive evidence of the fact that such declaration was duly made."

From what has been said it follows that the Land Commissioner did not act in excess of his powers under section 3 of the Land Redemption Ordinance and that the steps taken have vested the lands in the Crown which therefore had the right to place the second respondent in possession. Their Lordships consequently find it unnecessary to express an opinion upon the submission made by the appellant that a decision under section 3 (1) of the Land Redemption Ordinance is a judicial decision and can be attacked only by writ of certiorari in proceedings before the Supreme Court, or to comment on the other defences raised in the case.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be allowed, the judgment and decree of the Supreme Court set aside and the decree of the District Court restored. The first respondent must pay the costs of this appeal and of the hearing before the Supreme Court.

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In the Privy Council

THE ATTORNEY-GENERAL OF CEYLON

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R. B. HERATH AND ANOTHER

DELIVERED BY MR. DE SILVA

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