

1919.*Present: Schneider A.J. and Loos A.J.*DIAS *v* CARLINAHAMY.61—*D. C. Ratnapura, 3,123.**Partition—Nindagama—Decree for sale—Void.*

Lands subject to service tenures cannot be sold or partitioned under the provisions of the Partition Ordinance, unless it may be in cases where the proprietor of the nindagama and the paraveni nilakaraya are all consenting parties to the proceedings.

A decree for sale of such a panguwa was held to be void.

THE facts appear from the judgment.

A. St. V. Jayawardene and Canekaratne for defendant, appellant.

R. L. Perera and Weeraratne, for plaintiff, respondent.

July 3, 1919. SCHNEIDER A.J.—

The plaintiff seeks to vindicate title to certain premises in the town of Ratnapura, which consist of a land called Kalluappulagewatta and the house standing thereon. His title is a certificate of sale issued in pursuance of a sale held under the decree in action No. 2,125 of the District Court of Ratnapura, in which the premises in question were the subject-matter of proceedings under the Partition Ordinance, No. 10 of 1863. Neither the plaintiff nor the defendants pleaded that the decree in question was void, inasmuch as the premises in dispute are part of a panguwa in a nindagama, subject to service to the Maha Saman Dewale. It may be taken as established by the evidence, oral and documentary, in this action, that the premises are part of the Sanasige panguwa of a nindagama, of which the proprietor is given in the Register of Services as Sabaragamu Maha Saman Dewale; that action No. 2,125 proceeded, and was decided upon the footing that the parties to it were absolutely entitled to the land Kalluappulagewatta; that the Maha Saman Dewale was not a party to the action, and that the title set out and proved was that of the paraveni nilakarayas as absolute owners, without disclosing the fact that they were entitled only as such nilakarayas. The one issue which was argued before us was whether the decree in question was void. The learned District Judge held against the defendants on this issue. He appears to have been of opinion that as the decree had been entered after due investigation, and the first defendant had not made any claim to the house on the premises in those proceedings, her right to the house was concluded by the decree, and that it was not open to the defendants to question

the validity of the decree. I am unable to agree with the learned District Judge. It seems to me that he has missed the very essence of the defence. The defendants do not attack the decree in question upon the ground that it does not bind them because they were not parties to it, but for an entirely different reason. Their contention is that the decree is an absolute nullity, for the reason that the Court which pronounced it had no jurisdiction over the subject-matter of the action. They say that the land in question is, from its very nature, incapable of being the subject-matter of an action under the provisions of the Partition Ordinance. Upon the defendants' contention two questions arise: Are the defendants entitled to show in this action that the decree in question is a nullity? And, next, can a land which forms part of a panguwa in a nindagama not be the subject of proceedings either for partition or sale under the Partition Ordinance? The answer to the first of these questions is in the affirmative, the foundation of the title of the plaintiff is the decree. It is open to the defendants to show that the certificate which derives its validity from that decree is void and of no effect, because the decree itself is invalid, in much the same way as it would be open to them to show that a deed which is the foundation of the title is void. The authority for the proposition that a party to an action may show in that action any decree relevant to that action was delivered by a Court not competent to deliver it is to be found in section 44 of the Evidence Ordinance, No. 14 of 1895, and in the case of *Neelakutty v. Alvar*¹. The answer to the second question is that such a land cannot be the subject of proceedings under the Partition Ordinance. It has been held by this Court in several cases that the paraveni nilakarayas of a panguwa of a nindagama cannot maintain an action for the partition of the lands in the panguwa. These cases were considered, and had their culmination in the Full Bench decision in the case of *Appuhamy v. Menike*.² The reasons for the decision appear to be two; one, that the right of a paraveni nilakaraya falls short of the ownership required by the Partition Ordinance; and, next, that the services are indivisible. It was submitted to us that these reasons were not applicable where the proceedings terminated in a sale of the *corpus* sought to be partitioned, because then the *corpus* would pass under the sale as an entity, and the services would still be attached to it in spite of the sale. This argument, it seems to me, is not sound. It does not meet the first of the reasons that the right of a paraveni nilakaraya is not an ownership which would entitle him to proceedings under the provisions of the Ordinance. The argument contains a fallacy. It is not correct to say that the services would attach to the land and be transmitted with it on sale. The effect of a decree under the Partition Ordinance is to wipe out all encumbrances not expressly reserved. The purchaser would, therefore,

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¹ (1918) 20 N. L. R. 372.

² (1917) 19 N. L. R. 361.

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get a title free of the encumbrance to render services. I am, therefore, of opinion that lands subject to service tenures cannot be sold or partitioned under the provisions of the Partition Ordinance, unless it may be in cases where the proprietor of the nindagama and the paraveni nilakaraya are all consenting parties to the proceedings. This case is a specially hard one for the plaintiff, who has paid a large sum of money to purchase the premises in question, and who will probably find that the money he paid is all of it dissipated by now beyond all hope of recovery, but the law on the point is clear, and hard cases should not lead to laying down bad law.

I would, therefore, allow the appeal, with costs, and set aside the decree, and dismiss the plaintiff's action, with costs.

Loos A.J.—I agree.

Appeal allowed.
