IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

1. Madawatte Kammale Samel Sirisena, Madawatte, Malmeekanda, Opanayake.
2. Madawatte Kammale Magi Nona of Bodimalgoda, Pelmaduula.
3. Madawatte Kammale Manikhamy of Madawatte, Malmeekanda, Opanayake.
4. Madawatte Kammale Podi Nona of Madawatte, Malmeekanda, Opanayake.
5. Madawatte Kammale David Singho of Madawatte, Malmeekanda, Opanayake.
6. Madawatte Kammale Seelawathie of Midalladeniya, Opanayake.
7. Wijeratne haluge Somapala of Bandarawatte, Malmeekanda, Opanayake.

Plaintiffs

SC APPEAL NO: SC/APPEAL/82/2010

CA NO: CA/1339/2004(F)

DC RATNAPURA NO: 14016/P

Vs.

1. Madawatte Kammale Matheshamy
2. Dombagammana Badalge Randohamy
3. Medawatte Kammale Karunaratne
4. Medawatte Kammale Dayaratne
5. Medawatte Kammale Malani Chandralatha
6. Medawatte Kammale Gamini Wijeratne
7. Medawatte Kammale Gamini Jayaratne
8. Medawatte Kammale Ebert Piyasiri

all of Malmeekanda, Madawatte, Opanayake.

9. Pradeep Nilanga Dela Bandara, Basnayake Nilame, Ratnapura Maha Saman Devale.

Defendants

AND BETWEEN

1. Madawatte Kammale Samel Sirisena, Madawatte, Malmeekanda, Opanayake.
2. Madawatte Kammale Magi Nona of Bodimalgoda, Pelmaduula.
3. Madawatte Kammale Manikhamy of Madawatte, Malmeekanda, Opanayake.

4. Madawatte Kammale Podi Nona of Madawatte, Malmeekanda, Opanayake.
5. Madawatte Kammale David Singho of Madawatte, Malmeekanda, Opanayake.
6. Madawatte Kammale Seelawathie of Midalladeniya, Opanayake.
7. Wijeratne haluge Somapala of Bandarawatte, Malmeekanda, Opanayake.

Plaintiffs-Appellants

Vs.

1. Madawatte Kammale Matheshamy
2. Dombagammana Badalge Randohamy
3. Medawatte Kammale Karunaratne
4. Medawatte Kammale Dayaratne
5. Medawatte Kammale Malani Chandralatha
6. Medawatte Kammale Gamini Wijeratne
7. Medawatte Kammale Gamini Jayaratne
8. Medawatte Kammale Ebert Piyasiri

all of Malmeekanda, Madawatte, Opanayake.

9. Pradeep Nilanga Dela Bandara,
   Basnayake Nilame, Ratnapura
   Maha Saman Devale.
   Defendants-Respondents

NOW BETWEEN

1. Madawatte Kammale Samel
   Sirisena, Madawatte,
   Malmeekanda, Opanayake.
2. Madawatte Kammale Magi Nona of
   Bodimalgoda, Pelmaduula.
3. Madawatte Kammale Manikhamy
   of Madawatte, Malmeekanda,
   Opanayake.
4. Madawatte Kammale Podi Nona of
   Madawatte, Malmeekanda,
   Opanayake.
5. Madawatte Kammale David Singho
   of Madawatte, Malmeekanda,
   Opanayake.
6. Madawatte Kammale Seelawathie
   of Midalladeniya, Opanayake.
7. Wijeratne haluge Somapala of
   Bandarawatte, Malmeekanda,
   Opanayake.
   Plaintiffs-Appellants-Appellants

Vs.

1. Madawatte Kammale Matheshamy

2. Dombagammana Badalge Randohamy
   Both of Medawatte, Malmeekanda.
3. Medawatte Kammale Karunaratne
4. Medawatte Kammale Dayaratne
5. Medawatte Kammale Malani Chandralatha
6. Medawatte Kammale Gamini Wijeratne
   all of Malmeekanda, Madawatte, Opanayake.
7. Hunuwala Malawarage Nilupa Subhaseeli of Madawatte, Malmeekanda, Hunuwala, Opanayake.
8. Medawatte Kammale Ebert Piyasiri of Malmeekanda, Madawatte, Opanayake.
9. Pradeep Nilanga Dela Bandara, Basnayake Nilame, Ratnapura Maha Saman Devale.

   Defendants-Respondents-Respondents

Before: Buwaneka Aluwihare, P.C., J.
Mahinda Samayawardhena, J.
Arjuna Obeysekere, J.

Counsel: Gamini Marapana, P.C., with Navin Marapana, P.C., Thanuja Meegahawatta and Uchitha Wickremesinghe for the 1st, 2nd and 4th to 6th Plaintiffs-Appellants-Appellants.

H. Withanachchi with Shantha Karunadhara for the 1st to 8th Defendants-Respondents-Respondents.

Argued on: 28.03. 2022

Written Submissions:

By the 1st, 2nd and 4th to 6th Plaintiffs-Appellants-Appellants on 03.05.2011 and 15.09.2023
By the 1st to 8th Defendants-Respondents-Respondents on 26.07.2011 and 05.05.2022

Decided on: 13.11.2023

Samayawardhena, J.

Introduction

This partition case has a checkered history. The plaintiffs filed this action in the District Court of Ratnapura to partition the land known as Madawatta described in the schedule to the plaint in accordance with the Partition Law No. 21 of 1977 among the plaintiffs and the 1st-8th defendants. The 1st-8th defendants in their joint statement of claim *inter alia* took up the position that since this land is subject to service (rajakariya) to the Sabaragamu Maha Saman Devalaya, the plaintiffs cannot maintain this action as partition cannot be sought for land subject to such service.

Subsequently, upon the application of the 1st-8th defendants, the Basnayake Nilame of Sabaragamu Maha Saman Devalaya was added as the 9th defendant. He submitted that partition is possible subject to service. At the trial, all parties agreed that this land is subject to service to the Sabaragamu Maha Saman Devalaya and recorded it as a formal admission.

The 1st-8th defendants raised issue Nos. 14-26 and the 17th issue was on this question as to whether this land which is subject to service (rajakariya) to the Sabaragamu Maha Saman Devalaya can be partitioned according to the Partition Law. The trial proceeded and the plaintiffs closed their case. Thereafter, the Attorney-at-Law for the 1st-8th defendants made a belated application to try issue No. 17 as a preliminary question of law.

The learned District Judge by order dated 01.11.2004 answered this issue in the negative and dismissed the plaintiffs' action on the basis that the District Court has no jurisdiction to partition a land subject to rajakariya notwithstanding that the ninda lord consents to partition. On appeal, the Court of Appeal by judgment dated 12.01.2010 affirmed the order of the District Court. Thereafter, on 06.08.2010, the Court of Appeal granted leave to appeal against its own judgment to the Supreme Court.

The feudal land tenure system

The feudal land tenure system in Sri Lanka, commonly referred to as the "rajakariya" system, is a historical one that started well before the colonial periods.

The Sinhala king was the lord paramount of all the land in the country. On this basis king granted away whole villages to temples or individual persons on sannasa (සන්නස), royal grant etc., though much of the land was already held by private parties. A village (ගම) so granted to a temple is viharagama (විහාරගම) or dewalagama (දේවාලගම), and a village granted to an individual is nindagama (නින්දගම). The proprietor of a viharagama, dewalagama or nindagama was known as ninda proprietor or ninda lord. Each such village consisted of a number of holdings or allotments and each such holding was known as panguwa (පංගුව). The ninda lord could

assign such holdings to people subject to service (rajakariya). Such people are known as nilakarayas (නිලකාරයා). Nilakarayas were of two kinds, namely paraveni nilakaraya (පරවේනි නිලකාරයා) and maruwena nilakaraya (මාරුවෙන නිලකාරයා). Paraveni nilakaraya's panguwa is known as paraveni panguwa (පරවේනි පංගුව) whereas maruwena nilakaraya's panguwa is known as maruvena panguwa (මාරුවෙන පංගුව). Paraveni nilakarayas are those who held their lands before the nindagama or viharagama or dewalagama was granted to the ninda lord, and maruvena nilakarayas are those who received their lands from the ninda lord subsequent to the royal grant. Paraveni nilakarayas are hereditary holders in perpetuity of the pangu subject to the performance of different services to the ninda lord who could be the chief of the temple or dewalaya. In practical terms, maruwena nilakarayas also fall into the same category. However, paraveni nilakaraya is now statutorily recognised as a holder of a paraveni pangu in perpetuity by section 2 of the Service Tenures Ordinance No. 4 of 1870.

The excerpts, observations and dicta found in the Full Bench decision in *Appuhamy v. Menike* (1917) 19 NLR 361 throw some light to better understand this ancient system. In this judgment, Ennis J. states at 362-363:

> *Burge (vol. IV, p. 68), speaking of the hereditary tenure under the Sinhalese kings, says: "The king was the lord paramount of the soil, which was possessed by hereditary holders on the condition of doing service according to their **caste**. The liability to perform service was not a personal obligation, but attached to the land…Besides the land thus held by the ordinary peasant proprietors, there were the estates of the crown, of the church, and the chiefs. These are known as gabadagam, royal villages; viharagam and dewalagam, villages belonging to Buddhist*

monasteries and temples (dewala); and nindagam, villages of large proprietors. These last were ancestral property of the chiefs, or were originally royal villages bestowed from time to time on favourites of the court. In these estates certain portions…were retained for the use of the palace…while the rest was given out in parcels to cultivators, followers, and dependents, on condition…performing various services…These followers or dependents had at first no hereditary title to the parcels of land thus allotted to them. These allotments, however, generally passed from father to son, and in course of time hereditary title was in fact acquired. The real status of these followers was thus well described in 1824 by Mr. Wright, the Revenue Commissioner. Writing of the followers of the chief, he says: 'They are in fact servants by inheritance, whose wages are paid in lieu of money, and though he has the power of dismissing them and transferring their land to others if he pleases, this is seldom or rarely ever excised; they leaving in most instances a kind of birthright, by long residence and possession, living happily and contented in performing all the customary services which by the tenure of these lands they are bound to perform to their chief.' "

Pereira in his Collection (Pereira 303) says: "The only paraveni tenants were those who were on the land prior to the grant of the village to the ninda lord".

The word "paraveni" imports a right in perpetuity (Weerasinghe v. De Silva 6 S.C.C.17). It would seem then that historically paraveni nilakarayas were originally hereditary holders under the king before the grant of the royal village to the ninda lord. Thereafter certain followers were given allotments (panguwa) by the lord, and in the course of years the holders of these allotments assimilated their tenure to that of the original paraveni tenants, i.e., the holding

became heritable and alienable, and the holders acquired by prescription all the rights the original paraveni tenants under the king.

In the same judgment, De Sampayo J. states at 367-368:

The theory of the old Sinhalese constitution, as much as that of the English constitution, was that the king was the lord paramount of all the land, and on this basis the Sinhalese king granted away whole villages to temples or individual persons, though much of the land was already held by private parties. A village so granted to a temple is a viharagama or dewalagama, and a village granted to an individual is a nindagama. The proprietor of a temple village or a nindagama would also, after the grant, assign portions to tenants subject to service. Sir John D'Oyley's Notes quoted by Marshall state (see Marshall's Judgments 300) that paraveni tenants are those who held their lands before the nindagama or the temple village was granted to the proprietor, and maruvena tenants are those who receive their panguwas from the proprietor subsequent to the grant. This is confirmed by the Service Tenures Commissioners, who in their report (see Pereira's Collection 303) say that the only paraveni tenants were those who were on the land prior to the grant of the village to the ninda lord or vihare or dewale. With regard to the nature of tile paraveni tenant's right, Sawers (see Marshall's Judgments 307), after stating that a person having "the absolute possession of (and right to) real or personal property has the power to dispose of such property unlimitedly," adds "but to the unlimited power of disposing of landed property there was this exception, that lands liable to rajakariya, or any public service to the Crown, or to a superior, could not be disposed of either by gift, sale, or request to a

vihare or dewale without the sanction of the king, or the superior to whom the service was due."

Basnayake C.J. in *Herath v. Attorney General* (1958) 60 NLR 193 at 205-206 traced the history of this ancient system in the following terms:

A village or gama in respect of which services (rajakariya) were performed are of four kinds, viz., gabadagama, nindagama, viharagama, and dewalagama. A gabadagama is a royal village which was the exclusive property of the Sovereign. The Royal Store or Treasury was supplied from the gabadagama, which the tenants had to cultivate gratuitously in consideration of being holders of praveni panguwas. A nindagama is a village granted by the Sovereign to a chief or noble or other person on a sannasa or grant. Similarly, a village granted by the Sovereign to a vihare is a viharagama and to a dewale is a dewalagama. Each gama or village consisted of a number of holdings or minor villages. Each such holding or minor village was known as a panguwa. Each panguwa consisted of a number of fields and gardens. Panguwas were of two kinds, viz., praveni or paraveni panguwa and maruwena panguwa. A praveni panguwa is a hereditary holding and a maruwena panguwa is a holding given out to a tenant for each cultivation year or for a period of years. The holder of a panguwa was known as a nilakaraya. They were of two kinds: Praveni or paraveni nilakarayas and maruwena nilakarayas. The praveni nilakarayas are generally those who were holders of panguwas prior to the Royal Grant and the ninda lord is not free to change them. They were free to transmit their lands to their male heirs, but were not free to sell or mortgage their rights. They were obliged to perform services in respect of their panguwas. The services varied according as the ninda lord was an individual, a vihare or a dewale. In the case of

vihares or dewales personal services were such as keeping the buildings in repair, cultivating the fields of the temple, preparing the daily dana, participating in the annual procession, and performing services at the daily pooja of the vihare or dewale. In the scheme of land tenure the panguwa though consisting of extensive lands is indivisible and the nilakarayas are jointly and severally liable to render services or pay dues. Though the panguwa was indivisible, especially after a praveni nilakaraya's right to sell, gift, devise, and mortgage his panguwa came to be recognised, the practice came into existence of different persons who obtained rights from a nilakaraya occupying separate allotments of land for convenience of possession. The maruwena nilakaraya though known as a tenant-at-will held on a tenancy which lasted at least for one cultivation year at a time. Unlike the praveni nilakaraya he could be changed by the ninda lord; but it was seldom done. He went on year after year, but was not entitled to transmit his rights to his heirs. On the death of a maruwena tenant his heirs are entitled to continue only if they receive the tenancy. Though in theory maruwena tenure was precarious, in fact it was not so. So long as he paid his dues the ninda lord rarely disturbed him. Besides the praveni and maruwena panguwas in a nindagama, viharagama or dewalagama, there were also lands owned absolutely by the ninda lord both ownership and possession being in him.

In addition, the king preserved some lands for himself that were known as gabadagam (ගබඩාගම්) for the works of the royal palace. With the disappearance of kings as rulers, gabadagam also disappeared.

The abolition of the feudal land tenure system in Sri Lanka occurred in stages over time. The British colonial administration introduced certain land reforms during their rule, which began in the early 19th century. In

1832, the Colebrooke-Cameron Commission implemented land reforms with the objective of abolishing the feudal land tenure system. The shift from the old system to the new one was a gradual and complex process.

The Service Tenures Ordinance No. 4 of 1870 came into being in order "*to define the services due by the paraveni tenant of wiharagama, dewalagama and nindagama lands and to provide for the commutation of those services*." The following definitions were given by section 2 of the Ordinance.

> *"maruwena nilakaraya" shall mean the tenant at will of a maruwena pangu.*
>
> *"maruwena pangu" shall mean an allotment or share of land in a temple or nindagama village held by one or more tenants at will.*
>
> *"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.*
>
> *"praveni nilakaraya" shall mean the holder of a praveni pangu in perpetuity, subject to the performance of certain services to the temple or nindagama proprietor.*
>
> *"praveni pangu" shall mean 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.*
>
> *"temple" shall include wihara and dewala.*
>
> *"wiharagama proprietor" or "dewalagama proprietor" shall include the officer of any wihara or dewala respectively 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.

After the enactment of the Service Tenures Ordinance, the performance of services is not compulsory. Instead, sections 9, 10 and 14 provided for the commutation of nilakaraya's services by payment of money and section 24 imposed a period of limitation of one year in the case of the recovery of arrears of personal services and two years in the case of commuted dues. The right to recovery of services or dues if not enforced for ten years was to result in the loss forever of the ninda lord's rights in respect of the pangu. Section 25 also deprived the ninda lord of the right to proceed to ejectment against the nilakaraya on his failure to render personal services or to pay commutation.

Sections 9, 10, 14, 24 and 25 of the Service Tenure Ordinance read as follows:

9. On the day appointed in such notice the commissioners shall enter into their inquiries, and shall then, or on such other early day as they shall then and there from time to time publicly appoint, hear, try, and determine as follows:-

(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 their determination shall be final and conclusive in that or any future proceeding, whether before the said commissioners or any other judicial tribunal, as to the tenure of the pangus in such village, whether it be praveni or maruwena, 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.

10. So soon as the commissioners shall complete their inquiry into the claims in any village, they shall cause to be numbered and entered in a book of registry a list of praveni pangus in such village, and shall further cause to be entered the names, so far as the same can be ascertained, of the proprietors and tenants of each pangu, the nature and extent of the services due for such pangu, and the annual amount of money payment for which such services may be fairly commuted at the time the registry is made, and shall duly sign such registry and transmit the same to the kachcheri of the district.

14. If any praveni nilakaraya shall be desirous of commuting any service as aforesaid for a money payment, he shall, during the pendency of the commission (and the commission shall be held to be pending until the Governor-General[3] shall declare it to be at an end by notice in the Gazette), transmit to the commissioners, and, after the close of the commission, to the Government Agent of the district in which the praveni pangu is situated, an application in writing to that effect, which application shall set forth the name of the party making it, the name and number of the pangu in respect of which such service may be due, and the name of the village in which the same is situated. If there be more than one praveni nilakaraya in any praveni pangu, the application to commute must be made or acquiesced in by a majority of the entire number of nilakarayas who

shall have attained the age of sixteen years. The commissioners or the Government Agent to whom such application shall be made shall issue a notice to the proprietor of the pangu, informing him that, on a day to be named in such notice, the application will be considered and determined upon. A copy of the application must be served with the notice.

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 forever, 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:

Provided, however, that if at the time of such right of action accruing the proprietor shall not be resident within Ceylon, or if by reason of his minority or insanity he shall be disabled from instituting such action, the period of prescription of such action shall begin to run, in every such case, from the time when such absence or disability shall have ceased.

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 herein before 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 of 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.

Nearly after a century from this Ordinance, Nindagama Lands Act No. 30 of 1968 became part of our law. In terms of section 29 of the Act, the Service Tenures Ordinance ceased to apply to any nindagama land. The Nindagama Lands Act was passed for the abolition of services due in respect of nindagama lands and for the declaration of tenants or holders as owners of such lands.

Sections 2-5 of the Nindagama Lands Act read as follows:

2. The services due from any tenant or holder of any nindagama land to any proprietor thereof are hereby abolished, and accordingly-

(a) no such proprietor shall be entitled to demand the performance of such services or to demand or receive any sum of money (due or

which may fall due) in commutation of such services, from any tenant or holder thereof; and

(b) no such tenant or holder shall be liable to perform such services, or ten to pay such sum of money.

3. Every tenant or holder of any nindagama land is hereby declared to be the owner thereof.

4. No tenant or holder of any nindagama land shall be liable to pay compensation to the proprietor thereof or to any other person for any loss or damage incurred or suffered by such proprietor or other person, whether directly or indirectly, by reason of the abolition of the services due by such tenant or holder in respect of that land.

5. No tenant or holder of any nindagama land shall be liable to pay compensation to the proprietor thereof or to any other person for any loss or damage incurred or suffered by such proprietor or other person, whether directly or indirectly, by reason of his becoming an owner thereof.

However, according to the definition given to the term "nindagama land" in section 31 of the Nindagama Lands Act, viharagam and devalagam are unaffected by the Act.

"nindagama land" means any land in respect of which a proprietor thereof was, prior to the date of the commencement of this Act, entitled to demand services from any praveni nilakaraya or maruwena nilakaraya for and in respect of a praveni pangu or maruwena pangu held by any such nilakaraya, or to demand or receive from any such nilakaraya any sum of money in commutation of any such services, <u>but does not include viharagama or devalagama land</u>.

The Land Reform Law No. 1 of 1972 represented a significant step towards the further abolition of feudal land tenure.

Partition Law and the position of paraveni nilakaraya

The oldest Ordinance which governed partition proceedings was Ordinance No. 21 of 1844.

This Ordinance was replaced by the Partition Ordinance No. 10 of 1863.

These two Ordinances did not contain any special provision regarding the competency of a paraveni nilakaraya to partition a pangu land.

In *Jotihamy v. Dingirihamy* (1906) 3 Balasingham's Reports 67, the question whether a paraveni nilakaraya can file a partition action to partition a paraveni pangu was considered. The Court answered the question in the negative on two grounds: firstly, the paraveni nilakaraya lacks full dominium in the property, and secondly, the service required from them is indivisible. It is worth quoting the full judgment delivered by Wendt J. with the agreement of Middleton J. as some of the later cases followed this judgment without any hesitation.

> *This is an action of the most novel kind, and in all my experience I have never known another like it. Shortly, this is an application by a man, who has purchased an undivided share of a Panguwa in a Nindagama that is to say, the interest of one of the Nilakarayo. The first question that suggests itself to me is whether the lands can be said to "belong" to the parties within the meaning of the Partition Ordinance. The Ordinance has hitherto been regarded as requiring nothing short of the full dominium. Now the dominium in Service Tenures land is generally regarded as vested in the person usually described as proprietor of the Nindagama, or the over lord, while the Nilakarayo are similarly spoken of as tenants. I do not of course*

forget that the interests of a Paraveny Nilakaraya cannot be determined against his will by a proprietor although upon the non-performance of services judgment can be recovered for damages and the interest of the tenant sold up and so brought to an end. But I do not see that this makes a tenant an owner; he cannot therefore claim partition of the land. Another objection is based upon the indivisibility of the services. Counsel on both sides were allowed the opportunity of looking into the authorities on this point but have not been able to produce anything which recognises the right of a tenant to maintain a partition action. We are therefore invited to decide the appeal upon general principles. Applying these to the best of our ability we think that the provisions of the Partition Ordinance do not apply to lands of the character of those in question. We therefore reverse the decree appealed from and dismiss the action with costs.

The question whether a paraveni nilakaraya can file a partition action to partition a paraveni pangu was addressed in the Partition Act No. 16 of 1951. Section 54 of the Act expressly recognised the right of the paraveni nilakaraya to institute a partition action:

54(1). Every praveni nilakaraya shall, for the purposes of this Act, be deemed to be a co-owner of the praveni panguwa of which he is a shareholder and shall be entitled to institute a partition action to obtain a decree for the partition or sale of that panguwa or of any of the lands in that panguwa.

(2). The rights of the proprietor of a nindagama shall in no way be affected by the partition or sale under this Act of a panguwa or of any of the lands in a panguwa, and that proprietor shall be entitled to exercise those rights as though that partition or sale had not occurred.

(3). In this section, the expressions "praveni nilakaraya" and "praveni panguwa" have the meanings respectively assigned to them in section 2 of the Service Tenures Ordinance.

Section 48(1) of the Partition Act No. 16 of 1951 which recognised finality of interlocutory and final decrees of partition "*free from all encumbrances whatsoever other than those specified in that decree*", further acknowledged that "*the rights of a proprietor of a nindagama*" was unaffected whether or not it is specified in the decree.

Section 48(1) read as follows:

48(1). Save as provided in subsection (3) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, be good and sufficient evidence of the title of any person as to any right share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, claim to have, to or in the land to which such decrees relate and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.

In this subsection "encumbrance" means any mortgage, lease, usufruct, servitude, fideicommissum, life interest, trust, or any interest whatsoever howsoever arising except a constructive or charitable trust, a lease at will or for a period not exceeding one month, and the rights of a proprietor of a nindagama.

The Partition Act No. 16 of 1951 was replaced by the Partition Law No. 21 of 1977, which represents the current law governing partition actions. However, the Partition Law No. 21 of 1977, does not contain a provision similar to that of section 54 of the Partition Act No. 16 of 1951. I am aware that as a general principal the Court cannot assume a mistake in an Act of Parliament. Nevertheless, several reasons can be attributed to this omission.

One is, on 25.07.1960, the Privy Council, which was the highest Court at that time, in the case of *The Attorney General v. Herath* (1960) 62 NLR 145 decided that paraveni nilakarayas are the owners of the land.

The other is, the services due in respect of nindagama lands were abolished and all nilakarayas were declared as owners by the Nindagama Lands Act No. 30 of 1968.

These developments took place after the enactment of the Partition Act No. 16 of 1951 but before the enactment of the Partition Law No. 21 of 1977. I doubt whether this would have led the drafter of the Partition Law No. 21 of 1977 to choose not to include a provision similar to section 54 of the Partition Act No. 16 of 1951.

This omission can also be deliberate on the part of the legislature.

It is noteworthy that despite this omission, paraveni nilakarayas continued to file partition actions in the District Courts without any objection from the ninda lords. The District Courts entertained these cases without hesitation until the learned District Judge in the present case held that, following the enactment of Partition Law No. 21 of 1977, no partition action can be filed for land subject to rajakariya. This is stated by none other than the ninda lord in the instant action (Basnayake Nilame of Sabaragamu Maha Saman Devalaya) in his written submissions tendered to the District Court

dated 29.06.2004 and 02.09.2004 who says a paraveni pangu can be partitioned subject to rajakariya.

However, as I pointed out earlier, in the interpretation section of the Nindagama Lands Act, there was a reference excluding viharagam and devalagam from the operation of the Act. Therefore, whether paraveni nilakarayas in viharagam and devalagam can institute a partition action remains unresolved.

With this in view, a Bill was presented to Parliament in this year (which was gazetted on 23.02.2023) to amend the Partition Law introducing provisions similar to section 54 of the Partition Act No. 16 of 1951 expressly stating that paraveni nilakaraya can file a partition action to partition a paraveni pangu in a temple land according to the Partition Law. Following are the proposed amendments to the principal statute.

> *2A(1) Every praveni nilakaraya or any person who derives title from a praveni nilakaraya in a praveni pangu of a temple land shall be entitled to institute a partition action for the partition or sale of such praveni pangu in accordance with the provisions of this Law.*
>
> *(2) Where there are more than one praveni nilakarayas or persons having an interest in a praveni pangu, such praveni nilakarayas or such persons may be made parties to any action instituted under subsection (1).*
>
> *(3)(a) For the avoidance of doubt, it is hereby stated that the partition or sale of a praveni pangu shall not affect any rights of a temple enforceable under the provisions of the Service Tenures Ordinance (Chapter 467) and the temple shall be entitled to exercise rights under such Ordinance through its trustee or Viharadhipathi as the case may be, as though no partition or sale had occurred in respect*

of the entirety of the praveni pangu or any portion thereof as the case may be.

(b) Any right of a temple enforceable under the Service Tenures Ordinance (Chapter 467) shall remain unaffected irrespective of the fact that a trustee or a Viharadhipathi of such temple has been or has not been made a party to a partition action instituted under the provisions of this section.

(4)(a) A trustee appointed with reference to a temple referred to in subsection (1) under the provisions of the Buddhist Temporalities Ordinance (Chapter 318) or a Viharadipathi of a temple which is exempted under the provisions of section 4(1) of the Buddhist Temporalities Ordinance (Chapter 318), as the case may be, may make an application to be a party to the partition action instituted under subsection (1).

(b) Where such trustee or Viharadhipathi, as the case may be, makes an application under paragraph (a) of this subsection, the court shall make such trustee or Viharadhipathi a party to such action.

48(1) Substitution for the words "a lease at will or for a period not exceeding one month" of the words "a lease at will or for a period not exceeding one month or the rights of a temple enforceable under the Service Tenures Ordinance (Chapter 467)."

83. By the insertion of the following new definitions:

"praveni nilakaraya" shall have the same meaning assigned to it under section 2 of the Service Tenures Ordinance (Chapter 467) to the extent it relates to a temple;

"praveni pangu" shall include any land or a part of any land held by one or more persons subject to the performance of any service or

rendering of any duties to the temple as defined in section 2 of the Buddhist Temporalities Ordinance (Chapter 318) in respect of which an order for commuted dues in lieu of services under section 15 of the Service Tenures Ordinance (Chapter 467) has been made and shall include the same meaning assigned to it in section 2 of the Service Tenures Ordinance (Chapter 467) to the extent it relates to a temple;"

"temple" shall have the same meaning assigned to it in section 2 of the Buddhist Temporalities Ordinance (Chapter 318) in so far as such temple is possessed of rights as specified under the Service Tenures Ordinance (Chapter 467);

"Trustee" shall have the same meaning assigned to it in section 2 of the Buddhist Temporalities Ordinance (Chapter 318).

The order of the District Court affirmed by the Court of Appeal

The District Court decided to dismiss the partition action on four grounds:

(a) Lack of absolute ownership to the land to be partitioned by the plaintiffs;
(b) The indivisibility of service to be performed to the ninda lord;
(c) Partition Law No. 21 of 1977 does not provide for partition of lands subject to rajakariya;
(d) Land subject to rajakariya cannot be partitioned even with the consent of the ninda lord.

Who can institute a partition action?

The question as to who can institute a partition action relates to (a), (c) and (d) above. The short answer to the question of who can institute a

partition action is that any co-owner to the land can institute a partition action.

Section 10 of the Ordinance No. 21 of 1844 enacted that "*when any landed property shall belong in common to two or more owners, it is and shall be competent to any one or more such owners to compel a partition of the said property*". Section 15 provided for any such owner to seek sale of the land instead of partition when "*on account of the number or poverty of the parties, the nature or value of the property, or from other causes, a partition would be injurious or impossible*".

Section 2 of both the Partition Ordinance No. 10 of 1863 and the Partition Act No. 16 of 1951 contained similar provisions, addressing both partition and sale within the same section.

Section 2 of the Partition Law No. 21 of 1977 enacts the same:

> *2. Where any land belongs in common to two or more owners, any one or more of them, whether or not his or their ownership is subject to any life interest in any other person, may institute an action for the partition or sale of the land in accordance with the provisions of this Law.*

The term "owner" was not defined in the previous Partition Ordinances or the Partition Act. Nor is it defined in the present Partition Law. In the absence of a specific definition of the term "owner" in the Act, it should be construed to refer to a person possessing the attributes of ownership as recognised by the general law at the time of the enactment of the Partition Law. Any modification to this interpretation should be made in consideration of the context in which the term is used. This was what was stated by the Privy Council in *The Attorney General v. Herath* at page 147 when it was called upon to define the term "owner" in the context of a different statute.

What are the rights sufficient to constitute a person an "owner" under our law? The short answer is, the right to possession, the right to recover possession, and the right to disposition. I need only to quote pages 147-148 of the same Privy Council decision for a complete answer:

> *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".*

The next question is whether a modification of the general meaning of the term "owner" is required in the context of the Partition Law.

Full ownership

Should the plaintiff have "full ownership" or "full dominium" or "absolute ownership" in the property to institute a partition action?

As previously quoted, in the early case of *Jotihamy v. Dingirihamy*, Wendt J. thought that "full dominium" was necessary and that in service tenure lands it vested in the ninda lord and not in paraveni nilakarayas. Paraveni nilakarayas were recognised as tenants. This judgment was followed by Hutchinson C.J. in *Kaluwa v. Rankira* (1907) 3 Balasingham's Reports 264.

However, in the discussion of parties entitled to institute partition actions, K.D.P. Wickremesinghe in *The Law of Partition in Ceylon* (1969) at page 46 under the subheading "Trustee and Beneficiary" states:

> *To be entitled to institute a partition action it is not necessary that the co-owner should have absolute ownership in the property.*

Citing several judgments in support, the learned author states at page 48:

> *[T]he principle in all these cases is that a co-owner who institutes a partition action should have the legal estate of the property vested in him so that he can rightly be considered the owner. He need not be one who is entitled to the absolute dominium or who is beneficially interested.*

In *Daniel v. Saranelis Appu* (1903) 7 NLR 163 the plaintiff who was a trustee of a temple filed a partition action claiming an undivided two-fifths share of the land. It was argued for the respondent that a trustee is not an owner such as is contemplated by the Partition Ordinance No. 10 of 1863. Rejecting this argument, Layard C.J. with the agreement of Wendt J. held at 165-166:

> *It appears to me that Ordinance No. 10 of 1863 was not intended to be limited to persons who have an absolute ownership in the property, but that it also includes one who has an undivided share vested in him as trustee. The English Courts have allowed a partition suit to be brought by freehold tenants in possession, whether they are entitled in fee simple, or in fee tail or for life, and there have been cases in which they have allowed a partition action where an estate was vested in a person for a term of years only. The trustee under the Buddhist Temporalities Ordinance appears to me to be the owner of the temple property subject to the terms of the trust on which the property is vested in him, and I see no reason why he should not be allowed to bring an action for partition under Ordinance No. 10 of 1863. No authority has been cited to us in which it has been held that such a trustee cannot bring a partition suit under that Ordinance. This Court has recognized the rights of executors and administrators as parties to a partition suit under Ordinance No. 10 of 1863, and having allowed trustees to be parties in such suits I see no reason why a trustee created by statute should be excluded from the right of bringing a partition suit, unless there is anything in the statute which limits the power of the trustee and prohibits him from bringing such an action.*

In *Babey Nona v. Silva* (1906) 9 NLR 251 it was argued on behalf of the appellant that the Partition Ordinance was inapplicable to lands which are subject to fidei commissum because fiduciaries do not have absolute ownership in the property. This was rejected by Lascelles A.C.J. with the agreement of Middleton J. at pages 255-256 in the following terms:

> *It is true that the language of the Partition Ordinance appears at first sight to limit the scope of the Ordinance to land which is held in common by two or more persons as absolute owners. Section 2, for*

example, deals with the case of landed property belonging in common to two or more owners, and authorizes one or more of such owners to compel partition.

This difficulty is largely reduced, if it is not altogether removed, when it is remembered that by the Roman-Dutch Law the fiduciarius was a true owner; he had a real though a burdened right of ownership. It is also material that in David v. Sarnelis Appu 7 N.L.R. 163 this Court held that a trustee under the Buddhist Temporalities Ordinance was an owner for the purposes of the Partition Ordinance. In my opinion the balance of reason and authority is in favour of the view that property subject to fidei commissum may be the subject of partition, and I hold, in the case under consideration, that the property in dispute, though subject to fidei commissum, was lawfully partitioned.

But the partition decree in no way extinguishes the reversionary interest of the fidei commissarius. It merely sets apart a specific portion of the common estate to which the rights of the fidei commissarius attach in severalty.

By no reasonable construction of the Ordinance can it be held that the effect of a partition decree is to enlarge the life interest of the fiduciarius into absolute ownership. In the words of Lord Watson in Tillekeratne v. Abeysekere (2 N.L.R. 313): "…the partition…would not necessarily destroy a fidei commissum attaching to one or more of the shares before partition."

As mentioned previously, two of the essential attributes of ownership are the right to possession and the right to recover possession. However, in cases where a property is held by one person subject to the life interest of another, the former cannot be technically regarded as an owner

because he is unable to exercise the right to possession. He has only the bare dominium of the property. It may be on that basis in cases such as *Charles Appu v. Dias Abeysinghe* (1933) 35 NLR 323 the Court held that a person who is entitled to the dominium only of an undivided share of land, the usufruct being vested in another, is not entitled to bring a partition action. Nevertheless, section 2 of the present Partition Law No. 21 of 1977 allows a co-owner, whose rights in the land are subject to the life interest held by another, to institute a partition action.

For the aforesaid reasons, I take the view that the plaintiff does not necessarily require absolute ownership of the land to institute a partition action.

Can paraveni nilakaraya be regarded as an owner for the purpose of partition law?

In the early cases of *Marikar v. Assanpillai* (1916) 4 Court of Appeal Cases 85 and *Kiriduraya v. Kudaduraya* (1916) 3 Ceylon Weekly Reporter 188, De Sampayo J. expressed the opinion that paraveni nilakarayas are the owners of their holdings subject only to the performance of service to their ninda lords.

In *Marikar v. Assanpillai* at page 86-87 it was held:

> *The case for the plaintiff was put as high as this, that he was the owner of the tenants' holding and had in substance leased them to the tenants for a consideration which must be paid in some shape or another. This involves an entire misconception of the relation between the nindagama proprietor and the nilakarayas. The holding in fact belongs to the tenants themselves subject only to the performance of service, and they become free even of this burden if the right to service is lost, as, for instance, by non-performance of service for 10 years. The nature of the service is definite and*

> *determined, and the tenant is bound to do that [service] and none other. If he has elected to commute the service by a money payment, the proprietor can of course claim the money irrespective of any change in the circumstances. But if there has been no such election the proprietor must be content with exacting the service, and if that becomes impossible, he must suffer the loss.*

In *Kiriduraya v. Kudaduraya* at page 189-190 it was stated:

> *The word paraveni does not mean "inalienable", it only implies permanency and descent to heirs. The paraveni tenant holds the land in fee simple subject only to the performance of service, and his title is liable to be affected by the ordinary incidents of adverse possession by a third party. The fact that the party who so possesses adversely is the overlord himself makes no difference.*

However, in later decisions such as *Jotihamy v. Dingirihamy* and *Kaluwa v. Rankira* the contrary view was taken.

In the Full Bench decision in *Appuhamy v. Menike* (1917) 19 NLR 361, De Sampayo J. disagrees with the view expressed by Wendt J. in Jotihamy's case that a paraveni nilakaraya is not an owner but merely a tenant of paraveni pangu when he states at page 366:

> *I may say, with great respect to Wendt J., who delivered the judgment, that I am not convinced that his conclusion as to the nature of the title of a paraveni nilakaraya was right. He did not profess to discuss the origin of this species of feudal tenure, nor refer to any authorities. All that is said in the judgment is that "the dominium in service tenure land is generally regarded as vested in the person usually described as proprietor of the nindagama or the overlord, while the nilakarayas are similarly spoken of as tenants." There are no grounds stated for the opinion that the dominium is*

generally regarded as vested in the overlord. That is the very problem requiring solution.

Ennis J. in *Appuhamy v. Menike* states at pages 361-362:

It is clear that the relations of the ninda proprietor and the nilakaraya as of a paraveni panguwa are not the ordinary relations of a landlord and tenant. A nilakaraya of a paraveni panguwa holds the land in perpetuity subject to the service (Ordinance No. 4 of 1870, section 3); and since 1870 the ninda proprietor has no right to eject a paraveni nilakaraya for non-performance of the service, he can recover only the value of the services in an action for damages (Ordinance No. 4 of 1870, section 25). It is to be observed that a panguwa is only a portion (allotment or share) of the holding of a ninda lord as the "proprietor" of the whole nindagama of which any part is held by a nilakaraya. A "paraveni nilakaraya" is defined as a "holder" of a paraveni panguwa, while the term "tenant" is used to describe a maruvena nilakaraya, who is a tenant at will, as distinct from a paraveni nilakaraya, a holder in perpetuity.

This question of whether a paraveni nilakaraya can be regarded as the owner of paraveni pangu was extensively dealt with in the aforementioned Privy Council decision in *The Attorney General v. Herath*, which was an appeal from the judgment of the Supreme Court in *Herath v. The Attorney General* where the principal judgment was delivered by Chief Justice Basnayake.

First, the Privy Council unhesitatingly agrees with the majority view of the Full Bench decision in *Appuhamy v. Menike* that a paraveni nilakaraya is the owner of paraveni pangu and states at pages 150-151:

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 [i.e. "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 which attaches to the land"]. 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.

Thereafter, the Privy Council at pages 148-150 provides its own explanation as to why a paraveni nilakaraya is entitled to be regarded as an owner in the following manner:

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 Buddhist 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 paraveni 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 (1917) 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 niIakaraya 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 encumbrance upon the holding, in which case such balance shall be applied to satisfy such encumbrance."

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****.*

The Privy Council then explains why the ninda lord cannot be regarded as an owner at page 151 in the following terms:

> *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-fulfillment 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****.*

In the Full Bench decision of *Appuhamy v. Menike*, De Sampayo J. states at pages 368:

The state of the law to be gathered from the above references is made clearer by the Service Tenures Ordinance, No. 4 of 1870. It is remarkable that nowhere in the Ordinance is the lord of a nindagama referred to directly or indirectly as the owner of the lands held by the paraveni nilakarayas. On the other hand, section 24 declares that if services are not rendered or commuted dues paid by the paraveni nilakarayas for a period of ten years, the panguwa shall be deemed free thereafter from any liability on the part of the nilakarayas to render services or pay commuted dues. It seems to me clear that in such a case the Ordinance intends that what was previously qualified ownership shall become absolute ownership. Section 25 lays down the order in which the property of the nilakaraya may be sold in execution for default of payment of damages for non-performance of services, and provides that the value of services shall be recovered in the last resort "by a sale of the pangu." Here the pangu does not mean the possessory interest, because the same section enacts that the tenant shall not be ejected for non-performance of service. The pangu is defined in the Ordinance itself as the "allotment or share of land"; there is, to my mind, no meaning in providing for the sale of the pangu, unless the tenant is the owner of the allotment.

I hold that a paraveni nilakaraya is the "owner" of paraveni panguwa and therefore falls within the meaning of the term "owner" imposed upon it by the context of the Partition Law. The Partition Law does not restrict institution of partition actions by persons who have full ownership in the land to be partitioned.

Buddhist Temporalities Ordinance and Paraveni Nilakaraya

Buddhist Temporalities Ordinance No. 19 of 1931 contains several references to paraveni nilakaraya in its text although there are no express

provisions on the partition of a paraveni panguwa. Nonetheless, those references are helpful to understand the status of a paraveni nilakaraya in respect of a paraveni panguwa belonging to a temple within the meaning of the Ordinance. A closer look at the provisions referring to paraveni nilakaraya in the Ordinance shows that throughout the Ordinance, he has been treated as a tenant rather than an owner. For instance, the very definition of a paraveni panguwa under section 2 is as follows:

> "*paraveni panguwa" means an allotment of land held by one or more hereditary tenants subject to the performance of service or rendering of dues to a temple*.

It can be implied from the terminology used in the said definition that while the paraveni nilakaraya is a tenant, his interest in the land is hereditary. The term "paraveni nilakaraya" has not been defined in the Buddhist Temporalities Ordinance. This definition to the term "paraveni panguwa" found in the Buddhist Temporalities Ordinance is different from the definition given to "paraveni panguwa" in the Service Tenures Ordinance which is the principal statute governing the matters in relation to service tenures. According to section 2 of the Service Tenures Ordinance, "paraveni panguwa" means an allotment or share of land in a temple held in perpetuity by one or more holders subject to the performance of certain services to the temple. Temple includes vihara and dewala. In the Service Tenures Ordinance, the paraveni nilakaraya has been defined as the holder of a paraveni pangu in perpetuity (not as the tenant of the paraveni pangu) subject to the performance of services to the temple. The maruwena nilakaraya has been defined as the tenant at will in respect of the maruwena pangu. There is a conflict between the two parallel statutes on this point.

The idea that a paraveni nilakaraya is a tenant is in contradistinction with some of the provisions of the Buddhist Temporalities Ordinance itself.

When section 26 of the Buddhist Temporalities Ordinance is read with section 27, it can be inferred that while the immovable property of a temple cannot be alienated, that does not apply to a paraveni panguwa. However, under section 27, when a paraveni pangu tenant's interest in any land held of a temple is transferred, it shall be the duty of the transferee within one month of such transfer to send a written notice thereof in duplicate to the Commissioner of Buddhist Affairs. Thereafter, the Commissioner of Buddhist Affairs shall send one copy of every such notice to the trustee of the temple concerned. It necessarily follows that, a paraveni nilakaraya can transfer his interest without the permission of the temple which is not in line with his status as a tenant.

Furthermore, under section 28 of the Buddhist Temporalities Ordinance, whenever the Commissioner of Buddhist Affairs is satisfied that any immovable property belonging to any temple has been before the commencement of the Ordinance mortgaged, sold, or otherwise alienated to the detriment of such temple, it is the duty of the Commissioner of Buddhist Affairs to direct the trustee, or the controlling viharadhipati, to institute legal proceedings to set aside such mortgage, sale, or alienation, and to recover possession of such property. But this provision does not apply to a paraveni panguwa with the implication that it does not fall within the ownership of the temple like any other immovable property.

Appuhamy v. Menike and *Attorney General v. Herath* held that a paraveni nilakaraya is an owner of the paraveni panguwa subject to the performance of service to the temple. In *The Attorney General v. Herath*, the Privy Council, referring to the term "*paraveni pangu tenant's interest*"

found in section 27 of Buddhist Temporalities Ordinance states at page 148:

> *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*.

Similarly, in *Appuhamy v. Menike*, De Sampayo J. while ruling that a paraveni nilakaraya is an owner states at page 366:

> *The terms "overlord" and "tenant" are natural to any system of tenure, such as the fee simple tenure in the English system of real property, but they do not necessarily describe the nature of the rights*.

Therefore, despite the references of Buddhist Temporalities Ordinance to a paraveni nilakaraya as a tenant, it is settled law that he is the owner of the paraveni panguwa subject to the performance of service to the temple.

Acquisition of full ownership

Under section 24 of the Service Tenures Ordinance quoted above, the ninda lord loses his rights to the services or commuted dues, if they have not been rendered or paid for ten years and no action has been brought for them within those ten years. This results in the paraveni nilakaraya acquiring full ownership to the land.

There are several nilakarayas in a panguwa and such panguwa can comprise several allotments. According to the ruling in *Asmadale v. Weerasuria* [1905] 3 Balasingham's Reports 51, for the application of

section 24 of the Service Tenures Ordinance, it must be demonstrated that neither services have been performed nor dues paid by any one of the nilakarayas in respect of all the allotments included in the panguwa, and not solely in relation to the allotment that is the subject matter of the action. This ruling can be revisited in an appropriate future case.

If this is established, it was held in *Bandara v. Dingiri Menika* (1943) 44 NLR 393 that the paraveni nilakaraya acquires full ownership.

In this regard, the initial burden that no services were performed and/or no payments were made in respect of the allotment or allotments in suit lies with the paraveni nilakaraya. Once that burden is discharged, the burden shifts to the ninda lord to prove that services were rendered and/or payments were made in respect of other allotments of paraveni panguwa by some other nilakarayas.

In *Bandara v. Dingiri Menika*, Howard C.J. with the agreement of Keuneman J. stated at 395-396:

> *[D]ue regard must be paid to the decision in Asmadale v. Weerasuriya (supra), which was followed in Martin v. Hatana [16 NLR 92], that the obligation of the tenants of a panguwa of a nindagama to render services is in the nature of an indivisible obligation, and therefore the liability to pay commuted dues is also indivisible. The whole amount may be recovered from one tenant. The payment, therefore of the dues by one tenant in respect of the whole panguwa prevents forfeiture of the ninda proprietors' rights against the other tenants under section 24 of the Service Tenures Ordinance, and it is also a bar to the other tenants gaining prescriptive rights under section 3 of the Prescription Ordinance. So far as the evidence in this case goes, I agree with the learned Judge that the plaintiffs have established that neither services were*

performed nor dues paid in respect of the land, the subject of this action for a period of ten years. No evidence has been tendered by the appellants that such services were performed or dues paid in respect of other lands of the panguwa. In view of the fact that the plaintiffs had proved that no services were performed nor dues paid in respect of the land sought to be partitioned, I am of opinion that the burden of proof rested on the defendants to show that such performances were made or dues paid in respect of other lands of the panguwa.

The dicta of Howard C.J. at page 396 "*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*" was approved by the Privy Council in *The Attorney General v. Herath* at page 151.

Howard C.J. ultimately held at page 397 "*Inasmuch as the land is no longer subject to a liability to perform indivisible services I am of opinion that the learned Judge was right in coming to the conclusion that it could be the subject of a partition action under the Ordinance*."

However, as I have already stated, full ownership in a paraveni pangu is not necessary for a paraveni nilakaraya to institute a partition action.

Partition with the consent of the ninda lord

In the instant case, the ninda load, consented to partition the land but the learned District Judge stated that even with the consent of the ninda lord, partition is not possible.

In *Dias v. Carlinahamy* (1919) 21 NLR 112, Scheider A.J. held at page 114 "*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."

However, in *Kasturiaracci v. Pini* (1958) 61 NLR 167 it was held "*The partition under the repealed Partition Ordinance of a paraveni panguwa is not valid even where the ninda proprietor is a consenting party to the proceedings*." Basnayake C.J. at page 168 took the view that "*where a Court has no jurisdiction to entertain an action parties cannot by consent confer jurisdiction on it. The learned District Judge is therefore right in holding that the partition decree is a nullity*."

Parties cannot confer jurisdiction where there is none. In other words, when there is patent or total lack of jurisdiction (as opposed to latent lack of jurisdiction), parties cannot confer jurisdiction. The District Court has jurisdiction to hear partition cases and the question here is whether the jurisdiction has been invoked in the right way. It is not a question of patent or total lack of jurisdiction. In my view, in any event, a paraveni nilakaraya can file a partition action with the consent of the ninda lord.

Indivisibility of service

The Full Bench in *Appuhamy v. Menike* had to address two issues: whether paraveni nilakarayas are considered owners and whether the nature of services to be rendered made the Partition Ordinance inapplicable to pangu land.

In *The Attorney General v. Herath*, the Privy Council states at page 151 that the Full Bench in *Appuhamy v. Menike* decided that paraveni nilakarayas are disqualified from instituting a partition action because the services that have to be performed by nilakarayas in a pangu land are incapable of division. But the Privy Council did not express its opinion on that issue, although it expressed its opinion in favour of paraveni

nilakaraya on the other issue, namely whether paraveni nilakaraya is considered an owner.

In the early case (C.R. Ratnapura, No. 284) decided on 31.05.1877 and reported in (1877) Ramanathan's Reports 131, the Basnayake Nilame of Maha Saman Devalaya of Sabaragamuwa sued 12 defendants to recover Rs. 18.50 as commuted dues for failure as tenants of a pangu belonging to the said devalaya to render certain services. The Supreme Court held that each of the nilakarayas of a panguwa was liable only for the share of the service which is proportionate to his share in the panguwa.

> *The Commissioner has decided, as this Court thinks erroneously, that each is liable for the whole. We are not aware of any law or custom by which one of such nilakaraya's of a panguwa is liable to render services for the whole panguwa, that is to say, for himself as well as his co-tenants. The mere fact of the Commissioner having valued the services of the whole panguwa, instead of valuing the services of each nilakaraya, cannot create a liability which did not exist before.*

In *Ratwatte v. Polambegoda* (1901) 5 NLR 143, the question whether liability of the nilakarayas was or was not joint and several was in issue. The trial Court held that it was joint and several. On appeal, although this matter was not specifically dealt with, it is clear from the judgment of Lawrie A.C.J. that His Lordship concurred in that proposition of law laid down by the trial Court. This was so stated by Lascelles C.J. in *Martin v. Hatana* (1913) 16 NLR 92 at 93.

In *Herath v. Attorney General* Basnayake C.J. at page 205 states "*In the scheme of land tenure the panguwa though consisting of extensive lands is indivisible and the nilakarayas are jointly and severally liable to render services or pay dues.*"

In *Asmadale v. Weerasuria* it was held that the liability of nilakarayas is a joint liability. Pereira A.P.J. states at pages 52-53 that the whole service may be rendered or the whole commuted amount may be recovered from one nilakaraya and such nilakaraya is entitled to contribution from other nilakarayas of the panguwa.

> *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. Whether the service was to cultivate the muttettu field, or to accompany the ninda proprietor on a journey, or carry his talipot or watch his field or keep watch at his house, it was indivisible. Each tenant could not claim to be liable to cultivate a portion only of the field, or to accompany the chief on only a part of the journey, or to keep watch at a part only of his house, etc. The nature of the service was such that the liability to perform it was indivisible, and, therefore, as observed already, the liability to the commuted dues must also be regarded as an indivisible liability. This indivisible obligation must I take it, be given the same effect as it would have under our Common Law. The consequence to the debtors, where there are more than one, of an indivisible obligation, is practically the same as that of an obligation contracted in solido (see Pothier 2.4.31). Each obligator is obliged for the whole of the thing or act that forms the subject of the obligation. On his giving or performing such thing or act he is entitled to contribution from his co-obligors. The payment of the whole amount of the dues in the present case by one or more of the Nilakarayas, was a payment properly made in respect of the whole panguwa, and it cannot be said that there has been a forfeiture of the ninda proprietor's rights in respect of any part or portion of the panguwa under section 24 of the Service Tenures Ordinance; and for the same reason I think that the 3rd*

defendant cannot claim any prescriptive right under section 3 of Ordinance No. 22 of 1871.

The dicta of Pereira A.P.J. in *Asmadale v. Weerasuria* that "*the services in their nature were indivisible, and, therefore, the obligation to pay the commuted dues must be regarded as an indivisible obligation*" was not considered to be correct by Soertsz J. in *Jayaratne v. Gunaratna Thero* (1944) 45 NLR 97 at 99 when His Lordship stated "*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.*"

According to Soertsz J. at pages 99-100

Service Tenures Ordinance makes it sufficiently clear that the services as well as the dues 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 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 the proprietors may seize and sell any part of the crop and fruits or any part of the pangu.*

The opinion expressed by Wendt J. in the old case of *Jotihamy v. Dingirihamy* decided in 1906 was not a considered opinion on that matter. If I may repeat, this is all what Wendt J. stated at page 68:

> *Another objection is based upon the indivisibility of the services. Counsel on both sides were allowed the opportunity of looking into the authorities on this point but have not been able to produce anything which recognises the right of a tenant to maintain a partition action. We are therefore invited to decide the appeal upon general principles. Applying these to the best of our ability we think that the provisions of the Partition Ordinance do not apply to lands of the character of those in question.*

In my view, *Martin v. Hatana* (1913) 16 NLR 92 is an eye-opener and provides insights into solving the issue of indivisibility. In this case the plaintiff ninda lord filed action against several nilakarayas in terms of section 25 of the Service Tenures Ordinance to recover damages in a sum

of Rs. 25.40 for the value of services due by them. The position of the 14th defendant was that if the defendants are liable, his company is not liable to pay more than what is proportionate to the share of land owned by his company. Lascelles C.J. did not in my view reject this position on the sole basis that payment of commuted dues is indivisible on principle. His Lordship at page 93 also took into consideration that dividing the commuted dues among several nilakarayas would create practical difficulties for the ninda lord, including the need for surveys and share valuation, the cost of which would outweigh the damages to be recovered:

> *In view of these authorities, which represent the view commonly held as to the obligation of the tenants of a panguwa, and on account of the practical difficulty of distributing the liability, I think that the decision in C.R. Ratnapura, No. 284, is one which might properly be reconsidered by a Collective Court when the question comes up in a suitable form. But in the present case it is not necessary to take this course. The action is one for damages under section 25 of Ordinance No. 4 of 1870, a section which clearly enables the proprietor to sue the holders of the panguwa collectively. I fail to see that under this section it is open for one of the tenants to claim that his liability should be restricted to an amount of damages which is proportionate to his holding in the panguwa. To allow this claim would be inequitable to the proprietor, for the proportionate share of each tenant could not be ascertained without a survey and probably a valuation, the costs of which, in cases like the present, would far exceed the whole amount of damages. Whatever may be the law as to the divisibility of the liability to render services, or to pay the commutation for services, I think that when it comes to recovering damages, in a case where the liability has not been apportioned, the damages are recoverable from the tenants jointly.*

I think the concept of indivisibility of service and commuted dues should not be promoted or retained on the basis of convenience to the ninda lord or on the basis of potential litigation costs to the ninda lord. Such considerations are typical in any litigation, and there is no need for preferential treatment for the ninda lord.

In *Appuhamy v. Menike* the unanimous view of the Court was that the service of a paraveni nilakaraya is indivisible and on that ground paraveni nilakarayas cannot institute a partition action in respect of a paraveni panguwa. Ennis J. at page 363 states "*In my opinion a paraveni nilakaraya holds all the rights which, under Maarsdorp's definition, constitute ownership, but he, nevertheless, does not possess the full ownership, in that the ninda lord holds a perpetual right to service, the obligation to perform which attaches to the land*."

If the obligation to perform service is tied to the land, it is questionable as to how it would pose a difficulty for the partition of the land as the obligation can naturally transfer with the land and attach to the separate lots upon partition. This is how constructive or charitable trusts, leases at will, or those for periods not exceeding one month continue to exist after the partition decree, even if they are not specifically included in the decree.

The feudal system has long gone. The ninda lord, if interested, should work towards finding a mechanism to obtain services from nilakarayas after partition rather than merely echoing what was said centuries ago that service is inherently indivisible.

Even assuming that the services to be rendered in their nature are indivisible, after the enactment of the Service Tenures Ordinance, such services can be commuted to a quantifiable monetary payment recoverable in accordance with the procedure laid down in sections 24

and 25 of the Ordinance. Hence there is no justifiable reason to deny partition in respect of pangu land on the basis that service is indivisible.

It must be noted that under section 48(1) of the Partition Law No. 21 of 1977, the partition decree "*shall be free from all encumbrances whatsoever other than those specified in that decree*." Thus, the Court can specify in the partition decree the encumbrances attached to the allotments.

Section 48(1) of the Partition Law No. 21 of 1977 further states that the term "encumbrance" means "*any mortgage, lease, usufruct, servitude, life interest, trust, or any interest whatsoever howsoever arising except a constructive or charitable trust, a lease at will or for period not exceeding one month*." Constructive or charitable trusts, leases at will or for period not exceeding one month will continue to remain as encumbrances whether or not specified in the decree.

In the repealed Partition Ordinance, No. 10 of 1863, section 9 dealt with the conclusive effect of a partition decree, and sections 12 and 13 explicitly preserved the status of mortgages and leases, indicating that they would not be affected by the partition decree, regardless of whether they were included in it. However, unlike mortgages and leases, there was no express provision protecting constructive trusts or fidei commissa after a decree for partition was entered.

Nevertheless, the Full Bench of the Supreme Court in *Marikar v. Marikar* (1920) 22 NLR 137, having reviewed the conflicting previous decisions authoritatively held:

> *A trust, express or constructive, is not extinguished by a decree for partition, and attaches to the divided portion, which on the partition is assigned to the trustee.*

In the Privy Council decision of *Nadesan v. Ramasamy* (1961) 63 NLR 49 it was held:

> *Where property burdened with a fidei commissum under a deed of gift has been partitioned under the Partition Ordinance No. 10 of 1863, such partition has not the effect of destroying the fidei commissum which thereafter attaches to the land allotted in severalty to the fiduciaries or his successor in title, even though no mention has been made of his capacity in the partition decree. Section 9 of the Ordinance has no bearing upon the rights of fidei commissaries who have no present right or interest in the land which is being partitioned. They are not owners or co-owners to whom Section 2 can apply.*

These decisions illustrate that, in suitable cases, the Court is not precluded from introducing encumbrances that are not explicitly specified by the statute.

Therefore, once a paraveni pangu is partitioned, the District Court can specify in the decree that partition is subject to service. However, the failure to mention it should not prevent the ninda lord from exercising his rights under the Service Tenures Ordinance and Buddhist Temporalities Ordinance. The perpetual rights of the ninda lord in respect of paraveni pangu shall in no way extinguish or affect, regardless of whether they are explicitly mentioned in the partition decree since his rights are attached to the land (as opposed to a personal service) and carry with it even after the partition.

Human dignity

Both ancient and contemporary historical authorities unequivocally support the view that the rajakariya system was fundamentally rooted in the caste system. (Robert Knox, *An Historical Relation of the Island Ceylon*

(2nd ed, Tisara prakashakayo, 1989) 139-140; John D'Oyly, *A Sketch of the Constitution of the Kandyan Kingdom* (2nd ed, Tisara prakashakayo, 1975) 67-68; M.U. De Silva, *Land tenure, Caste System and the Rājakāriya, under Foreign Rule: A Review of Change in Sri Lanka under Western Powers*, 1597-1832, (1992) Journal of the Royal Asiatic Society of Sri Lanka 5)

Sri Lankan society has undergone significant transformations since the era of monarchy, and the preservation of vestiges of the feudal system, particularly regarding the role of paraveni nilakarayas, practically based on **caste**, may no longer be necessary. The question of the ninda lord's rights now warrants the exploration of novel approaches.

Caste-based discrimination is an outright violation of human rights. Human rights are the rights we have simply because we exist as human beings. They are inherent to all of us, regardless of caste, class, colour, race, gender, religion or any other status. Human rights spring from human dignity. In all the religious doctrines, such as Buddhism, Hinduism, Christianity, Islam, human dignity is revered as a fundamental and sacred principle.

The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, stands as the first legal document to delineate the fundamental human rights to be universally protected. This is the foundation of international human rights law including human rights conventions, treaties and other legal instruments. Article 1 thereof states "*All human beings are born free and equal in dignity and rights*." Article 2(1) states "*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*." Article 7 states "*All are equal before the law and are entitled without any discrimination to equal protection of*

the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

The Universal Declaration of Human Rights, along with the two covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, adopted by the United Nations in 1966, collectively form a comprehensive body of human rights.

While international law instruments may not be directly used to modify the domestic law, the importance of interpreting the law in light of the international standards has been stressed in several cases. I am reminded of the dictum of Amarasinghe J. in the landmark judgment of *Bulankuluma and Others v. Secretary, Ministry of Industrial Development and Others* [2000] 3 Sri LR 243 at 274-275, where His Lordship, in reference to the U.N. Stockholm Declaration (1972) and the U.N. Rio De Janeiro Declaration (1992), stated:

> *Admittedly, the principles set out in the Stockholm and Rio De Janeiro Declarations are not legally binding in the way in which an Act of our Parliament would be. It may be. It may be regarded merely as 'soft law'. Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior Courts of record and by the Supreme Court in particular, in their decisions.*

Although this is not a fundamental right application, Article 4(d) of the Constitution states "*The fundamental rights which are by the Constitution declared and recognized* ***shall be respected***, ***secured*** *and* ***advanced*** *by*

all the organs of government *and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided*." One of the three organs of the government is the judiciary, the other two being the legislature and the executive.

The *Svasti* of our Constitution *inter alia* assures "equality" and "fundamental human rights" that guarantees "the dignity" of the People of Sri Lanka. Fundamental rights spring from human rights. Article 3 of our Constitution states that sovereignty includes fundamental rights. Fundamental rights include equality and non-discrimination. Article 12(1) of the Constitution states "*All persons are equal before the law and are entitled to the equal protection of the law*." Article 12(2) states "*No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds*".

Under directive principles of state policy, Article 27(2)(a) states that the State is devoted to establishing a democratic socialist society with one of its objectives being "*the full realization of the fundamental rights and freedoms of all persons*". Article 27(6) states "*The State shall ensure equality of opportunity to citizens, so that no citizen shall suffer any disability on the ground of race, religion, language, caste, sex, political opinion or occupation*." Article 27(7) states "*The State shall eliminate economic and social privilege and disparity and the exploitation of man by man or by the State*."

In this backdrop, where both the international and domestic law strongly condemn and discourage the discriminatory practices in society, it is timely to reconsider whether remnants of the rajakariya system constitutes an infringement upon human dignity. If a partition action can be instituted by an owner of a land and a paraveni nilakaraya is

considered an owner of the land, why he should be prevented from instituting a partition action on the notion that rajakariya is indivisible?

Conclusion

The questions of law upon which leave has been granted and the answers are as follows:

(a) Was section 54(1) of the Partition Act No. 16 of 1951 necessitated due to judicial opinions expressed in judgments that paraveni nilakaraya is not the owner of the lands appurtenant to his paraveni panguwa?
That may have been one of the reasons.

(b) Was this judicial opinion reversed by the Privy Council in Attorney General v. Herath reported in 62 NLR 145?
Yes.

(c) In view of that, was there any need for section 54(1) to continue in the statute book?
Whether or not there is express provision, the Court can interpret the law.

(d) If (a) and (b) above are answered in the affirmative and (c) is answered in the negative, has the Court of Appeal erred in dismissing the appeal?
The Court of Appeal erred in dismissing the appeal.

(e) If so, are the appellants entitled to the reliefs prayed for in the Petition of Appeal to the Court of Appeal?
The appellants are entitled to continue with the action in the District Court.

The Partition Law does not restrict institution of partition actions by persons who have full ownership in the land. The paraveni nilakaraya is an “owner” within the meaning of the term imposed upon it by the context

of the Partition Law. A partition action can be instituted by a nilakaraya in respect of a land subject to rajakariya.

The obligation to perform services attaches to the land. Therefore, such obligation, upon partition, shall attach to the separate lots in severalty.

The perpetual rights of the ninda lord in respect of paraveni pangu will in no way extinguish or affect whether or not specified in the partition decree.

The impugned order of the District Court and the judgment of the Court of Appeal are set aside and the appeal is allowed with costs in all three Courts.

The learned District Judge is directed to procced with the trial and deliver the judgment according to the law.

Judge of the Supreme Court

Buwaneka Aluwihare, P.C., J.
I agree.

Judge of the Supreme Court

Arjuna Obeyesekere, J.
I agree.

Judge of the Supreme Court