

SURIAPPERUMA**V.****SEANAYAKE**

COURT OF APPEAL

P. R. P. PERERA, J. AND PALAKIDNAR, J.

C. A. NO. 301/82 (F)

D. C. GAMPAHA NO: 20632/L.

FEBRUARY 08, 1989

Servitude of cartway — Inspection — Validity of agreement to abide by Judge's order on inspection — Section 428 of the Civil Procedure Code — Consent decree — Appeal.

The Court has full power to conduct a local inspection under S. 428 of the Civil Procedure Code.

Where parties agree to abide by the Court's decision after an inspection, there is implied in it a waiver of all defences taken in the answer and a total acceptance of the outcome of the Court's decision after the agreed inspection.

The judgment and decree then are of consent of the parties and there is no right of appeal.

Cases referred to:

1. *Krishnan v. Vairy* 66 NLR 66
2. *Walliamma v. Selliah* 73 NLR 509
3. *Buckingham v. Daily News Ltd.*, [1956] 2 Q.B. 534
4. *Shariff Märikkař v. Abdul Azeez* 65 NLR 568
5. *Ameen v. Appusingho* [1914] 4 Bal. NC 24

APPEAL from judgment of the District Court of Gampaha

D. R. P. Goonatillake with D. G. Walpola and Miss. Shiranthi de Saram for Appellants.

Varuna Basnayake for Respondents.

Cur. adv. vult.

February 24, 1989.

PALAKIDNAR, J.

The plaintiff owned a land called Gorakagahawatte. There was a twelve foot wide cartway heading to this land from the

Malwana-Hanwella Road. The plaintiffs claim ownership of this cartway by prescriptive user.

The defendants obstructed the use of this cartway on 28.02.1977. The plaintiff sued the defendants for the restoration of his right of cartway and damages.

The trial proceeded on twelve issues. The crucial issue was issue number four raised thus "Have the plaintiff and his predecessors in title possessed the cartway for over ten years by prescriptive user and acquired a prescriptive title to a right of user of the said cart road?"

On 12.05.1982 during the course of the trial the parties agreed to abide by the decision of the Judge after an inspection of the land in dispute and signified their consent by signing the record. The case was to be called on 1.06.1982 to proceed for inspection.

On 08.07.1982 the learned trial Judge made order stating that after the inspection he holds that the plaintiff is entitled to cartway as depicted in plan number 508 of 10.01.1979 prepared by surveyor Kasturiratne.

The appeal is from that order. The contention of the appellants' Counsel was based chiefly on the views expressed by Herat J. in *Krishnan vs. Vairy*. (1). In that case complicated questions of inheritance were involved but parties agreed to settle the disputes after an inspection. Commenting on what transpired Justice Herat said "It staggers our imagination as to how the learned Commissioner was going to settle these questions after an inspection". The procedure adopted was set aside mainly on two legal grounds that all the parties did not apply for arbitration and that certain parties did not sign the record. I do not consider that the facts in the instant case are in any way comparable to the facts in *Krishnan vs. Vairy*'s case.

A Court has full power to conduct a local inspection. Section 428 of the Civil Procedure Code confers on the Judge in a Civil case authority to conduct a local investigation for the purpose of

elucidating any matter in dispute or of ascertaining any other matters referred to in the section.

Section 428 reads thus:—

In any action or proceeding in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or of ascertaining the market value of any property or amount of any mesne profits or damages or annual net profits and the same cannot be conveniently conducted by the Judge in person the Court may issue a commission to such a person as it thinks fit directing him to make such investigation and to report to this Court.

Thus it is clear that parties can inform Court that the only evidence in the case would be that adduced by local inspection by the Judge.

In *Walliamma vs. Selliah* (2) Tennekoon, J. (as he then was) citing an English parallel in order 35 rule 8 Rules of Supreme Court states that the Judge in a civil case is given the power "to inspect any place or thing with respect to which any question arises in the cause of matter."

Lord Denning in *Buckingham vs. Daily News Ltd.* (3) said "Everyday practice in these Courts shows that where the matter for decision is one of ordinary common sense, the Judge of fact is entitled to form his own judgment on the real evidence of a view just as much as on the oral evidence of witnesses."

These views are applicable to section 428 of the Civil Procedure Code in Sri Lanka as well. The record shows that the parties agreed to a Court decision after an inspection. Implied in such a decision is a waiver of all defences taken in the answer and a total acceptance of the outcome of the Courts decision after the agreed inspection.

Counsel for the Respondent took up a preliminary objection that the judgment and decree was one made of consent by the parties and that there was no right of appeal.

We are disposed to uphold the validity of this objection. The record shows that the agreement was clear and unequivocal, that the parties wished that their dispute should be ended by the Judge viewing and deciding whether there was a cartway in existence as contended by the plaintiff. The Judge duly inspected and decided that it was so, it would not be appropriate to confer Judicial blessings on what transpires to be a mere speculative move by the parties who now choose to resile from such an agreement and wish to appeal from such a decision.

In *Shariff Marikkar vs. Abdul Azeez* (4) Justice T. S. Fernando reviewed a long line of decisions and held that there is nothing in law to prevent the parties agreeing to waive a right given to them by law, quoting Wood Renton J. in *Ameen vs. Appusingho* (5) — he said that where parties agree that the dispute in the case be fairly left and be left finally to the decision of the District Judge then no appeal would lie. Accordingly we dismiss the appeal with costs fixed at Rs. 315/-

P. R. P. PERERA, J. — I agree

Appeal dismissed