COURT OF APPEAL

A.W. Perera
Vs
Belin Menike

C.A. Application No. 1131/81 - D.C. Gampaha 21485

Section 408, 428 and 676 of Civil Procedure Code – Compromise – agreement to abide by order of Judge after inspection – validity. Can Judge be an arbitrator in same case. Restitutio in integrum – Revision.

Plaintiff instituted action for a declaration of a right of roadway by prescription over two lands owned by the 2nd defendant. In the alternative Plaintiff claimed a way of necessity. First Defendant filed answer denying the plaintiff's right to a roadway.

During the course of the trial the parties agreed to abide by a decision of the Judge after he made a personal visual inspection of the lands. In pursuance of this agreement the Judge visited the lands in the presence of the parties and their lawyers and decided to award the plaintiff a right of way.

The first defendant respondent filed this action for restitutio in integrum on the grounds that the agreement was of no force or avail and the District Judge's order should be reversed.

Held that the inspection of premises is provided for in Section 428 of Civil Procedure Code and an agreement to abide by the decision of the Judge is a valid agreement (following decision in Walliamme v. Selliah)

Application for restitutio in integrum and revision.

Before: Tambiah, J. & Seneviratne, J
Counsel: C.D.S. Siriwardena for first Defendant-petitioner.
P.A.D. Samarasekera for respondent.
Argued on: 16.12.1981

Cur.adv.vult.

Decided on: 17.03.1982.

SENEVIRATNE, J

The plaintiff-respondent to this application filed an action on 11.4.1979 in the District Court, Gampaha, claiming a declaration that she was entitled to a right of roadway by prescription over two lands owned by the first defendant-petitioner and the second

defendant-respondent. In the alternative, the plaintiff-respondent claimed a cartway by way of necessity. The plaintiff-respondent stated in the plaint that the first defendant-petitioner had obstructed the existing cartway. The first defendant-petitioner filed answer denying that the plaintiff-respondent was entitled to the cartway claimed either by prescription or by way of necessity. The second defendant-respondent to this application admitted the claim of cartway made by the plaintiff-respondent . On the date of trial – 27.4.81, the issues were framed. The main issues related to the claim of cartway by the plaintiff-respondent by prescription and by way of necessity.

On the trial date, 2.7.81, the plaintiff was not present in Court and she was represented by her husband. Both defendants were present. The parties were represented by their respective Attorneys-at-Law. On this day the parties reached an agreement and all parties signed the record acknowledging the agreement which was read and explained to them by Court. The plaintiff-respondent was directed to attend Court on the next day and sign the record. As the consideration of the nature of this agreement is vital to this application before the Court, I will set out in full the terms of this agreement (translation). It was agreed as follows:-

> "The parties consent that the Court should visit the scene and inspect the road shown by the plaintiff and the road shown by the first defendant (both parties had submitted plans to the Court) and the parties agreed that the Court should decide whether the plaintiff should be given or whether he should not be given the right of way claimed by the plaintiff. Parties stated that they will accept the decision made by the Court whether it will be favourable or unfavourable to any party. I explain to the parties that if I visit the scene I will inspect the place and give my decision at the spot but I will not again hold any trial. I question the parties whether they consent to my giving a decision after inspecting the place – whether it will be favourable or unfavourable to any party. All parties state that they consent to my visiting the scene and giving a decision and to accept my decision."

In terms of the above agreement the Court (the Judge) visited the place on 31.08.81. The plaintiff and the two defendants were present. The plaintiff and the first defendant were represented by their

respective Attorneys-at-Law. The proceedings at that spot are recorded as follows in the journal entry of 31.8.81 (translation) - "In the presence of the parties and the Attorneys-at-Law I inspect the roads shown by both parties. Judgment on 2.9.81. Parties informed. The second defendant expresses his consent to give the road claimed by the plaintiff, that is the road going across the first defendants" .. .. (a word is missing in the copy of the document filed) and after that "across the second defendant's field." Judgment was delivered on 2.9.81 in the presence of all parties and their respective Attorneys-at-Law. The judgment gives in detail the notes of the Judge's inspection and the Judge sets out the tract of the roadway that should be given to the plaintiff-respondent. The Judge has stated in the judgment that the road as pointed out by the plaintiff was not visible on the ground at the time of inspection. This was due to the fact that across the road, as shown by the plaintiff, there were several trenches dug two feet by two and half feet and the entrance to the road as shown by the plaintiff was obstructed by a recent barbed wire fence and that Araliya branches have been planted along the fence recently. Then the Judge has stated, "I inspected the alternate roads as shown by the defendant. Those alternate roads were unsuitable." Ultimately the Judge states "As such, and as the second defendant consents to give a right of way across her land, I direct that the plaintiff should be given a right of way eight feet wide as shown by the plaintiff from the Gansabawa road across the first defendant's land."

In the present application before this Court the first defendant-petitioner has prayed that by way of Restitutio in Integrum and/or revision.

(a) that the order of the learned District Judge dated 2.9.81 be reversed.

(b) that the agreement dated 2.7.81 be declared void and of no force, and for an order that the case be decided after recording evidence.

Of the several grounds urged in this application the main grounds that were urged and pressed were that (a) the agreement to allow the learned District Judge to decide whether the cartway asked for by the plaintiff should be given or not on an inspection of the lands constituted the Judge an arbitrator and not a Judge for which there

was no provision in the Civil Procedure Code: (b) the agreement between the parties was bad in law in that it vitiates the provisions of section 676 of the Civil Procedure Code.

The plaintiff-respondent has objected to this application on the ground that the proceedings of 2.7.81 was a valid adjustment of the action lawfully made by the parties under section 408 of the Civil Procedure Code and that it was not open to the defendant to rescind that adjustment when he found that the result was unfavourable to him.

I will now deal with the submission made by learned Counsel for the petitioner – ground (a) referred to above – in that the judge was constituted as an arbitrator for which there was no provision in the Civil Procedure Code. Learned Counsel relied on several cases to substantiate this submission. I will refer to the cases in chronological order. In the case of *Mudalihamy (Appellant) V. Appuhamy & Others (Respondents)*[1] at the trial the parties decided "to refer all matters in dispute to the final arbitration of the court and the court to make its order after inspection of the place. The court inspected the land and made its order. In this case, Basnayake, J. held as follows: "I have not been able to find nor has the learned counsel been able to refer me to any provision in the Civil Procedure Code under which a judge may step aside from the office of a judge and assume the role of an arbitrator." The proceedings in the District Court were set aside on this ground. The case of *Cornelis Perera (Appellant) and Leo Perera (Respondent)* [2] is a Divisional Bench Judgment. In that case the plaintiff filed an action claiming a cartway across the defendant's land. In the course of the trial there was a challenge and counter challenge by respective counsel as to the correctness of a statement made by the defendant. After these challenges it was agreed between the parties that the judge should visit the place and make a decision and that the parties would be bound by that order. On this agreement the learned District Judge visited the place and made an order. The aggrieved party made an application in revision to set aside that order. Basnayake, C.J. held as follows: "A Court of Law is a forum for the determination of disputes by a Judge upon evidence and not upon challenge and counter challenge. The Civil Procedure Code makes no provision for what happened in this case. Decision of a cause in the way in which this action was decided is utterly foreign to our Code and I know of no system of Civil Procedure in which such a procedure finds acceptance." In this case

the proceedings in the District Court were set aside on two grounds: (1) on the ground set out above as stated by Basnayake, C.J. and (2) also on the ground that one party had made a mistake of fact in coming to that agreement. Sansoni, J who wrote a separate judgment agreed that the proceedings should be set aside on the ground that the agreement between the parties was based on a mistake of fact by one party. As regards the agreement to abide by the decision of the Judge, Sansoni, J. has dissented with the other two judges and held as follows: "I see nothing irregular or objectionable in the agreement itself. It is a common and well established method of solving a dispute such as arose in this case." As I will show later, this view of Sansoni, J. has prevailed and the present state of law is that. Learned Counsel for the petitioner has strongly relied on the case of *V. Thangarajasingham (Appellant) v. M. Iyampillai* (Respondent). [3] In this case there was a dispute between the parties for a right of way and water course. In the course of the trial parties came to an agreement and the learned District Judge recorded the agreement as follows: "The parties invite me to inspect and make an order as sole arbitrator, by which order they agree to abide. They sign the record signifying their consent." On this agreement the learned District Judge visited the place and made order. Tambiah, J. cited the case of *Mudalihamy* referred to by me above and relied on the dicta of Basnayake, J. that the judge cannot step aside from the office of a judge and assume the role of an arbitrator. On this reasoning he held that the proceedings were invalid and set aside the proceedings. In the case of *S. Krishnan (Appellant) V. Vairy (Respondent)* [4] on the trial date the plaintiff and the first defendant signed the record and consented to all matters arising and in issue between them to be decided by the Commissioner after the latter inspected the land. The learned Commissioner on this agreement inspected the land, heard submissions from Counsel and dismissed the plaintiff's action. Herat, J. set aside these proceedings on the ground that the learned Commissioner has played the role of an arbitrator in terms of section 676(1) of the Civil Procedure Code and also on another ground that the pleadings showed that complicated questions of law as to inheritance had to be decided and stated as follows: "How the learned Commissioner was going to decide these questions after an inspection of the land staggers one's imagination."

It will be seen that in *Mudalihamy's* case the parties had decided to refer the dispute to the arbitration of court. In *Thangarajasingham's*

case the parties had invited the judge to be the "sole arbitrator". In both these cases it was held that a judge cannot and should not play the role of an arbitrator in terms of section 676 of the Civil Procedure Code. In *Cornelis Perera's* case there was a challenge and counter challenge and then an agreement to abide by the decision of the court after an inspection The agreement reached in the case in respect of which this application is made, has not been on the basis that the judge was constituted an arbitrator to decide regarding the right of way. *Krishnan's case* was a pure agreement by the parties to abide by the decision of the judge after inspection. As shown earlier, the proceedinge were set aside on the ground that this agreement constituted the judge an arbitrator and also on the additional ground that the complicated questions of law could not be decided by an inspection. The facts of *Krishnan's case* fall in line with the facts pertaining to the present application as regards the agreement to abide by the decision of the Judge. In *Thangarajasingham's* case, Tambiah, J. referred to a number of cases from 1900 to 1960 wherein the parties have agreed to abide by the decision of the court after an inspection. This practice as is well known still continues. Thus, this mode of settlement has prevailed for eight decades.

The case most relevant to the decision of the matter before this Court is a case which had not been referred to in the course of the argument. That is the case of *Walliammai (Petitioner) V K. Selliah (Respondent).*(5)

In this case the plaintiff had filed an action alleging that the defendants, who are owners of a land contiguous to the plaintiff's land, built a tobacco curing shed on their land very close to the plaintiff's residential premises and caused a nuisance and that it was a danger to the plaintiff's house as the shed was liable to catch fire and prayed for an order to demolish the tobacco curing shed. On the trial date both parties arrived at this agreement - "It is agreed the parties will abide by any order that this court makes after inspection with regard to the question as to whether the tobacco curing shed in which tobacco is cured once or twice a year is injurious to the health of the plaintiffs and other inmates of their house." Parties signed the record consenting to abide by the order that the court made after inspection. After this agreement the learned District Judge visited the place and made his order. The defendants moved the Supreme Court by way of revision to set aside the agreement

and the order made by the learned District Judge. Tennekoon, J. who delivered the judgment distinguished *Thangarajasingham's* case referred to above, and held that the proceedings in that case were held to be illegal as the parties agreed to make the judge the "sole arbitrator" and stated as follows: "In the present case there was no attempt to appoint the judge an arbitrator. Parties to a civil action are free to withdraw defences taken in their pleadings; and if the parties, fully represented by counsel, submit to Court that the only outstanding differences between the parties are such as are capable of being elucidated and resolved by a local inspection, I can see nothing in the Code that prevents such a thing being done." Tennekoon, J. held that inspection of a place by the judge is provided for in section 428 of the Civil Procedure Code, and as such, an agreement to abide by the decision of the Judge after inspection was valid in terms of this section. Tennekoon, J. referred to the like practice in the English Courts and cited a case in which Lord Denning stated as follows: "Every day 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."

Learned Counsel for the plaintiff - respondent supported the proceedings in this case based on section 408 of the Civil Procedure Code "Adjustment of actions out of Court." He was not able to cite any authority which justified an agreement as contested in this case in terms of this section. The corresponding section to section 408 of our Civil Procedure Code in the Civil Procedure Code of India (1908) is section R. 3.375 - Chitaley, 7th Edition, Volume II Page 3481. In discussing this section Chitaley, at page 3488 states "An agreement to abide by the decision of the Court whether right or wrong amounts to a compromise within this rule" and refers to several authorities for this proposition.

I hold that the decision in *Walliammai's* case is the decision applicable to the present application. This lays down that an agreement such as entered in the present case is a valid agreement.

Learned counsel for the petitioner in the written submissions has raised the question "What exactly is meant by 'inspection' "? based on the Judge's order dated 2.9.81 . He has submitted that the learned Judge has gathered more facts from the plaintiff by questioning him at the inspection. That the learned Judge has also gath[illegible]

from other persons who watched the inspection and who had no status. He urges these matters as a ground for setting aside this order. I must state that this argument was not raised at the hearing of this application nor does it appear that a copy of the written submissions was served on the respondent so as to enable the respondent to reply. As the order of 2.9.81 shows that the learned District Judge has gathered some facts at the scene in that manner I will make my observations on this submission. It appears from the written submissions that the learned Counsel for the petitioner is seeking to equate an inspection of a scene by a civil judge to the inspection of a scene of crime by a High Court Judge in the presence of the Jury. I do not think that such a strict procedure as is observed in criminal cases, when the judge visits the scene with a jury, can be made applicable to an inspection of a scene by a judge in a civil case. The petitioner has not complained against this procedure in the application made to this Court to wit: the petition and affidavit filed. This inspection was made in the presence of the parties and their Attorneys-at-Law and no such objection has been raised at the inspection. When this matter came up for the order to be delivered in open court on 2.9.81 no party has made a complaint of this nature to the judge. As such, this complaint now made as regards the nature of the proceedings at the scene is a belated complaint. Further, there is no real complaint by the parties regarding the inspection as set out by Tennekoon, J. in *Walliammai's case* referred to above. Tennekoon, J. has stated as follows: "There is here no complaint that the parties or their lawyers were excluded when the judge made his inspection or that they were not permitted to point out anything of relevance; or that counsel were not given an opportunity of making submissions after the inspection."

I hold that the proceedings in this case which are sought to be set aside to wit: the proceedings of 2.7.81 and 2.9.81, are valid proceedings in accordance with the Civil Procedure Code. For the reasons given above, the application is dismissed with costs.

Tambiah, J: — I agree.

Application dismissed

References:

(1) (1949) 39 C.L.W. 103
(2) (1960) 62 N.L.R. 413
(3) (1962) 64 N.L.R. 569
(4) (1964) 66 N.L.R. 66
(5) (1970) 73 N.L.R. 509