

Present: De Sampayo J. and Schneider A.J.

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CANAPATHIPILLAI v. ADANAPPA CHETTY.

42.—D. C. Colombo, 48,993.

*Agreement to build for another — Action for remuneration — Finding of Judge that remuneration was due as alleged by plaintiff — Insufficient material on record to calculate amount due — Issue of commission after both parties had closed their cases — Civil Procedure Code, ss. 134 and 428.*

Plaintiff alleged that defendant entered into an agreement to remunerate him at a certain rate for erecting buildings on defendant's land, and on that footing claimed Rs. 48,004.34. The defendant denied the agreement as to remuneration. The District Judge held that the plaintiff had established the agreement pleaded by him, but as there was not sufficient materials for ascertaining the actual amount due to the plaintiff, he ordered a commission to issue to report on certain matters.

*Held*, that the District Judge had power to issue the commission even at that stage.

THE facts are fully set out in the judgment.

*Bawa, K.C.* (with him *A. St. V. Jayawardene*), for appellant.

*Hayley* (with him *Retnam*), for respondent.

*Cur. adv. vult.*

September 15, 1919. DE SAMPAYO J.—

This is an appeal from an order of the District Judge issuing a commission for the inspection of a certain building and report of the cost of constructing the building. The order was made in these circumstances. The plaintiff alleged in the third paragraph of his plaint that in the month of June, 1916, it was agreed between him and the defendant that the plaintiff should build for the defendant, on premises Nos. 15 to 22, Sea Street, Colombo, shops and stores according to a plan; that the defendant should advance the cost of the materials and labour required for the said building; and that upon the handing over of the building to the defendant, he should pay to the plaintiff by way of remuneration a lump sum, to be ascertained in this manner, namely, that, after deducting the cost and expenses already mentioned, the lump sum payable to the plaintiff should be the total charge which would be made for the completed building according to the current rates in Colombo for work of that class by any firm of standing carrying on the business of builders and contractors, and on that footing, after

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having credited the defendant with certain moneys paid, he claimed Rs. 48,004.84; and in the alternative he claimed the same sum as reasonable remuneration for his services. The defendant admitted that the plaintiff built the shops and stores for him, and that the expenses amounting to Rs. 73,944.80 were discharged by him, but as to the remuneration, he denied the making of the agreement alleged by the plaintiff, and said that the plaintiff was to get only reasonable remuneration for his work, and that after the work was completed the defendant duly paid to the plaintiff Rs. 5,000 (which is one of the payments admitted by the plaintiff) as his remuneration, and that it was accepted by the plaintiff in full settlement of all his claims. On these pleadings the issues stated at the trial relevant to the present appeal were: (1) Was the agreement between the plaintiff and the defendant as set out in paragraph 3 of the plaint? (2) Was the agreement between the plaintiff and the defendant as set out in paragraph 2 of the answer? (3) If issue (1) is answered in the affirmative, did the plaintiff carry out the terms of the agreement? If so, what sum is due to the plaintiff? The plaintiff gave evidence, and also called another witness, and the District Judge was satisfied that the agreement as to remuneration was as alleged by the plaintiff. As regards the figures necessary to make out the sum due to the plaintiff, the only witness whom the plaintiff called was one Hubert Walker. The plaintiff explained that he had approached Mr. Claessen, an architect, who was subsequently called by the defendant, as well as two other well-known builders, but he was not able to secure the services of any of them. Mr. Walker made an estimate and submitted it to Court, giving the cost of building, including supervision, if the building were constructed by a firm of builders, at Rs. 112,588.50. Mr. Walker's evidence was not valuable, because he made his calculations, not upon any independent inspection and measurement of the work, but upon particulars supplied by the plaintiff. On the other hand, the defendant called Mr. Claessen, a well-known architect, quite competent to express an opinion, and he valued the estimated cost of the building at Rs. 71,727.16, and stated that, according to the scale of charges of builders in Colombo, there should be added a 10 per cent. to that amount. According to Mr. Claessen, the costs and builder's charges would have been Rs. 78,899.87. On this footing, when the actual cost as stated by the plaintiff, namely, Rs. 73,944.80, is deducted, the balance would be Rs. 4,955.07 representing the remuneration to be paid to the plaintiff. As I said, the District Judge held that the plaintiff successfully established the agreement pleaded by him; but as in the circumstances there was not sufficient material upon which the District Judge could ascertain the actual amount due to the plaintiff on that footing, he ordered the commission referred to before. It is objected in these circumstances that it was not within the

competence of the District Judge to order the commission. In support of the objection, Mr. Bawa cited the case of *Fernando v. Johanes*.<sup>1</sup> Two remarks have to be made on the authority of that judgment: first, that it makes no reference to section 134 of our Civil Procedure Code; second, that no reasons were stated for disapproving of the District Judges's proceedings in that case. When the facts of the case are looked into, it would be further seen that it is quite a different case from the present. There the District Judge, after hearing both sides, reserved judgment, but in an order, which was the subject of the appeal, he stated that at present, upon the materials before him, he found himself unable to decide the question, and left the parties to take further action in the matter to have the point settled. That is, the District Judge did not call any evidence on his own initiative, but wanted both parties to call further evidence. An unreported case, No. 292—D. C. Kalutara,<sup>2</sup> was also cited. The facts of that case are similar to the one already referred to, and has hardly any bearing on the present question. On the other hand, the authority of *Hendrik Kure v. Saibu Marikar*<sup>3</sup> justifies, in my opinion, the course adopted by the District Judge in this case. It was there held that it was competent to the District Judge, after both parties had closed their case, to call *ex mero motu* a witness not cited by the parties and inform himself on any relevant point that requires elucidation. In the argument of that case the case of *Fernando v. Johanes*<sup>1</sup> was cited, but was not followed. Bonser C.J. in the course of the judgment said that it seemed to him that the District Judge was quite right in acting as he did in getting evidence to inform himself on this point, namely, as to the value and description of certain timber, the subject of the action. The witness whom the District Judge called was the Forest Ranger, whom Bonser C.J. said was a gentleman who had no bias on either side, and who was well acquainted with the matter. The Chief Justice proceeded to say that, in his opinion, not only was the District Judge's procedure in accordance with common sense, but that it was justified by our Code, and he referred to section 134 of the Civil Procedure Code. That section is to this effect: "Subject to the rules of this Ordinance as to attendance and appearance, if the Court at any time thinks it necessary to examine any person other than a party to the action and not named as a witness by a party to the action, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession on a day to be appointed; and may examine him as a witness, or require him to produce such documents."

It is true that in this case the advocate for the plaintiff, in the course of his address to the Court, made a suggestion that a

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commission might be issued. But it seems to me, from the tenor of the proceedings and the view of the District Judge as regards the evidence already on record, that the District Judge himself desired to inform himself further on the point, as he was unable to adjudicate on the issue as to the amount on the evidence recorded. The case appears to me to come under section 428 of the Civil Procedure Code, which authorizes local investigation by way of commission. It is obvious that the District Judge himself could not secure the material which he wanted to adjudicate on the issue, for it required the inspection of the building and the taking of measurements and various other processes, which only a competent professional man can do. I, therefore, think that both in respect of the procedure and in respect of the necessities of the case, the order to issue a commission was right.

The defendant purported also to appeal from another part of the judgment. The District Judge, after making the order to issue a commission, added that, if he had to determine on the evidence recorded as to what the plaintiff would be entitled, he would act on the evidence of Mr. Claessen, that is to say, that he would allow certain percentages, amounting in all to 22½ per cent., on the cost of the building. The appellant wished to attack this part of the judgment, and to have it found that the allowance of 22½ per cent. was, in the first place, unjustified by Mr. Claessen's evidence; and, in the second place, was not reasonable. But I consider that such an appeal could not be entertained at this stage of the case. The District Judge did not give judgment as alleged. All that he did was to record what he would be obliged to do if there was no further evidence available. Consequently no decree would have passed on this contingent opinion expressed by the District Judge. The proper course would be to relegate the defendant to his right of appeal when the case is finally determined by the District Court. The same remark is applicable to a further point taken by the appellant, viz., as to the correctness of the District Judge's finding that the agreement the plaintiff pleaded had been established. There will be time enough for an appeal to be taken on such a question, when the District Judge gives his final decision on the whole case. I would, therefore, dismiss the appeal, with costs.

SCHNEIDER A.J.—I agree.

*Appeal dismissed.*