1970 *Present :* G. P. A. Silva, S.P.J., and Tennekoon, J.

WALLIAMMAI (widow of A. Velupillai) *et al.*, Petitioners, *and*
K. SELLIAH *et al.*, Respondents

S. C. 159/70—Application for Revision in D. C. Point Pedro, 9617

Civil Procedure Code—Section 428—Local inspection by Court—Agreement of parties that their differences can be resolved by such inspection—Validity of the Court's decision.

Where the parties to an action are agreed that the issues between them can be answered by the Judge on the evidence afforded by a view of a place, there is nothing in the Code that prevents the differences between the parties being elucidated and resolved by a local inspection. Section 428 of the Code confers powers on a Judge to conduct such local investigation in person.

***Thangarajasingham v. Iyampillai* (62 N. L. R. 569) distinguished.**

APPLICATION to revise an order of the District Court, Point Pedro.

K. Thevarajah, for the petitioners.

Cur. adv. vult.

May 11, 1970. TENNEKOON, J.—

The plaintiffs who are the respondents to this application instituted an action in the District Court, Point Pedro, against the petitioners and one other (who was the husband of the 1st petitioner, but who is now dead) alleging that the defendants who are owners of land contiguous

to the plaintiffs' had in or about February 1967 built a Tobacco curing shed on their land very close to the plaintiffs' residential premises ; that that shed constituted a nuisance by reason of the large quantities of smoke issuing therefrom when it was in use, and also a source of danger to the plaintiffs' house as the shed was liable to catch fire and thus endanger the plaintiffs' own house ; the plaintiffs also alleged that the defendants put up the shed (despite protests by plaintiffs) very close to the common boundary fence and to plaintiffs' house ; among other relief the plaintiffs asked for an order requiring the defendants—

"to demolish the said Tobacco curing shed, and if necessary to shift same further away from the common boundary."

Defendants filed answer denying that a cause of action accrued to the plaintiffs, and stating that the shed had been in existence for the last 50 years and asking the dismissal of the plaintiffs' action. Trial was first fixed for the 11th of March 1968, and after two or three postponements was finally fixed for the 11th of May 1969. The parties had filed their lists of witnesses and got out summons on them and were apparently ready for trial on those earlier dates.

On the 11th May 1969 counsel appeared on both sides. It would appear that after some discussion an agreement was arrived at between the parties. The record reads as follows :—

"It is agreed that 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.

Inspection on 19.5.69 at 4.30 p.m.

Parties sign the record consenting to abide by the Order that the Court makes after inspection."

After conclusion of the inspection on the 19th of May the District Judge directed that the case be called on the 25th May. On that day counsel appeared for both sides again, and the Court made order as follows :—

"At the request of the parties who agreed to abide by the decision of my inspection, I proceeded to this land and inspected it. There I found that the tobacco curing shed on the Northern side has been constructed by the defendant immediately adjoining the plaintiffs' residential house. In my view the situation of this shed, as it now stands, is injurious to the health of the inmates of the plffs' house and his family. I therefore make order that the defendant do remove this curing shed and locate it further away from this house. The plaintiff will pay Rs. 150 as expenses for the removal of this tobacco curing shed to the defendant. The plaintiff will bring into Court Rs. 150 which the defdt will be entitled to withdraw on proof that

the tobacco curing shed has been removed from the present position. Plff will deposit this sum on or before 2.7.69. If the sum is not so deposited plaintiff's action to be dismissed.

Order delivered in Open Court in the presence of parties and respective Lawyers.

Sgd. C. M. THARMALINGAM
D. J.
25.5.69 ."

A formal Decree in terms of this order and dated as of the same date was later entered. The sum of Rs. 150 ordered to be deposited in Court was paid at the Kachcheri by the plaintiffs on or about the 30th of June 1969 and the Kachcheri receipt filed in Court on the 2nd of July 1969. Upon application of the plaintiffs, the Court on 3rd November 1969 issued Writ of Execution against the defendants. Thereafter on the 19th of November 1969 the defendants filed " a letter from the Kirama Sevaka of Karaveddy North to the effect that the tobacco curing shed had been demolished " and moved for an Order of Payment for the sum of Rs. 150.

The plaintiffs opposed the application alleging that the tobacco curing shed had not in fact been removed; after hearing counsel the learned District Judge on 17.1.70 made order in which he said that he did not believe that the shed had been demolished as alleged by the defendants; he further added that "it is quite evident that the defendant is misleading the Court." The application for an order of payment was refused.

The petitioners have now filed the present application dated 2nd March 1970 praying that this Court do in the exercise of its revisionary powers " set aside all proceedings in this action commencing from 11.5.69 " on the ground that the learned District Judge had unlawfully acted as an arbitrator.

I find some difficulty in understanding why this application is being made if in fact the petitioners had demolished the tobacco curing shed in pursuance of the order of the Court. For if the petitioners have already done so their only outstanding grievance would be to obtain the compensation ordered by Court and for that purpose to obtain a reversal of the Court's Order of 17.1.70. The present application places it beyond doubt that the learned District Judge was right in holding that the petitioners had not complied with the Order of the Court to demolish the shed.

It seems to me therefore that the petitioners have in the first place flouted the Order of the District Court ; and that they have thereafter sought to draw the sum of Rs. 150 deposited by the plaintiffs upon a false representation that the shed had been demolished. In these circumstances, quite apart from the merits of any submissions on the

legality of the proceedings in the District Court, I am disinclined to employ the revisionary powers of this Court at the instance of persons who have displayed an unmistakable tendency to abuse the processes of Court. Nor am I disposed to think that this Court should *ex mero motu* act in revision in this case as I am not convinced that there has been any miscarriage of justice by reason of the procedure adopted in the Court below or even that there is any illegality in those proceedings.

Counsel for the petitioners relied on the case of *Thangarajasingham v. Iyampillai* [1] in support of his submission that the proceedings on and after 11.5.69 were illegal. In that case the parties to the action had agreed that the Judge inspect the land and *make an order as "sole arbitrator"*; this Court held that while the Civil Procedure Code authorised the reference of any matter in dispute in an action to arbitration, those provisions did not enable parties to appoint the Judge himself as an arbitrator; and that where that is done all such proceedings are illegal and liable to be quashed by this Court in the exercise of its powers of revision [2].

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.

Section 428 of the Civil Procedure Code provides as follows :—

> "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 the 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 person as it thinks fit, directing him to make such investigation and to report to the court."

It is thus fully within the powers of a Judge in a civil case to conduct a local investigation in person for the purpose of elucidating any matter in dispute or of ascertaining any other matters referred to in the section. Courts are frequently called upon to examine exhibits produced in Court and to form an opinion on disputed questions relating to such exhibit. But where the real evidence is incapable of being produced in Court, the Judge can, acting under section 428, go and see it himself; and it seems to me that the procedure is the same as if it had been brought into Court and made an exhibit when it would unquestionably form part of the evidence. Local inspection by the Judge is of course primarily intended to enable a Judge to understand or follow the evidence. But

[1] *(1962) 64 N. L. R. 569.* [2] *Ibid at 574.*

if parties are agreed that the issues between them can be answered by the Judge on the evidence afforded by a view of the place, I can see no illegality in the parties informing the Court that the only evidence in the case would be that afforded by a local inspection by the Judge.

A useful parallel is to be found in the English rules of Civil Procedure. Order 35 rule 8 of the Rules of the Supreme Court gives to a Judge by whom any cause or matter is tried power "to inspect any place or thing with respect to which any question arises in the cause or matter"; and similar provision also exists in the County Court Rules. In *Buckingham v. Daily News Ltd.*[1] the Court of Appeal held that the power to inspect exists not merely to enable the Judge to follow the case; that an inspection is just as much part of the evidence as is the testimony of witnesses; and that unless the nature of the dispute is such that the testimony of experts or other witnesses is required the Judge may form a conclusion based on the inspection alone, or even in some cases contrary to the evidence of the witnesses. Lord Denning in a brief judgment agreeing with Birkett and Parker L.JJ. said—

> "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"

and in refusing to give leave to appeal to the House of Lords he added—

> "We do not give leave to appeal to the House of Lords. We are simply reaffirming the settled practice of the courts for many years."

I think that Lord Denning's remarks in regard to the position of a judge of fact acting on the evidence of a view in a civil case can be applied to a Judge making a local investigation in Ceylon under section 428 of the Civil Procedure Code.

In the present case when the counsel for the defendants agreed to a decision after inspection he must be taken to have waived any defences taken in the answer which were incapable of being resolved by an inspection alone and to have agreed to the evidence of a view as sufficient both to resolve outstanding differences and to enable the Judge either to give such relief to the plaintiffs as he thought fit within the prayer of the plaint or to dismiss the plaintiffs' action. It is evident from the learned District Judge's Order of the 25th May 1969 that the only questions to be resolved by inspection were the proximity of the tobacco curing shed to the plaintiffs' house and the cost of removal of the curing shed, if that became necessary. These can hardly be regarded as matters on which a personal view by the Judge was insufficient to base a judgment. There is here no complaint that the parties or their lawyers

[1] *(1956) 2 Q. B. 534.*

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 am not persuaded therefore that proceedings on and after 11th May 1969 in this case were illegal.

I would refuse to issue notice on the respondents and dismiss the application.

G. P. A. SILVA, S.P.J.—I agree.

Application dismissed.