1962 *Present :* **Tambiah, J., and Abeyesundere, J.**

V. THANGARAJASINGHAM and wife, Appellants, *and*
M. IYAMPILLAI and wife, Respondents

S. C. 454/1960—D. C. Jaffna, 1087/L

Arbitration—Appointment of trial Judge as arbitrator—Legality—Civil Procedure Code ss. 146 et seq., 676 et seq., 699 et seq.

A trial Judge cannot be appointed by the parties to an action to act as arbitrator under the provisions of the Civil Procedure Code except as expressly permitted thereby.

Where, in an action for a right of way and water-course, the parties invited the trial Judge to inspect and make an order as " sole arbitrator " and agreed to abide by such order—

Held, that there was no right of appeal from the order made by the trial Judge acting as arbitrator. In such a case, the parties must be deemed to have waived their right of appeal.

Held further, that the order made by the Judge as " sole arbitrator " was illegal and should, in revision, be set aside.

APPEAL from a judgment of the District Judge, Jaffna.

C. Thiagalingam, Q.C., with *J. N. David*, for Plaintiffs-Appellants.

N. Nadarasa, for Defendants-Respondents.

Cur. adv. vult.

November 13, 1962. TAMBIAH, J.—

The plaintiffs claimed a half-share of a well situated on the defendants' land and also a servitude of right of way and water-course, leading from the well along the southern boundary of the second defendant's land, to the second plaintiff's land. The defendants, while admitting that the second plaintiff was entitled to a share of the well in their land, denied that the plaintiffs had any right to lead water along the channel along the southern boundary of the second defendant's land and averred that the second plaintiff's predecessor in title drew water from the well by having access thereto along the lane on the north. They further took up the position that the plaintiffs' predecessor in title had abandoned the right to lead water through the second defendant's land and claimed the land free from this servitude by prescription.

On the 1st of August, 1960, when the matter came up for trial, the Journal entries read as follows :

> " Present—Plaintiff's Attorney and deft. Mr. Adv. Kathiravetpillai instd. for plff. Mr. Adv. Soorasangaran instd. for deft.—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. "

The learned District Judge inspected the place on the 10th of August, 1960, and on the 5th of September, 1960, the plaintiffs' counsel brought it to the notice of the learned District Judge that the second plaintiff was not consenting to abide by the order of the learned District Judge and that she wanted the case to be fixed for trial. The defendants' counsel, on the other hand, submitted, inter alia, that the inspection had already taken place and that the order should be delivered.

The learned District Judge proceeded to deliver order, the relevant portions of which read as follows :

> " The inspection revealed that the right of way and water-course has never been used and it could never have been used because of the rocky land and the difference in level. In this case the land in which the well is situated is on a lower level than the land which claims a servitude. But the share of well has been used obviously by coming along the lane and taking water. The fences across this alleged right of way also showed that they are very, very old fences with very, very old live fence trees and that this right of way could never have been used. "

On the 5th of September, 1960, the plaintiffs' counsel invited the learned District Judge to look into documents marked P1-P5, and although these documents were shown to the learned District Judge, they were not formally tendered till the 17th of the same month. The documents P1-P5 were produced for the purpose of showing that both the alleged dominant and servient tenements were at one time part and parcel of the same land belonging to the mother of the second defendant and that the right of servitude of way and water-course was reserved in the deeds of the 2nd plaintiff.

At the hearing of the appeal, the counsel for the defendants took up the preliminary objection that the plaintiffs have no right of appeal and urged that the appeal should be rejected. In support of this contention, he cited the case of *Davith Appuhamy v. Peduru Naide*[1] and also a long line of other decisions.

Mr. C. Thiagalingam, Q.C., who appeared for the plaintiffs, submitted, on the other hand, that the instant case is distinguishable from the case of *Davith Appuhamy v. Peduru Naide* (supra), and the other cases cited by the defendants' counsel, for the following reasons :

(1) In the instant case, the learned District Judge was appointed as an arbitrator under the provisions of the Civil Procedure Code and in none of the cases cited by the defendant's counsel was this procedure adopted. This case falls within the principle laid down in *Mudalihamy v. Appuhamy & others*[2].

(2) It was not possible, in the instant case, for the learned District Judge to decide all questions in dispute by an inspection of the land; and where the terms of reference impose duties on a judge, which are not capable of performance, then the whole reference is bad.

(3) The learned District Judge exceeded his authority and decided the points in dispute not only by an inspection (which alone he was authorised to do), but also by looking into documents.

(4) The ruling in *Davith Appuhamy v. Peduru Naide* (supra) and the earlier cases laying down this principle are all contrary to the provisions of the Civil Procedure Code and therefore should not be followed.

Mr. Thiagalingam also urged that the plaintiffs had a right of appeal in the instant case and that the order of the learned District Judge should be set aside.

The instant case is distinguishable from the case of *Davith Appuhamy v. Peduru Naide* (supra) and it is sufficient to decide this case on point (1) raised by Mr. Thiagalingam.

The provisions of the Civil Procedure Code impose a duty on a judge to frame issues and hear the suit between parties (vide sections 146 and the following sections of Cap. 101). But in *William Peiris v. Lucia Peiris*[3], the principle was laid down that when counsel for both parties

[1] *(1958) 62 N. L. R. 16.* [2] *(1949) 39 C. L. W. 103.*
[3] *(1900) 1 Browne Reports 420.*

invite a District Judge to look into certain documents and proceedings in another case, and then decide the case before him, the judge was not acting judicially, but as a quasi-arbitrator, and as the judge was invited, by the deliberate agreement of both parties, to act in a particular way, the parties had waived their right of appeal.

The above decision was followed in subsequent decisions of this Court, which formed the *cursus curiae* on this point for well over six decades.

In *Babunhamy v. Andiris Appu*[1] the plaintiff and the defendant agreed to abide by the decision of the Court, arrived at after inspection, as to whether the plaintiff was entitled to a way of necessity over the defendant's land or not. The Commissioner, after inspecting, entered judgment for the plaintiff. It was held by Hutchinson, C.J., that the defendant had no right of appeal against the judgment as he had agreed to abide by the decision of the Court.

In *Guneratne v. Andradi*[2] the plaintiff and the defendant, in a partition action, invited the judge to decide the question as to whether a particular lot should be excluded from the corpus, by perusing certain documents and they undertook to abide by the decision of the judge. Wood Renton, A.C.J. (as he then was) and Pereira, J., following the two above-mentioned cases, held that the parties were bound by the decision of the judge and consequently there was no right of appeal.

In *Ameru v. Appu Sinno*[3], this Court adopted the principles laid down in the cases above cited and held that when both parties practically agreed to leave the decision of the question to the sole arbitrament of the District Judge, they were bound by that order and consequently they could not appeal to the Supreme Court. Wood Renton, C.J., (with whom de Sampayo, A.J. (as he was then) agreed) stated :

> "The defendants' counsel thereupon produced certain leases in support of this claim of interest, and the learned District Judge proceeds as follows : 'I am invited to decide the issue as to the planter's interest on my reading of these leases'. The District Judge forthwith pronounced his order after perusal of the leases in question, finding that the defendants were entitled to certain planting interests. The plaintiff appeals. It appears to me that both sides practically agreed to leave the decision of the question as to the alleged planters' interest to the sole arbitrament of the District Judge. It is true that we do not find in the present case, as in *Babunhamy v. Andiris Appu*, an express undertaking on the part of the plaintiff to abide by the decision of the District Judge on that point. *But there is no sacramental force* in the words 'abide by' in such cases as this, and there is, I think, little difficulty in understanding what happened at the trial."

In *de Hoedt v. Jinasena*[4], where the parties invited the judge to decide the case after inspecting the land and also certain documents, and where the judge inspected the land and some of the documents, Schneider, A.J.

[1] *(1910) 5 Balasingham Reports 89.*
[2] *(1913) 3 C. A. C. 69.*
[3] *(1914) 4 Balasingham's Notes of Cases 24.*
[4] *(1919) 6 C. W. R. 178.*

(as he was then) was of the view that although the judge did not examine all the documents, nevertheless, the defendant had no right of appeal. The learned judge relied on the rulings in the above-mentioned case for this conclusion.

In *Mudiyanse v. Loku Banda* [1], where parties agreed to the Commissioner deciding a case without hearing any evidence, but simply on an inspection of the land in question, Porter, J., held that no appeal lay against the finding of the Commissioner. In the course of his judgment, he cited with approval the case of *de Hoedt v. Jinasena* (supra) and said " It seems to me to be impossible on a record which contains no evidence that on appeal the Appeal Court can differ from its finding. "

In *Punchi Banda v. Noordeen* [2], the parties to an action in the Court of Requests agreed to abide by the decision of the Commissioner after an inspection of the premises in dispute. The record in that case reads as follows : " At this stage plaintiff states that if on an inspection by Court, there are any traces of a boutique on one side of Galboda Hena, he is willing to have his case dismissed. The challenge is put to the defendant against whom judgment will be entered if there are no traces of a boutique. He is agreeable. I reserve the right in the event of what I consider uncertainty to let the case go to trial again. " After inspection, as the judge was satisfied that there was no trace of the boutique, he gave judgment for the plaintiff, as prayed for. Akbar, J., on appeal, held that the defendant had no right of appeal.

In *Davith Appuhamy v. Peduru Naide* (supra), the parties invited the Court to inspect the land and decide the points in dispute without any evidence being led. The judge made order after inspecting the land. On appeal, this Court held that no appeal lay from the said order.

The defendants' counsel stated that, in England, the judges adopted a similar procedure and he cited in support the rulings in *Durham County Permanent Benefit Building Society, In re Ex Parte Wilson* [3], *Robert Murray Burgess v. Andrew Morton* [4]. But we were not referred to the specific provisions of the English Civil Procedure which enabled the English judges to decide the said cases in that manner. Further, I feel that it is dangerous to adopt English procedure when specific provisions have been made in the Civil Procedure Code regulating the same matters.

Although I was somewhat attracted by Mr. Thiagalingam's argument inviting us to review the abovementioned cases, it is not desirable to depart from the well established principle laid down in *Peiris v. Peiris* (supra) and the other cases which followed it. Where an enactment concerning procedure has received a certain interpretation, which has been recognised by the Courts for a long period of years, the practice based upon such interpretation should not be lightly disturbed (vide *Boyagoda v. Mendis* [5]). But it is not necessary for us to deal with this point in the instant case.

[1] *(1922) 24 N. L. R. 190.*
[2] *(1929) 30 N. L. R. 481.*
[3] *(1871) VII L. R. Chancery Appeal Cases 45.*
[4] *(1895) L. R. Appeal Cases 136.*
[5] *(1929) 30 N. L. R. 321, D. B.*

Mr. Thiagalingam also sought to distinguish the instant case from *Peiris v. Peiris* (supra) and the cases which followed it. He urged that the terms of reference, in the instant case, showed that the parties had invited the learned District Judge to act as an arbitrator under the provisions of the Civil Procedure Code and that it was not permissible for a judge to assume the role of an arbitrator.

The facts in the instant case are on all fours with the facts in the case of *Mudalihamy v. Appuhamy and others* (supra). The provisions of the Civil Procedure Code do not permit a judge to combine the role of an arbitrator appointed under the Code, with his judicial functions. Basnayake, J., (as he then was) observed in *Mudalihamy's case* (vide 39 C.L.W. at p. 104) : " I have not been able to find, nor has learned counsel been able to refer me to, any provisions of the Civil Procedure Code under which a judge may step aside from the office of Judge and assume the role of arbitrator ". Special provisions have been made in the Civil Procedure Code to refer matters for arbitration (vide Chapter LI of Cap. 101), while separate provisions have been made to regulate the procedure where parties agree to refer a matter in dispute to a judge for his decision (vide Chapter LII of Cap. 101). Any attempt, therefore, to clothe a judge with the functions of an arbitrator under the Code would, in my opinion, be a contravention of the salutary provisions contained therein.

If the reference, in the instant case, is to be construed as a reference to arbitrator under the Code, then the order of the learned District Judge, dated 5th of September, 1960, should be set aside. In the recent case of *Chelliah v. Navaretnam* [1] a Divisional Bench of this Court held that it is quite sufficient if parties refer a matter to an arbitrator and sign the record, and no further formality is necessary. In the instant case, too, the parties have signed the record and appointed the learned District Judge as " sole arbitrator ". Counsel of experience have, after due deliberation, used the words " sole arbitrator " in designating the functions of the learned District Judge.

In construing an agreement, the natural meaning of words used by parties should be given effect (vide *British Movietone News Ltd. v. London District Cinemas Ltd.* [2]). In the instant case, there is no reason why the word " arbitrator " should be read as " judge ".

Although the procedure adopted in the instant case is conducive to expeditious justice, nevertheless it vividly brings to one's mind that many pitfalls and snares await litigants who attempt such short-cuts. Judges, who are appointed to try cases, should not stop down from their high judicial pedestal and assume the role of an arbitrator. Such a course often causes dissatisfaction to the party against whom the order is made. The grievance of the unsuccessful litigant is greatly aggravated by the fact that he is doprived of his right of appeal to this Court.

[1] *(1962) 64 N. L. R. 121.* [2] *(1952) 2 A. E. R. 617 at 622* per Viscount Simon.

The consensus of opinion of the judges in the cases cited earlier show that when parties waive their right of appeal, they cannot come to this Court by way of appeal. Therefore, I reject the appeal, but since the procedure adopted on and after the 1st of August, 1960, including the order of the 5th of September, 1960, is illegal, I quash, all proceedings on or after the 1st of August, 1960, and the order of the learned District Judge, dated 5th September, 1960, and send the case back for further hearing.

ABEYESUNDERE, J.—I agree.

Appeal rejected.

Case sent back for further hearing.