1962 *Present:* T. S. Fernando, J., and Herat, J.

SHERIFF MARIKKAR, Appellant, *and* ABDUL AZEEZ, Respondent

S. C. 9 (Inty.) of 1959—D. C. Kegalle, 11138

Appeal—Consent order—No right of appeal therefrom—Courts Ordinance, ss. 73, 78.

No appeal lies where parties have agreed to be bound by the order of the Judge sought to be appealed from.

Accordingly, in an action for a right of way, no appeal lies from an order given by Court in accordance with an agreement recorded by the Court as follows :—" It is agreed that the parties will accept any order made by me after an inspection. "

APPEAL from an order of the District Court, Kegalle.

H. W. Jayewardene, Q.C., with *C. P. Fernando*, for the plaintiff-appellant.

N. E. Weerasooria, Q.C., with *C. R. Gunaratne*, for the defendant-respondent.

Cur. adv. vult.

February 22, 1962. T. S. FERNANDO, J.—

A preliminary objection to the hearing of this appeal was raised on behalf of the defendant-respondent and, after hearing argument, we made order rejecting the appeal with costs on the ground that no appeal lies. We set down below shortly our reasons for so holding.

This was an action instituted by the plaintiff claiming (i) a declaration that he is entitled to use a certain strip of land as his private cart road, (ii) an injunction restraining the defendant from damaging the said strip of land until the final determination of the action, (iii) that the defendant be ordered to remove certain obstructions erected on the said strip of land and (iv) that he be placed in quiet possession of the said strip of land for use as a cart road. The defendant denied that the plaintiff was entitled to the right of cart-way claimed, denied that he had damaged the strip of land or had erected any obstruction thereon.

On the day fixed for trial, the parties reached an agreement which was recorded by the learned District Judge as follows :—" It is agreed that the parties will accept any order made by me after an inspection. " In accordance with this agreement the land was inspected by the District Judge on 26th February 1958 in the presence of the parties and their lawyers, and the record indicates that the District Judge was shown by the defendant an alternative road which he had constructed for the use of the plaintiff. After having heard counsel on behalf of the parties on 17th July 1958, the learned District Judge made order on 28th July 1958 " ordering the defendant to complete the construction of the new road, subject to the condition that he will warrant and defend the plaintiff's right to use the same. On the road being completed, the plaintiff will be declared entitled to the use of the same. " The plaintiff appealed to this Court against this order of the 28th July 1958.

Mr. Weerasooria, on behalf of the defendant, submitted that no right of appeal lay. He relied on a series of decisions of this Court that no appeal lies where parties have agreed to be bound by the order of the Judge sought to be appealed from. In the earliest of the cases brought to our notice, *Peries v. Peris* [1], the decision rested on the ground that the parties have constituted the judge an arbitrator and have therefore waived their right of appeal. In *Babunhamy v. Andris Appu* [2], Hutchinson C.J., holding against the existence of a right of appeal, expressed himself thus :—" Each party agreed to be bound and waived the right of appeal in case the decision should be against him. " Four years later, in 1914, in the case of *Ameru v. Appu Singho* [3], Wood Renton C.J., with whom De Sampayo, A.J. agreed, stated that both parties thought that the only question in the case " might fairly be left, and be left finally, to the decision of the District Judge ". In that case too, this Court held that no right of appeal lies. These three cases were followed in 1919 by Schneider J. in *De Hoedt v. Jinasena* [4], and, in 1922, Porter J. in *Mudiyanse v. Loku Banda* [5], agreeing with the judgment of Schneider J. in *De Hoedt v. Jinasena* (supra) observed : " It seems to me to be impossible on a record which contains no evidence that on appeal the Appeal Court can differ from its findings ". The last of the cases relied on by Mr. Weerasooria is *Punchi Banda v. Noordeen* [6] where Akbar J. in 1929 held that no appeal lay from the decision of a Commissioner of Requests where the parties to the action before him had agreed to abide by his decision to be made after an inspection of the premises in dispute.

Mr. Jayewardene attempted to find a way out from the effect of this long line of decisions by submitting that none of these decisions had taken into consideration the existence of sections 73 and 78 of the Courts Ordinance which confer on a party dissatisfied with any judgment, decree or order of a District Court or with any order having the effect of a final judgment of a Court of Requests a right to appeal to the Supreme Court. It is correct that section 73 or 78, as the case may be, of the Courts Ordinance is not specifically referred to in any of the judgments relied on but the reason for such omission is to be found in the circumstance that the *ratio decidendi* of these judgments is that where parties have agreed to accept or abide by the decision of a Court there is an implied waiver of the right of appeal. There is nothing to prevent parties so agreeing to waive a right given to them by law.

Mr. Jayewardene finally contended that a waiver of a party's right must be strictly construed, and that the order made by the learned District Judge in this case goes outside the subject-matter of the action. Having regard to the fact that the relief claimed by the plaintiff was essentially a grant to him of a right of cartway, we are unable to agree also with his final contention.

HERAT, J.—I agree.

Appeal rejected.

[1] *(1900) 1 Browne's Rep. 420.*
[2] *(1910) 5 Bal. Rep. 89.*
[3] *(1914) 4 Bal. N. C. 24.*
[4] *(1919) 6 C. W. R. 173.*
[5] *(1922) 24 N L. R. 190.*
[6] *(1929) 30 N. L. R. 481.*