IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Meherun Nisa,
No.257/2,
Madawala Mosque Road,
Madawala Bazar.
And 3 Others
1st-4th Defendant-Petitioners

CASE NO: CA/REV/1247/2006
DC KANDY CASE NO: 21463/L

Vs.

Abdul Muthalib Umma Nisa,
No.258,
Madawala Mosque Road,
Madawala Bazar.
Plaintiff-Respondent
Mohammed Hanifa Mohammed Sanif,
No.258,
Madawala Mosque Road,
Madawala Bazar.
5th Defendant-Respondent

Before: A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: Rohan Sahabandu, P.C., for the Petitioners.
Udaya Bandara for the Respondent.

Argued on: 28.11.2019

Decided on: 29.11.2019

Mahinda Samayawardhena, J.

The plaintiff filed this action against the five defendants seeking declarations that (a) she is a co-owner of the land described in the first schedule to the plaint and (b) she is entitled to a right of way over the land of the defendants described in the second schedule to the plant. Pending determination of the action, the plaintiff also sought an interim injunction preventing the defendants from obstructing the said right of way.

There is no dispute that, insofar as the application for interim injunction is concerned, both parties agreed to abide by an order given by the learned District Judge after an inspection. The plaintiff and all five defendants also signed the case record signifying their consent.

Thereafter, the learned District Judge, having visited the place and making written observations in the presence of the parties and their respective Attorneys, pronounced the order on 12.06.2006, directing the defendants to allow the plaintiff to use a right of way of three feet wide along the south-western boundary of Plan No.3148 prepared by the Court Commissioner for the purpose of the case.

The 1st-4th defendants have filed this revision application seeking to set aside that order.

The principal submission of the learned President's Counsel for the defendants is that such a mandatory order could be made only after the trial, but not in an interim injunction inquiry.

The learned District Judge, in the observation notes and the impugned order has stated that the old road used by the plaintiff has been made practically unusable by the defendants by making constructions, digging pits etc. It is against that backdrop the alternative road has been suggested by the learned District Judge as a temporary measure until the conclusion of the case.

The learned President's Counsel states that when the earlier land action (20411/L) filed by the plaintiff has been withdrawn, the application filed under section 66 of the Primary Courts' Procedure Act has been decided against the plaintiff, the learned District Judge could not have legally made that impugned order. He emphasizes that the order has been made not on law but on equity.

The learned President's Counsel further states that what was granted to the plaintiff is not what was prayed for in the prayer to the plaint, and the learned District Judge could not have made that order without the consent of the defendants.

I am not inclined to agree with these submissions.

The Court has power to conduct a local inspection under section 428 of the Civil Procedure Code.

It is well settled law that where parties agree to abide by an Order or Judgment given by Court after an inspection, all the defences which have been taken or which could lawfully be taken recede to the background. Then, the decision of the Court is based not on strict adherence to the letter of the law, but upon the observations made by the Judge at the inspection. The test is subjective, as opposed to objective.

In *Walliammai v. Selliah (1970) 73 NLR 509*, at the date of the trial both parties agreed to abide by the decision of Court by the Judge inspecting the place. When the final order was made after the inspection, the defendant tried to resile from the agreement and moved in revision to have the order set aside.

Victor Tennakoon J. with G.P.A. Silva J. agreeing (both of whom later became Chief Justices) at pages 512-513 held:

> *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 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. (1956) 2 QB 534 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.

Accordingly, Tennakoon J. dismissed the revision application *in limine,* without even issuing notice on the respondents.

This mode of concluding cases by way of local inspection by the Judge at the invitation of the parties to the case is not a new phenomenon. As Seneviratne J. with Tambiah J. agreeing stated in the year 1982 in *Perera v. Belin Menike [1982] 1 Sri LR 206 at*

211: "*This practice as is well known still continues. Thus, this mode of settlement has prevailed for eight decades.*"

In the said case *(Perera v. Belin Menike)*, as the head note of that case states:

> *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.*

It was held:

> *[T]he 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).*

In *Suriapperuma v. Senanayake [1989] 1 Sri LR 325*, Palakidner J. with the concurrence of P.R.P. Perera J. held:

> *The Court has full power to conduct a local inspection under section 428 of the Civil Procedure Code. Where parties agree to abide by the Court's decision after an inspection, there is*

implied in it a waiver of all defences taken in the answer and a total acceptance of the outcome of the Court's decision after the agreed inspection.

In this case, there is no complaint by the learned President's Counsel for the defendants that the learned District Judge acted as an arbitrator and not as a Judge.

From the above dicta of the decided cases, it is clear that the dismissal of the earlier case of the plaintiff upon withdrawal, the denial of the plaintiff's relief in section 66 application, and the failure to stick to the pleadings and legal principles etc. by the Judge are beside the point when the decision is to be arrived at after inspection. In such circumstances, the Court can certainly make an equitable order to meet the ends of justice.

Contrary to the suggestion of the learned President's Counsel, the Court need not get the consent of both parties to make a valid order at the inspection. If the consent of both parties is necessary, there is no necessity for the Judge to have an inspection. The parties can have a joint inspection and tender the written settlement to Court for the Court to enter decree accordingly. Consent is only necessary to go for an inspection and then to abide by the decision given after the inspection. There is no complaint that such consent was not given by the defendants.

The learned President's Counsel submits the Court has granted the interim injunction in a manner not pleaded in the plaint. I am unable to agree. What the plaintiff has sought in the prayer to the plaint is to grant the right of way over the land of the defendants, which is described in the second schedule to the

plaint. No specific road has been identified in the second schedule. Therefore, it is not correct to say that what has been given is not prayed for in the plaint. The road has been given along the boundary of the defendants' land described in the second schedule to the plaint.

The cases cited above are cases where final Judgments have been given after inspections.

In the instant case, the impugned order was made after the agreed inspection in respect of the interim injunction inquiry. That order is a provisional order valid until the Judgment is delivered.

For the aforesaid reasons, I dismiss the application of the petitioner with costs.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.
I agree.

Judge of the Court of Appeal