SUPRAMANI AYER *et al.* *v.* CHANGARAPILLAI *et al.* 1896. *March 10*

D. C., Jaffna, 24,688.

Under section 147 of the Civil Procedure Code the Judge has power, when an issue of law arises in a case, and it appears that the case can be disposed of on that issue only, to try that issue first, postponing the settlement of the issues of fact until he has disposed of the issue of law.

Per BONSER, C.J.—In the appointment of assessors to assist the Judge in the trial of a case the parties should not be asked to nominate any, but they should be selected by the Judge on his own responsibility, due weight being given to any objections that may be made by either of the parties to any assessor on the ground of interest or bias or otherwise.

THE facts of the case sufficiently appear in the judgment of BONSER, C.J.

Rámanáthan, S.-G., and *Dornhorst*, for first defendant, appellant.

Wendt and *Sampayo*, for plaintiff, respondent.

10th March, 1896. BONSER, C.J.—

This is an appeal from a decision of the District Judge of Jaffna.

On the day fixed for the hearing the parties agreed that the first issue in this case was, whether the plaint disclosed any cause of action ; that is, assuming that all the facts were proved, whether they constituted any cause of action. This issue was equivalent to what was formerly known as demurrer, and was an issue of law.

Under section 147 of the Civil Procedure Code the Judge has power, when an issue of law arises in a case, and it appears that the case can be disposed of on that issue of law only, to try that issue of law first, postponing the settlement of the issues of fact until he has disposed of the issue of law. The object of that provision is obvious. If the issue of law decided one way will finally dispose of the action, it is a saving of expense to the parties and it is a saving of time to the Court to postpone dealing with the issues of fact until it is ascertained whether they really arise or not.

In this case the Judge acted under that section 147, and he decided that the objection raised by the defendant was not a good one, and that the plaint disclosed a good cause of action. He then postponed the settlement of the issues of fact and the hearing of those issues until the 21st of this month.

The defendant has appealed against that decision.

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BONSER, C.J.

Mr. Wendt, who appeared for the plaintiff, contended that no appeal lay, but we are of opinion that in a case like this, where the decision on the point of law goes to the whole root of the action, an appeal does lie, and that the objections which were forcibly urged by Mr. Wendt do not apply, or are at all events counterbalanced by superior advantages.

An interesting discussion arose on the general question of appeals from orders made by the Court in the course of an action. We do not propose to lay down any general rule in respect of such appeals: we only decide that an appeal lies in this case.

I notice in this case that the District Judge desired the assistance of assessors. That was a praiseworthy desire. But I observe that the District Judge has chosen the three assessors in this way: he has asked counsel on either side to nominate one, and he has appointed a third to act with them. It appears to me that this is not the proper way to nominate assessors. If assessors are nominated by the parties, there is very great danger that they will consider themselves to be bound to support the cause of those who nominate them. That is found to be the case where arbitrators are appointed with an umpire; the two arbitrators act as advocates for the parties. That is not the object of the appointment of assessors. Their duties are analogous to those of jurymen, and the Judge should select them on his own responsibility, listening of course and giving due weight to any objections that may be made by either of the parties to any assessor on the ground of interest or bias or otherwise.

LAWRIE, J.—

I hold that when a Judge is of opinion that a case may be disposed of on an issue of law that goes to the root of the action, that issue should first be tried, and that an appeal is competent against the decision on that issue, and that the trial of the remaining issues should be delayed until the judgment in appeal.