1948 *Present :* **Basnayake and Gratiaen JJ.**

GIRANTHA *et al.*, Appellants, *and* MARIA *et al.*, Respondents

S. C. 15—D. C. Kurunegala, 2,927

Civil Procedure Code—Interlocutory appeals—When rejected—List of witnesses filed after original trial date—Discretion of Judge—How it should be exercised—Section 175.

An interlocutory appeal should be rejected as premature only in cases where the matter could more expediently be dealt with in a final appeal.

In exercising his discretion under section 175 of the Civil Procedure Code where it is sought to call a witness whose name was not in the list filed before the trial, the paramount consideration for the Judge is the ascertainment of the truth and not the desire of a litigant to be placed at an advantage by reason of some technicality.

APPEAL from a judgment of the District Judge, Kurunegala.

E. A. P. Wijeyeratne, for the defendants appellants.

C. Seneviratne, for the plaintiffs respondents.

Cur. adv. vult.

[1] *(1929) 6 Times of Ceylon L. R. 122.*

July 9, 1948. GRATIAEN J.—

The plaintiffs instituted this action against the defendants for declaration of title to a land called Bakmigaha Kumbure. The trial commenced on June 24, 1947, on various issues, one of which raised the question of the prescriptive rights of the parties. While the 1st plaintiff was giving evidence she was cross-examined with regard to a petition (marked D1) which she had submitted in 1940 to the Magistrate's Court of Dandegamuwa complaining that the defendants were forcibly resisting her claim to enter the land in dispute. It is common ground that this petition had been forwarded to Police Inspector Sivasambo for investigation, and that at the official inquiry held by that officer the 1st plaintiff had made a statement to him in connection with the dispute. The proctor for the defendants, who had been briefed with a certified copy of the Inspector's report to Court following the inquiry, suggested to the 1st plaintiff that she had on that occasion told the Inspector " that she had not been in possession of this land for the last ten years ". The 1st plaintiff denied having made any such statement to Inspector Sivasambo. There can be no doubt that such an admission, if made in 1940, at an official investigation held by a public officer, would have a very important bearing on the issue of prescription raised at the present trial. In view of the plaintiff's denial, however, the certified copy of this report could not be considered at the trial unless Inspector Sivasambo was called as a witness.

The case for the plaintiffs was concluded on June 24, 1947, and the trial was put off for further hearing on September 11, 1947. It was not actually heard till November 14, 1947, as the presiding Judge was ill in September. In the meantime, on July 4, the proctor for the defendants had filed an additional list of witnesses, with notice to and without objection from the plaintiffs' proctor, citing Inspector Sivasambo to give evidence and to produce his official report dated May 26, 1940, in which he is stated to have referred to the 1st plaintiff's alleged admission that she had not had possession of the land in dispute for 10 years. Inspector Sivasambo was duly summoned, and the defendants' proctor moved to call him as his first witness on the next trial date, November 14, 1947. The plaintiffs' proctor objected on the ground that the Inspector's name did not appear on the defendants' list of witnesses before the original trial date, June 24, 1947, as required by section 175 of the Civil Procedure Code, and the learned Judge made order refusing to allow Sivasambo to be called. The learned Judge in his order rightly held that Sivasambo's evidence and his official report which the defendants sought to produce had " *a direct bearing on the vital issue regarding prescriptive possession* " but stated that to permit the Inspector to be called at that stage would be " *putting the plaintiffs at a disadvantage* ". It is against this order that the defendants have appealed. On the petition of appeal being filed, the learned District Judge, in the exercise of his discretion, stayed further proceedings in the trial pending the decision of this Court on the interlocutory appeal. In view of the order which we propose to make, a continuation of the trial might well have proved abortive. I do not, of course, express the view that a trial Judge should always stay proceedings when an interlocutory appeal is filed against his refusal to allow witnesses to be called at the trial.

A preliminary objection was raised on behalf of the plaintiffs that the appeal was wrongly constituted and should not be entertained on the ground that an interlocutory appeal does not lie against an incidental order of this nature. Counsel argued that the defendants should have proceeded with the trial notwithstanding the order appealed from, and raised the question thereafter, if necessary, in the form of a final appeal to this Court. Counsel referred us to certain observations of Keuneman J. and Poyser J. in *Balasubramaniam v. Valliappa Chetty* [1] in support of his contention.

Under section 73 of the Courts Ordinance an appeal lies against any " judgment, decree, *or order* " pronounced by a District Court, and an order made by the trial Judge refusing, under section 175 of the Civil Procedure Code, to allow a witness to be examined on behalf of a party to the proceedings is, in my opinion, an appealable order to the same extent as an order refusing to frame an issue suggested by one party and objected to by the other was held to be appealable in *Pieris v. Perera* [2] and *Podi Appuhamy v. Mudiyanse* [3]. The order appealed from is clearly a " formal expression of a decision " of the learned Judge and therefore an " order " as defined in section 5 of the Civil Procedure Code.

The correct view appears to be that although this Court undoubtedly has *jurisdiction* to entertain interlocutory appeals of this nature, the attitude of the Court in disposing of such appeals must necessarily depend on the circumstances of each case. The main consideration is to secure finality in the proceedings without undue delay or unnecessary expense. On the one hand, therefore, this Court would always " discourage appeals against incidental decisions *when an appeal may effectively be taken against the order disposing of the matter under consideration at a final appeal* " (per Bertram C.J. in *Fernando v. Fernando* [4]). I do not think that either Keuneman J. or Poyser J. in *Balasubramaniam v. Valliappa Chetty (supra)* intended to lay down any principle of wider application than this.

Cases may well arise, however, where the point involved in an incidental order goes to the root of the matter, and it is both convenient and in the interests of both parties that the correctness of that order should be tested at the earliest possible stage in an interlocutory appeal. Indeed, as Sampayo J. pointed out in *Arumugam v. Thambiah* [5], an early decision of the appellate tribunal on the point in dispute might well obviate the necessity of a second trial. In such cases this Court would not refuse to entertain an interlocutory appeal against an incidental but far-reaching order of the trial Judge. Where, however, the matter could more expediently be dealt with in a final appeal, an interlocutory appeal would be rejected as premature. It seems to me that the chief safeguard against any attempt on the part of a litigant to abuse his right to file an interlocutory appeal against an incidental order is that an interlocutory appeal does not *ipso facto* stay proceedings in the Court below *unless an application for that purpose is allowed* by the trial Judge (*Arunasalam v. Somasunderam* [6]). Trial Judges in dealing with such applications would no doubt be guided by the principles of expediency which have been laid down in the decisions to which I have referred.

[1] *(1938) 39 N. L. R. 553.*
[2] *(1906) 10 N. L. R. 41.*
[3] *(1907) 2 A. C. R. 159.*
[4] *(1920) 8 C. W. R. 43.*
[5] *(1912) 15 N. L. R. 253.*
[6] *(1918) 20 N. L. R. 321.*

In the present case the learned Judge decided to stay the proceedings in order that the correctness of the order appealed from might be tested in appeal. It would therefore be manifestly futile for this Court on grounds of expediency to refuse now to entertain the appeal as premature. The preliminary objection raised on behalf of the respondent must therefore be overruled.

It remains to be considered whether the learned Judge was justified in refusing to allow Inspector Sivasambo to be called as a witness for the defence. The proviso to section 175 of the Civil Procedure Code authorises the Court to permit a witness to be called although his name does not appear on the list of witnesses filed before the commencement of the trial *if such a course is " advisable in the interests of justice "*. The purpose of the requirement of section 175 that each party should know before the trial the names of the witnesses whom the other side intends to call is to prevent surprise. Subject to the element of surprise being avoided, it is clearly in the interests of justice that the Court, in adjudicating on the rights of parties, should hear the testimony of every witness who can give material evidence on the matters in dispute. In this case Inspector Sivasambo is admittedly a person whose evidence, *if accepted by the trial Judge*, would be of the greatest importance in deciding the issue of prescription. The nature of the testimony which the defendants anticipate he would give was expressly put to the 1st plaintiff when she gave evidence. The element of surprise does not arise because the plaintiffs had several months' notice of the defendants' decision to call him on the adjourned date of hearing. In these circumstances it seems to me that the objection raised by the plaintiffs to Inspector Sivasambo being called as a witness was highly technical and without merit. It was " in the interests of justice " that this material witness should have been examined. The learned Judge refused the application because the plaintiffs " would be placed at a disadvantage " if Inspector Sivasambo's evidence were allowed to be called. This is no doubt correct in a sense, but the paramount consideration is the ascertainment of the truth and not the readily understandable desire of a litigant to be placed at a tactical " advantage " by reason of some technicality. In my opinion the learned Judge has not properly exercised the discretion vested in him by section 175, and this Court is entitled to reverse his decision.

I would set aside the order appealed from, and make order that in the interests of justice the defendants should be permitted to call Inspector Sivasambo as a witness. Before the defendants' case is opened, the plaintiffs may, if they so desire, call any further witnesses with reasonable notice to the other side and may also recall any witness who has already been examined. The defendants are entitled to the costs of this appeal and the costs of November 14, 1947, in the Court below. It is desirable that the same trial Judge should continue to hear the case from the stage at which it was interrupted.

BASNAYAKE J.—I agree to the order proposed by my brother.

Order set aside.