[Full Bench.]

1906.
November 7.

Present: Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Wendt, and Mr. Justice Wood Renton.

PIERIS *v.* PERERA.

D. C., Colombo, 21,970.

Order refusing to frame an issue—Appeal—Courts Ordinance (No. 1 of 1889)—Civil Procedure Code, ss. 5 and 146.

Held, by HUTCHINSON C.J. and WOOD RENTON J. (WENDT J. *dubitante*), that in a District Court case an appeal lies from an order refusing to frame an issue suggested by one side and objected to by the other, such order being "a formal expression of a decision" of the Judge within the meaning of section 5 of the Civil Code.

WOOD RENTON J.—The framing of issues under section 146 of the Civil Code involves a judicial decision.

APPEAL from an order of the Acting District Judge of Colombo (J. R. Weinman, Esq.).

The plaintiff sued the defendant for libel. The defendant denied that he made use of the precise words set out in the plaint, and while admitting that some of the statements were true in substance and in fact, he denied that they bore the interpretation put on them by the plaintiff, or that he made them falsely and maliciously against the plaintiff. The parties not being agreed on the issues, a day was fixed for the consideration of the issues suggested by both parties. Among the issues suggested by the plaintiff was the following: "Were the statements made by the defendant or any of them true in substance and in fact?" The defendant objected to this issue, and proposed the following instead: "Were the statements made of, and concerning, the plaintiff by the defendant false and malicious, and has the plaintiff thereby been injured in his feelings and in his good name and reputation, and prejudiced in respect of his present position as a Member of the Municipal Council who is seeking re-election at the forthcoming election to be held in December, 1905?"

The Acting District Judge (J. R. Weinman, Esq.) adopted the issue proposed by the plaintiff, and rejected the one suggested by the defendant.

The defendant appealed.

It was objected on behalf of the plaintiff, respondent, that no appeal lay from the order of the District Judge.

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Bawa, in support of the objection.—The order is not a final one, and is not appealable. There is nothing in the order from which an appeal could be taken. It has been held that an order fixing a case for trial is not appealable, *Le Mesurier v. Le Mesurier* (1). Under section 146 of the Civil Code the duty is cast on the Court of framing issues, and the order of the Judge could only be questioned at the final appeal. Otherwise a litigant can obstruct the Court and impede the progress of a case by filing an appeal from an order framing or refusing to frame a particular issue.

Walter Pereira, K.C., S.-G. (with him *Akbar*), for the defendant, appellant.—Every order of a District Court is appealable under section 75 of the Courts Ordinance (No. 1 of 1889). Refusal to frame a particular issue is an " order " within the meaning of section 5 of the Civil Procedure Code. It was held by Bonser C.J. in D. C., Chilaw, 24,176 (2), that an order rejecting security tendered for purposes of appeal was appealable. The framing of issues is a very important step in a case, as the whole course of a trial depends on the issues to be decided. Fixing a case for trial is a purely ministerial act, while the framing of issues is a judicial act, and involves the exercise of judicial discretion.

7th November, 1906. HUTCHINSON C.J.—

The first matter for our decision in this case is the preliminary point taken by the respondent's counsel, whether or not an appeal lies from an order of the District Judge framing certain issues to be decided at the trial.

The action before us is one for libel and defamation of character; the defendant denied that he made use of the precise words set out in the plaint, and while admitting that some of the statements are true in substance and in fact, he denies that they bear the interpretation put on them by the plaintiff, or that he made them falsely and maliciously against the plaintiff. The parties did not agree as to what the issues were, and each submitted the issues which he proposed to the Judge; there was a special day fixed for consideration of the issues, and the Judge then considered them. I know that it is not always easy to decide offhand in a libel or slander action on whom the burden of proof lies. The Judge had to consider the question and to make up his mind, and he, if we express ourselves in ordinary language, " decided in the plaintiff's favour. "

(1) (1891) 2 *C. L. R.* 21. (2) *S. C. Min., July* 25, 1895.

Under the Courts Ordinance an appeal lies against every judgment, decree, or order, and if you take the definition of an order which is given in section 5 of the Civil Procedure Code, that is, " a formal expression of a decision " of the Judge, this is an " order " and therefore an appeal lies against it.

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HUTCHINSON C.J.

It is said that, if appeals are allowed against decisions of this kind, the powers of appeal will be abused. I think that this particular case is one in which an appeal might not unreasonably be brought. If abuse does arise in the way suggested, this Court will doubtless be able to stop it and to protect itself.

The preliminary objection therefore fails, and the appeal can be set down for argument on the merits.

WENDT J.—

I entertained some little doubt at the commencement of the argument as to whether the District Judge's expression of opinion amounted to an order; my doubt, however, is not sufficiently decided to make me dissent from what I understand is the view of the majority of this Court.

I agree that the preliminary objection should be overruled and the appeal heard.

WOOD RENTON J.—

I entirely concur in what has fallen from the Chief Justice. It appears to me that the framing of issues under section 146 of the Civil Procedure Code involves a judicial decision, and frequently the decision involved—for example, where it is one on the question of the burden of proof—goes to the very root of the case.

Preliminary objection overruled.