1956 *Present :* **H. N. G. Fernando, J., and T. S. Fernando, J.**

K. L. M. PERERA, Appellant, *and* REV. FATHER BATTAGLIA, Respondent

S. C. 77—D. C. Kegalle, 9,054

Appeal—Interlocutory order—Right to question its correctness at stage of appeal against final judgment.

Defamation—Privilege—Should it be specially pleaded ?

In an appeal against a final judgment it is open to the appellant to question the correctness of an interlocutory order even if it had not been the subject of an immediate interlocutory appeal.

The defendant in a libel action is entitled to raise the issue of privilege if he has in effect, though not in express words, set up that plea in his answer.

APPEAL from a judgment of the District Court, Kegalle.

H. W. Jayewardene, Q.C., with *A. B. Perera* and *P. Ranasinghe*, for the plaintiff-appellant.

J. A. L. Cooray, for the defendant-respondent.

Cur. adv. vult.

June 7, 1956. T. S. FERNANDO, J.—

This is an appeal against the dismissal by the District Judge of Kegalle of an action which the plaintiff-appellant, the headmaster of a school, instituted against the defendant-respondent, the local manager of the same school, for damages in a sum of Rs. 15,000 alleged to have been suffered by him as a result of a publication by the defendant-respondent of certain statements defamatory of the plaintiff-appellant. These statements which admittedly were made in the Log Book kept in the school are all contained in the entry produced below—

" 8/2/52—Visited the school and held an inquiry about some complaints against the Head Teacher on the part of some of the staff and about a petition against the same Head Teacher on the part of

the villagers. On account of these complaints and a lack of harmony between the Head Teacher and at least some of the staff; on account of some irregularities about a child, whose name appears in the Lower Kindergarten Register for the whole of last year, while during the Second and Third Term the child was allowed to study in the Upper Kindergarten, while again the marks of the first term are entered in the L. K., those of the second term in the Upper K. and those of the third term in the Lower Kind. and no promotion was finally granted to the child who was examined at the end of the year at L. K. level, while he studied in Upper K. during the 2nd. and 3rd. terms; on account also of the fact the H. T. does not reside in the school in the evenings but goes home soon after class, thereby not being in a position to improve the school as he should—in fact the attendance is going down; (on account also of a serious irregularity in collecting money for the extra repairs to the school, and withholding the money, without even mentioning a word about it to the Manager, on account also of some other complaints about his conduct—as v.f. getting drunk) and also of some occasional lack of respect towards the Manager—he has been advised to ask for a transfer to another school of his choice and finding, or to tender his resignation, also notice is hereby given of discontinuance at the end of the present term."

On the day fixed for the trial, when issues were being framed, counsel who appeared for the respondent raised an issue as to whether the entry in the Log Book (reproduced above) was made on a privileged occasion. Counsel for the appellant objected to such issue on the ground that privilege was not pleaded in the answer. Respondent's counsel pointed to paragraph 2 of the answer in which it was pleaded that "the defendant admits having made certain entries in the Log Book in the course of his duty as Manager based on facts and in good faith," and contended that the averments contained in the said paragraph 2 clearly indicated that the plea of privilege was being relied on by the defendant. The learned judge allowed the issue and, at the end of the trial, answered it in favour of the respondent.

Learned counsel appearing before us at the appeal argued that this issue should not have been allowed as privilege had not been pleaded in the answer. Learned counsel for the respondent, while contending that the issue was properly allowed, submitted that if the appellant considered himself aggrieved by the allowance of the issue the proper procedure for him to have followed was to prefer an interlocutory appeal from the order allowing the issue. He referred us to the case, among others, of *Don Andris v. Jameshamy*[1], where Wood Renton J. stated that in ordinary circumstances the disallowance (or allowance) of an issue, the determination of which depends on viva voce evidence, is an order which ought to be made the subject of an immediate interlocutory appeal. While, no doubt, it was open to the appellant to have preferred such an interlocutory appeal before the evidence commenced, I am of opinion that it is competent to him to question the correctness of the

[1] *(1911) 14 N. L. R. 347.*

order allowing the issue during the course of the appeal against this final judgment. I would refer in this connection to the observations made by the same learned judge, Wood Renton J. in the case of *Abubakker v. Ismail Lebbe et al.*[1], recognising "the clear right of every litigant to invite the Appeal Court to consider on a final appeal any interlocutory decree, even if he did not directly challenge it at the time when it was made."

Counsel for the appellant has referred us (1) to *Nathan's Law of Defamation in South Africa*, (1933 ed), page 306, where it is pointed out that the defendant in a libel action cannot plead the general issue and under it raise the defences of privilege, justification or fair comment—each of which defences must be specially pleaded, and (2) to *Fraser on Libel and Slander*, (7th. ed), page 264, where it is stated that a defendant pleading that the occasion was privileged must give particulars of the facts creating the privilege. In the present instance if the appellant could reasonably have understood paragraph 2 of the answer as raising the defence of privilege, I do not consider that the circumstances of the case called for further particulars; if however the appellant considered himself prejudiced by the lack of particulars he could no doubt have invoked the relevant provisions of Chapter XVI of our Civil Procedure Code. His principal complaint appears to be that he could not reasonably have entertained the belief that privilege was being raised as one of the defences. He complains also that as a result he had no reason to be prepared with evidence of express malice on the part of the respondent to displace the privilege. It is relevant to point out that no attempt was made by counsel for the appellant at the trial to apply for a postponement of the trial on the ground that he was not prepared with evidence to meet the plea of privilege. As was pointed out by Wendt J. in *Dureya v. Siripina*,[2] if a party objecting satisfies the Court that the issue allowed takes him by surprise, the Court has the fullest power to prevent any prejudice to his rights by granting him an opportunity of meeting the new points raised. I am of opinion that when the respondent pleaded in his answer that "the entries in the Log Book were made in the course of his duty as Manager . . . . ." he was in effect, though not in express words, setting up the plea of privilege. Moreover, as was said by Layard C. J. in the case of *Attorney-General v. Smith*[3] in drawing attention to the difference between the English and the Indian systems of pleadings, "our Code does not allow the Court to try the case on the parties' pleadings, but requires specific issues to be framed. By section 146 of our Code, if the parties are agreed, the issues may be stated by them; if not agreed, then the court must frame them. In this case the defendant's counsel expressed a wish to have a further issue settled. There is no necessity under our law to restrict the issue to the pleadings, as was done in this case; in fact it appears to me contrary to our law." As the only complaint on account of the allowance of the issue can be one of unpreparedness by the appellant to lead evidence of express malice on the part of the respondent, it is pertinent to recall the answer o the appellant himself, given under cross-examination, that the respondent

[1] *(1908) 11 N. L. R. at 313.* [2] *(1908) 4 A. C. R 125.*
[3] *(1905) 8 N. L. R. 229 at 241.*

"has no grudge against me personally". I am therefore of opinion that the contention of learned counsel for the appellant that the latter was prejudiced by the allowance of the issue raising privilege fails.

Learned counsel for the appellant next contended that (*a*) his client has been deprived of a fair trial by the disallowance by the learned judge of certain questions which were put to the respondent while under cross-examination, (*b*) the learned judge appears to have approached a consideration of the issues in the case as if the case was one instituted by the appellant for his wrongful dismissal from service, and (*c*) the learned judge was wrong in considering that the statements in the Log Book were not defamatory per se. While the judgment delivered by the learned judge gives some room for criticism on the lines indicated in the contentions of learned counsel, it seems to me that the questions referred to at (*a*) above were rightly disallowed on the ground that they were irrelevant. At the same time, in regard to the other two points (*b*) and (*c*) raised, I desire to express here the view that the conduct of the appellant which led to the making of the entry in the Log Book was not such as to deserve the opprobrium of a court of law to the extent of describing the appellant, as the learned judge has done, as "a man of scurvy disposition". The evidence relating to the appellant's connection with the money collected as subscription falls short of establishing misappropriation by the appellant of such money, and the evidence relating to the allegation of drunkenness was of a flimsy and vague nature. While the learned judge was in error in considering that at least two of the statements in the Log Book entry were not defamatory per se, such error does not affect the decision that remains to be reached on this appeal, viz. the correctness of the learned judge's finding on the issue of privilege.

In regard to this remaining question of privilege, the statements which are the foundation of this claim for damages were made, as stated earlier, in the Log Book kept in the school. It is a book kept in the custody of the appellant himself. The nature of the entries that can legitimately be made in the Log Book appears in the evidence of the plaintiff's own witness, the Inspector of Schools. He stated that the Manager is entitled to make observations about all or any one of the members of the staff. The purpose of the Log Book, he admitted, was to record the nature of the work generally done in the school and any complaints regarding any of the members of the staff by the Manager and officers of the Education Department. In the state of this evidence as to (1) the purpose of the maintenance of a Log Book (2) the nature of the statements that can legitimately find a place therein and (3) the persons who are competent to make such statements, it is not possible in my opinion to complain of the conclusion reached by the learned judge on the issue relating to the plea of privilege. As, quite apart from the absence of any evidence of express malice, the position of the appellant himself was that the respondent has no grudge against him personally, this action for damages was correctly dismissed. I would therefore dismiss this appeal with costs.

H. N. G. FERNANDO, J.—I agree.

Appeal dismissed.