BHAGAL RAM PRASAD *v.* HARI CHARAN AND ANOTHER

[Fiji Court of Appeal (Hyne, C.J., Raby-Hieatt, Russell, J.J.) May 9th, 1953]

Meaning of words " interlocutory order "—appeal to Court of Appeal Rule 26 Court of Appeal Rules.

Judgment was given in a civil action on a special issue as to whether or not the plaintiff was a partner in a firm on the 25th November, 1952. The main issue was then tried later, judgment being given on the 18th January, 1953.

An appeal was then filed in respect of both judgments.

On appeal to the Fiji Court of Appeal.

HELD.—(1) It was never intended that an interlocutory order which amounts to a finding or verdict should be open to appeal out of time because the time for appeal from the final order founded on it had not expired.

(2) Principles upon which further evidence can be admitted by a Court of Appeal discussed.

Cases referred to:—

Johnson v. Johnson (1900) P. 19.
R. v. Copestake ex parte Wilkinson [1927] 1 K.B. 468.
Salaman v. Warner and Ors. [1891] 1 Q.B. 734.
White v. Witt (1877) 5 C.D. 589.

N. S. Chalmers for the appellant.

P. Rice for the respondent.

HYNE, C.J.—Two judgments were delivered in this matter, one dated 25th November, 1952, on the trial of a special issue, and one dated 8th January, 1953, on a motion on the part of the defendants, the respondents in this appeal, for judgment under O. 40 r. 7 of the Rules of the Supreme Court.

The appellant filed notices of motion in respect of each judgment, appealing against them both.

The first motion, in respect of the judgment of 25th November, was dated 8th December, 1952, and was filed on 15th December, 1952, appellant's Counsel, according to his argument, contending that the judgment of 25th November, 1952, was a final judgment, and that therefore notice was given in time, and in accordance with Rules 13 and 21 of the Court of Appeal Rules, 1949.

Mr. Rice, for the respondents, submitted that the judgment was an interlocutory one, and was, by being filed on 15th December, out of time. Further, it was submitted by him that the judgment, being an interlocutory judgment, an appeal only lies by special leave of the Judge of first instance or the Court of Appeal.

The judgment was a judgment on a special issue, tried by the Court, namely, " Whether or not the plaintiff is a partner in the firm of Manganese Development and/or Manganese Development Company." A final order is one made on such an application that for whichever side the decision is given it will, if it stands, finally determine the matter in litigation. Conversely, an order is interlocutory when it cannot be affirmed that in either event the action will be determined. (*Salaman v. Warner and Others* [1891] 1 Q. B. 734)

In our opinion, therefore, the judgment of the 25th November, 1952 was interlocutory.

Under section 11 (*b*) of the Court of Appeal Ordinance, 1949, appeal is therefore by special leave and under Rule 21 of the Court of Appeal Rules, 1949, the appeal must be brought within 14 days from the time the order was perfected.

Rule 21 is similar in language to O.58 r. 15 of the Supreme Court Rules. In a note on p. 1272 of the R.S.C. 1934, headed " *Time for Appeal,*" it is stated that " The time limit of fourteen days applies (*a*) to all interlocutory orders ; and (*b*) to final orders on decisions if made in any matter ' not being an action '."

It is quite clear therefore that the judgment of 25th November, 1952, being interlocutory, notice must be filed within 14 days of the date of judgment, and, as we have said, special leave to appeal is required. Although appellant's notice of motion is dated 8th December, 1952, it was not filed until 15th December, 1952. It was therefore out of time and cannot be entertained.

No application for special leave to appeal or for leave to extend the time was made by appellant's Counsel when this decision was communicated to him. Much later, when argument had proceeded for some considerable time, and after appellant's Counsel had been repeatedly warned that he could not challenge the first judgment, that is the judgment of 25th November from which there was no appeal before the Court, he asked for an adjournment to enable him to apply for an extension of time within which to appeal against this judgment. He said he had misconceived the position inasmuch as the judgment of 25th November was considered by the appellant to be a final judgment.

Counsel referred to Rules 23 and 28 of the Court of Appeal Rules and section 16 of the Ordinance.

Counsel for respondents pointed out that he raised the question before the Court on 19th December, 1952. At p. 37 of the record he said: " Notice of motion for appeal filed too late. It is against interlocutory judgment." This should, at least, have apprised appellant of the possibility of the judgment's being other than final.

Counsel for respondents rightly pointed out that Rule 28 of the Court of Appeal Rules is identical in terms with Order 58, r. 14 of the Supreme Court Rules, in respect of which *James L. J. in White v. Witt* (1877) 5 C.D., p. 589 at p. 590, said:—

> " It was never intended that an interlocutory order, which amounts to a finding or verdict, should be open to appeal after the fourteen days, because the time for appeal from the final order founded on it has not expired."

Having carefully considered the arguments of Counsel we came to the conclusion that adjournment at that late stage to enable appellant's Counsel to ask for leave to appeal, and for extension of time in which to file the necessary motion, should not be granted.

The appeal from the final judgment of the 8th January, 1953, being in time, Counsel was asked to argue this appeal. It was, however, pointed out to him that his argument would have to be confined to the motion filed in respect of this judgment, and that whilst he would be at liberty to show that the conclusions at which the learned Judge arrived, based on the judgment of 25th November, were wrong, he would not be permitted to challenge the decision in the former judgment.

Before commencing his argument Counsel invited attention to his notice of 20th April, 1953, in which he gave notice of his intention to apply to the Court of Appeal for special leave on special grounds to read and produce to the Court certain additional documentary evidence.

In support of his application he stated that the evidence had not been introduced at the trial of the special issue because he did not consider it relevant to the special issue.

Rule 15 of the Court of Appeal Rules, 1949, corresponds to Rule 4 of Order 58 of the Rules of the Supreme Court.

The principles upon which further evidence can be admitted by a Court of Appeal were stated by *Lord Hanworth, Master of the Rolls,* in the case *R. v. Copestake ex parte Wilkinson* [1927] 1 K.B. 468, wherein he cited with approval a definition of *Hill, J.* given in the judgment *Johnson v. Johnson* (1900) P. 19—

> "Fresh evidence means evidence of something which has happened since the former hearing or has come to the knowledge of the party applying since the hearing and could not by reasonable means have come to his knowledge before that time."

There is not the slightest doubt that in this case the evidence sought to be adduced was in appellant's possession at the time of the hearing. In the case above cited *Lord Hanworth* further said:

> "That evidence must be of such a character that not merely is it relevant but of such importance that it would have affected the judgment of the tribunal if it had been before them at the original hearing of the case."

We were not in a position to say whether the evidence which appellant wished to have admitted was relevant and conclusive for the reason that no copies of the documents referred to were annexed to the notice. It is true that the notice indicates that the documentary evidence could be inspected at the office of the appellant's Counsel at Varoka, Ba, Fiji, but the Court cannot be expected to derive its knowledge of the documents by this means.

Having fully considered Counsel's submissions, we, for the reasons above set out, refused the application.

The Court then considered other matters and allowed the appeal in respect of the judgment dated January 8th, 1956.

Judgment set aside. Order varied.