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NANNI *et al v.* MURUGEN *et al.*

C. R., Point Pedro, 6,677.

Courts of Requests—Ordinance No. 12 of 1895, s. 8 (2)—Judgment for default of appearance.

Per BONSER, C.J.—It is doubtful if section 8, sub-section (2), which permits the Commissioner to enter judgment against the defendant for default of appearing, applies to a case of adjourned hearing.

Where titles to lands are in dispute, the commissioner cannot exercise the power of entering judgment aganist defendant by default, but he should require the plaintiff to give evidence to support his claim.

THIS was an action in ejectment. Issues were framed on the pleadings, evidence for plaintiff fully heard, and the evidence for the defendant only partly heard on the 3rd November, 1899, at Point Pedro. For want of time on that day the further hearing was adjourned, by consent of parties, to 7 A.M. of the 10th November at Chavakachcheri. On the 10th, the Commissioner recorded as follows:—

" Plaintiffs only present. Defendants called—absent."

" This case was fixed for 7 A.M. to-day that it may not interfere " with my usual work for the day at Chavakachcheri. The Chief " Clerk called out names again at 8.30 A.M., and plaintiffs alone were " present. The defendants have failed to appear even when their " names were called in my presence at 8.45.

" Let decree be entered in favour of plaintiffs in default of " appearance of defendants as prayed for in the plaint."

The defendants appealed.

Maartensz, for appellant.—The order entering judgment by default against the defendant is wrong. In land cases sub-section 2 of section 8 of the Ordinance No. 12 of 1895 provides that where defendant is in default the Commissioner shall order the plaintiff to adduce evidence and give judgment on the merits without reference to the default committed.

Thiru-Návuk-Arasu, for respondent.—No appeal lies against the present judgment, because it was entered for default of appearance (sub-section 6 of section 8 of Ordinance No. 12 of 1895).

BONSER, C.J.—

This is an appeal which, of course, must be allowed. I cannot understand how it was that the plaintiff could have been advised to resist this application and incur the expense of instructing

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counsel to oppose it. The action was an action for the recovery of land. The trial took place at Point Pedro, and is said to have lasted three days. The plaintiffs' case had been concluded and evidence had been gone into on behalf of the defence. The Acting Commissioner on the 3rd November, at the close of the day's proceeding, adjourned the case to be continued at Chavakachcheri, fourteen miles away, at 7 A.M. on the 10th November. On that day he records this: "Plaintiffs only present. Defendants called—absent."

"This case was fixed for 7 A.M. to-day that it may not interfere "with my usual work for the day. The Chief Clerk called out "names at 8.30 A.M. and plaintiffs alone were then present. The "defendants have failed to appear even when their names were "called in my presence at 8.45.

"Let decree be entered in favour of plaintiffs in default of "appearance of defendants as prayed for in plaint."

So that, without discussing the evidence of the plaintiffs and their witnesses, or the considerable body of evidence which had been adduced on the part of the defendants, the Commissioner gave judgment for the plaintiff on the simple and sole ground that the defendants were in default in attending at the adjourned hearing. Now, in so doing he acted in direct contravention of the provisions of the Courts of Requests Amendment Ordinance of 1895. Section 8, sub-section 2, of that Ordinance provides that, if the defendant does not appear on the day fixed for the hearing of the action without sufficiently excusing his absence, the Commissioner may on due proof of the service of summons, notice, or order requiring such appearance, enter judgment by default against the defendant.

It seems to me very doubtful if that provision relates to a case of adjourned hearing, but it is expressly provided that, where titles to land come into question, the Commissioner is not to exercise the power of entering judgment against the defendant by default, but is to require the plaintiff to give evidence to support his claim. "And the Commissioner shall then give such "judgment on the merits as justice shall require without refer-"ence to default." The case must go back to the Court of Requests, that the trial may be continued and the defendants may have an opportunity of completing their case.

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GUNAWARDANE *v.* ALEXANDER.

P. C., Galle, 7,496.

Appeal—Criminal Procedure Code, s. 340—Duty of counsel signing petition of appeal.

The proctor or advocate who certifies a petition of appeal under section 340 of the Criminal Procedure Code pledges his professional reputation to the propriety of the appeal, and if the petition be found to be frivolous the Supreme Court will consider that he is either incompetent to discharge the duties of his profession, or that he is trifling with the Court.

THE accused, having been convicted of criminal trespass and sentenced to one month's rigorous imprisonment, professed to appeal on a matter of law, and his petition of appeal was signed by his proctor, in terms of section 340 of the Criminal Procedure Code, and bore a certificate under his hand that the matter of law stated in the petition was a fit question for adjudication by the Supreme Court.

F. H. de Vos (with him *C. E. de Vos*) appeared for appellant.

BONSER, C.J., who heard this case at Galle while on circuit, dismissed the appeal by the following judgment:—

No appeal lies in this case except on a matter of law. To prevent frivolous appeals being lodged, the Code requires that an appeal on a matter of law be certified by an advocate or a proctor, who thereby pledges his professional reputation to the propriety of the appeal. I am sorry to say that this petition is a frivolous one, and I am driven to the conclusion either that the proctor who signed the petition is incompetent or that he has trifled with the Court.