1948 *Present :* **Nagalingam J.**

PERERA, Appellant, *and* PERERA *et al.*, Respondents

S. C. 106—C. R. Colombo, 98,359

Court of Requests—Decree entered of consent—Application by one party to vary decree—Jurisdiction of Court—Final order—When appeal lies.

Where, in a Court of Requests, a consent decree has been entered, the Commissioner has no jurisdiction to vary such decree on the application of one party except with the consent of the other.

An order purporting to vary such a decree is a final order from which an appeal will lie.

APPEAL from a judgment of the Commissioner of Requests, Colombo.

E. B. Wikramanayake, with *E. S. Amerasinghe*, for the plaintiff, appellant.

M. M. K. Subramaniam, for the defendant, respondent.

Cur. adv. vult.

June 30, 1948. NAGALINGAM J.—

The plaintiff-appellant appeals from an order of the Commissioner of Requests staying execution of a writ of ejectment against the defendant. For the purpose of this appeal it is unnecessary to consider the proceedings had in the action prior to June 4, 1947 ; on this date by agreement of parties it was ordered that subject to the defendant continuing to pay damages, writ of ejectment against the defendants was not to be executed till December 31, 1947. On November 26, 1947, the defendant moved for an extension of time, in other words, to vary the order made on June 4, 1947. The application came up for inquiry on December 17, 1947, on which date the learned Commissioner made order that the writ of ejectment should not issue till December 31, 1948, thereby staying execution for a period of one year beyond the period agreed to by the parties. The appeal is from this order.

A preliminary objection was taken on behalf of the respondent to the hearing of this appeal on the ground that the order appealed from was not an appealable order as it was not an order having the effect of a final judgment within the meaning of sections 36 and 78 of the Courts Ordinance. Reliance for this contention was placed on the cases of *Arnolis Fernando v. Selestina Fernando*[1] and *Samaradiwakara v. de Saram*[2]. In the former case Bertram C.J. held that an order made by a Commissioner of Requests under section 326 of the Civil Procedure Code against a third party obstructing the execution of a writ was not an appealable order. In the latter case Fisher C.J. purported to follow the reasoning in the former case and held that there was no appeal from an order directing the issue of a writ of possession against a defendant. The attention of

[1] *(1922) 4 C. L. Rec. 71.* [2] *(1930) 7 Times of Ceylon Reports 108.*

Fisher C.J. does not appear to have been drawn to the case of *Vyravan Chetty v. Ukkubanda* [1] which had been decided by that date, where Jayawardene A.J. took the view that an order made against a person who had stood surety for the payment of a judgment debt was an appealable order. In *Marikkar v. Dharmapala Unnanse* [2] Garvin J. considered the cases of *Arnolis Fernando v. Selestina Fernando* (*supra*) and *Vyravan Chetty v. Ukkubanda* (*supra*) and came to the conclusion that the reasoning set out in the latter case embodied " a sounder test as to what may be deemed an order having the effect of a final judgment." The last case was followed quite recently in *Arlis Appuhamy v. Siman* [3] and there too the view taken by Dias J. was that an order having the effect of a final judgment cannot be limited to orders which have effect upon the original action and which would dispose of the issues arising therein, as was held by Bertram C.J. It would be noticed that in all these cases the question whether an order is one that is appealable or not had arisen in regard to proceedings subsequent to the entering of the final decree and in the course of proceedings in execution. Confining, therefore, my observations to orders made in proceedings after final decree, I should say that every order which finally disposes of or determines the rights arising in the course of execution proceedings as between either the original parties to the action or between any of the original parties and a third party must be regarded as an order having the effect of a final judgment and consequently appealable.

In regard to this class of orders, namely, orders after final decree, it would be unnecessary to make use of the further qualification adopted by Jayawardene A.J. in *Vyravan Chetty v. Ukkubanda* (*supra*) that the order must also be one which cannot be considered by a Court of appeal at a later stage of the proceedings, for the appeal which the learned Judge had in mind was the appeal on the action being decided ; for as the appeal here referred to would have been preferred before the making of any of the orders in the course of execution proceedings their validity cannot possibly be questioned on such appeal.

Applying the test enunciated above, it will be manifest that the order whereby the right of the plaintiff to eject the defendant on December 31, 1947, was varied was one which finally determined the right of the plaintiff to execute the writ of ejectment on December 31, 1947, against the defendant and took away finally from the plaintiff certain rights which he had under the order of June 4, 1947. The order, therefore, is one which can properly form the subject of an appeal. The preliminary objection, therefore, fails.

It was also contended further that the appellant had filed papers to have the order referred to revised by this Court and that the application bearing No. 33 of 1948 was dismissed by this Court on February 23, 1948. It is conceded that there was no appearance for the applicant at the hearing of the application in revision. The order cannot be regarded as operating as a bar to the hearing of the present appeal, if in point of fact a right of appeal exists. No adjudication upon the rights of parties was made on that application, and it is possible to take

[1] *(1924) 27 N. L. R. 65.* [2] *(1934) 36 N. L. R. 201.*

[3] *(1947) 48 N. L. R. 298.*

the view, as has been contended for by the appellant's counsel, that the appellant abandoned his application because of the fact that it would have to fail by reason of the existence of a right of appeal under the law. This objection too fails.

By this appeal the plaintiff seeks to question the jurisdiction of the learned Commissioner to modify or vary an order made by consent of parties. From what has been said already it would be apparent that on June 4, 1947, the parties arrived at a settlement that writ of ejectment was not to be executed till December 31, 1947. The learned Commissioner has given no reasons for holding that a consent order could be modified by Court at a later stage at the instance of one of the parties to it without the concurrence of the other party. In fact, on a previous application by the defendants in this very case under similar circumstances the learned Commissioner held he had no jurisdiction, citing authorities in support, and declined to give the respondents relief. The respondent appealed from that order and the appeal was dismissed. In these circumstances, it is difficult to see how the learned Commissioner came to make the order appealed from. It has been suggested that as the defendant had sued a tenant of his in another case and the tenant in that case had been given time till December 31, 1948, the learned Commissioner was swayed by this circumstance and deemed it equitable to postpone the execution of writ against the defendant. But, of course, this view leaves out of consideration that the plaintiff, although she may not want the premises for her own use and occupation, may have made other arrangements in regard to the disposal of the property on the faith of the terms of settlement enshrined in the records of the Court. But indeed these are considerations which are foreign to a proper decision of the legal rights of the parties. I cannot do better than quote a passage from the judgment of West J. in the case of *Balprasad v. Dharnidhar Sakhram* printed as a footnote to the case of *Shirekulidima' Pa' Hedga' v. Maha' Blya*[1] :—

> "The admission of a power to vary the requirements of a decree once passed would introduce uncertainty and confusion. No one's rights would at any stage be so established that they could be depended on and the Courts would be overwhelmed with applications for the modification on equitable principles of orders made on a full consideration of the cases which they are meant to terminate. It is obvious that such a state of things would not be far removed from a state of judicial chaos."

The learned Commissioner was in error in assuming jurisdiction to interfere with the terms of settlement arrived at by the parties. I therefore set aside the order of the Commissioner directing that the writ of ejectment do not issue till December 31, 1948, and direct the issue thereof forthwith, as the time allowed under the terms of settlement has expired. The plaintiff will be entitled to the costs of inquiry in the lower Court and of appeal.

Appeal allowed.

[1] *(1886) 10 Bombay 435.*